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IOWA INDUSTRIAL COMMISSIONER REPORT

Decisions on Selected Cases

July 1, 1980 — June 30, 1981

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
Des Moines, Iowa

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REPORT OF INDUSTRIAL COMMISSIONER

On appeal of the following proposed decisions, held that the proposed decision by the deputy is adopted as the final decision of the agency.

LOREN E. ACHENBACH,

Claimant,

vs.

IOWA DEPARTMENT OF PUBLIC SAFETY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed April 27, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse arbitration decision.

The record on appeal is the "Stipulated Facts and Issues to be Heard" and statement of claimant and Trooper Gregg and investigation report of the Iowa State Patrol, said stipulation is signed by the respective attorneys.

The question in this case is whether claimant's injuries arose out of and in the course of his employment. The prehearing order listed other issues, but the stipulation clearly says: "[t]hat the sole issue to be determined is whether claimant's injury arose out of and in the course of his employment." For that reason, apparently, the hearing deputy decided only that issue, as will this deputy industrial commissioner.

A good understanding of the facts may be made by quoting certain facts stipulated by the parties:

2. That on January 16, 1979, claimant, Loren E. Achenbach, was employed by the State of Iowa, Department of Public Safety as a highway trooper, Badge No. 168, and he reported for regular duty at 7:02 a.m. on that day.

3. That Trooper Achenbach patrolled in his assigned area which was the I-29 area, including Mills and Fremont counties.

4. That on January 16, 1979, Harry Gregg was employed by the State of Iowa, Department of Public Safety as a highway trooper, Badge No. 347, and he reported for regular duty at 4:03 a.m. on that day.

5. That at 8:44 a.m. Trooper Gregg met the claimant, for coffee at the L & S Cafe in Glenwood, Iowa. At that time they discussed going to Red Oak for a pancake feed held in honor of Trooper Dudley. All the troopers from Post No. 3 at Atlantic had been given permission to attend the pancake feed for Trooper Dudley. During their coffee break, Trooper Gregg also advised the claimant that he had a personal weapon in the trunk of his patrol car which he wanted to test fire, and asked Trooper Achenbach if he wanted to go along. Trooper Achenbach replied that he did, but that he first had to stop and see the Mills County Attorney concerning some criminal cases. Trooper Gregg then arranged to meet Trooper Achenbach at the Glenwood police station.

6. That the personal weapon in question was an old lever action Marlin .22 caliber rifle which Trooper Gregg wished to give to his son as a birthday present on that day. The rifle had been in Trooper Greggs' family for many years and had not been fired for approximately six (6) months.

7. That at approximately 9:30 a.m. Trooper Gregg met Trooper Achenbach at the police station. Trooper Achenbach parked his vehicle and joined Trooper Gregg in his patrol car. The troopers then proceeded six miles west on highway 34 to a deserted area roughly situated between the Missouri River and I-29.

8. That Trooper Gregg then parked his patrol car facing east and retrieved his personal weapon from the trunk. Standing behind the patrol car facing east, Trooper Gregg opened the lever action and inserted a shell. As he closed the lever action, Trooper Achenbach walked between he (Gregg) and the patrol car. The gun then discharged striking Trooper Achenbach's left leg.

9. That Trooper Gregg then assisted Trooper Achenbach to Jennie Edmundson Hospital in Council Bluffs for emergency treatment.

10. That Trooper Gregg and Achenbach were stationed at Post #3, Atlantic, Iowa on or about January 16, 1979.

17. That on or about January 16, 1979, State of Iowa Highway Patrol Troopers were authorized to carry only departmental issued weapons which include a shotgun and 357 magnum revolver.

18. That on or about January 16, 1979, Post No. 3, located in Atlantic, Iowa had an outdoor target range which was the accepted place to test fire all departmental weapons under the supervision of certified instructors.

19. That on or about January 16, 1979, State of Iowa Highway Patrol Troopers were required to account for all firings of departmental issued weapons.

21. That on or about January 16, 1979, Troopers Gregg and Achenbach did not have prior permission to test fire a personal weapon on State time.

22. That following a departmental investigation of Trooper Achenbach's accidental shooting, Trooper Achenbach received a written reprimand for violating rule D-25 of the Department of Public Safety. Attached hereto is a true and exact copy of said reprimand.

23. That at the time of his accident Trooper

Achenbach was not aware that a trooper could not have a personal weapon in his possession.

24. That at the time of the accident it was common practice encouraged by the Department of Public Safety and Post No. 3 that troopers take target practice and become familiar and proficient with all types of weapons.

25. That there is no convenient target range in Trooper Achenbach's assigned patrol area.

26. That Trooper Achenbach's rate of compensation is $144.22 per week.

27. That Trooper Achenbach was off work from January 16, 1979 to May 23, 1979, as a result of the above described accidental shooting.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 16, 1979 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 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 Dist.*, 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.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "in the course of" relates to time, place and circumstances of the injury. *McClure v. Union County, etal, Counties*, 188 N.W.2d 283 (Iowa 1971). An injury occurs "in the course of" employment when it is within the period of employment at a place where the employee may be performing his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *Id.* at 287.

Claimants have the burden of proof. *Lindahl v. 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 (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.

The Supreme Court of Iowa in *Bushing v. Iowa Railway and Light Company*, 208 Iowa 1010, 1017, 226 N.W. 719 (1929) stated that "[i]t is not, in any sense, controlling that an employee, during the hours of his employment, happened to be a short distance from the actual *situs* of his work. In other words, the Compensation Act does not contemplate that an employee may not momentarily step outside of the circumference of his working place." The employee's departure from the usual place of employment must amount to an abandonment of employment or be an act wholly foreign to his usual work. *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402, 68 N.W.2d 63 (1955).

In this case, there may have been a deviation from the employment, but it was slight. The deviation did not amount to an abandonment of the employment even though the claimant left his car in Glenwood, some 5.5 miles away. At the time of the injury he was near a patrol car with a radio.

Also, although one does not accept the argument that firing the rifle was in the public good because it familiarized the claimant with another type of weapon, the venture by the two patrolmen was not a clearly prohibited practice, at least not one which would remove claimant from the course of the employment.

Findings of Fact

1. That on January 16, 1979, claimant was employed by defendants and was assigned to the I-29 area of Mills and Fremont counties.

2. That on January 16, 1979, claimant left his vehicle in Glenwood, Iowa and proceeded with Trooper Gregg to an area between the Missouri River and I-29 for the purpose of test firing a .22 caliber rifle, said weapon being privately owned by Trooper Gregg.

3. That claimant was accidentally injured when the .22 caliber rifle discharged, striking claimant in the left leg.

4. That on January 16, 1979, employees of defendant-employer were not permitted to carry or test fire privately owned weapons.

5. That the employer provided ranges and encouraged its employees to use those ranges to become proficient with weapons issued by defendant-employer.

6. That on January 16, 1979, claimant was not aware of defendant-employer's prohibition against carrying privately owned weapons.

7. That claimant was injured at a location where he was able to perform his duties for defendant-employer.

8. That claimant was off work from January 16, 1979 to May 23, 1979 as a result of the injury.

Conclusions of Law

On January 16, 1979, claimant sustained an injury which arose out of and in the course of his employment.

WHEREFORE, it is found that claimant met his burden of proving his injury arose out of and in the course of his employment with defendant-employer.

* * *

Signed and filed at Des Moines, Iowa this 24th day of June, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

CHARLES ALEXANDER,

Claimant,

vs.

IOWA PUBLIC SERVICE,

Employer,
Self-Insured,
Defendant.

Declaratory Ruling

BE IT REMEMBERED that on June 1, 1981, claimant filed a request for a declaratory ruling. That request seeks this agency's interpretation of Iowa Code section 85.22(1).

To better understand what is at issue presently, it is necessary briefly to recount the facts. The claimant was a 27 year-old male employee of defendant-employer at the time of his injury. On May 12, 1971, the truck that he was driving was struck in the rear by a dump truck while he was stopped for a construction flagman. Soon after, claimant began complaining of pain in the neck, arms, and back. The existence of any actual permanent injury has been in constant dispute by the parties. Defendant had paid the claimant $13,380.19 in compensation for medical expenses and lost wages. Additionally, claimant obtained a third party judgment in tort against the owner of the offending dump truck. The parties have stipulated as per a letter filed with this agency on April 6, 1981, that defendant was repaid their $13,380.19 minus $4,460.06 in attorney's fees pursuant to Iowa Code section 85.22(1).

The issue is stated by claimant:

> 1. That the issue blocking settlement of petitioner's claim is whether the entire personal injury award is subject to set-off by the emmployer-insurer or whether it is the excess actually received by the employee after payment of the costs of litigation, including his attorney's fees, which are subject to set-off.

* * *

> WHEREFORE, petitioner requests that the Commissioner interpret ICA, section 85.22(1) and resolve the issue as stated in paragraph #1 of this, claimant's petition.

The question brought by the parties here has been approached by only a few jurisdictions. Any resolution attempted must not only consider the approach taken by other jurisdictions, but also a close analysis into the construction and legislative intent behind Iowa Code section 85.22(1).

The approaches taken in subrogation by other jurisdictions vary widely. Many jurisdictions provide for full subrogation of workers' compensation award. It is without dispute that Iowa Code section 85.22(1) adopts this approach. It is also undisputed that claimant's attorney fees have been properly deducted from the subrogation made to defendant against the third party judgment.

The petitioner, however, in seeking this declaratory ruling, addresses the problem of possible future benefits sought by the claimant and how much credit the defendant is entitled to against the third party award before they would again be statutorily liable for compensation under Iowa Workers' Compensation Law.

A few statutes deal with the issue of crediting against future benefits. Most, like Iowa, do not. Larson, *Workmen's Compensation Law*, Vol. 2A, §74.31 at p. 14-220 states the general rule where a subrogation statute does not deal with future benefits.

Professor Larson states:

> If the statute does not take pains to deal explicitly with the problem of future benefits, but merely credits the carrier for compensation paid, or compensation for which the carrier is liable, the correct holding is still that the excess of the third-party recovery over past compensation *actually* paid stands as the credit against future liability of the carrier. [emphasis added]

Usually attorney's fees and expenses are deducted both in priority to the employer's lien on the employee's recovery, and before there is any excess for the employee in the employer's recovery. If the sum recovered by the employee is more than enough to pay attorney's fees and reimburse the carrier, the carrier is reimbursed in full, and, apart from special statutes on sharing attorney's fees, is not required to share the legal expenses involved in obtaining the recovery. Under a considerable number of statutes, however, when the suit is brought or recovery effected by the employee, and sometimes in all cases, the carrier is obliged to pay a portion of the attorney's fees out of his share, usually in proportion to his share of the recovery. *Larson's Workmen's Compensation*, Desk Ed., Vol. 2, 14-48, §74.30.

See *Borelli v. Rochester Transport Corp.*, 285 N.Y. App. Div. 230, 136 N.Y. Supp.2d 315 (1954). *Bilodean v. Oliver Stores, Inc.*, 352 A.2d 741 (N. Hamp. 1976). *Richardson v. United States Fidelity & Guaranty Company*, 233 Miss. 375, 102 So.2d 368 (1958). *Lone v. Esco Elevators, Inc.*, 78 Mich. App. 97, 259 N.W.2d 869 (1977). *Brocker Manufacturing & Supply Co., Inc. v. Mashburn*, 17 Md. App. 327, 301 A.2d 501 (1973). *Sandstad v. Industrial Acc. Comm.*, 177 Cal. App. 2d. 32, 339 P.2d 943 (1959). *Cannon v. Container Corp. of America*, 282 A.2d 614 (Del. 1971). *Cannon* and *Brocker*, especially, are authority for the proposition that the credit is determined *after* the attorney's fees are deducted.

Claimant asks whether defendant's credit would be the entire award ($42,500) or the amount claimant actually received after paying attorney's fees. At the time of the tort judgment, the attorney who represented both claimant and the employer apparently received a total of $14,166.28 in fees from his two clients. Under the above precedents, the entire fee is deducted from the award in order to arrive at the amount of the credit: $42,500 minus $14,166.28 equals a credit of $28,333.72.

Claimant's petition for declaratory ruling further states:

> 3. That claimant concurs in the facts as stipulated by respondant's [sic] attorney in his letter to you dated April 3, 1981: That the Employer paid to the Employee $10,057.10 in temporary disability and $3,323.09 in medical expenses, that claimant suffered a 22% disability of the body of the whole which is 110 weeks at $56.00 per week for a total of $6,160.00, and that claimant's one-third contingency attorney fee came to a total of $9,706.66. Claimant would concur, as well, in respondant's [sic] attorney's stipulation of the total personal injury award at $42,500.

Adding the amounts together ($10,057.10 + 3,323.09 + 6,160.00) the total of $19,540.19 does not exceed the credit of $28,333.72. Thus, using the claimant's own figures, the totals do not favor claimant.

Finally, it must be noted that claimant's brief filed June 1, 1981, makes reference to Larson's desk edition on *Workmen's Compensation Law* at page 14-48. The undersigned was unable to find the full passage cited. Therefore, that reference to Larson's works were taken to be without authority.

WHEREFORE, the method of distribution of the proceeds from an award of damages is to deduct costs and attorney's fees, reimburse the carrier for the benefits paid, and pay the remainder to the employee, said remainder to be credited against future compensation due.

* * *

Signed and filed at Des Moines, Iowa this 25th day of June, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

PAUL J. ALLEN,

Claimant,

vs.

ROSE WAY, INC.

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Declaratory Ruling

On March 23, 1981, the above captioned employer and insurance carrier filed their petition for a Declaratory Ruling. The parties agreed that the matter would not be ready for ruling until May 27, 1981.

The facts are as quoted in the petition:

> 1. On or about July 20, 1979, while claimant was operating a motor vehicle owned by the employer, claimant was involved in an accident under circumstances creating a legal liability against a person, other than the employer, for injury and damage sustained by claimant.
>
> 2. On or about August 14, 1979, Liberty Mutual Insurance Co. filed a first report of injury and a notice of voluntary payment.
>
> 3. Thereafter, pursuant to Section 86.20 of the Iowa Code, Liberty Mutual Insurance Co. made voluntary payments to claimant and others in the amount of Four Thousand Two Hundred Thirty-five Dollars and Seventy-nine Cents ($4,235.79).
>
> 4. On or about September 23, 1980, Liberty Mutual Insurance Co. filed a memorandum of agreement.
>
> 5. Claimant has never filed a Petition for Arbitration and has never claimed entitlement to or made demand for payment of compensation from Liberty Mutual Insurance Co.
>
> 6. Claimant has negotiated a settlement of Forty Thousand Dollars ($40,000.00) with the third party legally liable for his damages.
>
> 7. Pursuant to Section 85.22(1) of the Iowa Code, which states in pertinent part:
>
> [Quotation deleted.]

8. Claimant has so far declined to make such reimbursement to Liberty Mutual Insurance Co.

The question is framed in the form of the prayer to the Petition for Declaratory Ruling:

a. An employer who, pursuant to Section 86.20, makes voluntary payments to an employee injured by a third party, may, under Section 85.22, obtain indemnification for such voluntary payments out of any recovery the injured employee may receive from the third party.

b. Claimant must reimburse Four Thousand Two Hundred Thirty-five Dollars and Seventy-nine Cents ($4,235.79) to Liberty Mutual Insurance Co. for the statutory payments made by Liberty Mutual Insurance Co. to Claimant, and for such other declaratory relief or ruling as may be appropriate.

The first unnumbered paragraph of Section 85.22 states:

When an employee receives an injury or incurs an occupational disease or an occupational hearing loss for which compensation is payable under this chapter, chapter 85A or chapter 85B, and which injury or occupational disease or occupational hearing loss is caused under circumstances creating a legal liability against some person, other than his or her employer or any employee of such employer as provided in section 85.20 to pay damages, the employee, or the employee's dependent, or the trustee of such dependent, may take proceedings against the employer for compensation, and the employee or, in case of death, the employee's legal representative may also maintain an action against such third party for damages. When an injured employee or the employee's legal representative brings an action against such third party, a copy of the original notice shall be served upon the employer by the plaintiff, not less than ten days before the trial of the case, but a failure to give such notice shall not prejudice the rights of the employer, and the following rights and duties shall ensue:

And Section 85.22(1) states:

1. If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's or his personal representative's attorney, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which he is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

Section 85.22 does not give the industrial commissioner power to determine either of the questions suggested in the Petition for Declaratory Ruling. Enforcement under Section 85.22(1) as stated in the statute is by way of lien in the district court. [The industrial commissioner has the power to provide written approval of a settlement for subrogation purposes where the parties don't agree. Section 85.22(3). However, no question is presented under the subsection by the petition.]

Findings of Fact

The facts stated in the Petition for Declaratory Ruling are adopted as the finding of fact.

Conclusions of Law

The industrial commissioner has no power to determine whether or not an employer and insurance carrier are subrogated under Section 85.22, Code of Iowa, for voluntary payments made under Section 86.20, Code.

WHEREFORE, this deputy industrial commissioner declines to rule as requested in the Petition for Declaratory Ruling filed March 23, 1981.

* * *

Signed and filed at Des Moines, Iowa this 19th day of May, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RICHARD PAUL ANDERSON,

Claimant,

vs.

OSCAR MAYER & COMPANY,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Richard Paul Anderson, the claimant, against his employer, Oscar Mayer & Company, a self-insured employer, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on or about April 27, 1978.

* * *

The issues to be determined herein are whether the claimant sustained an injury arising out of and in the course of his employment with this defendant, the existence of a causal relationship between that injury and the resulting disability as well as the nature and extent of claimant's disability. There is also an issue of 85.27 medical benefits.

Findings of Fact

There is sufficient credible evidence in the record to support the following findings of fact, to wit:

Claimant, Richard P. Anderson, was on April 27, 1978, the date of the incident involved herein, an employee of the defendant Oscar Mayer & Company. The claimant, on that date, was 31 years of age. The claimant's duties for the defendant on the date of injury involved the function of "scribbing loins and ribs." This job required claimant to use a power saw, which was suspended from the ceiling, and cut ribs from hogs. This procedure was done in assembly line fashion with claimant working at a revolving table with three or four other workers. Claimant had done the job of scribbing ribs for a year and a half prior to this incident. Normally this was a two man job, but claimant was doing it alone on an incentive pay basis. On occasion the job of scribbing ribs required claimant to remove abscessed ribs from the processing line by the claimant.

On the date of this incident claimant was scribbing loins and ribs when an abscessed rib came to his station. Claimant removed this abscessed rib by lifting it and turning to his left and depositing it behind him. He used hot water to wash off his work area and began scribbing ribs again. After working a few minutes, the claimant became dizzy, experienced blurred vision, and lost the use of his left hand, left arm, left leg, and experienced numbness. The line was shut down and the claimant was removed from the area by stretcher. He was eventually taken to the Iowa Methodist Medical Center and came under the treatment of Robert Hayne, M.D. Dr. Hayne reports in his letter of May 1, 1978 that the various diagnostic tests performed on claimant appeared to be normal. He further reports, "a definite diagnosis was not made. His symptoms are somewhat suggestive of a seizure type of activity."

In June of 1978 the claimant returned to work at the defendant's place of business doing the same scribbing job. He continued to perform this job for two weeks but was physically unable to continue to do this work. He continued to complain of dizziness, lightheadedness, and pain in the neck and shoulder area of his back. His left hand, arm, and leg would also become numb. Claimant was transferred into the job of weighing loin boxes which required less physical exertion. He performed this job through the spring of 1980. He also, subsequently, ran various pieces of machinery for the defendant used in the meat processing procedure. Claimant testified that he is now earning $9.74 an hour, but that if he were doing the loin scribbing job which he was performing on the date of injury, he would be earning approximately $12.92 an hour. Based on the testimony of the claimant, it appears that he has never had a similar physical problem in the past.

Today the claimant's complaints are numbness in the left arm, hand, and leg as well as the left side of the face. He has pain in the neck and shoulder region.

Claimant was examined and/or treated by a long list of physicians. At one point in time his family physician, Robert F. Deranleau, indicated a diagnosis of possible epilepsy.

Paul From, M.D., examined the claimant at one point and indicated that the condition noted did not arise out of the claimant's employment. In an attending physician's statement, Robert Hayne, M.D., also indicates that the claimant's condition did not arise out of his employment.

The claimant was examined by Stuart R. Winston, M.D., a neurosurgeon, and Dr. Winston reports, in part: "Due to secretarial error the box being checked on the report of 12/21/79 would seem to indicate that this was work-related. There is nothing in his history to indicate that such an injury ever occurred and I am sorry for the misunderstanding. The initial onset occurred while at work but I can see no indication that this was related to his employment."

Dr. J. G. Donovan, D. C., administered manipulative treatments to the claimant over a period of time and indicates in an attending physician's statement that the condition was not work related. The record reflects that for a period of time claimant has suffered from migraine headaches and in fact on the date of this incident had a migraine headache in the morning.

The testimony of Billy Junior Coffin generally corroborates the testimony of the claimant as to the details of the alleged incident at the employer's place of business.

The testimony of Larry Johnston also generally corroborates the testimony of the claimant with respect to the facts of the incident.

Gene Johnson testified on behalf of the defense and generally corroborated the claimant's testimony as to his job scribbing loins as well as his present position with the company.

Michael Patrick Murphy also testified on behalf of the defense and corrobarated the prior testimony.

Thomas Edward Blankenbaker, a chiropractor, testified by deposition on behalf of the claimant. His first examination of the claimant was on March 28, 1979, a significant period of time after the incident in question. Dr. Blankenbaker diagnosed claimant's condition as cervical syndrome. He expressed the opinion that claimant had a ten percent permanent partial disability. On cross-examination Dr. Blankenbaker was equivocal in terms of causation indicating that there are many causes for the cervical syndrome he diagnosed.

Thomas F. Hines, a clinical psychologist, testified on behalf of the claimant. He examined the claimant on two occasions and administered a variety of psychological tests. Dr. Hines indicates a diagnosis "that from a functional point of view it seems clear that psychological factors were significant in the presentation of symptoms, either the cause or the exacerbation of symptoms." He also expresses an opinion as to a diagnosis of anxiety neurosis. He expresses the opinion that claimant is in need of psychological treatment and his condition will worsen if he does not receive that treatment. He expresses

the opinion that the work related incident of 1978 caused or precipitated the condition that exists in the claimant upon his examination. He then goes on to state in what is considered equivocal language in terms of causation, as follow:

> I think it's important to understand in this situation from the point of view that the relevant factor is that Mr. Anderson believes that this incident caused the situation that exists now for him. Psychologically, the thing that is important in a situation such as we have where an individuals [sic] has a long-standing chronic psychological condition under control but then precipitated by an event, it's the belief of that individual that that [sic] even precipitated the condition that is what is most relevant. What I am saying, in a sense, is, and I don't mean this legally. That gets out of my area of expertise. In a sense, it's nobody's fault that this condition was precipitated at work, and in a sense, maybe this condition could have been precipitated at some other time or some other place. But, what's relevant is it was precipitated in that situation on April 27th, and that the patient in this case, Mr. Anderson, believes that the event precipitated this situation.

Hines expresses the opinion that claimant has a 40 to 50 percent permanent partial disability and is in need of treatment. Later in his testimony, Dr. Hines indicates that the precipitating or triggering events related to this psychological problem he has noted in claimant could have happened at any time or at any place.

Applicable Law

A claimant must prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

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, supra*.

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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 27, 1978 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).

The Iowa Workers' Compensation Act does not require an unusual incident. *Almquist v. Shenandoah Nurseries*, 218 Iowa 24, 254 N.W. 35 (1934).

> However, it is to be noted that just because a condition reaches the point of disablement while an employee is at work does not make that condition compensable. 'It is only where there is a direct causal connection between exertion of the employment and the injury that a compensable award can be made.' *Musselman v. Central Telephone Co., supra*. The burden of proof is upon the claimant to establish his case by a preponderance of the evidence. *Almquist v. Shenandoah Nurseries, supra;* [*Pecinovsky v. Fencl Oil and L.P. Company*, 33rd Biennial Report of the Industrial Commissioner.]

Analysis

In this case claimant, while performing his employment function for defendant, became dizzy, experienced blurred vision, and experienced numbness in the left portion of his body. Factually, there is no traumatic work related incident leading up to the manifestation of these symptoms. Under the aforecited case law, there does not need to be a specific incident or accident to make a particular disability compensable. On the other hand, the alleged work related injury giving rise to the disability, must be something more than a mere manifestation of a condition which could have occurred at any time or at any place.

In the opinion of the undersigned deputy, a review of both Dr. Hines' deposition as well as the testimony of Dr. Blankenbaker, indicates that the condition noted could have manifested itself at any time and at any place. Drs. Winston and Hayne indicate that the condition they noted was not work related.

Under the aforecited case law, the claimant has the burden of establishing that the injury arose out of the employment. Based on the facts of this case, the undersigned deputy is of the opinion that claimant has failed to sustain that burden and has not established that the injury arose out of his employment.

Conclusions of Law

The claimant failed to sustain his burden of proof and did not establish that he sustained an injury arising out of his employment with this defendant.

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

Costs of this action are taxed to the defendant pursuant to Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed at Des Moines, Iowa this 29th day of May, 1981.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

LOUIS E. APLING,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant appeals from a proposed arbitration decision in which claimant was awarded permanent partial disability benefits. This award was based upon the deputy's determination that claimant's work environment aggravated his obstructive lung disease. The issues on appeal are whether claimant received an injury which arose out of and in the course of his employment, whether a causal connection exists between the injury and any disability and the nature and extent of any disability. There is also a question as to whether this action should be under Iowa Code Chapter 85 or 85A. If it falls within chapter 85A, questions arise under section 85A.13, the provisions relating to pneumoconiosis, section 85A.18, which relates to notice of disability or death—filing of claims, and section 85A.7(4) which discusses occupational disease and aggravation.

. . .

Claimant, who is presently 57 years old, is married and has an eighth grade education. At the time of his retirement in March 1977 he had three minor children. In 1951 claimant began working for defendant as a chipper and grinder in the mill room. He retained that position until he retired in March 1977. At the hearing, claimant and his co-workers, Steve Williams, Howard Durnin and Dave Latusick, described their job and the area they worked in. Their duties involved chipping and grinding excess sand and metal from newly formed wheels. This process resulted in a high concentration of sand and metal particles in the area which created a constant fog of dust in the air. Tests performed in October 1975 in claimant's work area showed about 200 percent of the maximum tolerable allowance of silica. The testimony indicated that workers' skin and clothing would be totally covered with black dust at the end of each work day. Claimant and his co-workers testified that coughing produced black phlegm and that nasal discharge was black. In addition, although they had thoroughly showered, the workers' clean clothes would turn rusty from perspiration.

Claimant testified that his nose would get sore and on occasion would bleed. Before he retired, claimant was provided with a respirator to wear while working. After his retirement, all workers in the area were equipped with hoods which provided ventilation. The average length of time a person remained as a chipper and grinder was one to three years.

In 1970 claimant had pneumonia. It was after this illness that claimant began experiencing trouble breathing. He testified that he was short of breath and got fatigued easily. As a result he began to have trouble maintaining his regular job pace.

Claimant and his co-workers were paid at a group incentive rate. Claimant testified he found it difficult to produce his base rate after he began experiencing breathing problems. Steve Williams stated that claimant started to "slow down" somewhere in 1968, 1969 or 1970. Dave Latusick testified that the last year he worked with claimant, claimant really slowed down. According to Latusick, they barely made 100 percent and claimant lacked "get up and go." This was in contrast to claimant's former level of speedy performance which earned him the nickname "the machine." There was testimony, however, which indicated the employer changed rate levels occasionally which made it more difficult to make the rate.

Richard Corton, M.D., testified that yearly chest x-rays were taken of workers in claimant's area beginning sometime around 1970 due to a risk of contracting silicosis while working in that area. Dr. Corton testified that in 1975 the results of claimant's chest x-rays were called to his attention. The x-ray report indicated that claimant had bilateral interstitial fibrosis. Dr. Corton discussed the claimant's chest x-rays with him. According to claimant and a report dated October 6, 1975, Dr. Corton told claimant that the scarring was probably due to inhaling the dust in his work area. Claimant related to Dr. Corton that he had been smoking cigarettes for over 30 years. Dr. Corton recommended that claimant quit smoking since smoking aggravated the problem and could make it worse from a functional standpoint. Claimant discontinued smoking at that time.

Dr. Corton was employed as the part-time company doctor by defendant until 1976 when this became a full-time position. He still maintains a private practice, and testified that 30-50 percent of the practice involves patients with lung disease.

Claimant testified that when Dr. Corton notified him of a lung problem, he assumed defendant was notifying him and he didn't need to notify them. Claimant stated that his decision to retire in March 1977 was based upon his exhaustion and his inability to adequately perform his work. His fatigue and difficulty in breathing forced him to slow down to the point that he was unable to keep his partner busy.

Claimant testified that, although he had suffered a compound fracture of his ankle approximately 30 years ago and limped as a result of the injury, that condition in no way contributed to stiffening up over the years, and that he had discussed the pain in his ankle with Dr. Corton. However, claimant stated that his leg did not

bother him any more when he quit than twenty years ago. Dr. Corton, on the other hand, "got the feeling" that claimant's ankle was a part of his decision to retire.

When alternate jobs with defendant were suggested to claimant he indicated that he liked working in the mill room. Dr. Corton did not seek to place him elsewhere, apparently since claimant did not wish a change.

At the time of the hearing claimant continued to experience breathing difficulty, and fatigue. He was unable to work outside anymore since carrying even small items caused shortness of breath. Claimant testified that when he walked he was unable to catch his breath so as to enable him to carry on a conversation with anyone. Claimant was merely able, at the time of the hearing, to help with household chores such as vacuuming and dish washing.

When claimant's lung condition was discovered in 1975, Dr. Corton ordered complete pulmonary function studies. These test results, as well as results of tests performed in 1977 and 1978, were interpreted by James L. Shreffler, M.D., an anesthesiologist who supervises the Inhalation Therapy Department at Schoitz Memorial Hospital. Dr. Shreffler testified that the results of the October 1977 tests were indicative of a moderately severe, chronic obstructive pulmonary disease which was more advanced than in October 1975. According to a report of Dr. Corton dated October 10, 1978, the 1975 tests "showed a normal forced vital capacity (FVC) with some impairment in the forced expiratory volume—one second (FEV 1), suggestive of moderate obstructive lung disease. There was no indication of restrictive disease." A third test performed by Dr. Shreffler on October 17, 1978, in contemplation of testifying, showed an increase in FEV 1. Dr. Shreffler testified that this result was an actual improvement, so he assumed there was an improvement in claimant's chronic obstructive pulmonary disease. He found no evidence of any restrictive component.

Dr. Shreffler stated that silicosis is usually caused by the inhalation of respirable particles of metal and dust. Simple silicosis has neither restrictive or obstructive components. Advanced silicosis may show a restrictive component. Complicated silicosis, complicated by some other factor such as cigarette smoking, would cause a chronic obstructive pulmonary disease.

Dr. Shreffler stated the silicosis cannot be diagnosed from a pulmonary function test but that he thought the environment in which claimant worked could have caused silicosis. He further stated that there was a synergestic effect between claimant's environment and his cigarette smoking, and that both factors contributed equally to claimant's chronic obstructive pulmonary disease. Dr. Shreffler's definition of synergestic indicated that both factors, claimant's cigarette smoking and his environment, worked together concomitantly to cause the pulmonary insufficiency. Based upon claimant's history, his physical characteristics and interpretation of the test results, Dr. Shreffler computed claimant's disability rating as suggested by AMA guidelines as 20-25 percent. However, he did state that he was inexperienced in giving functional disability ratings.

Dr. Corton testified that silicosis is a form of pneumoconiosis, which is a restrictive lung disease. Dr. Corton's report of November 4, 1977 stated that he felt the "label" silicosis should be put on claimant's condition. Dr. Corton testified that claimant has "simple silicosis" caused by his work environment and that in addition claimant has chronic obstructive lung disease. He did not feel that the simple silicosis caused the obstructive lung disease, Dr. Corton rated claimant's disability as 15 percent on December 5, 1978.

Dr. Corton referred claimant to Matthew B. Divertie, M.D., of Mayo Clinic who performed pulmonary function tests. In a report dated March 16, 1978, Dr. Divertie stated that any limitation of respiratory capacity was due to obstructive airways disease. There did not appear to him to be any significant abnormality which would result in disability from restrictive disease of the type most often found in pneumoconiosis. Dr. Divertie rated claimant's disability from obstructive lung disease, which he felt was probably due to cigarette smoking, as 10 percent.

The deputy determined that claimant had silicosis but that he had failed to prove any disability causally connected to the silicosis. Also, the deputy determined that claimant had a preexisting lung disease and that claimant's work environment more than slightly aggravated his previous condition of obstructive lung disease. It was determined that claimant received a permanent partial disability of 20 percent of the body as a whole. He determined that claimant was being compensated under chapter 85 and concluded that since the employer had actual notice of claimant's condition, there was no notice problem.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 31, 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).

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 a 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).

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*, 25[illegible] Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada*

Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

Iowa Code section 85A.8 provides:

Occupational disease defined. Occupational diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational cosequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

Iowa Code section 85A.18 states:

Notice of disability or death-filing of claims. Except as herein otherwise provided, procedure with respect to notice of disability or death, as to the filing of claims and determination of claims shall be the same as in cases of injury or death arising out of and in the course of employment under the workmen's compensation law. Written notice shall be given to the employer of an occupational disease by the employee within ninety days after the first distinct manifestation thereof, and in the case of death from such an occupational disease, written notice of such claim shall also be given to the employer within ninety days thereafter.

Iowa Code section 85A.4 reads:

Disablement defined. Disablement as that term is used in this chapter is the event or condition where an employee becomes actually incapacitated from performing his work or from earning equal wages in other suitable employment because of an occupational disease as defined in this chapter in the last occupation in which such employee is injuriously exposed to the hazards of such disease.

Iowa Code section 85A.13(1) defines pneumoconiosis as "the characteristic fibrotic condition of the lungs caused by the inhalation of dust particles."

In the case at issue, Dr. Corton, the company physician who was also claimant's treating physician, diagnosed claimant's disease as silicosis. Dr. Corton based this diagnosis upon claimant's work environment and the 1975 x-ray report which indicated that claimant suffered from bilateral interstitial fibrosis. Dr. Divertie of Mayo Clinic confirmed this diagnosis, noting that claimant's chest x-rays showed innumerable small nodules in the lung compatible with a diagnosis of silicosis. According to Dr. Corton, silicosis is a form of pneumoconiosis characterized by a restrictive component resulting in a decrease in the lungs' ability to fully expand. If this restrictive component is present, the vital capacity of the lung is decreased. The tests performed on claimant in 1975, 1977 and 1978 all demonstrated that claimant suffered from no reduction in the vital capacity of his lungs. At no point did any of the tests indicate that a restrictive component existed with respect to claimant's lung disease. According to both Dr. Corton and Dr. Shreffler, simple silicosis has no obstructive component. However, in each test administered, claimant demonstrated a reduced forced expiratory capacity which is characteristic of obstructive lung disease. Consequently, claimant was diagnosed as having chronic obstructive lung disease.

Based upon the foregoing evidence, it is determined that, although claimant contracted silicosis, a form of pneumoconiosis, in his work environment, he suffered no disability from the siliosis. As such, Iowa Code section 85A.13 is not applicable to claimant's case. However, the evidence shows that claimant does suffer from obstructive lung disease.

Therefore, it must be determined whether the provisions of either Iowa Code section 85 or 85A are applicable to this case with respect to claimant's obstructive lung disease. Iowa Code Section 85.61(5)(b) narrows the definition of "injury" in the following manner: "The words 'injury'... 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." *Id.*

The Iowa Supreme Court in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 190 (Iowa 1980), noted that the definition of occupational disease was expanded in 1973 by the legislature when it omitted the restriction that occupational diseases be limited to those specifically listed in the pertinent schedule. The court further stated that "the concepts of occupational disease and injury cannot be used interchangeably." *Id.*

The definition of occupational disease as previously set out in section 85A.8 requires that the disease must be causally connected with the employment and must have followed from injurious exposure brought about by the nature of the employment. Additionally, the hazards claimant is exposed to must be more prevalent in the employee's occupation than in everyday life or in other occupations.

The evidence demonstrates that the atmosphere in claimant's work area contained an intolerable level of silica dust, which resulted in claimant's diagnosed disease of silicosis. However, as previously concluded claimant's silicosis produced no compensable disability. On the other hand, the record presents substantial evidence which establishes that the air surrounding claimant's working environment also contained high levels of irritating substances other than silica dust. Dr. Corton testified that, in addition to silica dust, quantities of "nuisance dust," smoke, fumes and dirt were airborn in claimant's work area.

Claimant and his co-workers also testified that there was a visible fog of dust, sand and metal particles which enveloped their work area. Claimant was constantly exposed to this noxious atmosphere due to the nature of his employment. The irritating atmosphere claimant encountered at work was certainly more prevalent than what he was exposed to in every day life or would have been exposed to in other occupations.

Each physician by whom claimant was examined related his obstructive lung disease to his cigarette smoking. However, according to Dr. Corton the elements present in claimant's work area, aggravated and contributed to claimant's obstructive lung disease.

Dr. Shreffler, while noting that smoking cigarettes was a contributing factor to claimant's obstructive lung disease, stated that it was not the sole cause. Rather, he found a synergestic effect between claimant's work environment and his smoking, stating that both factors contributed equally to claimant's obstructive pulmonary disease. Claimant additionally was advised by Dr. Divertie to avoid respiratory irritants including those due to industry, which indicates the aggravating effect of these substances.

Based upon the above evidence, it is determined that claimant suffered from a preexisting obstructive lung disease which was aggravated by exposure to the airborn irritants in his working environment and therefore, any compensation must be computed under the provisions of chapter 85A. In reaching a determination that claimant's disease is encompassed within the definition of occupational disease in section 85A.8, claimant's obstructive lung disease is thereby eliminated from consideration under chapter 85, since, as stated below, section 85.61(5)(b) specifically excludes occupational diseases from the definition of injury.

Before discussing the limitations section 85A.7(4) places on recovery when a preexisting disease is aggravated by an occupational disease, it must be determined whether the notice requirement of 85A.18 was met. The x-ray screening program which called attention to claimant's lung problems was instituted by the employer in response to its knowledge of the hazards in claimant's work area. Indeed, the record indicates that the foundry area in which claimant worked was the only area to receive such screening. It was Dr. Corton, the company physician, who informed claimant of the x-ray findings. It is understandable why claimant was of the opinion that his lung difficulties had already been brought to the attention of his employer. Therefore, although section 85A.18 requires that written notice be given to the employer within ninety days after the first distinct manifestation of the disease, it is determined that the employer received actual notice of claimant's lung problems and that the notice requirements of section 85A.18 were met.

Under section 85A.7(4) compensation must be reduced and limited to such proportion that would be payable if the occupational disease was the sole cause of the disability. Both Dr. Corton and Dr. Shreffler discussed the effects of claimant's work atmosphere on his obstructive lung disease. However, only Dr. Shreffler placed any value on what portion of claimant's obstructive lung disease was caused by his work environment. According to Dr. Shreffler, claimant's work environment contributed equally along with his cigarette smoking to his obstructive lung disease. Therefore only 50 percent of the total disability determined to be present will be attributable to claimant's employment.

This case was originally decided prior to the filing of the opinion of the Iowa Supreme Court in *McSpadden v. Big Ben Coal Co., supra*. Under the occupational disease law, compensation is payable only for disablement "where an employee becomes actually incapacitated from performing his work or from earning equal wages in other suitable employment." Iowa Code section 85A.4. In *McSpadden* the court considered the question of what criteria should be applied to determine disability under Iowa Code section 85A.4. After a discussion of the criteria used to determine "industrial disability" resulting from injuries covered by section 85, the court concluded that:

> [t]here is no reason to believe that these criteria should not also be applicable in determining the claimant's capacity to perform his work or to earn equal wages in other suitable employment, the standards for determining disability under section 85A.4, at least in cases where claimant proves that he has been unable to continue working for reasons related to his disease.

Therefore, reasons why the claimant may be unable to continue working may not always be related to functional impairment in an occupational disease.

In the present case, the testimony which demonstrates that claimant experienced difficulty breathing, is corroborated by test results which showed a decrease in his forced expiratory capacity. Co-workers testified that claimant's rate of production decreased significantly prior to his retirement. Although claimant began to wear a respirator while at work shortly before his retirement, he apparently continued to experience fatigue and inability to adequately perform his job duties.

Mention should be made of the fact that Dr. Corton felt claimant's previous ankle injury was instrumental in his decision to retire. Claimant directly contradicted Dr. Corton's contention. Claimant's testimony indicates that he retired because of breathing difficulty and inability to maintain a proper pace on the job. His ankle played no part in his decision to retire. Moreover, co-workers testified that, although claimant limped, he never complained of ankle pain.

Based upon the above considerations, it is apparent claimant was unable to continue working and, as a result, retired due to his disease. As such, the criteria for determining industrial disability can be used to determine claimant's disability. See *McSpadden supra*.

Claimant had worked for twenty-six years in the same capacity for defendant. Claimant has only an eighth grade education and has received no other training. He attempted to perform his job with the aid of a respirator,

but continued to experience fatigue and inability to maintain his work pace.

Claimant's functional impairment ratings due to his obstructive lung disease, ranged from ten percent to twenty-five percent.

These ratings given in 1978 reflect a slight improvement in claimant's functional disability ratings compared to those made in 1977. Dr. Shreffler testified that some slight improvement in a pulmonary function study could be expected after a person was no longer in contact with the lung irritants. However, he further noted that it is highly improbable that a person's obstructive lung disease would improve after the irritant was removed, due to the permanent damage inflicted on the lung from chronic irritant traumatization.

Based upon the above considerations, it is determined that claimant has a forty percent (40%) disability due to chronic obstructive pulmonary disease of which one-half is attributable to claimant's employment.

WHEREFORE, it is found:

That claimant contracted silicosis as a result of his work environment, but that claimant suffered no disability as defined in chapter 85A due to the silicosis.

That claimant had a preexisting obstructive pulmonary disease which was aggravated by his work environment.

That this aggravation was in the nature of an occupational disease and as such, the provisions of chapter 85A apply.

That the notice requirements of section 85A.18 were met.

That the provisions of sections 85A.7(4) apply since the occupational disease aggravated claimant's preexisting obstructive pulmonary disease.

That claimant has an overall disability of forty percent (40%) of the body as a whole, one-half of which is attributable to the occupational disease.

* * *

Signed and filed at Des Moines, Iowa this 19th day of March, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

VINTON JOHN BARKER,

Claimant,

vs.

CITY WIDE CARTAGE,

and

MILWAUKEE MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed July 28, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

* * *

Defendants appeal an award of weekly benefits in the nature of a "running healing period" and payment of a hospital bill and doctor bill. Defendants make the following exceptions to the hearing deputy's decision:

1. [T]o the finding that the claimant met his burden of proving he sustained an injury out of and in the course of his employment.

2. [T]o the finding that claimant met his burden of proving the disability on which he is basing his claim is causally connected to the injury.

3. [T]o the Deputy Commissioner's failure, if there is found to be an injury out of and in the course of employment, to either deny or award permanency benefits and to determine the extent of permanency proved, if any.

4. [I]f there is found to have been an injury out of and in the course of employment, the award of healing period benefits beyond the time claimant returned to work following injury and the award of running healing period benefits.

5. [I]f there is found to have been an injury out of and in the course of employment to award of weekly benefits in excess of the minimum rate.

6. [T]o the portion of the decision allowing claimant to sellect [sic] medical care, and to the portion of the decision ordering particular kinds of medical care.

7. [U]nless there is found to have been an injury out of and in the course of employment, to award of medical benefits.

8. [T]o award as costs of the maximum expert witness fee of $150 to Dr. Mooney.

The hearing deputy's findings basically are sustained as to numbers 1, 2, 7, and 8; his findings are reversed and modified as to numbers 4 and 6; and modified findings are made as to 3 and 5.

Claimant worked for the employer as a truck driver. On December 1, 1978 he was driving the employer's van when it was in an accident with a bus. Defendants concede that he was in the course of his employment at that time (record, p. 113). It did not appear that he was injured except for a police notation of an arm injury. The accident

occurred about 8:00 a.m., and he finished work that day.

He testified that about two days later his problems began:

> My legs and backaches [sic]. Then it went on. I was holding a cigarette in my hand one time, and pretty soon it went clear out of my hand. I was unloading a few times, and it got so I couldn't even hold the box. The boxes slid out of my hands because I couldn't hold onto them (p. 74).

On January 14, 1979 he visited Gordon Mitts, M.D., a resident in general surgery at the Veterans Administration Hospital in Des Moines. Dr. Mitts performed a thorough examination at that time (pp. 43-44). He phrased his diagnosis as follows:

> I made a tentative diagnosis. I made the diagnosis of sciatica, which is just a general term for the radiation of the pain down the lower leg, and it indicates a reticular type of problem. I made the conditional diagnosis of disk disease of the lumbosacral spine (p. 45).

Asked about future pain medication, he stated:

> No, I can't, because I haven't examined him since that time. As far as I know he has not had a myelogram or an electromyogram to document the nature of the disease. I would say that if it is a herniated disk, for instance, then the likelihood of his requiring pain medication in the future is great. If it was some other problem, I couldn't comment on that (pp. 46-47).

As to the nature of the disability:

> If it is disk disease, it is a fairly permanent thing, one that usually doesn't subside on its own (p. 47).

And finally:

Q. Do you have any opinion as to whether the complaints and your findings were the result or were caused by this accident or caused by injury?

A. I can only take his word for what happened about the accident. All I can say about that is that it is not uncommon for even a minor injury to later on, sometimes several months to a year, show up as a problem such as this. So the time interval is not out of line. I have no way of backtracking and saying that one was the cause of the other.

Q. In the absence of anything else indicating, would you say this was caused by the accident?

A. I would say that if this is the only event that occurred in that time interval, it would be likely that that would be the cause.

Q. With reasonable medical certainty you can say that?

A. Right (p. 48).

On January 16, 1979 claimant visited James C. Mooney, M.D. That doctor took a history and performed an examination. Then he was asked:

Q. Doctor, from your examination and your history, have you formed an opinion as to whether the injury he received in this accident would have any connection or have anything to do with or affect at all his prior condition because of this World War II injury?

A. Well, his World War II injury was treated very badly by the Army. They should have treated him differently and sent him home, but they didn't. He had, in my opinion, chronic brain damage. It is unusual for anyone to be as close to a shell as he was and still be alive. The explosive type of a shell just blows them up in the air. The thing it affects most is the cranium. The brain is soft, and the most damage was in his brain. He had chronic brain damage from that time on and up until—well, he will never get over it. The brain does not regenerate itself (pp. 15-16).

The diagnosis:

> Yes. My diagnosis was chronic brain damage exacerabated by the present accident, and also he had sprain of the cervical dorsal and lumbar spine. That means his whole spine. He had limitation of motion of the knees and arms and every joint in his body, and he also had pain on motion. The muscles of his back, called the trapezius area, were tender and tight and tender to palpation (pp. 18-19).

As to whether he kept records:

> No. What I usually do in most cases is keep a copy of them, but I told you this was a penny ante case, so I wrote up all I knew about the case, sent it to him, and we destroyed the other things (p. 25).

Dr. Mooney testified further that although Dr. Mitts recommended a myelogram, he advised claimant against the procedure (p. 36).

Richard Brewer, a Des Moines police officer, testified that his investigation showed claimant had an unspecified arm injury, as mentioned above.

Jim Teske, an adjustor for Crawford and Company, testified that he investigated the case for the insuror of the city bus. Claimant apparently told the adjustor that he had a minor injury to the right arm, although, incredibly, the hearing transcript reads:

Q. In the course of that statement did you ask him whether or not he had been **insured** in the accident?

A. Yes, I did.

Q. What was his response to you when you asked him that question?

A. To the best of my knowledge I asked him on two occasions, and he advised me that he was not *insured*.

Q. Did he mention any minor problems?

A. He said something that his right arm might have hurt him a little bit.

Q. Was the statement that you took recorded?

A. Yes, it was (p. 100, emphasis supplied).

The undersigned deputy industrial commissioner will read "insured" as "injured."

Paul Leto testified that he was the owner of the employer company and, basically, that claimant only complained of an arm or shoulder injury as a result of the accident (e.g., see p. 107). Mr. Leto was not under the impression that claimant left his employ because of an injury:

Q. I want you to just be certain to pay attention to the period time I am asking you about. After the accident how long was it that Mr. Barker continued working for City Wide Cartage before he left his employment?

A. I don't know how long he had been there. I never knew he left. The only thing I know is when I wanted him to work, I couldn't get ahold of him. His wife or his mother would call and say that he couldn't go to work or he had to do something or he had to go someplace out of town or somewhere, I don't know.

Q. When was the last day Mr. Barker worked for you?

A. I couldn't tell you.

Q. Can you tell that by reviewing your records?

A. No. It's been quite some time. As far as I'm concerned, he's always been an employee. He never got fired. The man never came up to me and said, "I'm hurt," or something like that. I mean, the only time I knew he got hurt on the job was when I got a letter from his attorney (p. 108).

Claimant's exhibit A is a bill from Dr. Mooney in the amount of $750.00 showing treatment on some 43 occasions in January, February, March, and April, 1979.

Claimant's exhibit B is a report by Dr. Mooney of April 14, 1979, which concluded "the injuries he received in this accident are an exacerbation of old spinal injuries."

Claimant's exhibit C is a bill and hospital notes from the Veterans Administration. Although not entirely legible, the history taken on January 14, 1979 states in part: "In accident early December 1978; has been having hip and back problems since that time;" was checked by private M.D. for shoulder and right arm problem. However, left hip back and leg problem seems to be getting worse, claim it causes him to limp and has heating sensation in it. Back and hip bothers him more when standing up [.] accident was between bus and truck."

The radiographic report in claimant's exhibit C is dated January 6, 1979 and states:

IMPRESSION:

1. There is increased lordosis of the lumbosacral spine and minimal degenerative changes. There is scoliosis, minimal, convexity to the left.

2. The hips and pelvis are not particularly remarkable, particularly the left hip is normal.

Claimant's exhibit D is a sheaf of the employer's driver trip tickets for claimant covering the period October 14, 1978 through January 11, 1979.

Claimant's exhibit E consists of claimant's federal income tax returns for 1974, 1977 and 1978.

Claimant's exhibit E [sic] is a compensation agreement dated February 2, 1979 between claimant and his attorney.

Defendants' exhibit 1 is a copy of the investigating officer's report of the accident.

Defendants' exhibit 2 is an application for employment signed by claimant and dated October 13, 1978.

Defendants' exhibit 3 is a typescript of the recorded statement referred to by Mr. Teske.

Defendants' exhibit 4 is a report dated August 6, 1979 by Jerome Bashara, M.D., an orthopedic surgeon, of an examination of July 11, 1979. That report recites the history and complaints. Then it proceeds:

On physical examination, he is a difficult historian and somewhat inconsistent from time to time in his answers. He moves at times as though he is in a great deal of pain and at other times as though he is not. He has mild lumbar paraspinous muscle spasm with tenderness at the L5-S1 interspace. He would not cooperate for a motion examination. His straight leg raising is negative to 90 degrees bilaterally in a sitting position and is positive at 20 degrees bilaterally in a lying position. A neurological examination of the upper and lower extremities is normal.

X-rays of the lumbosacral spine, pelvis and left hip were obtained from the Veterans Administration Hospital. X-rays of the lumbosacral spine dated January 14, 1979, show a partial sacralization of L5 vertebra. They are, otherwise normal. X-rays of the pelvis and left hip are normal.

Findings are those of a mild myofascial strain of the lumbar spine.

No specific recommendations for treatment are made at this time, except he should avoid those activities which specifically aggravate his back pain and use moist heat and rest.

Since there is no question of the accident being in the course of the employment, the main question is whether claimant's back condition arose out of the employment, or, put differently, whether there is a causal relationship between the accident and the back condition. Then, if so proved, the nature and extent of the disability is at issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 1, 1978 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 *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 375, 112 N.W.2d 299, the court quotes with approval from C.J.S.:

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

> No specific recommendations for treatment are made at this time, except he should avoid those activities which specifically aggravate his back pain and use moist heat and rest.

When a workman sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he must prove one of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury. *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d 777, 780 (1971).

"The opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa, 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra*, p. 907. Further, "the weight to be given such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances." *Bodish v. Fischer*, 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965).

There is no doubt that the accident could have injured claimant. Of course, the fact that claimant was able to work for some time after the accident and that he saw an attorney before visiting a doctor give rise to suspicion. However, as defendants themselves point out (under exception 2), claimant does have a low back condition. And, the testimony of Dr. Mitts is sufficiently convincing to connect a back problem to the accident. Dr. Bashara is the more qualified of the three physicians whose evidence is a part of this record; however, he gave no opinion as to the origin of claimant's problem. He did make a diagnosis of mild myofascial strain in the lumbar spine, and his opinion on the diagnosis is adopted in this decision.

Defendants argue that the opinions of Dr. Mooney are without weight, and one must agree. The above quoted portions of the record show that his opinions are virtually without foundation and are almost wholly speculative. The testimony of this 85-year-old physician therefore will be disregarded. Defendants argue (brief p. 4) that Dr. Mitts did not have sufficient facts or history and claim that he should have known some of the facts less immediate to the accident. Yet, for Dr. Mitts to give a *medical* opinion which considered Mr. Leto's remark, for example, that claimant went to a doctor before the injury, would seem not-well taken.

The extent of claimant's disability must be determined. The record shows that his last day of work for the employer was January 14, 1979. By claimant's own testimony, he worked for a service station beginning in June or July 1979 and later delivered newspapers by truck. These facts show that he was able to work at that time, and, as he was not under treatment at that time, there is no showing of causal relationship between his injury and his inability to work. Claimant, therefore, has shown temporary disability only from January 14—June 1, 1979. There is no evidence of permanent partial disability in the record.

Defendants argue that claimant presented evidence which would only entitle him to a minimum rate of compensation. However, the rate of weekly compensation should be determined under §85.36(7). However, no evidence was offered of the work available to other employees in a similar occupation for 13 weeks. As a result of this lack of evidence, claimant's gross weekly earnings will be determined by dividing by six the total number of dollars earned during the six full weeks he worked for the employer. (Hanssen, arbitration decision, *Goolsby v. Jackson Construction*, 3-30-76.) Thus $1,293.00 divided by 6 = $215.50 per week average weekly wage, figuring 2 exemptions = $137.17 weekly compensation rate.

The parties could have made a similar calculation and stipulated to the rate. They are admonished to attempt to do so in the future.

Defendants are correct that they have the right to choose the care under §85.27. Both parties should be guided by that section, which is quite clear and complete. That part of the arbitration decision contrary to this holding, namely the third, fourth, fifth, and sixth paragraphs under the "therefore" clause, pp. 5-6, is reversed.

Claimant having been injured on the job, he is of course entitled to medical benefits also. Defendants' rather peevish argument that Dr. Mooney should not receive an expert witness fee is not well taken, especially in the light of the fact that they subpoenaed him. He is a licensed medical doctor and therefore entitled to the expert witness fee.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on December 1, 1978 claimant sustained an injury which arose out of and in the course of his employment when he was in a motor vehicle accident.

2. That the nature of the injury to the low back was a myofascial muscle strain of the lumbar spine.

3. That claimant sustained temporary total disability from January 14, 1979 to June 1, 1979, a period of nineteen and five-sevenths (19 5/7) weeks.

4. That claimant did not prove any permanent partial disability.

5. That the proper rate of weekly compensation is one hundred thirty-seven and 17/00 dollars ($137.17).

* * *

Signed and filed at Des Moines, Iowa this 25th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Dismissed.

THOMAS E. BARNHART,

Claimant,

vs.

MAQ INCORPORATED,

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed December 22, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter. Defendants appealed from an adverse arbitration decision. A delay of about one month was occasioned by some confusion as to which exhibits should be included in the record. On February 23, 1981 the parties filed an agreement which solves the problem.

The decision of the hearing deputy will be affirmed with the following amplification.

Defendants' appeal brief contains a statement of the issues on appeal: (a) whether claimant sustained any temporary total disability as a result of the injury of November 16, 1979; (b) whether the defendants should be required to pay the bill of F. Dale Wilson, M.D.; (c) whether the objections made by defendants at the time of the hearing and renewed by means of the brief should be sustained.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 16, 1979 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 *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 375, 112 N.W.2d 299, the court quotes with approval from C.J.S.:

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

When a workman sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he must prove one of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury. *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d 777, 780 (1971).

Section 85.27, Code, 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.

Briefly, claimant was injured on November 16, 1979 in a motor vehicle collision in West Virginia. He was treated as an outpatient in that state and returned to Iowa soon thereafter. He has never returned to work.

Defendants divide their first issue on appeal, that pertaining to temporary total disability, into three parts:

A. "Whether claimant suffered any temporary total disability." The claimant, of course, testified to a prolonged inability to work because of the injury (Tr. 23-27). Also, Dr. Wilson's report, claimant's exhibit 3, shows that as of January 30, 1980, claimant was unable to work. On the other hand, defendants' exhibit 2, the report of Robert J. Chesser, M.D., would seem to indicate that claimant could work as of the time of the examination on April 8, 1980. However, Dr. Chesser prescribed a course of treatment prior to having claimant attempt to return to work. Finally, defendants' exhibit 4, the report of Prabhond Chinuntdet, M.D., states that claimant would not be able to work for two or three weeks, "unless complications set in."

Thus, all three doctors recognized some length of

disability for claimant. Although Dr. Chinuntdet was the treating doctor initially, he did not follow the case and the record contains no opinion by him as to claimant's condition at a time proximate to the hearing. Based on the reports of Dr. Wilson and Dr. Chesser, one concludes claimant obviously had an inability to work because of the accident as late as April 8, 1980, the date of Dr. Chesser's examination. It is not surprising that, as of the date of the hearing, April 15, 1980, the hearing officer found claimant was still temporarily and totally disabled.

B. "That the evidence shows claimant was released to return to work immediately following the accident. However, he remained off work for approximately two weeks because of a cold." It should be pointed out that the comment by Dr. Chinuntdet that claimant could be returned to in two or three weeks was qualified, as explained above. Whether or not claimant had a cold following the injury makes no difference, so long as a trauma of the injury kept him off work.

C. "That claimant suffered some temporary total disability from the truck accident. However, under the record before the Industrial Commission there is inadequate evidence to determine the actual length of said disability, if any." This sub-issue has been discussed above wherein it was found that the combination of Dr. Wilson's report and Dr. Chesser's report were of sufficient weight to prove disability in the winter and spring of 1980.

As the second full issue on appeal, defendants claim they should not have to pay Dr. Wilson's bill. The evidence shows that defendants did not know claimant went to see Dr. Wilson and that claimant was sent to that doctor by his then-lawyer. Often, such an allegation would be valid; in the usual compensable case, defendants have the right to choose the care, as it is clearly stated by the code section. However, defendants in their answer denied that claimant's injuries arose out of and the course of the employment; further, the issue of arising out of and in the course of the employment was included in the pre-hearing order as an issue to be tried. It does not seem logical that defendants can deny liability on the one hand and guide the course of treatment on the other. Both Dr. Wilson and Dr. Chesser recommend a course of treatment. If claimant is still disabled, defendants should offer a course of qualified treatment.

Finally, defendants renewed the objections made at the time of the hearing. The undersigned deputy industrial commissioner has studied the transcript and finds that, on the whole, little information reached the record as a result of the overruled objections and that such information was not of any great weight. Therefore, the hearing deputy's rulings remain intact. This is a case wherein defendants and claimant should cooperate toward getting claimant back into the labor force. Claimant's injuries should have healed after a few months.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on November 16, 1979, claimant sustained an injury which arose out of and in the course of his employment when he was involved in a motor vehicle collision in West Virginia.

2. That said injury caused temporary total disability.

3. That claimant's temporary disability commenced on November 17, 1979 and will continue until such time as the tests of §85.33, Code, have been met.

4. That the correct rate of weekly compensation is two hundred twenty-one and 44/100 dollars ($221.44).

* * *

Signed and filed at Des Moines, Iowa this 9th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

DEWAYNE E. BARRUS,

Claimant,

vs.

VITALIS TRUCK LINE,
Employer,

and

FARMERS INSURANCE GROUP,

Insurance Carrier,
Defendants.

Arbitration Decision

This matter came on for hearing at the Scott County Courthouse in Davenport, Iowa, on April 18, 1980 and was fully submitted on July 2, 1980.

A review of the commissioner's file reveals that an employers first report of injury was filed on August 27, 1979. The record consists of the testimony of claimant, Harland Bartels, Robert Soeshe, Jr., Elizabeth Knight, Sally Oderwald, and Richard Knight; the depositions of Don Shoeman and W. H. Verduyn, M.D.; claimant's exhibits 1-4; and the defendants' exhibit A.

The issues for resolution are:

1. Was claimant an employee of Vitalis Truck Line?

2. If yes, did claimant receive an injury arising out of his employment which is not barred by operation of Section 85.16(2), Code of Iowa?

3. If yes, what is claimant's rate of compensation?

4. If the answers to issues one and two are in the affirmative, what is the nature and extent of claimant's disability?

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

Claimant was a truck driver who entered into a relationship with Vitalis in June, 1979. The testimony of claimant, coupled with the deposition of Don Shoeman indicates that claimant had entered into a relationship whereupon the requisite choice had by defendant in selecting its drivers; that wages were paid by defendant; that defendants had the right to terminate and control; and that Vitalis was the responsible party to which others would look for the resolution of harm which claimant might perform.

On August 3, 1979 claimant delivered certain food products in Chicago, Illinois, having delivered them from Philadelphia, Pennsylvania. After the truck had been unloaded, claimant called Vitalis's dispatcher in Des Moines and was informed that he did not have to report for work for two days so claimant started to his home in Waterloo, Iowa. At about 9:00 p.m. claimant arrived in the Clinton, Iowa area. He contacted one Elizabeth Knight on his Citizen's Band Radio. Mrs. Knights' husband drives for Vitalis and she asked claimant to stop. Claimant parked his truck in a shopping center parking lot and went with Mrs. Knight to a bar which she owned called the "Knight Spot." Claimant drank some beer and appeared to be a "happy-go-lucky guy." The bar was crowded and at about 11:30 p.m. claimant consumed no more beer. At about 12:45 a.m. Richard Knight arrived and met claimant for the first time. He thought claimant was making a lot of noise. At about this time claimant placed a phone call to his wife in Waterloo and became visibly upset concerning his relationship with his wife. Mrs. Knight testified that claimant "went bananas" at this point. Sally Oderwald testified that claimant had drunk at least a half of from 8 to 12 cans of beer. Claimant, however, did not drink after midnight. Claimant stayed at the bar at which time the Knights offered sleeping accomodations to claimant. The Knights offered these accomodations to truckers who patronized the Knight Spot. Claimant refused the accomodations stating that he was going to stay in the back of the truck. Accordingly, Mr. Knight took claimant to the parking lot where his truck was parked. Both Mr. and Mrs. Knight thought claimant was not intoxicated but thought that he shouldn't drive. Claimant got into his truck and left. Claimant testified that he stopped at a truck stop in Clinton, Iowa, and had coffee. He then proceeded to his home and had driven for about 40 miles when he was involved in a motor vehicle accident. Claimant's truck ran off the road and it took some 45 minutes to extract claimant from the wreckage. Claimant was not charged with operating a motor vehicle under the influence.

Claimant was taken to the hospital where he was treated for a bruised left shoulder and right back puncture wound. The treating physician thought claimant was inebriated. However blood alcohol studies were cancelled. Claimant was discharged on August 7, 1979 and was told to see his family physician, a Dr. Freidman, upon his return home. Claimant was referred to W. H. Verduyn, M.D., a Reinbeck physician who specializes in spinal cord and brain injury rehabilitation on August 20, 1979. Claimant was complaining of neck pain. Physical examination showed significant weakness in the left arm. X-rays revealed a fracture of the 5th cervical vertebra. Claimant was placed in a Halo Vest, which immobilizes the cervical spine by holding the head with four pins which are screwed directly into the skull. Claimant remained in the Vest for three months and it was removed on November 21, 1979. Claimant's main complaints at that time were related to mild stiffness of the neck, but his range of motion was good. Dr. Verduyn felt claimant had a 10 percent permanent partial impairment. He also felt this was causally related to the injury in question. Claimant testified that he returned to work the day after Thanksgiving, November 23, 1979, as a dispatcher for another trucking company.

The deposition of Don Shoeman reveals that claimant's gross average weekly wage was $396.00. Claimant is married and entitled to three exemptions.

The Workers' Compensation Act defines a "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, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer..." Section 85.61(2), Code of Iowa.

Section 85.61(3), Code of Iowa, lists an "independent contractor" as one of the persons who shall not be deemed as a "worker" or "employee."

The Supreme Court of Iowa has stated there is no distinction between the terms "who has entered into the employment of" and "works under contract of service, express or implied... for" an employer. In order for a person to come within the terms of the Workers' Compensation Act as an employee it is essential that there be a "contract of service, express or implied," with the employer who is sought to be charged with liability. *Knudson v. Jackson*, 191 Iowa 947, 183 N.W.2d 391 (1921).

No contract between the parties was entered into evidence in this case. Indeed, therre is no evidence to indicate that claimant was an independent contractor.

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 to the five above-mentioned elements is the over-riding element of the intention of the parties as to the relationship they are creating. *Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429, 431 (1970). Standing alone, this intention of the parties as to the relationship created may be somewhat misleading. However, community custom in thinking that a kind of service is rendered by employees is of importance. Nelson v. Cities Service Oil Co.*, 259 Iowa 1209, 1216, 146 N.W.2d 261, (1967).

Although the supreme court cases indicate the element of control is probably entitled to greater weight than the other elements, it is not clear that in order for a claimant to establish the employer-employee relationship by a preponderance of the evidence that one must preponderate on each of the elements, a majority of the elements or certain of the elements.

In the event a prima facie case is established, the burden is upon the employer to go forward with the evidence to overcome or rebut the case. An independent contractor allegation is an affirmative defense which must be established by the employer by a preponderance of the evidence. *Daggett v. Nebraska-Eastern Express*, 252 Iowa 341, 197 N.W.2d 102. The term "independent contractor" is not defined in the Workers' Compensation Act and resort must be had to the common law to give the term its meaning. *Norton v. Day Coal Co.*, 192 Iowa 160 (1921).

The commonly recognized tests in Iowa for the existence of an independent contractor relationship are, (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer. *Mallinger v. Webster City Oil Co.*, 211 Iowa 847, 858, 234 N.W. 254, 260 (1931).

As before, other factors which can be considered are the intention of the parties as to the relationship created and community custom in thinking that a service is rendered by servants.

At least one Iowa case has quoted from the Restatement of Agency, indicating that it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation of independent contractor. *Hassebroch v. Weaver Construction Co.*, 246 Iowa 622, 628, 67 N.W.2d 549, 553 (1955).

In case of doubt, the Workers' Compensation Act is liberally construed to extend its beneficient purpose to every employee who can fairly be brought within it. *Usgaard v. Silvercrest Golf Club*, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964). Further, in Cowles v. J. C. Mardis Co., 192 Iowa 890, 919, 191 N.W. 872, 884 (1921), the court acknowledged the potential dual character or relation which may arise from varying degrees of control in different portions or phases of the work; that is "that, as to some parts of the work, a party may be contractor, and yet be a mere agent or employee, as to other work." As a general rule, in a workers' compensation case it is the relationship of the parties at the time of the injury that controls.

In *Daggett, supra*, a truck owner who was under a lease agreement with Nebraska-Eastern was found to be an employee. The court stated that there was evidence tending to support a hold that the deceased trucker was an independent contractor. However, the court affirmed the commissioner's finding that the greater weight of the evidence indicated that the company had under its agreement or assumed the right to control the time, manner and method of transporting and delivering the cargo and decedent was an employee. It was clear that the decedent was not engaged in a distinct occupation or business but the work he was doing when killed was part of Nebraska-Eastern's regular business.

In *Towers v. Watson Bros. Transp.*, 229 Iowa 387, 294 N.W. 594, the court identified the fact that claimant was hired for steady employment rather than for one specific job as indicative of an employer-employee relationship. *Towers, supra*, also pointed out that the work was part of the regular business of the employer in holding the owner/operator to be an employee.

Based on the foregoing principles, it is found that claimant has sustained his burden that he was an employee of defendant. It is apparent that Vitalis had the right of selection, responsibility for the payment of wages and right of termination.

Taking the above finding into account, it is apparent that claimant has established a prima facie case that an employee-employer relationship existed.

However, the burden of going forward now shifts to defendant to establish that claimant was an independent contractor. The tests are mentioned in *Mallinger, supra*.

No evidence of what the exact relationship had by the parties was admitted into evidence. No contract or other writing was admitted. Vitalis withheld taxes and the relationship was continuing in nature. The truck was presumed to be the property of Vitalis. The employer practiced with requisite control to preponderate in claimant's favor.

Therefore, considering the above, it is found that defendant has failed to go forward with the assertion that claimant was an independent contractor. *Cedar Rapids Community Schools v. Cady*, 278 N.W.2d 298 (Iowa 1979).

"In the course of" can be said to relate to the time and place, or the circumstances surrounding the injury. These circumstances must be employment circumstances. *Sister M. Benedict v. St. Mary's Corp.*, 255 Iowa 847, 124 N.W.2d 548. The "arising out of" requirement can be said to be a requirement that the employment must be the "cause" of the injury in the sense that the injury must result from the employment. *Volk vs. International Harvester Co.*, 252 Iowa 298, 106 N.W.2d 649.

The ultimate issue to be resolved is whether claimant's injury occurred in the course of his employment. The testimony of Don Shoeman, the general manager of Vitalis, is quite revealing. He testified that after unloading in Chicago, claimant was expected to call dispatch (which he did). Dispatch did not require him to be present for two days, so he was free under the limitation that Vitalis would know where claimant was going. Accordingly, claimant was proceeding to his home in Waterloo, and Clinton, Iowa is along this route. It would therefore appear that claimant was where his employer could reasonably expect him to be when the accident happened.

The next question which must next be resolved is whether stopping in Clinton constituted a significant deviation so as to take claimant out of the course of his employment.

1 Larson Section 19.00, states:

> An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. In some jurisdictions, the course of employment is deemed resumed if, having completed his personal errand but without having regained the main business route, the employee at the time of the accident was proceeding in the direction of his business destination. If the main trip is personal, a business detour retains its business character throughout the detour.

Claimant, in this case, had returned to the route which his employer expected him to be in at the time of his injury. The deviation had already occurred. Therefore, it must be found that the injury occurred in the course of employment.

Dr. Verduyn causally connects the resultant condition to the injury, so claimant has also established that the injury "arose out of the employment."

Defendants have drawn our attention to the defense set forth in Section 85.16(2), Code of Iowa. Said section states that a claim to compensation shall be barred when intoxication is "the proximate cause of the injury."

The evidence in this case indicates that claimant last had alcoholic beverages some three hours before the injury. There were no blood tests taken.

The bellweather case on the intoxication issue is *Farmers Elevator Co., v. Manning*, 296 N.W.2d 174 (Iowa 1979). Although it is often said that if intoxication be a proximate cause of the injury, the language of Section 85.16(2), Code of Iowa, states:

> No compensation under this chapter shall be allowed for an injury caused:
>
> . . .
>
> 2. When intoxication of the employee was *the* proximate cause of the injury.

Use of the definite article "the" rather than the indefinite article "a" indicates a specific intent that imposes a burden of approximating soleness. The burden appears to be somewhere between "sole proximate cause" and "a proximate cause."

The evidence of intoxication in this case indicates that claimant drank beer on the evening prior to the accident. The testimony of the Knights indicate that claimant did not consume alcohol after midnight, and that claimant's condition was such that he was not drunk, but shouldn't drive. Although there was evidence indicating that claimant may have had possession of a controlled substance, there is no sufficient evidence to indicate that claimant consumed such a substance. The evidence also indicates that the medical personnel at the hospital reached the conclusion that claimant was inebriated, but no tests were taken to bolster this conclusion. Considering the above, it must be found that defendants have failed to establish this defense.

The next question which must be resolved is the nature and extent of disability which claimant had because of the injury. The evidence, in particular that offered by Dr. Verduyn, indicates that the injury is permanent and 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, in his twenties, is now a dispatcher rather than a truck driver. Although there is some evidence in the file to indicate that claimant's age, education, and experience, and inability to perform driving duties may be available, it was not offered into evidence. However, claimant has sustained his burden that he is disabled to the extent of 10 percent of the body as a whole.

The healing period awarded in this case appears to be from August 5, 1979 through November 22, 1979, a period of 15 4/7 weeks.

Claimant's rate of compensation is based upon a gross weekly wage of $396.00, therefore entitling him to be compensated at the rate of $236.15 per week.

Claimant has submitted various medical expenses and these will be awarded pursuant to Section 85.27, Code of Iowa.

WHEREFORE, it is found:

1. Claimant was an employee of Vitalis Truck Line on August 4, 1979.

2. That on August 4, 1979 claimant sustained an injury arising out of and in the course of his employment.

3. That defendants failed to prove that intoxication was the proximate cause of said injury.

4. That claimant was entitled to healing period compensation, permanent partial compensation and Section 85.27 benefits.

THEREFORE, defendants are ordered to pay unto claimant fifty (50) weeks of permanent partial disability compensation at the rate of two hundred thirty-six and 15/100 dollars ($236.15) per week.

Defendants are further ordered to pay fifteen and four-sevenths (15 4/7) weeks of healing period compensation at the rate of two hundred thirty-six and 15/100 dollars ($236.15) per week.

Defendants are futher ordered to pay the following authorized medical expenses:

W. H. Verduyn, M.D.	—	$ 1040.00
Shoitz Memorial Hospital	—	1389.90
DeWitt Community Hospital	—	530.00
Dr. Lewis	—	150.00
Dr. Freidman	—	70.00
Ambulance	—	50.00

Interest is to accrue on this award pursuant to Section 85.70, Code of Iowa.

Defendants are to file a final report upon payment of this award.

Costs are taxed defendants.

* * *

Signed and filed at Des Moines, Iowa this 18th day of September, 1980.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

ROBERT BAUERS,

Claimant,

vs.

ARMOUR-DIAL, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed July 28, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

* * *

Claimant has appealed the amount of the permanent partial disability award (10%), stating it should be no less than 30% of the body as a whole. Defendant has appealed the finding of permanent partial disability attributable to the job injury and the extent of the temporary total disability. (Technically, defendant's appeal was filed after the 20 day limit provided by Industrial Commissioner's Rule 500—4.25; however, this appeal is *de novo*, and the entire record has been reviewed.)

The hearing deputy satisfactorily set out the facts and the law; however, that decision may be amplified as follows. Claimant was injured on April 28, 1978, while working at defendant's plant in Omaha. At that time, while carrying a portion of beef weighing 140-150 pounds, his legs gave out, and he injured his back. Following the injury, he missed work from April 28, 1978 to July 2, 1978; from August 22, 1978 to February 20, 1979; and from October 1, 1979 to the date of the hearing.

Claimant's main treatment was by Louis F. Tribulato, M.D., an orthopedic surgeon from Omaha. Claimant was also examined by Don K. Gilchrist, M.D., an orthopedic surgeon from Quincy, Illinois. In a report of June 28, 1978 Dr. Tribulato states:

> Examination indicated essentially full range of motion of his back. Minimal tenderness to the sacrioliac joint. Negative straight leg raising. Negative neurological examination of the leg. I told him that he could be suitable for work July 3 and he did not need to return. I don't think there is any significant residual disability.

Dr. Gilchrist examined claimant on October 1, 1979 and wrote a report dated October 3, 1979. That report was summarized in large part by the hearing deputy but should be re-emphasized:

> Examination: His height is 71-inches, weight is 154 pounds. His gait and station seem normal today. He can walk on his heels with good appearing strength. When he stands the right lower extremity functionally is ½-inch shorter than his left. Forward flexion is limited so that his finger tips reach only to the tibial tubercles with knees extended. Right and left lateral bend are not more than 10 degrees to either side. In the sitting position both knees can be extended producing a sitting straight leg raising test without the appearance of discomfort to the patient. In the supine position straight leg raising produces back pain at 60 to 70 degrees on *each* side. The circumference of the thigh 8-inches above the tibial tubercles on the right is 17-inches, left is 16½-inches. The circumference of the calves 5-inches below the tibial tubercles are equal at 13½-inches. In the prone position with knees fully flexed forceful dorsiflexion on the left foot produces back pain. The same on the right foot does not. Forceful plantar flexion on either side does not increase his back pain. He can now accomplish the Burn's test of kneeling in a chair and bending over and touching the floor with ease. He has good peripheral pulsations in both legs. Testing for sensation with the pinwheel reveals hypesthesia on the left lower extremity from groin to toes completely circumferentially not in any anatomic nerve root or dermatome patters.
>
> X-rays of the lumbosacral spine in multiple projections show a few small drops of residual pantopaque in the spinal canal that are otherwise unremarkable.
>
> DIAGNOSIS: I can only make a diagnosis of chronic lumbosacral strain here. There are a few elements of his history and physical finding that would suggest psychosomatic overlay. He shows no signs that would indicate a herniated nucleus pulposus at this time.
>
> This man has been given a 30% disability evaluation referable to his back and I would be incline [sic] to agree with that rating. I would suggest, however, that a psychological battery of tests be given this gentleman in an effort to delineate how much, if any, psychogenic overlay is present.

Dr. Tribulato's report of October 23, 1979 is also worthy of re-emphasis.

> On February 12, 1979, I next and last saw him. He said he was some better but they would not let him go

back to work. Therefore he was not doing any work. He said he was some better, but if he tried to shovel snow his back huty [sic] considerably. He still hurts some in the low back and the left hip area.

Examination showed straight leg raising positive on the left at 70 degrees. It was negative on the right. He still had the same tenderness in the left sacrioliac joint. I told him as far as I was concerned I thought he ought to go ahead and try and work. If he could not tolerate that they [sic] we ought to go ahead and rehospitalize him and perhaps repeat his myelogram, as I felt that he did have a small disc. He was unfortunately in the borderline where he was not 100 percent laid up all the time, but every time he tried to do something it bothered him.

I re-examined Mr. Bauers on October 17, 1979 and have recommended a repeat myelogram, but for all practical purposes he is stable. I believe that Mr. Bauers has reached maximum improvement.

It is my opinion that, to a reasonable degree of medical certainty, that the injury was caused by an injury he received on his job with Armour-Dial on April 28, 1978, while carrying beef.

It is also my opinion, to a reasonable degree of medical certainty, that the injuries sustained by Mr. Bauers will continue for an indefinite time into the future. He has a 30 percent partial disability of the body as a whole.

Claimant described his difficulties at the time of the hearing:

Q. (By Mr. Wright) How has your back felt from the first of October until today?

A. Well, seems like it's getting a little bit better at times; then again, it completely goes bad. Just gets that spot where she just makes your legs numb and that and you just can't move.

Q. Do you have any difficulty moving about or walking?

A. Yes.

Q. What difficulty do you have?

A. Well, I have pains in my back; my legs go numb on me.

Q. Are you doing any exercises?

A. Yeah.

Q. What exercises are you doing?

A. I do my bending exercise every day. Bend over as far as I can. I get over on my back and bring my legs over. All the exercises they taught me for this. (Transcript, p. 17)

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 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. * * *

Further, the Iowa Supreme Court has enlarged the reasons for industrial disability:

> These reasons may not always be directly related to functional impairment. For example, a defendant-employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability.
>
> * * *
>
> Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 at 192 (Iowa, 1980).

And, in *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 at p. 354 (1980), the court holds that a claimant "is not barred from recovery by failure to prove an increased functional disability..."

The opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa, 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra*, p. 907. Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstance." *Bodish v. Fischer*, 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965).

Applying these principles to the facts, two things are clear. First, claimant's overall industrial disability is

caused in large part by his functional disability. Thus, although such elements as his age and education do not work in his favor, it is the injury itself which is the root of claimant's problem.

Second, the amount of functional impairment is not necessarily 30%, as stated above. There is no showing of definite disc pathology, although Dr. Tribulato obviously suspects the same. In other words, and this is emphasized in another way by the hearing deputy, the medical evidence shows no more than a soft tissue injury, such as one might expect to heal.

Now, of course, claimant may well have a far more serious problem: a herniated intervertebral disc. If that turns out to be the case, and if that condition can be causally related to the injury, then claimant would be entitled to further benefits if he can show an increase in loss of earning capacity as a result of a change of condition. That eventuality, however, is in the future.

At this time, one would agree that a permanent partial disability rating of functional disability in the amount of 30% is excessive. The overall rating of industrial disability based on the available evidence (there was no evidence of what employment would suit claimant or whether claimant made an effort to find work) seems appropriate at 10%.

Defendant claims there was no "temporary disability healing period" (petition for review) after July 2, 1978. The record shows, obviously, that claimant was released for work after that time. It is equally as obvious that Dr. Tribulato attributed claimant's disability to the injury. Matters of causal connection are in the realm of expert testimony. *Bradshaw*, cited above. The hearing deputy's analysis seems sound.

WHEREFORE, it is hereby found that claimant has sustained his burden of proving that he suffered an injury in the course of and arising out of his employment with the defendant and that said injury is the cause of the disability on which he now bases his claim.

Based on the above analysis of the record viewed as a whole, the claimant is found to have a ten percent (10%) permanent partial disability as a result of the April 28, 1978 injury. It is further found that healing period extended from the date of injury through July 2, 1978, from August 22, 1978 through February 19, 1979 and from October 1, 1979 through October 17, 1979.

With respect to the medical bills offered at the time of hearing, it is hereby found that the myelography performed at Dr. Tribulato's direction and the cost thereof are contemplated by Iowa Code Section 85.27. The record is devoid of evidence explaining the statement from Community Memorial Hospital regarding a December 22, 1978 admission and discharge. Said expense will not be allowed.

With respect to the issue of rate, defendant submitted a statement from the claimant indicating that the claimant's average weekly wage was three hundred seventy-five and 50/00 dollars ($375.50) per week. Claimant testified that he also was paid a certain number of "brackets" depending on the job performed. Such pay amounts to premium pay and is not considered in determining the weekly wage. [See Code section 85.36(6)]. Claimant is married and had two dependent children on the date of the injury. Claimant's weekly rate of compensation is two hundred twenty-nine and 20/100 dollars ($229.20) per week.

* * *

Signed and filed at Des Moines, Iowa this 18th day of September, 1980.

BARRY MORANVILLE,
Deputy Industrial Commissioner

No Appeal.

FLOYD A. BELT,

Claimant,

vs.

NEBRASKA ENGINEERING COMPANY,

Employer,

and

THE TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals a proposed decision in arbitration wherein claimant was awarded 20 percent permanent partial disability. The record on appeal consists of the testimony of claimant and Barbara Boortz; and exhibits 1-28.

Claimant was injured on January 6, 1978 while working for defendant employer when he tried to turn turn over a wooden skid that he was dragging, injurying his back. M. P. Margules, M.D., performed surgery on May 15, 1978 at which time a herniated disc was excised at the L4-L5 level. Dr. Margules released claimant to return to work on August 21, 1978 with a fifty-pound weight restriction. He gave claimant a 15% functional disability rating.

The employer refused to rehire claimant because of the weight restriction. Claimant, with the help of Barbara Boortz, rehabilitation counselor, attempted to find work at seven other plants as a press brake operator but was refused because of his back condition or no openings. He also applied for work as a lot attendant but no openings were available. He turned down janitorial positions because they only paid minimum wage. Tests were run on claimant through vocational rehabilitation, and he enrolled in a thirty-six week training program to become a body and fender man.

At the time of hearing, claimant had not finished his training course and did not yet have a job. He testified that body and fender work did not require heavy lifting. He stated he was doing well in the course but was missing, on the average, one day of class work per week because of back pain.

As stated in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980), the defendant-employer's refusal to give any sort of work to a claimant after he suffers his affliction or his inability to find other suitable work after making bona fide efforts to find such work may justify an award of disability. Those elements are present in the instant case.

However, the rehabilitation objective of workers' compensation would be totally defeated if an award of permanent disability were to be made based upon the condition of a claimant prior to the completion of a rehabilitation program. There would be no incentive for an employer to offer rehabilitative services if such were the case.

In this case it can be determined that some degree of loss of earning capacity will be present because of the injury even upon successful completion of the rehabilitation program and placement. This degree has been set at 20 percent. The record as it now stands supports this finding as to permanency. That is not to say that if the rehabilitation program should prove unsuccessful that the facts at that time might dictate an adjustment in the award. In any event, however, the rehabilitation objective would be encouraged.

THEREFORE, it is found that the hearing deputy's proposed findings of facts and conclusions of law are proper.

WHEREFORE, the hearing deputy's proposed arbitration decision along with the amplification contained herein shall constitute the final decision of the agency.

. . .

Signed and filed at Des Moines, Iowa this 7th day of July, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LESTER BENDA,

Claimant,

vs.

FISHER CONTROLS CO.,

Employer,

and

INA INSURANCE,

Insurance Carrier,
Defendants.

This matter came on for hearing at the Marshall County Courthouse in Marshalltown, Iowa, at which time the record was closed.

A review of the commissioner's file reveals that an employer's first report of injury was filed on November 15, 1978. A memorandum of agreement which eventually revealed that claimant should be paid $184.10 per week was filed on November 22, 1978. A final report was filed on March 27, 1980 revealing that claimant was paid 40 5/7 weeks of weekly compensation. The record consists of the testimony of the claimant, Rod Collins, Wanda Burnett, and Jim Beasley; defendants' exhibits A, B, and C; the reports attached to claimant's service of reports dated February 25, 1981; and the answers to interrogatories.

Issues

The sole issue for determination is the nature and extent of any disability.

Finding of Fact

1. Claimant was employed by defendant-employer on November 10, 1978.

2. On that date, he hurt his back while lifting a box weighing from 30 to 35 pounds.

3. Claimant reported the injury and was sent to First Aid.

4. Claimant was seen by P. Collins, D.C. on November 15, 1978. When treatments were not successful, Dr. Collins referred claimant to Robert Hayne, M.D., a Des Moines neurosurgeon, who caused claimant to be hospitalized on November 20, 1978. Dr. Hayne had removed claimant's fifth lumbar disc on the left in January 1971.

5. Dr. Hayne's examination showed restriction of lower back motion and diminished left ankle reflex. A myelogram showed asymmetry of the opaque column at the L5-S1 level on the left side.

6. Although surgery was recommended, claimant decided to wait. His condition did not improve, so Dr. Hayne rehospitalized claimant on January 18, 1979. Claimant had surgery on January 23, 1979. There was some scar tissue and a small recurrent herniated disc at the fifth lumbar interspace on the left side which were removed. Other than some muscle spasm, his hospital recovery was unremarkable and he was discharged on February 5, 1979.

7. Claimant's condition improved for a period of three weeks, but he soon relapsed and was readmitted to the hospital. On March 23, 1979 x-rays at that time showed evidence of disc space infection at the lumbosacral level with some destructive changes in the inferior portion of L5. He was seen in consultation by Donald Blair, M.D., a Des Moines orthopedist, who recommended intravenous antibiotic therapy. A back brace was prescribed and claimant was discharged on April 19, 1979.

8. Claimant continued to be treated by Drs. Hayne and Blair and returned to work in August 1979, having been disabled from work for 40 5/7 weeks.

9. Claimant was re-examined by Dr. Hayne on March 3, 1980 and at that time Dr. Hayne gave a

permanent partial disability rating of 18 percent of the body as a whole because of the November 10, 1978 injury.

10. Claimant was examined by John R. Walker, M.D. on December 29, 1980. Dr. Walker thought that claimant's problems were caused by the degenerative situation, rather than by infection. He recommended consideration of further surgical procedures. He stated that permanent partial disability was 35 percent of the body as a whole, 10 percent attributable to the 1978 injury and subsequent surgery.

11. Claimant cannot lift as much as previously and makes less money than he did previously. His present renumeration is $9.03 an hour and if he were employed at his previous job, he would be paid $9.35 an hour.

12. Claimant is 45 years old and has been employed by defendant-employer since 1959. He has an eighth grade education.

Conclusions of Law

1. By filing a memorandum of agreement, it is established that an employer-employee relationship existed and that claimant sustained an injury arising out of and in the course of employment. *Freeman v. Luppes Transp. Co.*, 227 N.W.2d 143 (Iowa 1975). This agreement cannot be set aside by this forum. *Whitters & Sons, Inc., v. Karr*, 180 N.W.2d 444 (Iowa 1970).

2. The claimant has the burden of proving by a preponderance of the evidence that the injury of November 10, 1978 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 questions 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 cn these principles, it is found that claimant has established his claim. All medical evidence indicates that claimant has some permanent partial disability because of the injury.

2. 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's age, education, experience, and inability to engage in employment have been outlined above. Claimant will not, in all likelihood, compete in the job market as he had formerly. The defendant-employer is to be commended for finding a job for claimant which meets his limitations. Without this, claimant's disability might be much higher. See *Blacksmith v. All-American Inc.*, 290 N.W.2d 348 (Iowa 1980) and *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). Based on the principles enumerated herein, claimant's permanent partial disability for industrial purposes is 35 percent of the body as a whole.

3. Claimant is not entitled to further healing period compensation since his entitlement of 40 5/7 weeks has already been paid.

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of one hundred eighty-four and 10/100 dollars ($184.10) per week with defendants receiving credit for any permanent partial disability they have previously paid.

Accrued amounts are to be paid in a lump sum along with statutory interest pursuant to section 85.30, Code of Iowa.

A final report shall be filed upon payment of this award.

Costs of this proceeding are taxed against defendants.

Signed and filed this 15th day of May, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

DEAN BENDER,

Claimant,

vs.

DUBUQUE PACKING,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Dean Bender, the claimant, against his employer, Dubuque Packing, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on February 7, 1980. This matter came on for hearing before the undersigned at the Dubuque County Courthouse in Dubuque, Iowa on September 9, 1980. The record was left open for one month for the taking of medical depositions. On December 15, 1980 defense counsel advised that no depositions were taken. The record will be considered fully submitted as of December 15, 1980.

On September 8, 1980 defendant filed a first report of injury concerning the February 7, 1980 injury.

. . .

The issues to be resolved are whether claimant sustained an injury in the course of and arising out of employment; whether there is a causal relationship between the alleged injury and the disability; and the nature and extent of the disability. Defendant has also

raised an affirmative defense of intoxication pursuant to Code section 85.16(2).

At the time of the hearing the parties stipulated that the rate of compensation that would apply if liability was established was $213.54 per week. They likewise agreed that claimant's time loss was 52 days (February 8, 1980 through March 31, 1980). Such stipulation did not include any agreement as to the issue of causal connection.

Claimant, who had worked for defendant since December 15, 1966, was employed as a second shift checker in the assembly room. His duties included palletizing loads and marking them for transfer to appropriate trucks for shipping. Claimant testified that on the date of injury, he stepped back from his desk to review the truckload schedule on the monitor five feet above his head and fell backwards as his left foot hit a power jeep which was parked there. His left wrist swelled to the point where he could not work. He notified his superintendent and went to the company nurse and then to Finley Hospital where x-rays were taken and a cast was applied.

Claimant testified that the power jeep which is used to move the pallets usually is not parked behind him as it was on the date of injury. He stated that it was his custom to check the monitor every five minutes. He noted the monitor was lowered three feet one week after the episode.

Claimant did not know if he sustained a permanent injury to his hand. He commented that his hand becomes sore if he bumps it. He did not believe his hand was healed but returned to work when the company doctor so authorized him.

Upon cross-examination claimant agreed he did not work the day before the injury because it was his fiftieth birthday. He estimated that he drank 15 beers over the course of the day, ending sometime in the early morning of the date of injury. Claimant assumed he went to bed around 2:00 a.m. He slept till noon and then cleaned up, had dinner and listened to the news before going to work at 4:30 p.m. He insisted he had nothing to drink between noon and 4:30 p.m. His first ten minute break occurred around 7:00 p.m. and, as was customary among the employees, he left the work area. His next break was around 9:30 p.m. for supper. Claimant recalled going up the street to a nearby tap for a hot dog, two beers and two coke highs (a shot of whiskey and coke.) He did not have any coffee. He said he was back to work by 10:05 p.m. He estimated he was at work about one and one-half hours before he fell over the jeep. Claimant indicated he had no further alcohol nor any coffee during that time or at anytime thereafter that night. He was given no medication at first aid or at the hospital.

Claimant testified that at the hospital a sample of blood was taken from his right arm while a cast was being applied to his left. He states this was done without his first being asked for permission. Claimant found out about the results of the blood test two or three weeks after his hospitalization when he went to Paul Casel inquiring why the company refused to pay his hospital bill.

Claimant's witness, Paul Casel, an employee of defendant for 22 years and presently a union steward, testified that he did not witness the accident but talked to the supervisor, a company man, about what another individual had seen and reported to the supervisor. Such double heresay is deemed to be without weight by the undersigned.

X-ray examination of the left wrist on February 8, 1980 revealed: "...a minimally displaced fracture involving the distal radius. The fracture line appears to extend into the ulna aspect of the radiocarpal joint. On the lateral view, there is a suggestion of a discontinuity of the volar cortex of the distal ulna suggesting a nondisplaced cortical fracture of it as well." (Claimant's exhibit B, page 4). In a surgeon's report dated February 8, 1980, L. C. Faber, M.D., indicates that claimant's fracture of the left wrist and forearm were due to the accident and no permanent defect was anticipated. (Claimant's exhibit C.)

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 injury of February 7, 1980 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).

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*.

There appears to be no real dispute over the fact that claimant was in the course of employment when he fell over the jeep or that as a result of the fall he fractured his left wrist and forearm. The record fully supports such findings. Likewise the scant medical evidence supports finding the claimant was only temporarily disabled as a result of the work injury. No mention of permanency is made in the medical reports—except to say that none is expected. The claimant himself offered no evidence, through testimony or demonstration, that he has any permanent loss of use.

The true point of controversy revolves around

defendant's affirmative defense of intoxication. Code section 85.16 reads in relevant part:

> No compensation under this chapter shall be allowed for an injury caused:
>
> * * *
>
> 2. When intoxication of the employee was the proximate cause of the injury.

Whether or not claimant was intoxicated is not crucial—it is not "the" or even "a" proximate cause of the injury. Claimant fell over the jeep parked behind him as he stepped back to look up at the monitor. Intoxication would not have contributed to falling over something out of view. Compare *Farmers Elevator Co., Kingsley v. Manning*, 286 N.W.2d 174, 178 (Iowa 1979). The record in no way suggests that claimant's fall was related to the alleged state of intoxication. The evidence does not suggest that the claimant stumbled in a stupor. Even if he had, then the presence of the jeep and its contribution to the severity of the fall would have to be taken into consideration.

Parenthetically, it is noted that defendant's effort to establish that claimant was intoxicated through introduction of defendant's exhibit 1, the February 8, 1980 blood test, which merely states "124" as test results for units of "MG/DL" would not have been persuasive if intoxication otherwise was the proximate cause. Said test results (without explanation) do not in and of themselves amount to sufficient proof of intoxication.

WHEREFORE, it is hereby found that claimant has sustained his burden of proving that he sustained an injury arising out of and in the course of his employment and that such injury resulted in his being temporarily totally disabled from the date of injury through March 31, 1980.

It is further found that defendant has failed to establish an affirmative defense pursuant to Code section 85.16(2).

It is further found that expenses for treatment at Finley Hospital were reasonable and necessary as contemplated by Code section 85.27.

* * *

Signed and filed this 23rd day of February, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

DEWAYNE BENSON,

Claimant,

vs.

IOWA BEEF PROCESSORS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant has appealed from a proposed review-reopening and arbitration decision and from all orders, decisions and rulings previously filed. The proposed decision determined that this office had jurisdiction over the action pursuant to Iowa Code section 85.71. Claimant was awarded healing period compensation and permanent partial disability compensation.

The record consists of the testimony of the claimant, Clarissa Benson, Larry Weaver, and Orin Selby; claimant's exhibits 1, 2, 3, 4 and 5; and defendant's exhibits A and B.

Although the defendant's appeal notice stated that it encompassed all matters contrary to its interest, the letter "brief" filed indicates that the main issue is the priority of this agency accepting jurisdiction based soley upon claimant's Iowa domicile. This tribunal has consistently held that jurisdiction of a claim based solely upon a claimant's Iowa domicile is proper based upon its interpretation of Iowa Code section 85.71(1). Until such time as the statute is amended or the court rules either the statute unconstitutional or the interpretation erroneous, we shall continue to interpret section 85.71(1) as conferring this jurisdiction.

As defendent has made reference to the briefs which were filed in *Miller v. Iowa Beef*, we shall refer to the holding in that case as precedent along with the numerous other cases on the same issue in which this defendant was a party.

On reviewing the record, it is found that the deputy's findings of fact and conclusion of law in their orders and rulings filed November 13, 1978, April 10, 1980 and August 14, 1980 and in the arbitration and review-reopening decision filed November 19, 1980 are proper. The order filed December 15, 1978 simply dismissed an interlocutory appeal.

WHEREFORE, the holdings of findings of fact and conclusions of law of the orders and rulings filed November 13, 1978, April 10, 1980 and August 14, 1980, and the arbitration and review-reopening decision filed November 19, 1980 are adopted as the final decision of the agency.

It is found and held:

That this tribunal has jurisdiction over this contested case proceeding.

That claimant was employed by defendant at all times pertinent hereto.

That claimant sustained an injury arising out of and in the course of his employment on January 12, 1977 but lost insufficient time from work to be awarded compensation.

That claimant sustained an injury arising out of and in the course of his employment on August 13, 1979.

That the injury of August 13, 1979 caused claimant to be entitled to healing period compensation and permanent partial disability compensation based upon a twenty-five percent (25%) loss to the body as a whole.

That claimant sustained an injury arising out of and in the course of his employment on May 20, 1980 which resulted in claimant's entitlement to temporary total disability compensation.

* * *

Signed and filed this 27th day of March, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JONATHAN M. BENSON,

Claimant,

vs.

ALLAN MACHINE COMPANY,

Employer,

and

UNITED FIRE & CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed March 2, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse arbitration decision.

* * *

This final agency decision will adopt the result and analysis of the hearing deputy except that the findings of fact and conclusions of law herein are those of the undersigned deputy industrial commissioner.

The issues on appeal are stated in defendants' brief:

> The primary issue on appeal is whether the facts show that the claimant gave notice to his employer within the 90-day provision of Code section 85.23. It is the primary contention of the appellant that the conversation had to have taken place in February while the condition arose in early September. The appellant also contends that, even if the condition arose within the 90-day notice, the conversation didn't give the employer any knowledge of any injury at work. Other issues are whether the claimant sustained an injury which arose out of and in the course of his employment; and whether the award should include medical bills which have already been submitted to and paid by a health and accident insurance carrier.

The question of a credit to the employer for benefits paid by a health and accident insurance carrier was not raised in the answer and not included as an issue in the pre-trial order. Further, defendants' brief contains no analysis of the amount of the credit defendants should receive. Therefore, the credit under §85.38(2) is denied.

There appears to be no dispute over the time loss as a result of the injury, so the hearing deputy's decision is adopted in that regard, as is the determination of the rate of weekly compensation at $120.48. Finally, the amounts of the medical and hospital bills listed in the hearing deputy's decision are adopted.

Findings of Fact

1. Claimant's low back pain at work came on gradually during September 1978. (Tr. 34)

2. Claimant saw Duane Anderson, M.D., a general practitioner, September 18, 1978. (Tr. 34)

3. Claimant first saw R. D. Pehl, D.C., February 14, 1979. (Claimant's exhibit 4)

5. Robert G. Gitchell, M.D., a qualified orthopedic surgeon, first examined claimant January 19, 1979. (Gitchell depo., 4)

6. The diagnosis of Dr. Gitchell was that of degenerative disc disease with nerve root irritation at L-5 nerve root. (Gitchell 6)

7. The fairly heavy lifting at work produced the physical problem diagnosed by Dr. Gitchell. (Gitchell 7)

8. Dr. Gitchell performed a lumbar laminectomy at L-4/5 on January 17, 1980. (Gitchell 21)

9. Claimant's permanent physical impairment from the operation is fifteen percent (15%) of the body as a whole. (Gitchell 24)

10. Claimant had no overt back problems prior to September 1978. (Tr. 37)

11. Claimant was born October 14, 1957 and is unmarried. (Tr. 31)

12. Claimant is employed part-time by the employer and has been employed by said employer full-time and part-time since March 1977; claimant is also a student at Iowa State University (Tr. 32)

13. Claimant's occupation is that of a metal fabricator. (Tr. 32)

14. Claimant missed work from January 26, 1979 through March 11, 1979 and July 27, 1979 through May 27, 1980. (Hearing deputy's decision, 8)

Conclusions of Law

1. Claimant sustained an injury which arose out of and in the course of his employment in September 1978.

2. The injury aggravated a preexisting degenerative disc condition in claimant's lumbar spine and necessitated a lumbar laminectomy at L-4/5.

3. Claimant missed work and is entitled to healing period benefits from January 26, 1979 through March 11, 1979 and July 27, 1979 through May 27, 1980.

4. Claimant's disability to the body as a whole for industrial purposes is fifteen percent (15%).

* * *

Signed and filed at Des Moines, Iowa this 15th day of May, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

JONATHAN M. BENSON,

Claimant,

vs.

ALLAN MACHINE COMPANY,

Employer,

and

UNITED FIRE & CASUALTY CO.,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

A review of the appeal decision filed May 15, 1981, shows that the undersigned deputy industrial commissioner, indicating from his notes, left out a finding of fact and, therefore, a conclusion of law.

The findings of fact are therefore amended to add the following:

4. The employer knew of the injury in October 1978. (Claimant's exhibit 6, a copy of the employer's first report, also on file in the industrial commissioner's office)

The conclusions of law are amended to add the following:

The employer knew of the injury within 90 days of the occurrence thereof.

* * *

Signed and filed at Des Moines, Iowa this 1st day of June, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

ALTA M. BEVARD,

Claimant,

vs.

LOUISE HERREBOUT,

Employer,

vs.

AID INSURANCE COMPANY,

Insurance Carrier,

Appeal Decision

By order of the industrial commissioner filed September 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from an arbitration decision which held that she was entitled to no benefits.

* * *

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

The claimant argues that not only did she sustain an episode on June 23, 1978, she was disabled because of the episode. Claimant further argues that this is a question for expert medical testimony.

Indeed, John T. Bakody, M.D., connects up her injury and disability. However, the hearing deputy felt that claimant's lack of frankness gave her testimony such little weight that the evidence did not support an award.

The record shows that claimant was impeached successfully. For example, she failed to reveal an old injury in answer to specific interrogatory (transcript, p. 35). Further, the record showed claimant denied any substantial drinking while the record showed considerable evidence of such drinking. The evidence included an episode where claimant stumbled and fell down in a bar (transcript, p. 65). Such inconsistencies in claimant's testimony makes it difficult to determine exactly wherein her testimony is accurate. For that reason, her testimony cannot be given much weight.

Expert opinion may be accepted or rejected by the trier of fact. *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa, 1974). Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstance." *Bodish v. Fischer*, 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965).

Dr. Bakody's testimony is insufficient to carry the day because claimant's exhibit A (including Bakody's reports) show that he did not have a complete history from claimant. For example:

> Mrs. Bevard reports that she has not been able to work since June of 1978 and it does appear that she is disabled from working at this time. From what Mrs. Bevard tells me her continued disability is related to the June 23, 1978 incident. I cannot be more definite at this time.

This report shows Dr. Bakody did not possess the facts as to claimant's other back episodes as discussed by the hearing deputy.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That the claimant sustained injuries as a result of an assault in the East Town Tavern on November 9, 1972.

2. That the claimant sustained an injury while employed by Selectivend, Inc. on April 24, 1974.

3. That claimant sustained an episode on June 23, 1978, which did not result in the claimant's inability to continue her employment activities.

4. That since June 23, 1978, claimant has fallen and has failed to so advise her attending physician.

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

. . .

Signed and filed at Des Moines, Iowa this 18th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

CHARLES J. BOYER,

Claimant,

vs.

KROBLIN REFRIGERATED EXPRESS, INC.,

Employer,

and

GREAT WEST CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision in which claimant was awarded permanent partial industrial disability as a result of an injury he received on April 10, 1979.

. . .

That claimant had an injury on April 10, 1979 is not in dispute. Defendants contend that claimant's disability is all related to his prior injury in 1976. This position is untenable as claimant was examined subsequent to this injury and given a medical clearance to work which he successfully accomplished until the injury in 1979.

Whether additional functional impairment was caused by the 1979 injury is of limited import although it can hardly be denied. The medical disqualification from the job he was previously doing was placed upon claimant after the release from care subsequent to the 1979 injury. Although defendants contend it was all related to disability from the 1976 injury they had medically cleared claimant for work until the aggravation of the injury in 1979.

Although *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181 (Iowa 1980) is not controlling as to the industrial disability (as it is an occupational disease case defining disablement as used under that law) there is more than sufficient support for this finding in *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980).

Whether or not the claimant had a preexisting industrial disability of fifteen percent for which he had been compensated the finding of twenty percent industrial disability to the body as a whole *as a result of the 1979 injury* is appropriate.

The findings of fact and conclusions of law in the proposed decision as herein modified and amplified are adopted in this decision.

WHEREFORE it is found:

That claimant sustained an industrial injury in 1976 for which he received compensation based upon fifteen percent (15%) of the body as a whole.

That claimant thereupon was accepted as an employee by this defendant-employer and performed heavy manual labor as an over-the-road truck driver for a period of two years, eight months.

That on April 10, 1979 claimant aggravated this preexisting impairment by sustaining the admitted industrial injury that day.

That the claimant was unable to perform any acts of gainful employment thereafter until June 23, 1979 when in the opinion of the attending physician claimant's condition stabilized medically.

That as a result of the aggravation, claimant must now refrain from his prior occupation resulting in an additional industrial disability of twenty percent (20%) of the body as a whole chargeable to this injury.

. . .

Signed and filed this 30th day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

JAMES A. BREITBACH,

Claimant,

vs.

BERTCH CABINET,

Employer,

and

HARTFORD INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed ruling overruling defendants' motion to set aside a default ruling against defendants.

A review of the chronology of events is of interest.

1. The first item in the industrial commissioner's file is a petition for arbitration filed September 18, 1980 alleging an unspecific injury date of "one month after employment" with the part of the body affected as the "spine" resulting in "lumbar disc herniation" caused by "bending, lifting and stooping in the course and scope of employment" resulting in disability from "January 7, 1980 to March 21, 1980." The petition names "Bertch Cabinet" as the employer and "Hartford Insurance Company" as the insurance carrier. A certificate of service indicates the instrument was served upon the "party" to the cause on September 17, 1980.

2. On October 2, 1980, an Employer's First Report of Injury was filed which was signed by "Rebecca Bertch" as "Secretary" for the employer on "1/14/80". The first report shows the date disability began as "1/7/80" and that the employer first knew "1/3/80". The first report shows a received stamp impression by "Hartford Group" dated "Jan. 31, 1980".

3. On October 27, 1980, claimant filed a motion for default.

4. On November 6, 1980, claimant filed an affidavit of mailing the motion for default on November 3, 1980 to Bertch Cabinet.

5. On November 21, 1980, a deputy industrial commissioner entered a ruling sustaining claimant's motion for default.

6. On December 8, 1980, defendants, Bertch Cabinet and the Hartford Insurance Company, moved to set aside the ruling sustaining the motion for default claiming there was no showing either defendant had received the petition.

7. On December 9, 1980, defendants filed an answer to claimant's petition for arbitration.

8. On December 9, 1980, a deputy industrial commissioner filed a ruling overruling defendants' motion to set aside default.

10. On December 30, 1980, defendants appealed the ruling overruling the motion to set aside default.

11. On January 2, 1981, claimant filed a resistance to the appeal.

12. On January 8, 1981, the undersigned advised the parties to submit any further considerations on the appeal by January 15, 1981.

13. On January 15, 1981, defendants filed a brief on appeal.

Review of the record discloses that the petition was served by certified mail return receipt requested upon the defendant employer as required by Code of Iowa §17A.12 (1979) and Rule 500—4.7 IAC. Nothing therein contained shows that petitioner must prove that it was received.

Failure to serve the insurance company is not fatal. The insurance carrier becomes a party after the insured becomes a party and because of the insurance contract. Rule 500—4.10 IAC, contrary to defendant insurance carrier's contention, was not intended to defeat a recovery against an employer because an insurance carrier was not originally served with the original notice and petition. It was intended to allow the insurance carrier to receive notices of subsequent actions after the employer becomes a party to the case and to make orders enforceable against the insurance carrier after jurisdiction has been obtained upon the insured employer.

Any rule of an administrative agency must have, as a basis for its creation, a statutory provision, §17A.2(7) of the Code. The statutory basis for Rule 500—4.10, IAC, is §87.10, Code of Iowa. The statute requires a policy provision in a workers' compensation insurance policy which provides that jurisdiction of the employer is jurisdiction of the insurance carrier. This is the only statutory provision, relative to matters such as are before this commissioner in the instant case which places the insurer under the jurisdicton of the industrial commissioner. The required policy provision of §87.10 binds the insurance carrier to any "agreement, adjudication, award or judgment rendered against the insured."

The intitial act creating jurisdiction over the defendants is delivery to the employer. At the instant jurisdiction is obtained over the employer, the insurance carrier likewise comes under the industrial commissioner's jurisdiction, by virtue of the required policy provision. No notice, as contemplated by §17A.12, Code of Iowa, to the insurer would be required to obtain jurisdiction of the insurer as the agreement to submit to jurisdiction contained in the policy is the avenue for obtaining jurisdiction.

The workers' compensation law refers to the "employer" as the party responsible for workers' compensation benefits. The insurance carrier is not referenced in the first instance as a responsible party. The required policy provision, §87.10 of the Code, is the only manner in which jurisdiction over the insurance carrier is given to the industrial commissioner in matters such as the instant case. Once jurisdiction is obtained, the insurance carrier is thus a party and entitled to "service" of other documents and papers, Rule 500—4.12, IAC, as distinguished from "delivery", §17A.12(1) of the Code, Rule 500—4.7, IAC. Accordingly, the defendant insurance carrier is not entitled to separate delivery under §17A.12(1) of the Code.

It is interesting to note defendants' conspicuous disregard for the statutory provision regarding reporting of injuries. Section 86.11, Code of Iowa (1979), recites in pertinent part:

> *Reports of injuries*. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, *alleged* by an employee to have been sustained in the course of his or her employment and resulting in incapacity for a longer period than one day. *If the injury results* only *in temporary disability*, causing incapacity *for a longer period than three days* except as provided in section 86.36 *then within four days*

thereafter, not counting Sundays and legal holidays, *the employer or insurance carrier* having had notice or knowledge of the occurrence of such injury and resulting disability, *shall file a written report with the industrial commissioner* on forms to be procured from the commissioner for that purpose. (Emphasis supplied.)

The actions of the defendants and most notably the insurance carrier show a lack of respect for this provision of the law. The first report of injury shows on its face that at least four days had been lost at the time it was filled out. Apparently something prompted the carrier to file the report some nine months late (after the petition was filed) to avoid the penalty provisions of §86.12, Code. Such action is dilatory and not looked upon with great favor.

As no apparent reason exists to set aside the default the appeal will be dismissed and the proposed ruling adopted as the final agency decision on this issue.

The whole matter of the default is, however, for the most part an exercise in futility and an unnecessary delay in arriving at the ultimate issue. As noted by the deputy the default has little effect upon the defendants.

"Where a defaulting defendant appears prior to trial of the question of damages, he has a right to be heard and participate therein." *Williamson v. Casey*, 220 N.W.2d 638, 640 (Iowa 1974). "He (defendant) may cross-examine witnesses and may offer proof in mitigation of damages. Defendant may in effect even defeat the action by showing that no damages were caused to plaintiff (claimant) by the matters alleged." *Hallett Construction Co. v. Iowa State Highway Com'n.*, 154 N.W.2d 71, 74 (Iowa 1967).

The damages in this workers' compensation case would appear to be the amount of weekly compensation and medical benefits related to claimant's injury. Defendants may thus "be heard and participate", "cross-examine witnesses", "offer proof in mitigation of damages" and show that "no damages were caused to claimant by the instant injury.

WHEREFORE, the ruling refusing to set aside defendants' default is affirmed.

THEREFORE, the case is remanded for inclusion in the regular assignment.

* * *

Signed and filed this 23rd day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MELVIN BROER,

Claimant,

vs.

EBASCO SERVICES,

Employer,

and

KEMPER INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

This matter came on for hearing at the Woodbury County Courthouse in Sioux City on October 2, 1980 at which time the record was closed.

A review of the commissioner's file reveals that an employers first report of injury was filed on April 8, 1974 along with a memorandum of agreement calling for the payment of $91.00 in weekly compensation. Although defendants were ordered to file a final report at the pre-hearing conference, they did not do so. The record consists of the testimony of the claimant and Rebecca Marie Broer; claimant's exhibit 1; and defendants' exhibits A, B, and C.

The issue for resolution is the nature and extent of disability.

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

Claimant was employed by defendant-employer on March 18, 1974 when he sustained an injury arising out of and in the course of his employment. He was an ironworker who was assisting in the erection of a coal hopper. One side of the hopper collapsed and claimant was pinned beneath it in flexed position. He was taken to St. Vincent Hospital in Sioux City where he was admitted for dislocation fractures of L3 and L4. He had an open reduction and internal fixation and was transferred to St. Joseph Hospital for further care and further decompression was carried out. He had moderately severe neurological deficit which improved. He was relased from the hospital on June 3, 1974 and has never returned to work. During this hospitalization he was treated by Carroll A. Brown, M.D., a neurosurgeon, who indicated that the nature of claimant's physical injuries were a dislocation of the lumbar spine of L4 and L5 and a block of the 3rd lumbar interspace. A laminectomy was performed at the L4 level.

As of November 12, 1974 claimant had minimal backache and weakness of the feet with minimal residual foot drop. Tai Jin Pak, M.D., evaluated claimant on May 20, 1975. Claimant was unable to clear his right heel off the floor while walking on his toes and was not able to clear the toes on both sides when he walked on his heels. There was mild thoracic scoliosis with a convexity toward the left side which disappeared during forward bending of the spine. Side to side bending of the back was 25° and backward bending was 20°. Rhomberg's sign was negative. Straight leg raising was 75° bilaterally when both hamstrings become tight. Thomas and Fabere's tests were negative bilaterally. There was some atrophy of the right lower extremities noted. The circumference of the right thigh was two inches less than the left. There was also mild gross atrophy of the right forearm muscles. Claimant had mild weakness of the interosseous muscles

of the right hand with gross strength slightly weaker compared to the left side. Sensory examination revealed that claimant had a mild degree of sensory loss along with ulnar aspect of the right hand and fifth finger. Dr. Pak felt claimant had weakness of the lower extremity muscles in the distribution of L5-S1 and some limitation of back motion. He felt claimant had weakness of the lower extremity muscles in the distribution of L5-S1 and some limitation of back motion. He felt claimant could physically perform all duties except those requiring speedy walking or running and heavy lifting or push-pull movements. Dr. Pak felt claimant had a 24 percent permanent impairment to the body as a whole. D. G. Paulsrud, M.D., treated claimant's orthopedic problems. He felt that claimant reached maximum orthopedic recovery on March 20, 1975 and felt that claimant had a 20 percent permanent partial disability to the right upper extremity and 15 percent permanent partial disability to the body as a whole.

Claimant continued to see Dr. Brown, who noted that claimant continued to have trouble with bowel and urine control. On August 5, 1975 he felt claimant had at least a 30 percent permanent partial disability. Dr. Brown released claimant on January 26, 1976.

On June 27, 1980 claimant was examined by William P. Isgreen, M.D., a neurosurgeon, who noted that claimant had problems with both legs, more severely on the right with a 7 cm. size differential in the calf. He felt that the maximum permanent partial disability was 30 percent. He later revised the maximum to 25 percent.

As was noted earlier, claimant has the burden of proving by a preponderance of the evidence that the injury of March 18, 1974 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).

Based on the foregoing principles, it is found that claimant has established his claim to permanent partial disability compensation. All medical evidence points to the conclusion that claimant's physical problems were caused by the injury of March 18, 1974.

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 33, has a twelfth grade education and has been a farmer, packing house worker, and ironworker. He will not, in all likelihood, return to these types of employment again. However, claimant's lack of motivation in seeking employment is less than admirable. He appears to be content with his lot. Based on the principles of industrial disability cited above, it is found that claimant's permanent partial disability, for industrial purposes, is 50 percent of the body as a whole.

It does not appear that claimant is entitled to further healing period compensation and that all outstanding 85.27 benefits have been paid.

WHEREFORE, it is found:

1. That claimant sustained an injury arising out of and in the course of his employment on March 18, 1974.

2. That because of said injury, claimant is permanently and partially disabled to the extent of fifty (50%) percent of the body as a whole.

THEREFORE, defendants are ordered to pay unto claimant two hundred fifty (250) weeks of permanent partial disability compensation at the rate of eighty-four and 00/100 dollars ($84.00) per week.

Defendants are to receive credit for permanent partial disability already paid.

Interest on accrued amounts are to be paid from the date due pursuant to Section 85.30, Code of Iowa.

Defendants are to file a final report upon payment of this award.

Costs of this claim are taxed defendants.

* * *

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

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

WILLIAM BRUNDIGE,

Claimant,

vs.

BEIER GLASS COMPANY,

Employer,

and

AETNA LIFE & CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals a proposed decision in review-reopening wherein claimant was denied benefits. The record on appeal consists of the testimony of the claimant; the depositions of Thomas B. Summers, M.D., and Adrian J. Wolbrink, M.D.; claimant's exhibits 1-6; and the briefs filed by the parties.

A review of the file reveals that an arbitration decision was filed in this case on September 5, 1978 and was not appealed. Deputy Mueller found the following:

1. That the claimant sustained an industrial injury on February 23, 1973, but in failing to file an appropriate proceeding within two (2) years is now barred from asserting that claim.

2. That the claimant sustained an industrial injury on March 8, 1974, resulting in insufficient lost time for an entitlement of benefits.

3. That the claimant sustained an industrial injury on April 9, 1975, resulting in insufficient lost time for an entitlement of benefits.

4. That the claimant has a spondylolisthesis which has been aggravated by the claimant's employment activities.

5. That the claimant is entitled to appropriate medical care in order to treat this condition.

On September 5, 1978 claimant filed an original notice and petition seeking review-reopening of his claim for weekly benefits under the terms of section 85.26(2), Code of Iowa 1978, which provides, in part, that "[a]ny award for payments or agreement for settlement... where the amount has not been commuted, may 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 under such award or agreement.

Defendants agree that claimant filed his petition within three years of the date of the arbitration decision. However, it is the defendants' contention that the arbitration decision was not an award for payments as contemplated by the legislature, but merely a recapitulation of the employer's statuory obligation to provide injured employees with medical services, and, therefore, it cannot serve as a basis for a review-reopening proceeding. Thus, they assert that claimant's petition to reopen is, in effect, an original proceeding filed more than two years from the date of injury and is now barred by the statute of limitations. *Rankin v. National Carbide Company*, 254 Iowa 611, 118 N.W.2d 570, ruled that medical payments alone did not constitute an award for payments and thus, could not serve as a basis for review-reopening.

The ruling in the case of *Floyd Williams v. Firestone Tire & Rubber Company and Liberty Mutual Insurance Company* filed by this agency on October 26, 1977, which was affirmed by the district court and the court of appeals, stands for the proposition that the filing of a memorandum of agreement when only payment of certain medical bills had occurred was subject to review-reopening within three years of the date of filing of the memorandum of agreement. As the ruling stated, it is well established that the compensation act is for the benefit of the worker and is to be construed as liberally as possible to him or to her. *Hoening v. Mason & Hanger, Inc.*, 162 N.W.2d 188, 190 (Iowa 1968); *Bergen v. Waterloo Register Co.*, 260 Iowa 833, 838, 151 N.W.2d 469, 471 (1967); Price v. Fred Carlson Co., 254 Iowa 296, 299, 117 N.W.2d 439, 441 (1962). This principle would be defeated by a conclusion that review is barred in this case because the arbitration decision filed on September 5, 1978 found that there was no known disability at the time for which weekly compensation benefits were to be paid. As the court stated in *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 906, 76 N.W.2d 756, 759-60 (1956), quoting *Henry Cowell Lime & Cement Co. v. State Industrial Accident Commission*, 511 Cal. 154, 160 294 p. 703, 705, 72 A.L.R. 1118, 1123 (1930):

Many times the seriousness of the injury is not at first apparent, and from its very nature cannot be determined until considerable time has lapsed after its infliction. The clear intent of the statute in such cases is that that injured employee shall be entitled to compensation for his permanent disability notwithstanding the fact that he may in the early stages of his injury have been granted an award only for temporary disability, or may have been paid compensation voluntarily by his employer;..."

"When passage of time and subsequent events show the true extent of industrial disability there should be some vehicle for adjusting a prior award." *Meyers v. Holiday Inn of Cedar Falls*, 272 N.W.2d 24, 26 (Iowa Ct. App. 1978). Therefore, for the reasons cited, it is concluded that the review-reopening in this case was properly filed.

The arbitration decision filed September 5, 1978 established the same matters as the filing of a memorandum of agreement and accordingly should be accorded at least equal status.

WHEREFORE, it is found:

That claimant's petition in review-reopening was timely filed and is subject to the jurisdiction of the industrial commissioner.

. . .

Signed and filed this 16th day of July, 1980.

ROBERT C. LANDESS
Industrial Commissioner

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

JAMES T. BRUNEAU,

Claimant,

vs.

INSULATION SERVICES, INC.,

Employer,

and

UNITED STATES FIDELITY and GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner dated January 14, 1981 the undersigned deputy industrial commissioner was assigned under the provisions of §86.3, Code, to write the final agency decision on appeal in this matter. Defendants appeal from a review-reopening decision filed on November 7, 1980 wherein they were ordered to pay running healing period benefits and a certain medical bill.

. . .

The decision of the hearing deputy is affirmed in part and modified in part. The part which is affirmed is amplified below, as is the modification.

The issues are stated in defendants' brief:

> The issue is whether or not Rule 500—8.3 (85) requires healing period payment even though the injured claimant has declined and refused treatment for a several month period and refuses to commit himself on whether or not he ever intends to have surgery. The issue is that the Deputy Industrial Commissioner is in error for the reason that there is an obligation on his behalf to determine a definite healing period when surgery has been declined.
>
> The issue also is that the Deputy Industrial Commissioner's decision was in error for not establishing the amount of permanent disability and industrial disability at the time of the hearing.
>
> The next issue is that the Deputy Industrial Commissioner's decision was in error by Ordering [sic] the defendants to pay Dr. Blume's bill in the amount of $1295.00.

The record is undisputed that claimant received a compensable injury which was diagnosed as a ruptured intervertebral disc at the L-5/S-1 level. A myelogram was performed. The main issue in the case stems from claimant's refusal, thus far, to have surgery. He stated in his sworn testimony that his fear stems from knowing a friend who had difficulty for many years following a back fusion (Tr. 29-31).

The law is adequately stated in the hearing deputy's decision. It would be well to repeat that under Rule 500—8.3, I.A.C., healing period ends when claimant returns to work or recuperates from the injury. Professor Larson's work contains a valuable summary of the law concerning the question of refusal to have surgery. He states that most courts will not disturb the finding that a refusal to have surgery for an intervertebral disc is reasonable and, therefore, the claimant's compensation would not be interrupted. *1 Larson's Workmen's Compensation Law* 4-10 to 4-19 (§13.22). Further, Larson states, on the other hand, refusal to have surgery would not be deemed reasonable if the refusal was based upon subjective fear. *Larson, supra*, 3-423 to 3-424.

The question also arises in the case of *Stufflebean v. City of Fort Dodge*, 233 Iowa 438, 9 N.W.2d 281 (1943). In that case the question of whether claimant's unreasonable refusal to have surgery for a hernia repair could result in a loss of compensation. However, that exact issue was not ruled upon.

The first two issues may be discussed together. One might agree with Larson's conclusion that subjective fear is insufficient to excuse a claimant's refusal of surgery; however, this is a case of very serious surgery indeed. Regardless of that source of claimant's fear, if the trier of fact believes that fear to be sincere, as it were, and if the surgery itself is dangerous, claimant should not be deprived of any compensation benefits. Such is the case here.

Defendants speak of an "obligation" on the part of the deputy industrial commissioner to determine a definite healing period. However, here the deputy industrial commissioner reviewed the report of Horst G. Blume, M.D., a neurosurgeon, which was dated June 23, 1980. It stated unequivocably that claimant had "not reached maximum medical recovery." Since the hearing was less than one month later, on July 8, 1980, it is not unreasonable that the hearing deputy concluded claimant was disabled as of the time of the hearing and that the award for benefits should run until the healing period ended according to the tests set out in §85.34(1) and the above mentioned rule.

With respect to the issue of the medical bill, Dr. Blume submitted a bill in the amount of $1,295.00. An entry of 11-14-79 for which the charge was $100.00 reads as follows:

> 11-14-79 Reviewing of the chart & literature related due to the medical problems to obtain an expert opinion for litigation purposes..... $100.00

Such a charge to claimant for the purpose of claimant's lawyer preparing the case is not a part of the costs but is an expense incident to the preparation of the case.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on February 5, 1979, claimant sustained an injury which arose out of and in the course of his employment when he stepped through a hole in a scaffold.

2. That said compensable injury was in the nature of a ruptured intervertebral disc at the L-5/S-1 level.

3. That claimant was unable to work and had not recuperated as of July 7, 1980.

4. That claimant's proper compensation rate is two hundred sixty-five and 00/100 dollars ($265.00) per week for healing period and two hundred forty-four and 00/100 dollars ($244.00) per week for permanent partial disability.

. . .

Signed and filed at Des Moines, Iowa this 23rd day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

JAMES T. BRUNEAU,

Claimant,

vs.

INSULATION SERVICES, INC.,

Employer,

and

UNITED STATES FIDELITY and GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

The applicable portion of paragraph 2 of the appeal decision filed March 23, 1981, is hereby amended to read "...plus claimant's exhibits 1 through 10, inclusive..."

* * *

Signed and filed at Des Moines, Iowa this 8th day of May, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

JAMES BUCKENDAHL,

Claimant,

vs.

ALBIN DEPUE d/b/a DEPUE HAY COMPANY,

Employer,

Defendant.

Interim Arbritration Decision

This is a proceeding in arbitration brought by the claimant, James August Buckendahl, against his employer, Albin DePue, d/b/a/ DePue Hay Company, on account of an injury he sustained on March 10, 1980. This proceeding was consolidated for hearing with the case of Murlie Persons, surviving spouse of Eugene Persons, vs. Albin DePue, d/b/a/ Depue Hay Company. These cases came on for hearing before the undersigned on March 30, 1981 at the Buena Vista County Courthouse in Storm Lake, Iowa. The Buckendahl case was considered fully submitted only as to that issue of whether the injury occurred in the course of employment. The present decision will address only that issue. The record otherwise has been left open for 30 days from the date of the hearing for completion of the medical evidence regarding the nature and extent of the disability claimant sustained as a result of the March 10, 1980 injury.

* * *

The issue to be determined at this time is whether the injury occurred in the course of employment. At the time of the hearing the parties in the Buckendahl case stipulated that the applicable rate of compensation was $109.79 per week. (They agreed claimant was single with no dependants at the time of the injury.) The Buckendahl parties further stipulated that the claimant was an employee of the defendant on the date of injury and that at the time of the accident he was driving a vehicle owned by the defendant. Claimant acknowledged that defendant paid him $139.38 for the date of the accident and remainder of the week. The parties also stipulated that the medical expenses shown by exhibit B was fair and reasonable.

The testimony, evidence, applicable law and conclusions with regard to the common issue are as follows:

Murlie Persons testified that the decedent worked for the defendant for over three years and that his duties included going to various corn cob stockpiles around and outside the Storm Lake area, loading corn cobs onto trucks and working on equipment at defendant's farm. According to Mrs. Persons, defendant provided decedent with a pickup from the first day of employment and paid for all expenses connected with the use of the vehicle. She noted that the decedent kept the pickup at their home overnight and then drove either to defendant's farm or to a stockpile or other work site in the morning. Mrs. Persons commented that the decedent transported other employees of the defendant on the way to and from work. According to Mrs. Persons, the defendant had not instructed the decedent regarding decedent's use of the pickup on off hours.

Mrs. Persons testified that the decedent left home around 6 a.m. on the date of the accident. She assumed he had knowledge of where he was to report for work that day. Policemen advised her around 3 p.m. that her husband had been killed in an accident near Pocahontas.

Mrs. Persons acknowledged that she had no personal knowledge regarding where decedent reported for work on any specific day. She recalled decedent arriving home around 4 p.m. in winter months and 7 p.m. or later in summer months.

Mrs. Persons insisted that the decedent did not use the pickup for moving furniture. She seemingly conceded that the decedent may have used the pickup when shopping for a family car in August of 1979. Apparently, decedent bought an automobile which they used on a vacation the last week of August 1979.

James Buckendahl, who began working for defendant in 1979, testified that the decedent usually picked him up and brought him home in defendant's pickup. Buckendahl would do the driving on the return trip until they arrived at his house and then the decedent would take the pickup home. Buckendahl recalled that he and decedent had been loading semis most of the winter at a cobsite a few miles east of Emmetsburg. He remembered nothing about the accident or the day of the accident. The first thing he recollects about the episode is waking up four days later in the intensive care unit of a Sioux City hospital.

Albin DePue testified that the business he owns is located at the site of his home and farm, south of Storm Lake. His business entails buying corn cobs from farms in the surrounding areas and transporting the cobs to Omaha, Nebraska. He recalled that both decedent and Buckendahl were loading semis for him at the Emmetsburg cobsite on the date of injury. He saw both employees the morning of the accident. Apparently, decedent and Buckendahl left in separate vehicles but were going to return together in the pickup. The understanding was that the employees could go home after their work was done at the cobsite. DePue presumed that decedent and Buckendahl were on their way home from the cobsite when the injury occurred. He did not tell his employees what route to use going to or coming from the various job sites. He hesitatingly agreed that driving back and forth was part of the job.

DePue testified that when he hired the decedent he agreed to pay decedent a certain wage and to provide a cost-free means of transportation. He conceded that he placed no restrictions on decedent's use of the pickup nor on the employees' use of it once their work was done each day. However, they were free to use their own vehicles to get to the cobsites if they so wished.

DePue noted that the distance between Storm Lake and Emmetsburg was about 60 miles and that the place where the accident occurred was about 30 miles from the worksite. He estimated that decedent and Buckendahl normally completed their work around 1 or 1:30 p.m.

Patty DePue, defendant's wife, testified regarding conversations she had with decedent about his purchase of a family car.

The State of Iowa Investigating Officer's Report of Motor Vehicle Accident indicates that the accident occurred as the vehicle left a county road ("C-29 1 mile east of N-28") and eventually landed in a dredge ditch at 2 p.m. on March 10, 1980. (Claimant's exhibit A.) Decedent died of multiple skull fractures and massive intracranial bleeding. (Persons' exhibit C.) Buckendahl was taken to the Pochahontas Community Hospital by ambulance. (Claimant's exhibit A.)

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 the 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).

Code section 85.61(6) states:

> The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Absent special circumstances, an employee who is injured in going to or coming from his/her place of work is excluded from coverage. *Frost v. S. S. Kresge Co.*, 299 N.W.2d 646 (Iowa 1980); *Farmers Elevator Co., Kingsley v. Manning*, 286 N.W.2d 174 (Iowa 1979); *Otto v. Independent School District*, 237 Iowa 991, 23 N.W.2d 915 (1946).

"[C]ases involving an injury from a highway accident suffered while enroute to or from work require a determination whether the employee was engaged in his employer's business at the time..." *Pribyl v. Standard Electric Co.*, 246 Iowa 333, 339, 64 N.W.2d 438 (1965). A journey to and from work when made in the employer's conveyance might be considred to be in the course of employment. See *Id.*; Compare *Crees v. Sheldahl Tel. Co.*, 258 Iowa 292, 139 N.W.2d 190 (1965).

An exception to the "going and coming" rule includes a situation wherein an employee performs some special service, errand, or duty incidental to his employment in the interest of his employer and on his way home after performing such service, errand or duty. *Pohler v. T. W. Snow Constr. Co.* 239 Iowa 1018; 33 N.W.2d 416 (1948).

The record is without dispute that the work decedent and Buckendahl performed for the defendant at the time of the injury required that they travel substantial distances to varius cobsites in addition to reporting at times to defendant's location. The travel was more than incidental to fulfillment of the work duties—it was essential. Additionally, although defendant suggested that his employees could use their own means of transportation and did not dictate what routes they used, the fact remains that defendant provided transportation for decedent and Buckendahl. Clearly this case presents a special circumstance which falls within the rationale of the above cited exceptions to the going and coming rule.

Defendant's questions aimed at implying that the decedent and Buckendahl could use the pickup for other purposes when their work at a cobsite was done established no conclusive proof that decedent and Buckendahl had deviated from the employment-related travel routine. Indeed, defendant testified that a working day at a cobsite frequently ended between 1 and 1:30 p.m. and the accident report established that the mishap occurred at 2 p.m. at a distance described by the defendant as being about 30 miles from that day's worksite. (Likewise, the inquiries regarding whether decedent used the pickup in the purchase of family vehicle months earlier in no way detracts from the finding that the injury occurred in the course of employment. Rather such fact suggests that at the time of the injury, decedent would have used his own vehicle for any personal errands.)

As agreed at the time of the hearing, a determination of the length of claimant's healing period and the extent of permanent disability will be decided by the undersigned upon receipt of the medical evidence which is to be submitted by April 29, 1981. Likewise, a determination with regard to the medical expenses contained in Buckendahl exhibit B will be made at that time.

WHEREFORE, it is hereby found that claimant sustained an injury in the course of and arising out of his employment on March 10, 1981.

. . .

Signed and filed this 8th day of April, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

EDNA BURCH,

Claimant,

vs.

ROBERT OHNMACHT,

Employer,

Defendant.

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs on May 27, 1980 at which time the record was closed.

A review of the commissioner's file reveals that this matter was the subject of a previous application for commutation which was heard by Deputy Industrial Commissioner Lee Jackwig. She rendered a decision on September 28, 1979 which denied claimant's application. Said decision is, by reference, incorporated herein as if set forth fully. Said decision denied claimant's application because it would not be in the claimant's best interest. It appears that the deputy was concerned that claimant would squander the funds which would be awarded. This previous decision has preclusive effect. *Blacksmith v. All-American Inc.*, 290 N.W.2d 348 (Iowa 1980).

* * *

The issue for resolution is whether the commutation presented by claimant should be granted.

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

Claimant's decedent, Roland Burch, received injuries which arose out of and in the course of his employment on February 6, 1978 which resulted in his death the same day. He left a surviving spouse, the claimant herein. Claimant has been personally paid by the defendant on a regular basis. A third party suit is presently pending to recover damages from an insurance agent.

Claimant lists the following statement of assets and liabilities:

1. I am now 59 years of age. I am presently responsible for the support of one child born to the marriage of Roland Burch and myself, a daughter, Peggy Lynn Burch,now age 18, and residing with me a 1111 W. Valley, Shenandoah, Iowa.

2. I am presently self-employed as a cleaning lady and earn from such occupation from $30.00 to $70.00 each week gross. Many of the persons for whom I clean are away from Iowa during the winter months and it is during this period of time that my gross income is reduced.

3. My property is as follows:

REAL PROPERTY

Homestead: I am presently renting my home at 1111 W. Valley, Shenandoah, and will continue to do so in the future. I own no real estate and have no plans at present to purchase any.

PERSONAL PROPERTY

Description	Market Value
Household Furnishings	$ 1,500.00
1972 Chevrolet Automobile	1,100.00
Checking Account, First National Bank of Essex	100.00
Savings Account, First National Bank of Essex	1,000.00

OTHER PROPERTY

At the present time I am receiving a workers' compensation benefit from Robert Ohnmacht on account of the death of my husband, in the amount of $128.81 per week.

4. My liabilities are as follows:

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

5. Personal expenses for the support of my daughter and myself:

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.
Electricity, Heat, Water	50.00	per month ave.
Telephone	50.00	per month ave.
Insurance	50.00	per month ave.
National Home	31.00	per month
Automobile	150.00	ea. 6 months

Claimant, in order to resolve the objections raised by the previous commutation, has proposed a trust for the

proceeds of the commutation. The trust is revocable and claimant's counsel stated that the trust was so arranged because of gift tax consideration.

The ultimate determination for resolution is whether the commutation as proposed is in the best interests of the claimant. In holding that it is not the following quote from Deputy Jackwig's decision is pertinent:

> 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 has 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.
>
> * * *
>
> An irrevocable trust might be appropriate.

The same applies now. The undersigned feels that claimant would be manipulated by the plight of her children. Since the trust is revocable in nature it would appear that claimant's application should be denied.

THEREFORE, claimant's application for full commutation is hereby denied.

* * *

Signed and filed this 18th day of July, 1980.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

JOYCE BURKHEAD,

Claimant,

vs.

THE GOLD BUFFET FRANCHISE,

Employer,

and

UNITED STATE FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner dated January 14, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse review-reopening decision.

On January 14, 1981 the parties were advised as to the filing of briefs and appellants were given an extension to February 17, 1981. As a result, claimant filed no brief, and defendants filed a 15-page brief covering two issues. On March 12, 1981, claimant was given an extension of time to April 1, 1981 in which to file a brief, but none was ever received.

For reasons stated below, this decision which differs in result from the proposed agency decision, will constitute the final agency decision under §17A.15(4). (However, the part of the hearing deputy's decision which relieved defendants of paying the bill of Donald W. Blair, M.D., will be retained. That ruling was not appealed.)

The issues are described in defendants' brief:

> Whether claimant proved her problems from the chrondromalacia [sic] since 1977 were proximately caused by the injury of October 29, 1976.
>
> Whether claimant proved she has sustained a permanent partial disability of 40% of the right leg.

Briefly, claimant hurt her knee in 1975 and in 1976, and as a result of the latter injury, drew workers' compensation benefits for 34 weeks, 5 days. On April 17, 1979, she filed her petition in review-reopening. Upon hearing, the deputy industrial commissioner awarded her permanent partial disability benefits to the extent of 40% of the leg. Defendants appealed, claiming as above, that claimant did not show a causal connection between the reopened case, that of October 29, 1976, and the disability described in the testimony.

As to the 1975 injury, she testified:

> A. In 1975 I had a minor twist and then again in October of '76.
>
> Q. Can you describe the type of injury you received in 1975 in detail, how it occurred?
>
> A. I was told that it was a torn cartilage in my right leg. I went to see our family doctor and he is the one that told me it was a torn cartilage.
>
> * * *
>
> A. I understood that the cartilage was torn in my leg. There was swelling and he took fluid from my leg and also injected it with Cortisone (Tr., pp. 12-13).

In her discovery deposition, she described the 1975 incident thus:

> It appears that in 1975 you injured your right knee while you were working at the Aldo Cafe?
>
> A. Yes.
>
> Q. Is that the first time you had injured that knee?
>
> A. Yes.
>
> Q. Can you tell me how that happened?
>
> A. I was at the cash register and I either turned to go and get an order or turned to go get coffee for somebody. It was—usually it was a really busy place. I mean, we had a big breakfast hour, and I can't really remember for sure, but I had been at the cash register, I know that, I went to turn and I — I — my knee just popped.
>
> And I — you know, it hurt periodically during the day, and I got home that night and it was really swollen, and I went to the doctor the next day.
>
> And he told me that he thought that I had torn a cartilage in my knee and that I should take it easy. I should take off work for a couple, three days, so — which I did (Claimant depo., pp. 10-11).

On cross-examination, with respect to the 1976 injury, she testified as follows:

> Q. In your petition you mentioned the injury date as October 29, 1976. Are you sure that is the date when you injured your knee?
>
> A. I am not sure because, as I said, I think I had told Mrs. Silliman and that is the date she put down on the form because she wasn't sure either of the date.
>
> Q. Is is possible that your knee problems could have just been continuing from the 1975 injury rather than a new injury in October 1976?
>
> A. I can't say that for sure. I was told that I could go back to work and resume my responsibilities as a waitress. Doctor Allender did know what kind of work I done (Tr., pp. 45-46).

Ronald K. Bunten, M.D., a qualified orthopedic surgeon treated claimant in the main. On November 30, 1976, he operated, removing the medial meniscus from claimant's right knee. With respect to the history, Dr. Bunten testified:

> A. She reported that she'd had difficulty with her right knee for about one year. The onset of her symptoms was related apparently to some twisting sort of injury that she sustained while working about a year previously.
>
> She reported that she worked as a waitress. Following this initial injury she was off work a week or two and apparently developed some swelling in her knee and had some limp for about that time. Subsequently, her knee had continued to be troublesome. She reported some mild intermittent swelling in the knee, particularly around the front of the knee near the patellar tendon and kneecap. She didn't seem to be describing true swelling or a fusion within the knee. Most of the discomfort she experienced was to the inner or medial aspect of the knee joint although she had some on the lateral aspect as well.

She reported some sensations of the knee wanting to buckle or give way and a tendency to want to fall down although she had not actually done so. She reported she had been able to work most of the time since the onset of this, although for a couple of weeks prior to my initial visit with her she reported missing work about half the time because of the symptoms. Her general health, otherwise, was thought to be good.

> Q. Did she indicate to you, Doctor, from your history, of an injury that occurred within the month before you saw her?
>
> A. I don't have any specific recollection about that nor do my office records particularly reflect that except that she did report she had been missing work intermittently for a couple of weeks prior to the office visit (Depo. pp. 4-5).

A to the diagnosis, he testified:

> A. Yes, I felt she showed signs of a disorder we call chondromalacia of the patella or kneecap, which is basically a degenerative sort of disorder and that she possibly had a tear of the meniscal cartilage on the inner aspect of her knee (Depo. p. 7).

With respect to causal relationship, the following question and answer appear:

> Q. Doctor, would the basis for this particular percentage of 25 percent, would that be based on what observations and what knowledge you have of the particular injury that he had related to you from what your office notes indicate?
>
> A. Well, it would be based on the condition of her right knee as I last observed it on October 26, 1979 (Depo. p. 32).

Finally, on cross-examination of the doctor by defendants, the following question and answer appear with respect to the history:

> Q. Do those two pages make any notation on there of a recent injury of October 26, 1976?
>
> A. No (Depo. p. 35).

With respect to the matter of causal connection, *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965), states:

> True, we have said 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." However, the weight to be given such an opinion is for the finder of

fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances.

When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner or the court. It is then to be weighed together with the other disclosed facts and circumstances, and the ultimate conclusion is for the finder of fact. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 699, 73 N.W.2d 584; *Hinrichs v. Davenport Locomotive Works*, 203 Iowa 1895, 1897, 214 N.W. 585, 586.

On the whole, claimant's testimony shows two clear work incidents. The problem, of course, is that it is the second incident which was used as the injury date in the petition, and Dr. Bunten's testimony does not establish a causal relationship between that date (October 29, 1976) and the disability. Indeed, it could be argued that Dr. Bunten's testimony does not establish a causal relationship between any injury and the disability in that in his deposition (p. 32) he does not relate the cause of the disability to anything traumatic.

The history taken by Dr. Bunten did not include a 1976 injury and his diagnosis of chondromalacia of the patella was said to be degenerative in nature. It is noted that Dr. Bunten did not mention an aggravation of the chondromalacia.

Further, there were three other doctors who were mentioned as caring for the claimant to one degree or another. From these doctors there were no reports and no depositions. One must concede, of course, that Dr. Bunten's evidence would be more extensive than any or all of the others.

One is quite willing to believe that claimant hurt her knee on October 29, 1976; however, the law requires (see above) that the causal relationship be established. The causal relationship is not established in this case. The history given by claimant to Dr. Bunten is an obstacle to claimant's case, yet Dr. Bunten was not asked a hypothetical question which contained a revised history. Thus being the case, we do not have the benefit of Dr. Bunten's opinion in a case where he considered another history.

Since claimant did not show the necessary causal relationship, it is not necessary to consider the permanency issue.

Although the form five, claimant's exhibit 1, showed claimant's time loss beginning November 25, 1976, the hearing deputy shows November 17 as the first day of disability, apparently because that was the date claimant first visited Dr. Bunten. On the whole, that seems to be a reasonable assumption. Therefore, instead of temporary disability of 34 weeks, 5 days, the period of disability is 35 weeks 6 days.

Findings of Fact

1. Claimant was injured at work on October 29, 1976 when she twisted her knee. (Memorandum of agreement filed June 13, 1977, Tr., 17)

2. The injury or condition was a chondromalacia of the right patella. (Dr. Bunten depo., 7)

3. The cause of the chondromalacia was natural degeneration or a traumatic tear of the meniscal cartilage. (Bunten depo., 7)

4. Dr. Bunten had no notation of an injury of October 26, 1976 [sic]. (Bunten depo., 4-5, 35)

5. Claimant was off work from November 17, 1976 through July 25, 1977. (Bunten depo., 4, and Claimant exhibit 1)

Conclusions of Law

1. That on October 29, 1976, claimant sustained an injury which arose out of and in the course of her employment in the nature of a twisted knee.

2. That as a result of this injury, claimant missed work from November 17, 1976 to July 25, 1977.

3. That the evidence did not reveal a causal relationship between the injury and any permanent disability.

4. That the correct rate of weekly compensation is one hundred twenty-one and 13/100 dollars ($121.13).

* * *

Signed and filed at Des Moines, Iowa this 15th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ROBERT BUTCHER,

Claimant,

vs.

VALLEY SHEET METAL,

Employer,

and

GREAT AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

Order

On April 29, 1981 claimant filed a motion for permission to amend his petition to indicate a claim for second injury fund benefits.

Review of the pleadings indicates that claimant filed a review-reopening proceeding against the above-named employer and insurance carrier on September 29, 1980. The present motion seeks to add a claim against a party not presently before the agency.

The better method of bringing in the Second Injury Fund after the action against the employer already has been filed is to bring a separate action against the Second Injury Fund, serving the Iowa Industrial Commissioner with notice (complimentary copy should go to the Iowa Attorney General, the Fund's counsel by statute), and thereafter, to file a motion to consolidate the two actions. However, the same can be accomplished in the present matter by making allowance of the amendment contingent upon proper service of the amended petition.

It should be noted that the merits of claimant's cause of action are not being ruled upon by determination that he may amend his petition to include a claim against the Second Injury Fund.

THEREFORE, claimant may amend his petition to include a claim against the Second Injury Fund (top box and paragraph 26 of the form 100) and shall serve such amended petition on the Iowa Industrial Commissioner and shall send a copy to the Attorney General's Office, Tort Claims Division.

. . .

Signed and filed this 7th day of May, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

KATHERINE CAMARILLO,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant appeals a proposed arbitration decision in which claimant was awarded temporary total disability benefits and related medical expenses as a result of an injury she sustained on May 15, 1979. Credit was given for benefits already paid pursuant to an award in the Nebraska Workmen's Compensation Court.

. . .

Review of the record discloses the findings of fact and conclusions of law of the deputy are proper.

WHEREFORE, the proposed decision is adopted as the final decision.

It is found:

That claimant sustained an industrial injury on or about May 15, 1979.

That claimant returned to work on July 2, 1979.

That as a result of the May 15, 1979 injury claimant sustained temporary total disability of four (4) weeks (from June 4, 1979 through July 1, 1979).

That no permanent disability resulted from the claimed injury.

That full faith and credit shall be given to the payment previously made under the Nebraska Workmen's Compensation award.

That claimant is entitled to the difference between the temporary total compensation rate paid under the Nebraska award of one hundred fifty-five and 00/100 dollars ($155.00) per week and this award of one hundred sixty-eight and 40/100 dollars ($168.40) per week for three (3) weeks, namely thirteen and 40/100 dollars ($13.40) times three (3) plus an additional week's compensation of one hundred sixty-eight and 40/100 dollars $168.40) totalling two hundred eight and 60/100 dollars ($208.60) payable in a lump sum.

That the employer shall be given credit for the medical treatment previously paid under the Nebraska Workmen's Compensation award.

. . .

Signed and filed this 29th day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

CHARLES CAMPSEY,

Claimant,

vs.

FORMAN BROTHERS,

Employer,

and

BITUMINOUS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed March 2, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from a review-reopening award of 35% of the body as a whole.

The issue is stated in claimant's brief:

The sole issue on appeal from the review-reopening Order is that the Deputy Industrial Commissioner erred in finding the Claimant 35 percent industrially disabled as the record discloses that the Claimant sustained an injury resulting in a

100 percent industrial disability as a result of his fall on August 29, 1978.

There is no question but what claimant received an injury on the job and that the deputy made an award which included the correct rate for a permanent partial disability, $244.00 weekly. There appears to be no dispute over the length of healing period. There was no appeal of the order to pay expenses under §85.27 for medical and allied benefits, so that award will be reordered.

The only issue, therefore, is as stated above.

Claimant, a laborer, was hurt when he fell some 20 feet. He was treated initially for a fracture to the lower pubic ramus and a laceration of the right elbow. In December 1978, some three and one-half months after the injury, claimant visited Alan H. Fruin, M.D., a qualified Omaha neurosurgeon. As a result of diagnoses by Dr. Fruin, claimant underwent surgery for a left carpal tunnel syndrome and a cervical laminectomy and foraminotomy. Claimant was also examined by a psychiatrist and found to have a depressive neurosis.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 29, 1978 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 *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 375, 112 N.W.2d 299, the court quotes with approval from C.J.S.:

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

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).

While a claimant is not entitled to compensation for the results of a preexisitng 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).

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 as 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, 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. * * * *

"The opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa, 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra*, p. 907. Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances." *Bodish v. Fischer*, 257-516, 521, 133 N.W.2d 867, 870 (1965).

The difficulty in deciding this case stems from the rather imprecise nature of the medical evidence. Often there is a lack of clarity in the testimony. A portion of Dr. Fuin's testimony furnishes an example:

Q. Okay. Now, Doctor, at one time you rated Mr. Campsey as a disability of five percent to the body as a whole; that was on January 10, 1980, is that correct?

A. Probably. If that is what — wait a minute. Yes. But that was a mistake.

Q. What do you mean, it was a mistake?

A. It was a typographical error. It should have been fifteen percent.

Q. So, your rating was fifteen percent to the body as a whole?

A. Right.

Q. And is part of that based upon the symptoms that he, that is, his subjective symptoms and history that he gives you as regards to his left and right arm pain, now?

A. No.

Q. It has nothing whatsoever to do with his alleged pain in the groin or loss of feeling in the groin or whatever it is he feels?

A. No. I wasn't aware of any groin problem.

Q. Excuse me. Not groin. Where was the problem he had down below?

A. He had a fractured pelvis.

Q. Pardon? The Lhermitte's sign you talked about?

A. Not—not taking that, those things into consideration.

Q. Okay. Because you consider those to be perhaps outside?

A. Well, I see. Let's see. This was January 10th and he did not really come to me complaining of his Lhermitte's sign until January 15th.

Q. Okay. May I see your file, Doctor?

(Counsel for employer-insurance carrier examines doctor's file.)

Q. (By Mr. Laubenthal, continuing) Doctor, is a copy machine any where in the area? (Depo., pp. 45-46)

Or, there is an example of a portion of an answer by David K. Kentsmith, M.D.:

> I think I can give a pretty definite yes to the surgeries having produced then this disability. As far as the—what disability, psychological disability he had from the fall itself. I don't have anything that I can very clearly say, well, the fall itself did produce a psychological change in this man. (Depo. pp. 65-66)

That statement could be construed to mean that the fall either did or did not produce a psychological change in claimant.

On the whole, claimant seemed to recover well from his original injuries, and there is considerable doubt as to whether his subsequent physical ailments (carpal tunnel syndrome, cervical disc problem, and Lhermitte's sign) were connected to the injury. On the other hand, it does appear that claimant's psychiatric disorder was aggravated to some extent by the injury. David K. Kentsmith, M.D., a qualified psychiatrist, testified in part:

Q. Now, Doctor, what effect, if any, would that fall have on the condition?

A. Okay. The fall on the condition could have an effect in terms of him immediately focusing all of his depression and all his concerns onto that fall. It would also give him a reason to explain why he didn't feel good. You know, if he hadn't been feeling good before, had been depressed, the fall may then cause him to have something to focus on. In other words, he now had something real to complain about.

* * *

Q. Now, would you have an opinion to a reasonable degree of medical certainty whether or not the fall that he sustained in August of 1978 would have had an effect on this depressive neurosis that would either aggravate or accelerate or light up that condition, taking into effect that he was able to work, even though he might have had these latent—this latent condition from 1975 through 1978?

A. The fall itself could have brought on more of the symptoms that he had. (Depo., pp. 63-65)

On the whole, claimant's physical disability as a result of the injury is not severe but the psychological aggravation causes him some industrial disability.

1. On August 29, 1978, claimant was employed by the employer Forman Brothers. (Tr. 6)

2. Claimant was born April 2, 1929. (Tr. 6)

3. Claimant worked as an installer of accoustical tile, a carpenter, for the employer for 18 years. (Tr. 6)

4. Claimant has an eighth grade education and went to an apprentice school. (Tr. 7)

5. Claimant was injured on August 29, 1978 when he fell 20 to 25 feet. (Tr. 8)

6. Claimant's injuries from the fall were a fracture of the lower pubic ramus on the right, pubic separation (mild), and a laceration of the right elbow. (Claimant's exhibit 11)

7. The pubic injury and elbow laceration did not cause any permanent physical impairment. (Claimant's exhibit 12)

8. Dr. Fruin performed a left ulnar nerve transplant to relieve a carpal tunnel syndrome. (Fruin depo., 16-19)

9. Dr. Fruin performed a cervical laminectomy and foraminotomy. (Fruin 26)

10. The left carpal tunnel syndrome, cervical disc symptoms, and Lhermitte's sign were not caused by the injury. (Fruin 34)

11. Dr. Fruin estimated claimant's permanent partial disability at fifteen percent (15%) of the body as a whole. (Fruin 45)

12. Claimant suffers from an hysterical personality disorder, a depressive neurosis. (Kentsmith 18, 30, 62)

13. Claimant's psychiatric symptoms preexisted his compensation injury. (Kentsmith 34)

14. Claimant can function physically. (Kentsmith 55)

15. Claimant's injury causally contributed to his psychiatric disability. (Kentsmith 63-65)

16. Claimant, by inference, can work if he goes unrewarded for not working. (Kentsmith 54, 55)

1. On August 29, 1978, claimant sustained an injury which arose out of and in the course of his employment with Forman Brothers.

2. There was no causal relationship between the injury and claimant's left carpal tunnel syndrome, his cervical disc symptoms, and Lhermitte's sign.

3. Claimant sustained no permanent physical impairment as a result of the injury.

4. Claimant's injury causally contributed to his psychiatric disability.

5. Since claimant's psychiatric symptoms preexisted his injury and continued to persist, that part of his psychological problem which is connected to the injury is permanent.

6. Claimant's permanent partial disability to the body as a whole for industrial purposes is thirty-five percent (35%).

7. The proper rate of weekly compensation for permanent partial disability is two hundred forty-four and 00/100 ($244.00).

* * *

Signed and filed at Des Moines, Iowa this 20th day of May, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ARDITH CAPUTO,

Claimant,

vs.

UNIFIED CONCERN FOR CHILDREN a corporation, d/b/a/ MOTHER GOOSE CHILD CARE CENTER,

Employer,

and

EMPLOYERS MUTUAL COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a review-reopening decision in which the claimant was awarded healing period and permanent partial disability benefits.

* * *

On December 27, 1977 defendants filed a First Report of Injury concerning the October 4, 1977 injury. On December 27, 1977 defendants filed a Memorandum of Agreement indicating that the weekly rate for compensation benefits was $143.78. No final report has been filed. At the time of the hearing, defendants indicated 69 3/7 weeks of temporary total/healing period benefits (October 4, 1977 to February 2, 1979) had been paid pursuant to the Memorandum of Agreement.

The decision of the deputy held in part:

THEREFORE, it is ordered that the defendants pay the claimant fifty (50) weeks of permanent partial disability at the rate of one hundred forty-three and 78/100 dollars ($143.78) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of January 17, 1978.

Defendants are ordered to pay the claimant healing period benefits from the date of injury through January 16, 1978 at the rate of one hundred forty-three and 78/100 dollars ($143.78) per week.

Compensation that has accrued to date shall be paid in a lump sum.

Credit is to be given to defendants for the amount of compensation previously paid by them for this injury with the exception of any overpayment of healing period. See *Cecil McCombs vs. Mercy Hospital and St. Paul Companies*, Appeal Decision filed January 31, 1979.

This appeal is limited to the issue as to whether or not the insurance carrier is entitled to a credit against the permanent partial disability award for the overpayment of temporary total disability payments in the amount of $7,825.74 (54 3/7 weeks overpayment).

A SHORT LEGISLATIVE HISTORY OF THE EMPLOYER'S RIGHT TO A CREDIT FOR THE OVERPAYMENT OF HEALING PERIOD

At least back to 1959 and until July 1, 1976, part of the first unnumbered paragraph of §85.34, Code of Iowa read:

> In the event weekly compensation had been paid to any person under any provision of this chapter or chapter 85A other than is 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.

Chapter 1084, Acts of 1976 Regular Session of the General Assembly amended the section effective July 1, 1976 thus:

> Sec. 7. Section eighty-five point thirty-three (85.33), Code 1975, is amended to read as follows:
>
> 85.33 Temporary disability. The employer shall pay to the employee for injury producing temporary disability and beginning upon the ~~eighth~~ *fourth* day

thereof, weekly compensation benefit payments for the period of his disability, including the ~~periodical~~ increase in cases to which section 85.32 applies.

Sec. 8. Section eighty-five point thirty-four (85.34), unnumbered paragraph one (1), Code 1975, is amended to read as follows:

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 *under section eighty-five point thirty-three (85.33) of the Code* had been paid to any person ~~under any provision of this chapter or chapter 85A other than is 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~~ *the healing period*.

The previously quoted portion of §85.34 now reads thus:

> In the event weekly compensation under section 85.33 had been paid to any person for the same injury producing a permanent partial disability, any such amounts so paid shall be deducted from the amount of compensation payable for the healing period.

Defendants have requested the industrial commissioner review that portion of the deputy commissioner's decision disallowing a credit for overpayment of healing period benefits in the amount of $7,825.74 and that he allow such a credit toward the award for permanent partial disability benefits so that the claimant will not be unjustly enriched. Defendants contend such payments were made in good faith in reliance upon the doctors' reports and claimant's statements, and the insurance carrier should not be penalized for voluntarily making said payments before a determination was made as to when healing period should be terminated.

Defendants arguments and excellent brief are most persuasive. However, the industrial commissioner is not clothed with equity powers nor does the commissioner have the right to determine what the general assembly should have done but rather what they did do.

Prior to July 1, 1976, an employer or insurer could have a credit against the permanent partial disability payments for any overpayment of healing period. The amendment, perhaps inadvertently, allows only a credit against the healing period for temporary total disability payments. The law does not specifically provide for credit for overpayment of healing period of benefits against permanent partial disability benefits. Since the legislature specifically provided for such a credit when a permanent total disability is involved [§85.34(3)] 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.

THEREFORE, the decision of the deputy with regard to credit for overpayments of healing period benefits against permanent partial disability benefits is upheld.

WHEREFORE, credit is not to be allowed for overpayments of healing period benefits against permanent partial disability benefits.

* * *

Signed and filed this 29th day of August, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

BRUCE CARMEN,

Claimant,

vs.

COMFORT HEATING & AIR CONDITIONING,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Bruce Carmen, the claimant, against his employer, Comfort Heating and Air Conditioning, and the insurance carrier, Insurance Company of North America, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on August 26, 1977.

* * *

The issues to be determined herein are whether the claimant sustained an injury which arose out of and in the course of his employment with the defendant, and, if so, the existence of a causal relationship between that injury and the alleged resulting disability as well as the nature and extent of that disability.

There is sufficient credible evidence in this record to support the following findings of fact, to wit:

Claimant, age 54, on August 26, 1977 suffered a myocardial infarction which he alleges in his petition arose out of and in the course of his employment with the defendant-employer. Defendants, in their answer, deny this allegation.

Mr. Carmen testified that he has an eleventh grade education and received no special training in any field while in school. He has worked at a variety of jobs, all primarily in the furnace repair and installation field. As his

career progressed, he received on-the-job experience in this area.

In 1972, while in the employ of Fegley Colonial Heating and Cooling, claimant suffered his first myocardial infarction. He was off work as a result for 14 months and received workers' compensation benefits based on a disability rating of 25 percent of the body as a whole. This amount was commuted by order dated June 15, 1973. Claimant returned to work at the Wierch Store and later at the South Sioux City Foundry.

In 1975 claimant entered into the employ of the defendant, Comfort Heating and Air Conditioning. While working for the defendant-employer claimant did various types of sheet metal work including making furnace ducts. He also was involved in tearing out and replacing old furnaces. This task involved lifting and hauling old furnace parts and hauling the new and installing same. He describes himself as being in good physical shape when he started with the defendant-employer indicating that he could do all the work required of him. Claimant testified that while working for the defendant-employer in the warm weather, he would occasionally experience cramps in his arms and chest when doing heavy lifting. This discomfort would last five to ten seconds and be relieved when he relaxed. During the summer of 1977 claimant experienced the aforedescribed cramping sensation.

Continuing on direct examination claimant stated that on August 22 or 23 he, along with other employees, began a job tearing out an old furnace. A sledge hammer was used to break up the old furnace and pieces, weighing from ten to 40 or 50 pounds, were then carried out. Claimant stated he helped break up and carry out the old unit. During this dismantling process he experienced the familiar cramping sensation and rested to relieve the discomfort. Claimant continued to work on this project through August 26. On that date claimant arrived at the project and began putting in cold air ducts. This required claimant to work with his arms extended over his head and arm pain developed as he was working. He sat down when the pain started and began working again when it stopped. After three hours of this work claimant returned to the shop, ate lunch and began making sheet metal fittings. He then alleges he lifted and moved a condensing unit weighing 118 pounds. He stated he immediately noticed chest pains which did not dissipate when he rested. Claimant was permitted to go home and on the way stopped at the Eagles Club and drank some whiskey under the assumption this might help his situation, which it did not.

Claimant was hospitalized on August 26, 1977 under the care of Dr. Bramlett Murphy and remained hospitalized for four weeks. He was released to go back to work after 14 months and is presently employed by the defendant-employer. When he returned to work he was paid the same compensation as when he left.

Mr. Carmen states he is now unable to lift as much weight as prior to his attack and cannot exert himself. Mr. Carmen stated he spends most of his time off watching television and gardening and does some fishing and hunting.

On cross-examination claimant admitted he stated in his deposition he picked up a compressor, not a condenser, and that it weighted 60 to 80 pounds. His testimony at the hearing is admittedly the first time he mentioned a condenser weighing 118 pounds. He admitted he has done heavy work all his life, however, he states that the work for defendant-employer did not ordinarily require heavy exertion or heavy lifting.

Claimant now is paid more money in wages by the defendant-employer than he made previously. He admitted that between the first and second attack he experienced cramps, arm pain and chest pains. He further admitted with regard to the August 23 furnace installation project that he had done all of that type of work before including the sledge hammer work, lifting and carrying and that it was not unusual for his employment. He also previously had moved new furnaces in for installation and lifted furnace coils weighing 25 to 30 pounds. He also had installed duct work before and stated this is generally a two man job. The duct work is in five foot lengths and weighs about 15 pounds.

Claimant admitted giving a statement to the defendant-insurance carrier on September 13, 1977 in which he never mentioned lifting a compressor. Claimant agreed with the content of the statement that he was cutting out fittings from pieces of sheet metal in the shop all during the day of the second attack. This was the normal type of work claimant did for the defendant-employer. The statement indicates that claimant was not having chest or arm pain on the date of his attack. Claimant admitted he would have known the facts of the incident better on the date of hearing and that it is correct. The statement itself was not introduced into evidence.

Claimant admitted that he had picked up condensers and compressors before for the defendant-employer without any difficulty. Claimant also stated he gave his physician a full history of the second attack.

Prior to this attack claimant smoked a pack and one-half of cigarettes per day but discontinued this habit after the attack. Prior to the second attack he drank a 12 pack of beer per day or four or five shots of whiskey daily. This activity has also been discontinued.

Defendants' exhibit A is the time records of the claimant covering the period July 11, 1977 through August 18, 1977. Those time cards reflect that claimant spent a substantial amount of time in the shop making items for later installation.

Virgil Fowler testified on behalf of claimant. He has been in the heating, cooling and air conditioning business in the Sioux City area for 15 years. This witness stated he would not hire claimant in light of his physical limitations. The defense objection lodged as to this witness's testimony concerning whether similar companies in the community would hire claimant is sustained as it lacks proper foundation. On cross-examination the impact of this witness's prior testimony was substantially diminished when he admitted that there were a variety of light duty jobs in the furnace business which in his opinion claimant could perform.

Additional testimony was received from claimant to the effect that claimant can do everything now he did before his second attack except heavy lifting. He is happy working for defendant-employer and does some supervisory work now. He admitted that early in the morning of the second attack he had no chest or arm pain. Any discomfort he had the day before was gone. However,

on that date, when he was putting up duct work, his arm ached. He also stated that he picked up a condensing unit that had a compressor contained in it. Normally it is a two man job to pick this unit up but he had done it alone before. He further states he would not lift this heavy a weight in his nonwork environment. He admits that he did not tell his treating physicians about the lifting incident upon admission to the hospital.

Bramlet Murphy, M.D., is the treating physician in this case. He describes claimant's injury in the surgeon's report dated September 23, 1977 as "acute myocardial infarction with pulmonary embolus." That report reflects that this physician was not aware of any accident bringing on the attack. Dr. Murphy referred claimant to Michael S. Chandra, M.D., a cardiologist, for cardiac evaluation. The history recited in Dr. Chandra's report of December 27, 1977 reflects that claimant had a prior myocardial infarction and suffers from angina. Claimant underwent a right and left heart catheterization under the direction of Dr. Chandra on January 12, 1978. The catheterization indicated a "60% lesion of the left anterior discending [sic] coronary artery at its origin."

Dr. Murphy's history taken from claimant on August 26, 1977 indicates:

> History—the patient is a 51 year old white male who noted some chest pain in the early morning and this continued throughout the day. He works as a furnace repairman. As he continued to work the chest pain got progressively worse and he presented in the emergency room and was directly transferred to CCU and EKG showed acute inferior MI. The patient was having a lot of chest discomfort but did get some Morphine IV and he has felt better since that.

Claimant was evaluated at the Creighton University Cardiac Center and Syed M. Mohiuddin, M.D., reports his impression of that exam as:

a. Previous myocardial infarction.
b. Angina pectoris.
c. Ventricular arrhythmias, exercise induced.

Robert C. Larimer, M.D., in a report dated June 7, 1979:

> It would appear to me that Mr. Carman's [sic] second heart attack unquestionably provided damage over and above that residual which he had from his first attack, and that presently he must be considered to have an additional 25% permanent partial disability over and above the previous disability. According to Dr. Murphy's history on the 8/26/77 admission, Mr. Carman [sic] developed chest pain while working on the morning of 8/26/77, and had increasing pain while he tried to continue work during the day, until he finally gave up, and was brought to the emergency room by ambulance, arriving at 3:25 P.M. This would indicate to me that the myocardial infarction did appear while he was working, and therefore should be considered job related. Mr. Carman's [sic] activity is clearly quite limited; he can walk about the shop floor, supervising and performing very light jobs of bending and cutting sheet metal, etc., as would be required of a worker in his field. Once again, I feel that Vocational Rehabilitation and job retraining would be of considerable assistance in his situation.

Dr. Michael S. Chandra again reports in a letter dated September 29, 1979:

> Based on all of the above information it is my opinion that Mr. Bruce Carmen should not engage in strenuous activity or any type of work which demands extremes of effort and physical exertion. He, however, should be able to do any type of work or activity which does not demand extremes of exertion.

The first mention in any medical record or report of claimant's lifting the condenser or compressor appears in Dr. Ronald A. Draur's report of June 11, 1980. He indicates:

> There is no question that Mr. Carman [sic] did indeed suffer a myocardial infarction (heart attack) on 8/26/77, and it would appear to be of moderate-to-large size according to the blood tests. There is also no question that it occurred while he was on the job. However, Mr. Carman [sic] told me that he was *not* performing an unusual amount of exertion at the time of onset of the most severe and persistent chest pain that resulted in his hospitalization. He readily admitted that lifting the compressor was an exertion equivalent of something that he might ordinarioy [sic] do. Therefore, the issue of causality seems to me to be more a point of interpretation of the law rather than an issue of medical fact. It would appear to me that a relationship between his work duties and his heart attack exist, at least temporally [sic].

The nature of the injuty [sic] was a myocardial infarction, i.e., death of heart muscle cells due to insufficient blood supply to meet the needs of the heart cells. However, this occurred by a combination of excessive demand for blood supply to meet the needs of the heart cells. However, this occurred by a combination of excessive demand for blood (and oxygen) by those heart cells (reflecting the work he was performing), and the inability of his narrowed arteries to meet those demands. The narrowing of Mr. Carman's [sic] arteries was not related to his work, but rather, to hardening of the arteries (the disease process known as arteriosclerosis, whose causes are unknown), as documented by the coronary arteriogram made by Dr. Chandra. The extent of his injury was a moderate-to-large myocardial infarction as documented by the rise in serum enzyme levels to about 6½ times the normal values.

The disability resulting from this heart attack is moderately difficult to assess, and is probably best judged by this treadmill performance since that lends some objectivity to the evaluation. Using this

most recent treadmill performance as a guide, Mr. Carman's [sic] exercise was limited by his having achieved satisfactory test levels according to his age-predicted heart rate. This test showed none of the classic "ischemic" (insufficient blood supply) changes. However because of the occurrence of multiform ectopic ventricular prematurities it would seem to be in his best interests to limit his activities so that his heart rate would not exceed 120 beats per minute. This ought to be the equivalent of about 6 METs of energy-requiring activities. (Please see the enclosed list of occupational activities that might be considered "safe" for this level).

You might refer to this same list for considering what type of work Mr. Carman [sic] is capable of doing at the present time in view of his heart condition. In general terms, his work should be only of the light-to-moderate variety, with no lifting of weights greater than 25-30 pounds for short periods of time.

Robert Larimer, M.D., again reports on July 7, 1980 to claimant's counsel that:

This letter is to acknowledge our conference of this date at which Mr. Carman [sic] was present to discuss the report of Dr. Ronald A. Draur, dated 6/11/70, as you kindly provided me with a copy of this letter.

I again went over the details of Mr. Carman [sic] activity the afternoon of 8/26/77, when he had his repeat myocardial infarct. He told me that he lifted a compressor about 2 ft. x 2 ft. x 2 ft., weighing an estimated 60-100 lbs., a height of about 2 ft., to set on another compressor so that he could get past [sic] it. At this time, he developed the severe substernal pain, which was later found by Dr. Murphy to be due to the repeat heart attack.

Interestingly, two days earlier, while ripping out a furnace—removing the blower motor, grates, etc. (a lighter load but one involving considerable exertion, crawling around, etc.)—he had developed a pain "like a toothache" in his chest; he stopped work and sat down for a few minutes and the pain went away. The pain, of course, did not go away the afternoon of 8/26/77.

According to Mr. Carman, [sic] the compressor that he lifted on the afternoon in question was a good deal heavier than anything he had been lifting or moving during the several weeks preceding this incident.

According, [sic] it is my opinion that this unusual exertion was, in fact, causally related to his recurrent myocardial infarct.

It is interesting to note that neither the treating physician, Dr. Murphy, or the consulting cardiologist, Dr. Chandra, offer any testimony indicating they were aware of the lifting incident or of its effect in terms of causation of claimant's heart attack.

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 293 (Iowa 1979).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 26, 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 the course of" can be said to relate to the time and place, or the circumstances surrounding the injury. These circumstances must be employment circumstances. *Sister M. Benedict v. St. Mary's Corp.*, 255 Iowa 347, 124 N.W.2d 515. The "arising out of" requirement can be said to be a requirement that the employment must be the "cause" of the injury in the sense that the injury must result from the employment. *Volk v. International Harvester Co.*, 252 Iowa 293, 106.

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.*, 216 Iowa 724, 274 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. * * * *

Thus a heart attack may be compensable pursuant to the Iowa law. See also *Sondag v. Ferris Hardware*, 220 N.W.2d 903 and citations, particularly *Littell v. Lagomarcino Crupe Co.*,. 235 Iowa 523, 17 N.W.2d 120 (1945). In *Sondag*, now Chief Justice Reynoldson noted the parallel reasoning of the *Littell rationale and that presented by Professor Arthur Larson at 1A Larson's Workmen's Compensation Law* Section 38.83.

In *Sondag*, Justice Reynoldson quoted, with apparent approval, the rationale which was germane to Larson's reasoning. The succeeding paragraphs also contain pertinent language:

In heart cases, the effect of applying this distinction would be forthright:

If there is some personal causal contribution in the form of a previously weakened or diseased heart, the employment contribution must take form of an exertion greater than that of nonemployment life. This is similar to the New York "wear and tear" rule. Note that the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person.

If there is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the collapse as a matter of medical fact is adequate to satisfy the legal test of causation. This is the heart-case application of the actual risk test: This exertion in fact causally contributed to this collapse.

In both situations, with or without prior personal weakness or disease, the claimant must show that medically the particular exertion contributed causally to the heart attack.

This is clearly a situation where the claimant had a preexisting heart condition. The facts are undisputed that he had a prior myocardial infarction some years prior to the second attack. The facts further indicate the presence of angina.

In this jurisdiction a claimant with a preexisting circulatory or heart condition has been permitted, upon proper medical proof, to recover workmen's compensation under at least two concepts of work related causation.

In the first situation the work ordinarily requires heavy exertion which, superimposed on an already defective heart, aggravates or accelerates the condition, resulting in compensable injury. See: *Littell v. Lagomarcino Grupe Co.*, 235 Iowa 523, 17 N.W.2d 120 (1945), *Sondag v. Ferris Hardware*, 220 N.W. 903 (1974).

The claimant has not attempted to prove in the case, *sub judice*, the theory of compensability set out in *Littell, supra*. His entire theory of recovery is based in the alleged specific incident contained in the position of lifting an air conditioner compressor weighing 80 pounds.

In the second situation compensation is allowed when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a preexisting diseased condition, results in a heart injury. See: *Suyon v. Swift and Co.*, 229 Iowa 625, 295 N.W.185 (1940). See also *Sondag v. Ferris Hardware, supra*.

There is no dispute herein that claimant did indeed suffer a myocardial infarction on August 26, 1977. There are, however, in the opinion of the undersigned deputy, too many inconsistencies in the testimony of the claimant to find that he sustained his burden of proof under the aforecited case law.

There is no recital of the specific lifting incident in any of the hospital records (claimant's exhibit 4). Nor does Dr. Murphy, the treating physician, or Dr. Chandra, his consulting cardiologist, mention the incident. Neither of the individuals offer any opinion as to causation or the extent of disability other than Dr. Chandra's opinion that claimant should not engage in strenuous activity.

Claimant admitted to a statement shortly after August 26 wherein he did not mention the lifting incident. He also admitted to a better knowledge of the facts on that date than on the hearing date. Prior to hearing and in his pleadings claimant indicated he lifted a compressor weighing 60 to 80 pounds but at the hearing he testified it was a condensing unit weighing 118 pounds. He acknowledged at the hearing that this was the first time he mentioned the condensing unit or weight thereof.

The aforequoted quoted report of Dr. Draur clearly indicates claimant advised him he was not performing any unusual amount of exertion at the onset of the most severe pain. Dr. Larimer, on the other hand, specifies the compressor claimant lifted on the date of the attack was heavier than anything he had recently lifted or moved.

It should be noted there is no expert testimony contained herein that reflects claimant's continuation of his work duties after the onset of the infarct. See *Sondag v. Ferris Hardware, supra*.

WHEREFORE, it is found:

That claimant failed to sustain his burden of proof and did not establish that the myocardial infarction of August 1977 arose out of and in the course of his employment.

THEREFORE, it is ordered:

That claimant shall take nothing from this proceeding.
That the costs of this action are taxed to the defendants.

* * *

Signed and filed this 27th day of February, 1981.

E. J. KELLY
Deputy Industrial Commissioner

RUTH F. CASTLE,

Claimant,

vs.

MERCY HOSPITAL,

Employer,

and

ST. PAUL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision in which it was determined she was entitled to healing period and permanent partial disability compensation.

* * *

The issues on appeal are the nature and extent of the claimant's disability, the length of the hearing period, the contested expenses incurred by claimant at Mayo Clinic, and the accuracy of the claimant's and carrier's records of workers' compensation payments.

Claimant, seventy years of age, is a widow with two adult children. She has a B.S. degree in institutional management and equipment and has worked in that field most of her life, except for the years her children were young.

Claimant began employment at Mercy Hospital as a dietary supervisor and dietician on June 12, 1976. On August 29, 1974, she sustained fractures of her left hip and left wrist when she was struck by a loaded food cart, thrown into the air and landed on her left side with her left hand under her hip. Claimant was released from the hospital on September 28, 1974, after her hip and wrist were surgically repaired by Marvin Dubansky, M.D. A total hip arthroplasty subsequently was required and was performed on October 10, 1974. Claimant began to experience pain within two days following this surgery. She testified that she is in constant pain twenty-four hours per day. She can barely walk and is unable to perform even simple chores.

Claimant periodically saw Dr. Dubansky for check-ups. She continued to complain of pain, but Dr. Dubansky noted x-ray examination of the hip and wrist looked "good." On January 31, 1975 and February 20, 1975, claimant's left hip was injected with Xylocaine and Celestone Soluspan to help relieve the pain.

In a letter dated April 28, 1975 to the insurance company Dr. Dubansky stated that he didn't feel claimant could return to work at that time and never to a job on her feet. Claimant continued to complain of left hip problems and in August 1975 complained of pain in both hips and of her right knee "going." Dr. Dubansky noted claimant had some evidence of degenerative arthritis not caused by her fall, but the fact that she was having to work harder to walk might be making "some laten arthritis complain some" [sic]. In January 1976 claimant additionally began to experience swelling and soreness in her left wrist.

In a report dated March 16, 1976, Dr. Dubansky estimated a 20 percent physical impairment of the body as a whole and a 5 percent physical impairment of the left upper extremity. On June 7, 1976 after receiving Iowa City reports, he estimated a value of 22 percent of the body as a whole.

Claimant was examined at University Hospitals Orthopedic Clinic on April 20, 1976 and the Rheumatology Clinic on April 2, 1976. X-rays showed degenerative changes of the lumbosacral spine and of the right hip and no abnormality around the hip prosthesis on the left side. Wrist and knee x-rays showed diffuse and severe osteoporotic changes secondary to disuse.

Claimant was next examined by A. Suzanne Morstad, M.D., a physical medicine and rehabilitation specialist. Dr. Morstad's impression was degenerative joint disease of the right hip, post-op total hip arthroplasty on the left with hip pain and mild carpal tunnel syndrome. In a report dated July 21, 1976 Dr. Morstad stated that claimant was unable to return to work because of difficulty walking and pain associated with standing or sitting for long periods of time. Dr. Morstad noted that at that time claimant had some mild decrease in the amount of pain since beginning physical therapy.

On the basis of joint motion alone Dr. Morstad gave claimant a 35 percent total body disability. However, because of pain secondary to claimant's degenerative changes and impaired body mechanics, Dr. Morstad felt claimant was totally disabled for any type of competitive employment.

Dr. Morstad recommended an intensive orthopedic examination at Mayo Clinic. Upon examination at Mayo claimant was found to have severe degenerative joint disease of the right hip and underwent a total right hip arthroplasty on May 18, 1977. An injection of the left trochanteric area with Celestone and Xylocaine was also administered.

Claimant was again seen at Mayo Clinic in August 1977 with symptoms of back pain radiating to her hips and buttocks. X-rays showed evidence of degenerative joint disease of the lumbar spine.

Claimant's left hand symptoms were evaluated at Mayo Clinic in December 1977. An EMG showed no evidence of carpal tunnel syndrome. Claimant's wrist was treated with an injection. R. D. Beckenbaugh, M.D., stated that x-rays showed degenerative changes that were commonly seen in women not related to injury. He stated in a March 24, 1978 report that he would suspect these changes might be related to claimant's 1974 accident if the 1974 x-rays were negative, but he did not have the 1974 x-rays for comparison.

In a report dated August 12, 1977, Charles H. Gutenkauf, M.D., claimant's family physician, stated that claimant complained of arthritic pain in the neck and shoulders and discomfort in her right leg. In 1968 she complained of pain in the ankles, wrists, and left hip. In June 1969 claimant reported to Dr. Gutenkauf that she had seen a doctor because of arthritis of her right hip. Claimant reported taking medication in February 1970 for her low back ache. On July 27, 1971 she complained of right hip pain, knee pain, and hypertrophic changes in the fingers.

Dr. Gutenkauf noted in an examination on October 23, 1973 that claimant complained of constant low back ache. His impression was "osteoarthritis of the lumbar spine and the hips." Dr. Gutenkauf's impression on June 9, 1976 was that claimant had "mixed arthritis, primarily osteoarthritis, aggravated by trauma."

Claimant worked part-time from August 18, 1975 until June 20, 1976. She ceased working due to continuous pain.

Exhibit M was stipulated to as a partial record of the compensation paid to claimant. Claimant testified that she kept a photocopy of every compensation check received and also noted on her calendar the period of time

each check covered. Exhibit N is claimant's comparison of her records with those of the carrier. Claimant's records demonstrate that she was underpaid by $882.82. Defendants contend that they erroneously paid $848.10 of the Mayo Clinic expense and believe they are entitled to a credit in this amount.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 29, 1974 is the cause of the 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at that time of a subsequent injury is not a defense. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" so it results in a disability found to exist, she is entitled to compensation to the extent of the injury. *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).

Dr. Gutenkauf indicates in his reports that claimant experienced problems with her right hip prior to the injury on August 29, 1974. However, Dr. Gutenkauf does not express an opinion concerning whether claimant's preexisting problems were worsened or aggravated by the work-related injury.

Dr. Dubansky's report of August 5, 1975 notes that at that time claimant had degenerative arthritis not related to her fall. However, his statement that "[i]t could be that the fact that she is having to work a little harder to walk and do things put a little strain elsewhere and is making some laten arthritis complain some" [sic] establishes only a remote possibility that claimant's degenerative arthritis was aggravated by her injury.

Neither do the reports of Dr. Morstad nor the reports from Mayo Clinic establish any connection between claimant's right hip problems and her injury.

Claimant has produced no medical evidence which establishes the probability that a causal relationship exists between claimant's right hip condition and the injury. There was no showing that a preexisting condition was aggravated by the injury. Neither was there a showing that her right hip problems were caused by or directly traceable to the August 29, 1974 injury, or caused by the condition caused by the injury. Therefore, it is determined that claimant's right hip condition is unrelated to the August 29, 1974 injury.

Iowa Code §85.34(1) refers to healing period compensation paid for an injury causing permanent partial disability. Healing period compensation is paid until the employee has returned to work or competent medical evidence indicates that recuperation from the injury has been accomplished, whichever comes first. Recuperation occurs when it is medically indicated that either no further improvement is anticipated or the employee is capable of returning to substantially similar employment. The claimant returned to work part-time for a short period, although it was not substantially similar to that in which she was engaged at the time of her injury. However, the medical reports indicate that no further improvement of claimant's condition as a result of her injury was anticipated.

That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond the point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

On July 21, 1976 Dr. Morstad found that claimant had some mild decrease in pain from physical therapy. In a report dated April 28, 1977 Dr. Morstad noted that this improvement had been minimal and therapy was discontinued on October 7, 1976 due to lack of progress. Although claimant continued to receive therapy after July 21, 1976 her condition did not improve. It was at this point that there was no medical anticipation of further improvement. Recuperation was accomplished and healing period terminated.

To give the carrier credit for payments they made to Mayo Clinic on claimant's behalf, which they now contend to have been erroneous, would not put in the hands of the claimant weekly benefits to which she is entitled. Although the treatment claimant received at Mayo Clinic was primarily for conditions not related to the injury, it is reasonable to assume that some treatment was received for conditions related to the injury. Defendants have paid $848.10 on the Mayo Clinic bill. This is 14 percent of the claimed expenses at Mayo Clinic. As defendants had resisted claimant's application for alternate care to be provided by Mayo Clinic, it can be assumed that this amount was their contribution to the examination and treatment at Mayo Clinic.

The discrepancy between what weekly benefits were paid by the insurance carrier and received by the claimant are noted in exhibits M and N. At the review-reopening hearing it was indicated that discrepancies should be worked out by counsel. This was further suggested in a letter from this commissioner on May 15, 1979. Reviewing the exhibits it would appear there are no discrepancies between the payments and the receipts but that there are unexplained lapses in payment made by the carrier. This is not to say that the payments which were made by them as indicated in exhibit M were not in fact made, but there is insufficient explanation as to why lapses in payments exist.

According to the record claimant returned to work part-time on August 18, 1975 and discontinued work on June 20, 1976. Claimant is owed full healing period compensation at a rate of ninety-seven dollars per week from August 30, 1975 through August 17, 1975. She is also entitled to the full healing period compensation from the time she ceased working on June 21, 1976 until the termination of her healing period on July 26, 1976. During claimant's part-time employment healing period must be paid based upon a proportionate percentage of the time

she worked. In the weeks during this period in which claimant did not work, she should receive a full week's benefits.

Claimant's disability is to the body as a whole and must be evaluated industrially and not merely functionally.

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 failed to demonstrate the causal relationship between her injury of August 29, 1974 and her right hip problems and therefore, is not entitlted to compensation for any disability relating to the right hip problems.

Dr. Dubansky rated claimant's disability as a result of the fractures as twenty-two (22) percent of the body as a whole on June 7, 1976. Dr. Morstad's rating of thirty-five (35) percent and her further indication that claimant was totally disabled for any type of competitive employment was apparently upon claimant's total limitations which are only partially related to the injury.

Claimant is educated and experienced as a food supervisor. She was able to engage in her former occupation on a part-time basis for a period of time. It was the development of additional problems unrelated to the injury which produced her inability to continue her employment. Nevertheless, claimant does have some inability to engage in employment for which she is fitted as a result of the injury she received.

Therefore, based upon only that disability which is causally related to the August 2, 1974 injury, it is determined that claimant is fifty (50) percent industrially disabled as a result of that injury.

Therefore, it is determined that claimant is fifty (50) percent industrially disabled as a result of the August 29, 1974 injury.

WHEREFORE, it is determined:

That claimant has proven by a preponderance of the evidence that she is entitled to healing period and permanent partial disability compensation.

That claimant has not proven a causal relationship between her right hip condition and her August 29, 1974 injury.

That healing period terminated on July 21, 1976 when claimant showed a slight decrease in pain.

* * *

Signed and filed this 26th day of August, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

RUTH F. CASTLE,

Claimant,

vs.

MERCY HOSPITAL,

Employer,

and

ST. PAUL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

In the appeal decision filed August 26, 1980 the date June 12, 1976 found on page 1, paragraph 4, line 2 should read June 12, 1967.

The date August 2, 1974 on page 5 in the sixth full paragraph, line 2 should read August 29, 1974.

* * *

Signed and this 27th day of August, 1980.

ROBERT C. LANDESS
Industrial Commissioner

CHESTER CAYLOR,

Claimant,

vs.

LUCAS COUNTY, IOWA,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a proposed review-reopening decision in which he was denied compensation, and from all prior orders and rulings filed. The issues on appeal are whether a causal connection exists between claimant's right knee condition and the work-related injury of October 21, 1976, whether the right leg condition has worsened since the October 21, 1976 injury and whether all prior orders and rulings should be upheld.

* * *

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

Claimant alleged that "personal bias against the issues presented and the efforts of [claimant's] counsel on behalf of his client" has been established. Claimant, therefore, requested that the industrial commissioner and the deputy commissioner be disqualified and be replaced by a special hearing officer.

A review of this office's records reveals no evidence of any pattern of decisions which suggest personal bias of either the industrial commissioner or the deputy industrial commissioner with respect to the issues claimant presented or which might undermine the efforts of claimant's counsel. It is true that a number of attorneys previously employed by this agency are currently engaged in private practice and appear before this agency. However, the industrial commissioner's records reflect the fact that previous agency involvement of these attorneys bears no relationship to the decision making process of this agency.

WHEREFORE, it is found:

That claimant failed to demonstrate that a causal relationship existed between his right knee condition and the October 21, 1976 injury.

That claimant failed to sustain his burden of proof that his right leg condition had worsened.

THEREFORE, it is ordered:

That claimant takes nothing from these proceedings.

* * *

Signed and filed this 26th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Remanded.

DONALD LEE CHASE,

Claimant,

vs.

TRANSCON LINES,

Employer,

and

TRANSPORT INDEMNITY INSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling

Claimant has filed a motion to dismiss defendants' appeal. An arbitration decision awarding claimant benefits was filed in this matter by the deputy industrial commissioner on September 9, 1980. Defendants' notice of appeal was filed October 8, 1980. Claimant filed a motion to dismiss the appeal as it was not timely filed. Iowa Code §86.24 states "[a]ny 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 85 or 85A may appeal to the industrial commissioner in the time and manner provided by rule." Industrial Commissioner Rule 500—4.27 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 clearly states that the appealing party has twenty days following the day in which the deputy commissioner's decision, order or ruling is filed in which to file a notice of appeal with the commissioner.

Even if there was good cause for the belated appeal, this commissioner could not allow such appeal. Section 17A.15(3) provides "When the presiding officer makes a proposed decision, that decision then *becomes the final decision* of the agency *without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule*. (Emphasis supplied)

The Iowa Supreme Court in *Barlow v. Midwest Roofing Co.*, 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) stated:

> 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 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, the commissioner has no jurisdiction to hear an appeal when the time prescribed for filing the appeal has passed. The commissioner is limited to the exercise of those powers prescribed in workers' compensation law. He cannot extend his jurisdiction to include matters expressly excluded by this law.

The deputy industrial commissioner's decision was filed on September 9, 1980. The twenty day period prescribed in 4.27 expired September 29, 1980. The notice of appeal was not filed until October 8, 1980. Therefore, the appeal was untimely since it extended past the twenty day period required by the rule.

Based upon these considerations, defendants' appeal must be dismissed.

WHEREFORE, it is found that defendants' appeal was not timely filed.

THEREFORE, it is ordered that defendants' notice of appeal be dismissed.

* * *

Signed and filed this 4th day of November, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

WAYLAND CLAY,

Claimant,

vs.

PRIESTER CONSTRUCTION,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Defendants, Priester Construction and Employers Insurance of Wausau, have appealed from a proposed arbitration decision wherein claimant was awarded compensation for temporary total industrial disability, plus related medical expenses.

* * *

The issues remaining on appeal are whether claimant sustained an injury arising out of and in the course of employment and whether claimant gave defendant-employer sufficient notice pursuant to Iowa Code section 85.23.

Claimant was employed by defendant-employer as an apprentice cement finisher. Claimant testifield that he was injured on October 3, 1979 when he fell in wet gravel attempting to get out of the path of an approaching front loader. Claimant stated at the hearing that in the fall he struck his left side and experienced immediate pain along his belt line. At dispute are the activities of the claimant and the circumstances surrounding the October 3, 1979 accident. Testimony of the witnesses at the hearing fails to provide any clarity. Testimony of the witnesses at hearing was also vague and conflicting as to whether claimant reported the injury to his supervisors on October 3, 1979.

Claimant consulted Raymond Dasso, M.D., a Rock Island orthopedic surgeon, on October 5, 1979. Dr. Dasso diagnosed claimant's conditions as severe discongenic disease of the L-4, L-5 disc space, severe degenerative arthritis of the lower spine, and a lumbosacral myofascial strain. Again, the testimony of claimant and Dr. Dasso was in conflict as the history given to Dr. Dasso on the October 5, 1979 visit.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 3, 1979 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).

The test of whether an injury arises out of employment is whether there is a causal connection between the conditions under which the work was performed and the resulting injury; whether the injury followed as a natural incident of the work. *Musselman v. Central Telephone Company*, 154 N.W.2d 128 at 130 (1967).

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

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

Claimant need not prove that an employment accident be the sole and proximate cause of the injury, but only that the injury is directly traceable to an employment incident or activity. *Langford v. Keller Excavating and Grating, Inc.*, 191 N.W.2d 667 (Iowa 1971).

The record establishes that claimant had a record of back troubles preceeding the October 3, 1979 incident. The presence of a preexisting condition, however, does not negate the fact that a claimant's complaints were work related and therefore compensable.

While the circumstances surrounding the incident of October 3, 1979 might be in question, it is none-the-less made clear by the reports of Dr. Dasso and Steven R. Jarrett, M.D., that claimant suffered from a work related injury.

It is equally clear that the claimant has fully recovered from the October 3, 1979 injury and is able to work without restriction. Claimant was released for work without restriction by Dr. Dasso on March 10, 1980. In his report of March 14, 1980, Dr. Jarrett stated that claimant was able to perform his normal job without difficulty. In his deposition, Dr. Fellows also reported that claimant was fully recovered and that there was no permanent residual disability or impairment of physical functioning as a result of the October 3, 1979 injury.

The only issue which remains is whether defendant-

employer received proper notice of the October 3, 1979 injury as required by Iowa Code section 85.23 which reads:

> *Notice of injury-failure to give.* Unless the employer or his representative shall have actual knowledge of the occurrence of an injury, or unless the employee or someone on his behalf or some of the dependents or someone on their behalf shall give notice thereof to the employer within fifteen days after the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if such notice is given or knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced thereby, and then only to the extent of such prejudice; but if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice; but unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed.

The claimant has the burden or proving notice by a preponderance of the evidence, *Almquist, supra.* While the claimant's testimony as to notice is often conflicting, defendants' evidence to lack of notice may by no means be regarded as a picture of clarity. Given this, there can be no basis for concluding that the deputy's holding of adequate notice was in error.

WHEREFORE, the holdings of findings of fact and conclusions of law of the deputy filed September 25, 1980, are adopted with expansion as the final decision of the agency.

It is found:

That on said date he sustained an injury arising out of and in the course of his employment, said injury being in the nature of an aggravation of a preexisting condition.

That adequate notice of the injury was given by the claimant.

That because of said injury, claimant was temporarily and totally disabled from gainful employment from October 4, 1979 through March 9, 1980, a period of twenty-two and four-sevenths (22 4/7) weeks.

That claimant has fully recovered as of March 10, 1980 and is able to work without restriction.

That certain medical expenses have been paid.

That pursuant to the stipulation of counsel, the rate of compensation is two hundred forty-two and 00/100 dollars ($242.00) per week.

* * *

Signed and filed this 21st day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GLORIA CLEMENT,

Claimant,

vs.

SOUTHLAND CORPORATION,

Employer,

and

TRAVELERS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Gloria Clement, the claimant, against her employer, Southland Corporation, and the insurance carrier, Travelers Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on April 6, 1978.

* * *

Issues

The issues to be determined herein are the existence of a causal relationship between the alleged injury and the resulting disability as well as the length of healing period and nature and extent of disability. At the time of hearing the defense conceded the issues of arising out of and in the course of and further indicated that notice under Code section 85.23 was not an issue.

Findings of Fact

There is sufficient credible evidence in this record to support the following findings of fact, to wit:

The claimant, Gloria Clement, age 33, was on April 6, 1978 an employee of defendant-employer, Southland Corporation.

In light of the defense counsel's concession as to the issues of arising out and in the course of the employment, it is found that on April 6, 1978 the claimant sustained an injury to her low back and neck which arose out of and in the course of her employment with Southland Corporation. At the time of injury the claimant was the manager of defendant-employer's store and as part of her duties as manager was stocking the store room when she lifted a box, fell and landed on her back on a concrete floor.

Claimant came under the care of Dr. Mark Knutson, a

chiropractor. She continued to be treated by Dr. Knutson until October 28, 1978. The claimant continued to work for the defendant-employer until the middle of May 1978 at which time she voluntarily quit her employment with this defendant. Between the date of injury and the middle of May 1978 the claimant had been demoted to the position of assistant manager and placed in another of defendant-employer's stores. She was at this time being paid $3.50 per hour. Claimant received unemployment compensation through the fall of 1978.

In December 1978 the claimant secured a manpower secretarial position at John Deere in Waterloo. She continued in this position until June 1979 when the manpower contract with John Deere terminated. The record reflects that claimant has not worked since June 1979.

In July 1979 the claimant was experiencing continuing back difficulties and consulted John R. Walker, M.D., an orthopedic specialist. After a period of conservative treatment with no significant improvement, the claimant underwent a spinal fusion on December 11, 1979. This surgery was performed by Dr. Walker.

In his deposition Dr. Walker establishes the existence of a causal relationship between the work related injury at the defendant-employer's place of business and the resulting pain, surgery and disability. This causal relationship is substantiated by the fact that the record clearly reflects that prior to the date of injury, the claimant did not have the back problems which she had subsequent to the date of injury. Dr. Walker expresses the opinion that the claimant has sustained a permanent partial disability to the extent of 20 percent of the body as a whole.

The claimant was subsequently examined, at the request of the defendant-employer, by Arnold E. Delbridge, M.D., an orthopedic surgeon. Dr. Delbridge expresses the opinion in both his report and deposition that the claimant has sustained a permanent partial disability to the extent of 24 percent of the body as a whole as a result of this work related injury and the resulting surgery to her back.

Dr. Walker has placed bending, stooping and lifting restrictions upon the claimant. Dr. Walker is basically of the position that the claimant's condition stabilized as of November 17, 1980.

Since the claimant's surgery and recuperative period, she has made application at a variety of grocery stores and convenience stores in the Waterloo area, but has not been able to secure employment. She also, upon the advise of her legal counsel, checked with vocational rehabilitation in October 1980.

The record reflects that the claimant is a high school graduate and has had some vocational technical training in the area of business and secretarial work. Prior to commencing employment with the defendant-employer, she had worked as Accounting Clerk II, a Clerk Typist I, an office manager, waitress, car hop and stocking clerk. She has had some special training for the position of office manager.

The testimony reflects that the claimant has difficulty doing her housework today and has an inability to lift and move heavy objects. Prior to the date of injury, she was able to be physically active with no restrictions. After the injury and resulting surgery, she testified to an inability to physically perform as she once did.

The claimant has expressed desire to return to some form of productive employment. She testified to difficulty in sitting in one position for an extended period of time. The record reflects that the claimant has never been paid any workers' compensation benefits for the injury in question nor has any of the medical bills been paid by the compensation carrier.

Claimant is presently receiving A.D.C. in the amount of $360. a month.

The record reflects that the claimant is single and has two children. She testified to receiving a salary of $205 as the manager for the defendant-employer during the last few weeks of her employment with them.

The record is not entirely clear as to the calculation of the appropriate rate in this case. The undersigned deputy examined the personnel records provided by counsel for the defendants and which are a part of this record, and those records indicated as of January 1, 1978 the claimant was paid $400 on a biweekly basis and as of March 31, 1978 the was paid $410 on a biweekly basis. The weekly earnings are therefore $205.00—figured according to section 85.36(2), and the applicable rate for workers' compensation benefits based on a single individual with two dependent children is $128.32.

Applicable Law

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 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. * * * *

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 (1960), and again in *Olson v.*

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). 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. * * * *

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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 6, 1978 is the cause of the 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).

Analysis

As noted earlier in this decision, the defendants conceded the issue of employer-employee relationship as well as the issue of arising out of and in the course of the employment and notice. Hence, the only issues remaining are causation as well as nature and extent of disability.

Dr. Walker is a highly qualified orthopedic surgeon and performed extensive examination, conservative treatment and eventual surgery on the claimant. He is thus given the position of the treating physician in this case and his opinion will be given the greater weight.

As noted earlier in the decision, Dr. Walker establishes the existence of a causal relationship between the claimant's work related injury, as resulting surgery and resulting industrial disability. As noted, the surgery was to claimant's back and thus the case becomes one involving an injury to the body as a whole as defined under Code section 85.34(2)(u).

Dr. Walker expresses the professional opinion that based upon a reasonable degree of medical certainty, the claimant has sustained a permanent partial disability to the extent of 20 percent of the body as a whole.

It is also noted that Dr. Delbridge, another highly qualified orthopedic surgeon who examined the claimant on behalf of the defense herein, expresses the opinion that the claimant has sustained a permanent partial disability of 24 percent of the body as a whole. Dr. Walker stated he did not disagree with the 24 percent opinion of Dr. Delbridge.

Clearly, an examination of this record reflects that the claimant was free of physical impairment to her back prior to the date of injury. The record is clear that the claimant was a highly physical, active individual prior to the date of injury. Post injury she has sustained significant discomfort and pain. She has been required to undergo a surgical procedure to her back. She testified to extensive limitation in the performance of her household tasks as well as an inability to perform physically as she did prior to injury.

Dr. Walker has placed a restriction on the claimant as far as lifting, bending and stooping.

The record reflects that the claimant is a relatively young individual being 33 years of age as of the date of hearing. She has had a variety of experiences in various jobs and appears to have some secretarial and office managerial skills which she can hopefully put to good use in the future.

The fact remains, however, that she has undergone a significant surgical intervention and both orthopedic surgeons in this case testified to a rather significant amount of impairment to her body as a whole which is partial in extent, however, permanent in nature.

The records reflects, in the opinion of the undersigned, that the claimant is fairly well motivated to find a position, but has been unable to do so thus far.

Dr. Walker is of the opinion that the claimant may have some difficulty in working in a standing position for an extended period of time, but may be able to work sitting down as time progresses.

Based on the record as a whole, the undersigned is of the opinion that claimant has sustained an industrial disability to the extent of 50 percent of the body as a whole.

Conclusions of Law

Based upon the record as a whole, it is concluded:

That the claimant was on April 6, 1978 an employee of the defendant, Southland Corporation.

That on April 6, 1978 the claimant sustained an injury to her low back and neck which arose out of and in the course of her employment with the defendant, Southland Corporation.

That there exists a causal relationship between the work related injury of April 6, 1978 and the resulting disability.

That based upon the record as a whole and taking into consideration the industrial disability of tests and considerations as set out in the case law previously cited, it is concluded that the claimant has sustained a permanent partial disability to the extent of fifty (50) percent of the body as a whole.

That the healing period in this case extends from May 15, 1978 through December 1, 1978, a period of twenty-five and five-sevenths (25 5/7) weeks, and from July 18, 1979 through November 17, 1980, the point in time in which Dr. Walker testified that claimant's condition stabilized. This is a period of sixty-nine and four-sevenths (69 4/7) weeks.

The applicable rate for purposes of workers' compensation benefits in this case is one hundred twenty-eight and 32/100 dollars ($128.32).

* * *

Signed and filed this 24th day of June, 1981.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

PAUL CLEMENT,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,

Defendant.

Appeal Decision

Defendant appeals from an arbitration decision and special appearance and from all adverse findings, conclusions, orders, decisions and rulings in connection therewith. The proposed decision determined that this agency has jurisdiction over the action pursuant to Iowa Code section 85.71. Claimant was awarded temporary total disability benefits and chiropractic expenses.

* * *

Although the defendant's appeal notice stated that it encompassed all matters contrary to its interest, the brief filed indicates that the main issue is the propriety of this agency accepting jurisdiction based solely upon the claimant's Iowa domicile. This tribunal has consistently held that jurisdiction of a claim based solely upon a claimant's Iowa domicile is proper based upon its interpretation of Iowa Code section 85.71(1). Until such time as the statute is amended or the court rules either the statute unconstitutional or the interpretation erroneous, we shall continue to interpret section 85.71(1) as conferring this jurisdiction. As to the constitutionality of the statute conferring such jurisdiction this tribunal is without authority to act.

As defendant has made reference to the briefs which were filed in *Miller v. Iowa Beef*, we shall refer to the holding in that case as precendent along with the numerous other cases on the same issue in which this defendant was a party.

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law in the ruling filed September 18, 1980 and in the arbitration decision filed February 17, 1981 are proper.

WHEREFORE, the holdings of findings of fact and conclusions of law of the ruling filed September 18, 1980 and the arbitration decision filed February 17, 1981 are adopted as the final decision of the agency.

It is found and held:

That the claimant is a domicilary of the state of Iowa.

That this tribunal has jurisdiction over this contested case proceeding.

That claimant was employed by defendant at all times pertinent hereto.

It is further found whereas the parties have agreed claimant's disability is that shown on defendant's exhibit A, the defendant is entitled to credit for the amount of compensation paid under the Nebraska law against the amount of compensation owing under the Iowa law for the same period of disability.

It is further found that the expenses for treatment at the Chicoine Chiropractic Clinic were reasonable, necessary and authorized in accordance with Iowa Code section 85.27.

* * *

Signed and filed this 29th day of June, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

SHEILA CLUBB,

Claimant,

vs.

RAWHIDE RANCH BAVARIAN MEATS, INC,

Employer,

and

DODSON INSURANCE GROUP,

Insurance Carrier,
Defendants.

This matter came on for hearing at the office of the Iowa Industrial Commissioner in Des Moines on September 18, 1980 and was fully submitted on October 20, 1980.

A review of the commissioner's file reveals that an employers first report of injury was filed on April 2, 1979 along with a voluntary payments form wherein the weekly compensation was stated to be $99.55 per week. At the commencement of the hearing the parties were unwilling to stipulate as to the rate of compensation, the parties later stipulated that payments made pursuant to the voluntary payments form were made pursuant to the memorandum of agreement. At this point claimant amended her Original Notice and Petition to include the statement that claimant was not given notice pursuant to

the dictates of *Auxier v. Woodward State Hospital School*, 266 N.W.2d 139 (Iowa 1978).

The record consists of the testimony of the claimant, Howard W. Greener, and Paul W. Clubb; the deposition of Donald D. Berg, M.D.; claimant's exhibits 1, 2, 3, 4, 5, 6 and 7; and defendants' exhibits A, B, C, and D.

The issues for determination are whether claimant is entitled to further compensation for the injury of January 29, 1977 and at what rate.

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

Claimant sustained an injury arising out of and in the course of her employment on January 29, 1977 when she hurt her lower back when she fell while holding a box of hamburgers. She was, at the time, employed as a salesperson in defendant-employer's retail outlet. She reported the injury and was told that she should be treated by Puangtong Jutabha, M.D. although claimant desired to see a chiropractor from which she had previously sought treatment. Dr. Jutabha treated claimant with Robaxin and Buffadyne for lumbar strain. She was treated by the chiropractor. Claimant continuted to work with restrictions until February 9, 1979. During the intervening time she was advised to get a full release "from a specialist." Accordingly, claimant quit working and saw Donald D. Berg, M.D., an Ottumwa orthopedist, on February 19, 1979. The history taken at that time indicates that claimant had injured herself in July of 1978. At that time, claimant had right lower back pain. X-rays were normal. Physical examination revealed that claimant was tender to palpation in the right lumbar spine area and paraspinous muscles adjacent to the dorsal spine and right lower back area. The neurovascular status of her lower extremities was normal. His recommendation was that claimant do flexion exercises, take Norgesic Forte, and to return to work in about a week if claimant had improved. By February 26, 1979 claimant had improved, although she was still having pain. He recommended that claimant return to work on March 5, 1979 with a 30 pound weight limitation. The "return to work slip," signed by Dr. Berg, contained no weight restriction (claimant's exhibit 6). A collateral letter to the adjusting company reflects that the limitation was mentioned. Dr. Berg's diagnosis was that claimant had sustained a lumbosacral strain. Claimant, however, was not permitted to return to work by supervisory personnel. Claimant again saw Dr. Berg on April 9, 1979 at which time she was given a 50 pound weight limitation for 6 months. Claimant never did return to work because the employer apparently would never consider returning her to work unless she has a "100% release." At about this time, claimant received communication from the insurer that her compensation would be cut off in a week. Claimant applied for, and received, unemployment benefits for a period of six months, commencing in June 1979.

Dr. Bert continued to see claimant and she was still having problems as late as February 1980 and July 1980. She was complaining of right sciatic pain and at first felt she had a 5 percent permanent partial impairment to the body as a whole, which rating was later lowered to 3 percent.

There was some evidence that claimant played in a recreation softball league in the summer of 1980. This was successfully rebutted by claimant.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 29, 1979 is the cause of the 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).

Based on the forgoing principles, it is found that claimant has established her claim. The evidence as submitted indicates that claimant sustained an injury arising out of and in the course of her employment. Although claimant was treated for a prior back problem, Dr. Berg makes the necessary causal connection which is borne out by the facts. So also, has claimant established her burden as to permanency.

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, presently age 31, has a GED. Her experience includes working on a farm and working as a nurse's aide. She has not worked since the injury. Based on the principles of the industrial disability, it is found that claimant is disabled to the extent of 20 percent of the body as a whole.

Claimant's entitlement to healing period compensation is the next issue to be discussed. Defendants paid 10 6/7 weeks of compensation, representing a period of February 9, 1979 to April 29, 1979. However, the notice given to claimant was not furnished to the deputy industrial commissioner. This is also coupled with the fact that claimant qualified for unemployment compensation effective June 17, 1979. The record, however, indicates that claimant's permanent partial impairment rating decreased as of July 10, 1980. This shows some improvement in claimant's condition until that time. Therefore, healing period compensation will be extended through July 10, 1980, entitling claimant to a total of 62 5/7 weeks of healing period compensation. The defendants will not receive credit for unemployment compensation previously paid.

The last item which shall be decided is the rate of compensation to be paid claimant. The record indicates that on January 1, 1979 claimant's salary decreased for $800.00 a month to $600.00 a month. Thus it would appear that for the thirteen weeks prior to the injury the claimant's gross income was somewhere between the two amounts. Four weeks were incurred in January 1979 (29/31 x $600.00) at $561.00, all December 1978 at $800.00, all of November 1978 at $800.00, and two days of October 1978 (2/31 x $800.00) or $52.00. This totals to $2313.00 for the thirteen weeks prior to the injury. This is a gross weekly wage of $178.00. Claimant is married and has three minor

children, (5 exemptions), entitling her to be compensated at the rate of $123.08 per week.

WHEREFORE, it is found:

1. That claimant was employed by defendant-employer on January 19, 1979.

2. That on that date claimant sustained an injury arising out of and in the course of her employment.

3. That because of said injury claimant is entitled to healing period compensation for a period of sixty-two and five-sevenths (62 5/7) weeks.

4. That because of said injury claimant sustained a twenty (20%) percent permanent partial disability to the body as a whole.

5. That certain medical expenses have been incurred, which should be paid.

6. That claimant should be compensated at the rate of one hundred twenty-three and 08/100 dollars ($123.08) per week.

THEREFORE, defendants are ordered to pay claimant sixty-two and five-sevenths (62 5/7) weeks of healing period compensation at the rate of one hundred twenty-three and 08/100 dollars ($123.08) per week.

Defendants are further ordered to pay one hundred (100) weeks of permanent partial disability compensation at the rate of one hundred twenty-three and 08/100 dollars ($123.08) per week.

Defendants are further ordered to pay claimant the following approved medical expenses, to wit:

Donald D. Berg, M.D.	- $189.00
Mileage	
(60 miles at $.20 per mile)	
(160 miles at $.18 per mile)	40.80

Defendants are to receive credit for healing period already paid.

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa.

Defendants will file a final report upon payment of this award.

* * *

Signed and filed this 28th day of January, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

**KITTIER LEE COCHRAN,
BY HIS NEXT-BEST FRIEND
AND PARENT, GARY COCHRAN,**

Claimant,

vs.

WINTERSET HYBRIDS,

Employer,

and

**FARM BUREAU MUTUAL
INSURANCE COMPANY,**

Insurance Carrier,
Defendants.

Decision on Hearing on Varied Motions

On December 18, 1980 another deputy industrial commissioner set the following matters down for oral argument:

BE IT REMEMBERED that on November 6, 1980, after issues having been joined, claimant filed a request for admissions as well as a motion to produce.

Be it further remembered that on November 6, 1980 defendant Farm Bureau Mutual Insurance Company filed a motion to dismiss based upon an allegation of a lack of coverage and that on November 17, 1980 defendant Winterset Hybrids filed its answer to 15 interrogatories, and that on November 25, 1980 defendant Farm Bureau Mutual Insurance Company reviewed its motion to dismiss and rquested oral arguments.

Be it further remembered that on December 1, 1980 defendant Winterset Hybrids filed interrogatories 1 — 11 on the claimant together with a request for production of documents to which the claimant responded. On December 8, 1980 claimant filed a motion to amend the petition together with a resistance to the defendant Farm Bureau Mutual's motion to dismiss as well as a motion to compel defendant Winterset Hybrids to answer the interrogatories, and on December 8, 1980 a resistance to motion to compel was filed by defendant Winterset Hybrids to which a resistance was filed.

At the time of the oral arguments, on December 29, 1980, the parties agreed that the only matters that had not previously been resolved or were in the process of being resolved were the question of coverage (motion to dismiss by defendant-carrier and subsequent filings) and the sufficiency of defendant-employer's answers to interrogatories 4 and 12 propounded by the claimant (claimant's motion to compel and subsequent filings). The matter of the claimant's motion to amend the petition must be ruled upon formally despite the partial obvious adoption of the caption change by the parties and on the December 8, 1980 order. These three matters will be addressed in separate divisions.

Division I

Review of the filings and consideration of counsel's arguments regarding the issue of whether the defendant-employer was insured by defendant-carrier on the date on injury reveals:

(1) The date of injury is August 6, 1979.

(2) The motion to dismiss filed November 6, 1980 contended that defendant-employer had been issued a standard workers' compensation and employers' liability policy for the period from March 14, 1978 to March 14, 1979. ITEM 2 on the attached Exhibit A, which was "Part B Standard Workers' Compensation And Employers' Liability Policy Declarations," stated that the policy period extended from March 14, 1978 to March 14, 1979, "12:01 A.M. standard time at the address of the insured as stated herein." The same time period was specified on the pre-policy change Part B.)

(3) Pursuant to a November 19, 1980 order by another deputy industrial commissioner, defendant-carrier on November 25, 1980 refiled the motion to dismiss and attachments with an affidavit by the vice-president of defendant-carrier's company stating that the affidavit's Exhibit A, a duplicate of the second Part B and a sample "Workmen's Compensation Policy," was a true and accurate copy of the policy issued to defendant-employer for March 14, 1978 to March 14, 1979, 12:01 A.M. standard time.

(4) On December 8, 1980 the claimant filed a resistance to the motion to dismiss disputing for lack of sufficient information any policy period or failure to renew alleged in the motion. At the time of the arguments, the parties seemingly agreed that defendant-employer did not renew the policy. No evidence to the contrary has been presented. Instead claimant's argument was that there was no showing the defendant-employer ever received timely notice of the termination of the policy. (A May 2, 1979 letter sent from the defendant-carrier to the defendant-employer in which defendant-employer was advised his policy had expired March 14, 1979, 12:01 A.M., C.S.T., was discussed but not offered on behalf of any party at that time. Claimant further pointed out that said letter violated Paragraph 15 of the policy which specified that written notice of cancellation by the company shall be given at least ten days in advance of the effective cancellation date. (The paragraph says nothing about the expiration of a policy.)

(5) Defendant-employer joined in claimant's resistance and argument at the time of the oral arguments. Defendant-carrier requested 48 hours to file additional proof in support of the motion. It was agreed that the record would remain open for cross-examination of defendant-carrier's affiants within a short but reasonable time after defendant-carrier's proof was to be filed. The parties seemingly wanted every effort to be made to resolve the present dispute so that the hearing on the issue of employer-employee relationship and scheduled for January 20, 1980 could proceed.

(6) On December 31, 1980 defendant-carrier filed an offer consisting of the May 2, 1979 letter mentioned above in Paragraph 4, with an affidavit by an underwriter for the defendant-carrier indicating that such letter was prepared and mailed to defendant-employer on May 2, 1979, and a copy of a premium notice indicating "Renewal Premium 3-14-79" and due date of "4-10-79," with an affidavit by the manager of multiple line processing indicating that such premium was prepared and mailed to defendant-employer on March 21, 1979.

(7) As of January 14 neither claimant nor defendant-employer had requested the right to cross-examine but defendant-employer filed a resistance to the motion to dismiss. Said resistance amounts to a brief and argument in support of defendant-employer's theory. Defendant-employer's theory and supporting case law were not persuasive in that the present matter concerns the expiration coverage.

In *Hoefler v. Farm and City Insurance Company*, 193 N.W.2d 538 (Iowa 1972) the Iowa Supreme Court found the defendant-carrier was not required to give notice under section 515.80 of the Iowa Code where the policy was written for a definite and certain period. Defendant-carrier had argued that the notice statute had no application to the expiration of a policy but rather applied to the suspension, forfeiture or cancellation of a policy. Defendant-carrier further argues that the case was governed by Rule 9, Rules of the Insurance Department, which provides that a contract of insurance automatically expires, without giving of notice, at the end of any specific term of duration therein provided. The *Hoefler* Court (at page 540) reasons:

> The question here is one of policy construction. We have stated that insurance policies should be construed as an ordinary man would understand the language used and not as a technical insurance expert would interpret it. We have also said that doubt or ambiguity in an insurance policy is to be construed strictly against the insuror and liberally in favor of the insured. [Citations.]
>
> [1] However, this does not mean that we may undertake to make a new policy for the contracting parties whenever we deem that course desirable. We can apply the rules of construction only when there is ambiguity or uncertainty in the contract terms. [Citations.]
>
> [2, 3] We find no ambiguity or uncertainty here. The policy was written for a definite and certain period. Both starting and terminating dates were given with certainty. There could be no possible misunderstanding about the term of the policy or its expiration date.
>
> Plaintiff relies strongly, as did the trial court, on the provisions under which the policy could be renewed. We fail to see how the language relied on here can be said to have enlarged the term for which it was written. If this provision did anything, it emphasized to the policy holder that his policy expired on a date certain and that affirmative action by *both* parties was necessary to continue the coverage thereafter. We cannot agree with the trial court that the policy provided for "automatic" renewal.
>
> We hold the policy issued by defendant was for a "specific term of duration" and that, under rule 9 of the Insurance Department's regulations above referred to, defendant company was not required to give the notice provided for in section 515.80. * * * *

[See also *Gibson v. Milwaukee Mut. Ins. Co.*, 265 N.W.2d 742, (Iowa 1978) at page 744.]

WHEREFORE, it is hereby found that Part B of the policy in question was certain and definite as to the period of coverage. Notice of expiration was not necessary.

THEREFORE, defendant-carrier's motion to dismiss claimant's action as against the defendant-carrier is hereby sustained.

Division II

Interrogatory number 4 and defendant-employer's answer read as follows:

> INTERROGATORY NO. 4: Identify each expert witness which the Employer may call at trial of this matter and identify each expert witness which the Employer has consulted regarding the incident as alleged in Claimant's Petition who Employer will not be calling to trial in this matter and, in addition:
>
> a. Give the occupation of each such expert witness;
> b. Designate the area of specialization of each such expert witness;
> c. Give the education and experience of each such expert witness;
> d. Provide a bibliography of the written works that the expert witness believes to be authoritative on the subject of any testimony he would give;
> e. Provide a bibliography of the written works that the expert witness believes to be authoritative on the subject of any testimony he would give;
> f. Give the exact manner in which the witness became familiar with the facts of this case;
> g. Give a summary of the subject matter of the prospective testimony of each such expert witness;
> h. State the facts and opinions to which each expert witness will testify: [sic]
> i. Give a summary of the grounds for each opinion of each such expert witness;
> j. State whether each such expert witness has examined the scene of the incident as alleged in Claimant's Petition or has examined the Claimant for injuries he sustained as alleged in Claimant's Petition and, if so, state:
>
> (1) The date and time;
>
> (2) The observation made;
>
> (3) Describe the procedure used in examination;
>
> (4) Identify the tests of analysis, conducted by each such expert;
>
> (5) Give the purpose of each test, analysis, or examination;
>
> (6) Give a summary of the results or conclusions derived from each test, examination, analysis, or observation.

ANSWER: The employer has no intention at the present time of calling an expert witness. However, if he does at a later time decide to call an expert witness, other than himself, he refuses to answer the interrogatory because it requests substantially more information than the claimant is entitled to discover under the Iowa Rules of Civil Procedure.

In his motion to compel, claimant asserts that interrogatory 4

> . . .is a permissible interrogatory and even though the Employer has indicated in its answer that he has "no intention at the present time of calling an expert witness" the Employer then goes on to say that he refuses to answer the interrogatory. The Commission should enter an order requiring the Employer to answer the interrogatory in the event that the Employer has intentions of calling an expert.

In his resistance to the motion to compel, defendant-employer contends:

> INTERROGATORY NO. 4:
>
> Without a special order and provisions for payment fees and expenses, the Claimant is entitled only to the following information with regard to expert witnesses under Iowa Rule of Civil Procedure 122:
>
> "(d) Trial preparation—experts. Beyond what is provided in rule 133, discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision "a" of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (1) (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision "d" (3) of this rule, concerning fees and expenses as the court may deem appropriate."

The information requested by the Claimant in Interrogatory No. 4 goes well beyond which is provided for in Iowa Rule of Civil Procedure 122. However, in the event that the claimant [sic] does call an expert, the claimant [sic] will provide the information set forth in the above quote about this expert as a supplement to its previous answer to

> Interrogatory No. 4. In addition, Kenneth Callison agrees to supply the names, addresses and areas of specialization of any experts that he does consult who will not be called as witnesses at the hearing of this action, and the claimant can seek such information as he wishes by following the procedure for making a showing of exceptional circumstances under Iowa Rule of Civil Procedure 122. No such experts have been contacted to date.

Claimant's motion to compel anticipates that the defendant-employer will not comply with the relevant Iowa Rules of Civil Procedure if and when the defendant-employer decides to call an expert as a witness or consults an expert for trial preparation. The defendant-employer's answers suggest neither event has occurred and hence the motion to compel is without merit *at this time*.

With regard to interrogatory number 12, the interrogatory and answer are as follows:

> INTERROGATORY NO. 12: If it is your contention or allegation that the Claimant or any other person or entity by any act or omission caused or contributed to cause the alleged occurrence, please state in detail the act or omission that caused or contributed to the cause of the alleged occurrence.
>
> ANSWER: Claimant Kit Cochran was not employed, and had no business on the machine in question, at the time that he was injured. In addition, he was violating specific safety procedures described in the answers to interrogatories, which are incorporated herein by this reference.
>
> The employer specifically refuses to give any further answers to this Interrogatory, and refuses to be completely bound by this answer to this Interrogatory in any later action, because the requested information would not be admissible evidence in the above-entitled action, and would not be reasonably calculated to lead to the discovery of admissible evidence in a workers' compensation action such as this one.

Claimant contends in his motion to compel that:

> Employer has apparently failed to provide all the information called for in Interrogatory No. 12, as the second paragraph of said answer states "The Employer specifically refuses to give any further answer to this interrogatory and refuses to be completely bound by this answer to this interrogatory in any later action...". If there is further information available to the Employer which he has not included in the interrogatory for any reasons, he should concisely state his objection or provide the information as requested.

Defendant-employer responded to his resistance:

> Kenneth Callison should not be required to commit himself to any position in what might later develop into a civil lawsuit, rather than a worker's [sic] compensation action, with regard to the cause of the claimant's alleged injury. A brief statement of this cause has been supplied, and since a specific determination of cause is not necessary in a worker's [sic] compensation action, the answer to this interrogatory would not be relevant or reasonably calculated to lead to the discovery of relevant evidence.

The dispute arises over the second paragraph of defendant-employer's answer which alludes to expectation of the development of a non-workers' compensation. What "further answer" is being refused is not clear. Nor obviously can it be determined whether such further answer would be material and relevant. However, in the opinion of the undersigned, the first paragraph of defendant-employer's answer to interrogatory 12 sufficiently answers the particular question asked. (Answer to interrogatory number 6 indicates that oral instructions were given regarding the safety procedures mentioned in answer to interrogatory number 12.)

THEREFORE, claimant's motion to compel as to interrogatories number 4 and 12 is hereby overruled.

Division III

On December 8, 1980 claimant filed a motion to amend his petition (to change the caption). The change consists of renaming the defendant-employer from "Winterset Hybrids" to "Kenneth R. Callison, d/b/a/ Winterset Hybrids; Winterset Hybrid."

No resistances have been filed by the other parties. Defendant-employer has signed pleadings and varied filings as Kenneth R. Callison doing business as Winterset Hybrid.

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, it is hereby found that amending the petition with respect to the employer should be allowed.

THEREFORE, the caption of the petition with respect to the employer is hereby amended to read "Kenneth R. Callison d/b/a/ Winterset Hybrids; Winterset Hybrids."

Signed and filed this 15th day of January, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

COLEMAN DEAN,

Claimant,

vs.

IOWA BEEF PROCESSORS,

Employer,
Self-Insured,
Defendant.

Defendant appeals from a proposed arbitration decision and ruling on a special appearance in which this agency took jurisdiction over this contested case proceedings and awarded disability benefits and medical expenses over and above those previously paid under the Nebraska law.

* * *

Although defendant has noticed that its appeal is to cover all matters contrary to its position, the letter "brief" filed January 28, 1981 indicates that the issue is the propriety of this agency accepting jurisdiction based solely upon the domicile of the claimant. This tribunal has consistently so held and until such time as the statute is amended or the court rules either the statute unconstitutional or the interpretation erroneous we shall continue to interpret §85.71(1) as conferring jurisdiction to this agency of a claim based solely upon the domicile of the claimant being in Iowa.

As the defendant has made reference to the briefs which were filed in Miller v. Iowa Beef we shall refer to the holding in that case as precedence along with the numerous other cases on the same issue in which this defendant was a party.

Review of the findings of fact and conclusions of law of the deputies in the order filed April 12, 1979 and arbitration decision filed October 16, 1980 are proper.

WHEREFORE, the holdings of findings of fact and conclusions of law of the order filed April 12, 1979 and the arbitration decision filed October 16, 1980 are adopted as the final decision of the agency.

If it found and held:

That this tribunal has jurisdiction over this contested case proceeding.

That on June 23, 1978 claimant sustained an injury which arose out of and in the course of his employment while working at the defendant's premises in Dakota City, Nebraska.

That said injury caused the claimant to be disabled from work from August 7, 1978 through February 12, 1979, a period of twenty-seven and one-sevenths (27 1/7) weeks.

That as a result of said injury, claimant sustained a disability to the body as a whole in the amount of twenty percent (20%) for industrial purposes.

That claimant's proper rate of weekly compensation for both healing period and permanent partial disability is one hundred sixty-five and 21/100 dollars ($165.21) per week.

That the defendant is entitled to a credit, per the stipulation, for the previous payments made pursuant to claimant's exhibits C and D.

That the defendant shall also be liable for the medical bill of Plaza Urological, P.C., in the amount of one hundred two dollars ($102.00).

* * *

Signed and filed this 20th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

DEBRA DURANT,

Claimant,

vs.

ALAMO FRIENDSHIP INN,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

This matter came on for hearing at the Linn County Juvenile Court Facility in Cedar Rapids, Iowa, on November 12, 1980 and was fully submitted on January 8, 1981. Later documents were submitted but will not be considered.

A review of the commissioner's file reveals that an employer's first report of injury was filed on November 27, 1978. The record consists of the testimony of the claimant, Sterling D. Durant, and Leanne Thormann; the depositions of Bruce L. Aprague, M.D. and Earl Y. Bickel, M.D.; claimant's exhibit 1 through 8; and defendants' exhibit A.

Issues

The issue for determination is whether claimant sustained an injury arising out of and in the course of her

employment which resulted in her entitlement to compensation.

Facts

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

Claimant was employed by defendant-employer on November 5, 1978. She was a housekeeper in the motel complex who worked a 35 hour week at $3.00 per hour. she also performed duties as a laundress and head housekeeper and was paid separately for each of these jobs.

On November 5, 1978 claimant fell while she was pushing a laundry cart and struck her left arm. She informed her employer and was told to go to the emergency room of the University Hospital in Iowa City. She was complaining of pain in the left elbow. X-rays of the left arm taken on November 7, 1978 demonstrated a small chip fragment adjacent to the proximal radius anteriorly along with some irregularity along the capitellum suggesting osteochondritis. On November 8, 1978 claimant was seen by Bruce Sprague, M.D., an orthopedic surgeon, who observed mild swelling of the left elbow. There was diffuse tenderness to palpation about the elbow, and no definite tenderness over the radial head. She had full range of extension and flexion with slight limitation of supination. Dr. Sprague thought that claimant had sustained an osteochondritis dissecans of the capitellum. The fragment appeared to be fresh with sharp edges which was suggestive of a recent fracture. Claimant was treated conservatively with a posterior splint. Claimant did not return to work and was seen again at the University Hospital on November 20, 1978 when claimant was complaining of left wrist pain. Conservative treatment was continued. On December 6, 1978 the splint was removed. The elbow pain was still present. Physical examination demonstrated tenderness to palpation and tenderness with extension and pronation over the posterior aspect of the elbow down the extensor surface of the forearm, and lateral aspect of the wrist. Range of motion of the elbow joint demonstrated about 15 degrees extension, full range of motion with flexion, and approximately 45 degrees supination. Claimant was instructed on range of motion exercises. Claimant returned on January 31, 1979 and reported that she had returned to work (this was at variance with claimant's testimony) and was still complaining of pain. X-rays taken at this time showed no change in that claimant had two post traumatic ossicles about the ligament of the radius. The x-rays did not reveal evidence of aseptic necrosis of the humeral capitellum. Claimant continued to be treated by Dr. Sprague through July 7, 1979 when physical examination revealed that range of motion (flexion) of approximately 5 degrees to 145 degrees. She had marked tenderness with full extension and was slightly tender about the posterior aspect of her elbow. X-rays showed disappearance of the post-traumatic ossicles around the radial ligament.

Claimant stopped going to Iowa City because of the distance involved and saw a Dr. Breindle four times before being referred to Earl Y. Bickel, M.D., a Cedar Rapids orthopedist on May 12, 1980. She was complaining of tenderness throughout the whole elbow joint. X-ray findings, AP and lateral and some oblique views of the left elbow showed that he had some joint mice present, mice meaning loose bodies. A splint was applied on June 6, 1980. On July 3, 1980 a cast was applied, and when these conservative measures proved to not relieve the symptoms, claimant was hospitalized. On July 30, 1980 an excision on the radial head and chondromalacia of the radial head and capitellus was noted. Her arm was put in a sling and she was discharged on August 1, 1980.

On September 5, 1980 claimant saw Dr. Bickel and reported that she had fallen at home. Dr. Bickel thought this fall was innocuous. In surgery Dr. Bickel found that claimant had traumatic osteochondritis dissecans of the left humerous.

Claimant was instructed on therapy at home. Dr. Bickel felt that claimant was still recovering and that she would reach maximum recovery "in a short period of time." She was not, in his opinion, able to return to work. He was not ready to assign permanency at the time of his deposition although he was sure that there would be some permanent partial disability. Dr. Sprague had previously assigned a 3 percent functional impairment to the left arm.

Although claimant at first testified that she did not return to work, the deputy's notes on cross-examination reveal that claimant tried to work for a couple of weeks, but left. In support of the conclusion that claimant did return to work, Dr. Sprague's notes and the testimony of Leanne Thormann reveals claimant did return to her employment for about two weeks. However, there are no employment records present to substantiate a resolution of this controversy. It will therefore be held that claimant returned to work from December 1, 1979 through December 15, 1979.

As far as causation is concerned, the following testimony is relevant. Dr. Sprague testified as follows:

Q. So to sum up, Doctor, would it be correct that because of the x-ray findings and the nature of the subjective findings on examination reflecting the lack of a severe trauma to the elbow in November of 1978 it is possible that the trauma could have caused her problems, but it is not—you're not able to say it is medically probable that they caused her problems, is that correct?

A. That's a fair enough summation, legalese.

* * *

Q. All right. One more quick question. Can you say within a reasonable degree of medical certainty that what Debra Durant had was osteochondritis dissecans? We've kind of talked back and forth about the pros and cons.

A. I think probably that's what she had and then aggravated it with her injury, okay? You know, either separated the fragment at that time or separated more fragments.

* * *

Q. And it's my understanding that is is possible that the fall caused the aggravation?

A. Yes.

Q. It cannot be said because of the nature of the fall as reported and the physical findings on examination—it cannot be said that it's probable that there was an aggravation, but rather simply that it's possible?

A. Well, I think, you know, if we believe the patient's history, the representation that she started having elbow pain at the time of the fall, then probably we have to give her the benefit of the doubt and say it's probable it's an aggravation.

Dr. Bickel testified as follows:

Q. And are you able to state that the hospitalization which she had at Mercy Hospital in 1980 was as a result of the injuries which she sustained on or about the 5th day of November, 1978?

* * *

A. The answer is yes.

Applicable Law

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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 5, 1978 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).

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).

Analysis

Based on the foregoing principles, it is found that claimant sustained an injury arising out of and in the course of her employment with defendant-employer on November 5, 1978. All evidence indicates that an incident occurred on that date which aggravated a preexisting condition.

Although Dr. Sprague gave a rating of permanent partial disability, Dr. Bickel only estimated a permanent partial disability and indicated that at the time of his deposition, claimant had not reached maximum medical recuperation. Dr. Sprague did not see claimant after her surgery. Therefore, Dr. Bickel is the only opinion available with regard to claimant's later condition. This entitled claimant to healing period compensation outlined in Section 85.34(1), Code of Iowa.

Claimant has submitted medical bills for payment which should be paid.

As far as the rate of compensation is concerned, the facts indicate claimant was paid $3.00 per hour for a 35 hour work-week. Although claimant was paid in three checks for the various functions she performed, she clearly was paid for all jobs within the employ of the employer. See Section 85.61(12). Claimant was married and was entitled to take two dependents. Her gross weekly wage was $105.00 and therefore her rate of weekly compensation was $73.55.

Findings of Fact

WHEREFORE, considering all the evidence, it is found:

1. That claimant was employed by defendant-employer on November 5, 1978.

2. That on November 5, 1978 claimant sustained an injury arising out of and in the course of her employment, said injury being in the nature of an aggravation of a preexisting condition.

3. That because of said injury, claimant has sustained a permanent partial disability to the right arm which is unable to be ascertained at the present time.

4. That because of said injury, claimant was disabled from gainful employment from November 6, 1978 through November 30, 1978 and from December 16, 1978 until such time as she is able to meet the tests of Section 85.34(1), Code of Iowa.

5. That because of said injury, claimant has incurred medical expenses which should be paid.

6. That the proper rate of compensation is seventy-three and 55/100 dollars ($73.55) per week.

THEREFORE, defendants are ordered to pay unto claimant healing period compensation from November 6, 1978 through November 30, 1978 and from December 16, 1978 until such time as claimant's entitlement to healing period compensation ceases pursuant to the dictates in Section 85.34(1), Code of Iowa, at the rate of seventy-three and 55/100 dollars ($73.55) per week.

It is further ordered that when defendants have any evidence that either of the tests for the termination of healing period benefits has been met, they are to submit the evidence to claimant's counsel and this office. If the parties are unable to reach an agreement as to the cessation of healing period and amount of permanent disability, a hearing shall be requested by defendants on those issues. Giving due consideration to the prompt obtaining of rebuttal evidence by claimant, a hearing shall

be set at the earliest possible time. Defendants shall pay healing period benefits until either an agreement between the parties is reached and this office is given written notice or until defendants, with prima facie showing that healing period benefits shall cease, shall file a request for immediate hearing for a determination of the cessation of the healing period.

Defendants are further ordered to pay the following medical expenses, to wit:

University of Iowa Hospitals and Clinics	—	$ 246.47
Linn County Orthopedists	—	681.00
Mercy Hospital	—	1,065.53

Payments that have accrued shall be paid in a lump sum.

Interest pursuant to Section 85.30, Code of Iowa, is to accrue from the date due.

Costs are taxed to defendants.

A final report shall be filed upon payment of this award.

* * *

Signed and filed this 13th day of April, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

JACK DUREE,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY AND TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant, defendant-employer, and Liberty Mutual Insurance Company have appealed from the deputy's review-reopening conclusions in a proposed arbitration and review-reopening decision filed November 29, 1979, wherein claimant was awarded compensation for permanent partial industrial disability as a result of two separate injuries, permanent total industrial disability as a result of a third injury, plus related medical expenses.

* * *

The deputy did not give consideration to claimant's deposition exhibits A and B or to a waiver pursuant to Iowa Code section 85.55, holding the aforementioned to be irrelevant and immaterial. Such ruling is not disputed on appeal and therefore the deposition exhibits and waiver are not considered as part of the record here.

Claimant brought combined proceedings against defendant-employer (hereafter referred to as Firestone), Liberty Mutual Insurance Company and Travelers Insurance Company as carriers for Firestone. Claimant is seeking review-reopening for benefits as a result of an injury which occurred on October 1, 1973. Liberty Mutual was the workers' compensation insurer of Firestone until August 1, 1975 when coverage by Travelers began. Claimant and Firestone-Travelers entered into a compromise special case settlement under Iowa Code section 85.35 on September 4, 1980, for all claims arising out of injuries sustained by claimant on December 8, 1976 and in September of 1977. The appeal of claimant against Firestone-Liberty Mutual remains.

The record shows that claimant, a 53 year old man, has a long history of heavy manual labor. Claimant received his G.E.D. Certificate in 1964 and has no further academic training. He is married with no dependent children. Claimant was employed by Firestone from August 1955 until October 1977 and for several other employers intermittently during work stoppages at the Firestone facility. The various capacities in which claimant was employed by Firestone have all involved physical labor of varying difficulty.

Claimant has suffered from back problems dating back to December 1956 when he fell from his garage roof. In 1960, Robert Hayne, M.D., performed a laminectomy removing claimant's disc at the L5-S1 level. At this time, claimant was given a 10 percent impairment rating by Dr. Hayne. Claimant received medical clearance to return to work on June 22, 1960, but was often off work, hospitalized, or receiving treatment for back pain thereafter. Claimant, however, testified at the hearing that he had no further problems until 1970.

On July 23, 1970, claimant suffered a muscular strain in his back while working at Firestone. The injury occurred when claimant twisted his back as a result of stepping into a shallow hole while lifting heavy rubber strips. As a result of that injury, claimant was hospitalized for one month and released for work January 26, 1971. The progress notes of F. Eberle Thornton, that the injury of July 23, 1970 was an aggravation of a preexisting lower back problem.

On October 1, 1973, claimant suffered another back injury which is the subject of the present dispute. Claimant testified at the hearing that on the above date he was ordered to throw scrap rubber without the normal assistance of another employee. When claimant attempted to do so, his lower back "popped". On October 31, 1973 Dr. Hayne performed a repeat laminectomy at the L4-5 level. In his report of November 27, 1973, Dr. Hayne stated that claimant's injury was the result of an October 1, 1973 accident.

Liberty Mutual filed a memorandum of agreement, paying claimant temporary and permanent partial disability of 30 percent of the body as a whole as a result of the October 1 1973 injury. In his deposition Dr. Fellows

calculated claimant's impairment to be 30 percent of the body as a whole after the October 1 accident; taking into consideration and including claimant's previous impairment of 10 percent.

On April 2, 1974, claimant was referred to Dr. Fellows for treatment of claimant's persistent back pain. Dr. Fellows, in his report of October 9, 1978, found claimant to be suffering from a "disc space inflammatory reaction" arising out of the October 31, 1973 surgery for which claimant was successfully treated. In the October 9 report, Dr. Fellows states that he later found claimant to have developed a vertebral "fusion" at the L4-5 disc space, the location of two prior laminectomies.

The October 9, 1978 report of Dr. Fellows repeats the finding of 30 percent impairment of the body as a whole as a result of the October 1, 1973 injury. No medical reports of any other doctor exist in the record addressing the amount of claimant's disability as a result of the October 1, 1973 accident; the testimony of Dr. Fellows at hearing remains unrebutted. Dr. Fellows' findings of 30 percent impairment of the body as a whole served as the basis for a memorandum of agreement between claimant and Firestone-Liberty Mutual filed March 13, 1976.

Claimant was released to return to work in March of 1975, but was maintained on light work restrictions on the recommendation of Dr. Fellows: This light work at Firestone consisted of repetitious movement over long periods as opposed to heavy lifting required of non-restricted employees. Claimant testified that this light duty did cause continued pain in his lower back, but that he was, none-the-less, able to work satisfactorily. Dr. Fellows gave a full work release for claimant to return to his former position at Firestone in June of 1976. Claimant testified that this full release was given at his request.

Claimant's next reported injury occurred on December 8, 1976 while claimant was working with another employee lifting heavy tire treads. According to claimant's testimony, he and the other employee were throwing the treads up into a collection tray approximately five feet off the floor. Claimant states that he slipped, again twisting his back. Claimant further testified that after the December 8, 1976 accident, he was transferred back to the same light duty that he had been on after the previous injury. Claimant testified at the hearing that he didn't consult Dr. Fellows about the December 8, 1976 accident until January 31, 1977.

Claimant's next injury occurred sometime in early September of 1977. [The record fails to specify the date of claimant's last reported injury.] According to claimant's testimony at the hearing, claimant had just completed his daily shift and was in an employee locker room cleaning up. Claimant stated that he felt himself suddenly fall without cause or warning. Claimant twisted his back in the fall attempting to avoid striking wooden pallets stacked in the area. According to claimant's testimony at the hearing, this September 1977 injury resulted in an aggravation of his lower back pain.

Claimant consulted Dr. Fellows on September 16, 1977, approximately a week and a half after the latest injury. Dr. Fellows treated claimant conservatively with corset immobilization and back exercise.

In his deposition and again in his report of October 9, 1978, Dr. Fellows rated claimant's present functional disability at 40 percent of the body as a whole as a result of all injuries including the December 8, 1976 and September 1977 injuries. This new rating by Dr. Fellows represented a 10 percent functional disability increase as a result of the December 8, 1976 and September 1979 accidents from the previous 30 percent disability rating.

Claimant testified thast he has not worked since September of 1977. Claimant further testified at the hearing that he has had increased pain in his lower back and thighs since the September 1977 accident. Additionally, claimant states that around June or July of 1977, his left leg would "give way" causing him to fall "for no reason at all." Claimant has not sought any type of work since September of 1977 feeling that the aforementioned complaints make even the lightest work activity impossible for any length of time.

Firestone medically discharged claimant in September of 1977 upon the recommendation of Dr. Fellows. Dr. Fellows reported to Firestone, later to claimant's attorney, and in deposition that claimant, as of the September 1977 accident, was no longer capable of even light manual labor. Dr. Fellows warned in his October 9, 1978 report that if claimant continued to use his back in any prolonged activity, claimant would have increasing lower back problems including "rather extensive lumbar fusion."

The claimant has the burden of proving by a preponderance of the evidence that the injuries he received on October 1, 1973, December 8, 1976 and in August or September of 1977 are 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).

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.

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).

An "employer is liable for all consequences that naturally and proximately flow from the accident." *Oldham v. Schofield & Welch*, 222 Iowa 764, 266 N.W. 480; 269 N.W. 925 (1936).

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

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

Based upon Dr. Fellows' findings, the deputy found that due to the 1973 injury, claimant sustained a 30 percent permanent partial disability of the body as a whole. However, the deputy also found that the claimant's December 8, 1976 injury resulted in an additional permanent partial disability rating of 30 percent and that the latest injury of September 1977 had permanently and totally industrially disabled claimant within the meaning of Iowa Code section 85.34(3).

On appeal claimant asserts that Liberty Mutual's liability should be 50 percent of the permanent total award.

Liberty Mutual filed a memorandum of agreement for liability arising out of the October 1, 1973 accident. The permanent weekly rate for this memorandum was set at $84.00. However, the weekly rate for the permanent disability award as of 1977 was $159.50.

This agency has found no explanation why claimant would base an appeal for 50 percent of the total permanent industrial disability award pursuant to Iowa Code section 85.34(3) based upon a 1973 weekly rate when the deputy's decision gave the whole permanent total award based upon a higher 1977 weekly rate.

Claimant contends that because the October 1, 1973 accident contributed one-half of the ultimate 40 percent functional impairment rating of claimant, it would be a more equitable allocation of liability to hold Liberty Mutual liable for one half of the permanent total award within the meaning of Iowa Code section 85.34(3).

Consider by hypothetical an employee who has a preexisting industrial injury which has produced a 20 percent impairment to the body as a whole, and later suffers an industrial injury with a different employer which produces an additional 20 percent impairment to the body as a whole. Consider also that the industrial disability after the first injury is determined to be 30 percent permanent partial disability and after the second is permanent total disability. If claimant's argument is followed, the second employer in the above hypothetical would then be liable for only a portion of the employee's permanent total disability and the original employer would be responsible for another portion. Following this to its illogical conclusion every episode of insult to a claimant's body would have to be taken into account and the permanent total disability apportioned amoung each, whether occupationally acquired or not, according to its contribution. Such a result is not intended by the law. It is well settled that an employer takes the employee as is. *Ziegler, supra* at 620. This must be so even if the successive injuries are with the same employer. Each injury stands alone and is responsible for its results taking the person "as is" at the time of the injury.

While an employer is responsible for the consequences of an employee's successive industrial injuries while such person is still in its employ such is not the case for the workers' compensation carrier of such employer. It is the employer who is legally responsible for an employee's injury; the workers' compensation carrier agrees to pay the bill on the employers behalf. Carriers are normally only responsible for coverage of injuries occurring during their period of coverage.

In 4 Larson Workmen's Compensation Law, section 95.00, Dr. Larson states:

> When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation . . .

Based upon the uncontroverted statements of Dr. Fellows, the deputy found claimant to be 30 percent industrially disabled as a result of the October 1, 1973 injury.

Factors considered in determining industrial disability 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.

In *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980), the court stated that it was looking for the reduction of earning capacity as well as lost earnings in a finding of functional disability. Based upon the record, the finding of the deputy of 30 percent functional disability of the body as a whole as a result of the October 1, 1973 injury was proper.

WHEREFORE, it is found:

That as a result of his injury on October 1, 1973, claimant received a permanent partial disability of thirty percent (30%) of the body as a whole.

That Liberty Mutual has paid claimant all amounts due for the injury of October 1, 1973.

That Liberty Mutual is not responsible for any contribution to the disability found to exist after subsequent injuries of December 8, 1976 and September 1977.

THEREFORE, claimant's appeal is hereby dismissed.

* * *

Signed and filed this 21st day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

PERRY J. ELSBERRY,

Claimant,

vs.

BOONE COUNTY, IOWA,

Employer,

and

NORTHWESTERN NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

This is a proceeding in review-reopening brought by Perry J. Elsberry, the claimant, against his employer, Boone County, Iowa, and the insurance carrier, Northwestern National Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on July 6, 1977.

This matter came on for hearing before the undersigned deputy industrial commissioner at Des Moines, Iowa on July 10, 1980. The record was considered fully submitted on July 24, 1980.

* * *

The primary issue in this matter is the application of the Iowa Civil Rights Act, (§601A, Code of Iowa) to the claimant's resulting industrial disability as the direct result of the injury under review. This is a case of first impression.

* * *

This record contains sufficient credible evidence to support the following statement of facts:

Claimant, age 64 and married began his career as a motor grader driver for the defendant-employer in 1969, after selling his trucking concern consisting of 15 trucks which he began in 1933. On July, 6, 1977, while attempting to lift a motor grader blade, claimant sustained a rotator cuff tear of the left shoulder. Based upon the medical opinion of John A. Grant, M.D. defendants paid claimant a healing period from July 6, 1977 until October 12, 1978, a total of 66 weeks. Again, based upon Dr. Grant's opinion, defendants are currently paying the functional impairment rating of 24 percent of the body as a whole as contemplated by section 85.34(2)(u), Code, 1977 (claimant's exhibit 4). Claimant's employment contract was terminated December 30, 1977 (claimant's exhibit 8 and 9). Hence, the issue.

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 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 apparent that the claimant has sustained his burden of proof.

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 to the case under review it is concluded that this 64 year old county road maintenance worker has sustained an industrial disability of 40 percent

of the body as a whole. Claimant is of an age and background that does realistically operate against a new vocational area, in light of his existing functional impairment.

It should be noted that the claimant requires daily self-administered physical therapy (claimant's exhibit 1) which was prescribed by Dr. Grant. Claimant testified that in order to maintain any shoulder movement, he must pull his bad arm up using his good arm through the pulley arrangement as shown in the aforementioned exhibit.

Considering all the elements of industrial disability, it is clear in this case that the functional impairment is by far the greater cause of claimant's problems. That is, the other factors, such as age, education, etc., mitigate less against claimant's earning capacity than does the plain fact of having a virtually useless right arm. Finally, when one considers the opinions of functional impairment given by Dr. Grant over the years one concludes that a rating of disability of 24 percent of the body as a whole is indeed a serious disability.

Defendants urge that the undersigned take official notice of chapter 97B and section 601A, Code, 1979 in determining this claimant's industrial disability and no consideration be given to a claimant over the age of 65.

This office is a creature of statute and in the arguments presented no statutory language in chapter 85 is cited as giving the undersigned the authority to so find. Nor is any case authority cited as bearing solely on the "age" factor.

The troublesome problem was before the Industrial Commissioner in *Becke v. Turner-Busch, Inc.*, filed January 31, 1979 where in the commissioner said, in part, as follows:

> Claimant argues that retirement at age of 65 should be disregarded in fixing industrial disabiity. Claimant's belief 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 Commissioner 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.
>
> . . .
>
> Although the Iowa Supreme Court has indicated that age is a factor to be considered in determining the 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 middleaged person with no formal education.
>
> How to apply age as a factor when a person is nearing the end of this normal 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 emnployee'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 the 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

typing 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.

WHEREFORE, after having heard and seen the witnesses and after taking all of the credible evidence into account the following findings of fact are made, to wit:

1. That the claimant sustained an admitted industrial injury on July 6, 1977.

2. That by reason of said industrial injury claimant has sustained a permanent partial disability of forty percent (40% of the body as a whole.

Claimant's exhibit 8, wherein it is shown that the defendant-employer required this claimant to accept accumulated sick leave and vacation pay in lieu of weekly workers' compensation as provided in section 85.33, Code, 1977, displays a lack of knowledge of the workings of the act. Such payments are not to be used as credit by the defendants for the healing period payments. Such vacation time and sick leave rights should be returned to the claimant.

THEREFORE, it is ordered that the defendant's pay a healing period beginning from the date of the accident until October 12, 1978 or a sixty-six (66) week period at the agreed weekly rate of one hundred forty-six and 58/100 dollars ($146.58) with credit to be taken by the defendants for forty-nine (49) weeks previously paid.

It is further ordered that the defendants pay the claimant a permanent partial disability of a two hundred (200) week duration at the agreed rate less credit for the one hundred twenty-five (125) weeks previously paid together with statutory interest.

Costs are charged to the defendants who are further directed to file a final report within twenty (20) days from the date that this decision becomes final.

* * *

Signed and filed this 15th day of September, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

JERRY FAWCETT,

Claimant,

vs.

DONALDSON, INC.

Employer,

and

THE TRAVELERS INSURANCE CO.

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Jerry Fawcett, the claimant, against Donaldson, Inc., the employer, and Travelers Insurance Co., the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred August 13, 1979 for which claimant received weekly entitlement of $195.18.

* * *

Based upon this deputy's notes, there is sufficient credible evidence contained in this record to support the following statement of facts:

Claimant, a resident of New Sharon, Iowa, age 41, with three dependent children, began his duties as a welder for the defendant-employer nine years ago.

Claimant testified that on August 13, 1979, while pulling a muffler off a conveyor belt, he noticed a popping sensation and associated pain in the neck radiating down into the right hand. He was seen by the company physician at that time, then was referred to Iowa City for evaluation. Dr. Gelman in Iowa City gave the patient injections in the posterior cervical area as well as in the right elbow. He was seen on December 11, 1979 by Dr. Robert Hayne who performed a cervical fusion at C5 and C6. A carpal tunnel syndrome was also noted on the right, and this was surgically corrected at that time as well. The patient states that prior to August 13, 1979 he never had any history of neck pain or hospitalization for that problem. There was no prior history of trauma. In August of 1980 the claimant attempted to return to work with a 50 lb. weight limit, however, after three hours, the pain in the right neck and arm became so severe that he had to discontinue working. Swelling in the right hand was also noted by the claimant at that time.

The claimant was seen a second time by Dr. Hayne; a weight reduction limit down to ten pounds was instituted. The claimant returned to work on September 9, 1980. After two hours of work he again had to stop because of swelling and pain in his right wrist as well as pain in the right shoulder and arm.

Since the time of the patient's injury in August of 1979, the patient stated that he has not noticed any significant improvement. He continues to have weakness on grasp in the right hand as well as numbness over that area. He is not able to lift his arm above the horizon. Claimant remains unable to perform acts of gainful employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 13, 1979 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*, 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 matter under review, it is clear that the claimant has borne his burden of proof.

Of particular note is the report of Robert Jones, M.D., a neurologist (defendants' exhibits 11-1), who conducted a recent medical examination of the claimant on February 10, 1981, and which reads in part as follows:

> Impression: Status post operative carpal tunnel release and anterior cervical fusion.
>
> The patient has not reached the state of maximum healing because I think he should be evaluated for a thoracic outlet syndrome on the right. It is noteworthy that he says his numbness is somewhat better since his surgeries, but the discomfort in the arm is not any better. It appears, also, that he has a complicated problem involving the thoracic outlet, and he might well benefit from resection of the first rib.
>
> In regard to gainful employment, this should be addressed after further evaluation by a thoracic surgeon.
>
> The question of functional impairment is answered by attention to the above, of thoracic outlet evaluation and its treatment. Should no further surgery be done, for some reason, I would estimate that this man has at least 15% permanent physical impairment for his neck, and another 10% for his hand and wrist which has to be related to the body as a whole, and whatever additional physical impairment from a presumed thoracic outlet syndrome.
>
> I feel that the patient's problem is causatively related to the accident at work of August 13, 1979.

WHEREFORE, after having heard and seen the witnesses in open hearing and after taking all of the credible evidence contained in this record into account, the following finding of fact is made:

That the claimant sustained an admitted industrial injury on August 13, 1979 from which he has not recovered.

THEREFORE, it is ordered:

That the defendants pay the claimant a healing period as contemplated by section 85.34(1) at the agreed weekly rate of entitlement of one hundred ninety-five and 18/100 dollars ($195.18) together with statutory interest from the date due.

It is further ordered that when defendants have any evidence that either of the tests for the termination of healing period benefits had been met, they are to submit the evidence to claimant's counsel and this office. If the parties are unable to reach an agreement as to the cessation of healing period and amount of permanent disability, a hearing shall be requested by defendants on those issues. Giving due consideration to the prompt obtaining of rebuttal evidence by claimant, a hearing shall be set at the earliest possible time. Defendants shall pay healing period benefits until either an agreement between the parties is reached and this office is given written notice or until defendants with a prima facie showing that healing period benefits shall cease, shall file a request for immediate hearing for a determination of the cessation of the healing period.

Costs are charged to the defendants.

* * *

Signed and filed this 27th day of May, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

TRAVIS FETTERS,

Claimant,

vs.

CENTRAL PAVING CORPORATION,

Employer,

and

IOWA CONTRACTORS WORKERS' COMPENSATION GROUP,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Travis Fetters, the claimant, against Central Paving Corporation, his employer, and Iowa Contractors Workers' Compensation Group, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged injury which occurred on May 5, 1980.

* * *

There is sufficient credible evidence contained in this deputy's notes to support the following statement of facts:

Claimant, aged 37, married with one dependent child, began his employment activities on Wednesday, April 16, 1980 as an end loader operator. Defendant-employer's foreman Edwin Haag, had called Iowa Job Service on Tuesday, April 15, 1980, requesting that agency to send him two equipment operators to assist him in completing

"shoulder" dirt work following the completion of road paving contract the prior autumn. (Defendants' exhibit 9.)

Claimant testified that in addition to operating the end loader, part of his duties required him to lift and roll large rocks into the end loader "bucket." This activity was necessary in order to provide a rock free surface on the newly constructed shoulders and grader ditches, built as a result of the new paving.

Claimant further testified that on May 5, 1980, while picking up a rock weighing 225 to 275 pounds, he felt his back "pop," but that he felt no pain, and continued working that day, the following day, May 6, as well as May 7. On May 8, 1980 claimant left his duties at 11:30 a.m. and then sought assistance from D. L. Musselman, D.C., on May 9, 1980, at which time claimant told the foreman, "I fell down stairs carrying a baby bed." Claimant continued his duties until defendant-employer finished the contract on May 10, 1980. Claimant, based upon continuing complaints of low back pain, sought relief from Ray Sebek, M.D.,on May 16, 1980, who admitted claimant to the Trinity Regional Hospital that day. No surgery was performed nor does Dr. Sebek feel that claimant has sustained a permanent injury. Claimant resumed gainful employment in August 1980.

The issue requiring a ruling is whether or not claimant has established by a preponderance of the evidence that the condition found by Dr. Sebek was caused by an injury which arose out of and in the course of claimant's employment.

In light of claimant's initial fabrication as to the source of his low back problem, it is concluded that his testimony be given little weight in this decision. It seems unreasonable to conclude that an episode wherein claimant felt a "popped" back while moving a 225 pound rock into an end loader would not timely be reported to the foreman. Claimant's excuse for telling the foreman that he hurt himself at home, because he wished to find full-time employment with the defendant-employer, is not well taken.

WHEREFORE, after having heard and seen the witnesses and after taking all of the credible evidence contained in this deputy's notices, the following findings of fact are made:

1. That the claimant was an employee of the defendant-enmployer on May 5, 1980.
2. That the claimant did not injure himself in the course of his employment on that day.

THEREFORE, it is ordered that the claimant take nothing as a result of these proceedings.

It is further ordered that the claimant pay the costs of these proceedings.

* * *

Signed and filed this 23rd day of June, 1981.

HELMUT MUELLERS
Deputy Industrial Commissioner

No Appeal.

DAVID C. FINCH,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants, Firestone Tire and Rubber Company and Travelers Insurance Company, have appealed from a review-reopening decision in which claimant was awarded healing period benefits, medical expenses, and mileage costs.

The issue for determination is whether a causal relationship exists between the injury of October 29, 1975 and the back disability on which claimant bases his claim.

* * *

The parties stipulated that causal connection between the back condition and claimant's injury on October 29, 1975; healing period and medical expenses were at issue in the review-reopening.

Claimant was employed by defendant-employer as a welder at the time of his injury which arose out of and in the course of his employment on October 29, 1975. That injury occurred when claimant stepped down from an electric motor platform, slipped on some grease, and fell. He struck his hip hard against the cement and felt a tearing sensation in his left knee.

Claimant continued to work although his knee was wrapped daily with elastic bandages and he received whirlpool treatments in addition to medication.

Due to continued pain and problems with his left hip and knee claimant was examined by Sidney Robinow, M.D., who operated on claimant's left knee on March 26, 1976. This operation did not result in complete recovery and a second surgery was performed on claimant's left knee on August 9, 1976 by John Albright, M.D. Claimant's testimony at the arbitration hearing indicates he experienced back pain, hip and leg pain following these two surgeries.

Claimant returned to work for defendant-employer as a jeep driver on October 4, 1978. He worked in that capacity until January 12, 1979, although he continued to experience pain throughout the back, hip, and knee.

A myelogram was performed on January 16, 1979, after Dr. Albright reconsidered the possibility that a lot of claimant's left lower extremity pain could be coming from his lumbar spine. Both Thomas R. Lehmann, M.D., whom claimant was referred to, and a radiologist interpreted the

myelogram as showing "amputation of the nerve root sleeve on the left at L5-S1 strongly suggesting a lateral disc herniation." It was Dr. Lehmann's impression at the time that all claimant's left lower extremity pain could be explained by the defect on the myelogram.

A bilaminotomy was performed at L5-S1 on March 7, 1979. No definite disc herniation was observed at that level; consequently, it was felt that a decompression by virtue of the bilaminotomy would suffice.

In his report of June 20, 1979, Dr. Lehmann states:

> Throughout the chart, it has been documented that the patient has complained of pain in his left lower extremity which at times was associated with numbness and tingling in the extremity. Although early on, all of the symptoms in the left lower extremity were soon to be related to his instability in the knee. There, subsequently, developed enough concern that the problem might be in his back that Dr. Albright decided to do a myelogram. The myelogram was read as positive by the radiologist as well as by myself. The suggestion was that there was a disc herniation at L5-S1. Inasmuch, the original symptoms of left lower extremity pain prior to his history of injury one must assume that this injury played a role in the cause or aggravation of this supposed herniated disc.

In addition Dr. Lehmann noted that from the time claimant was examined by Dr. Robinow he complained of more than knee pain; his symptoms at the onset were consistent with a radiculopathy that he presented to Drs. Albright and Lehmann.

Claimant's testimony at the review-reopening hearing indicated that he still has hip and low back pain which seems to be getting progressively worse.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 29, 1975, was the cause of the disability on which he bases his claim. *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Anderson v. Oscar Mayer and Co.*, 217 N.W.2d 531 (Iowa 1974). When a claimant sustains an injury and receives another injury based on the first injury, he must prove one of two things: (a) that the disability for which he seeks additional compensation was proximately caused by the first injury, or (b) that the second injury and ensuing disability were proximately caused by the first injury. *DeShaw v. Energy Manufacturing Co.*, 192 N.W.2d 777 (Iowa 1972). The question of causal connection is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960). On proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, cause for allowance of additional compensation exists. *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731 (Iowa 1968).

Dr. Lehmann noted in his report of June 20, 1979 that although claimant's complaints of left lower extremity symtoms were initially related to his knee instability, Dr. Albright subsequently became concerned that the problem might be in claimant's back. Claimant had not responded favorably to the two previous knee surgeries; his pain had not been alleviated. This concern prompted Dr. Albright to order a myelogram which was read as positive by both a radiologist and Dr. Lehmann. Although no definite disc herniation was observed during surgery, the disc was bulging and slightly protuberant. However, since it was believed a decompression by virtue of the bilaminotomy would suffice in claimant's case, it was decided not to do a discectomy. Dr. Lehmann stated in the June 20, 1979 report that it must be assumed that claimant's injury played a role in the cause or aggravation of this supposed herniated disc. Dr. Lehmann's statement is the only expert testimony relating claimant's back condition to his work-related injury.

Based on the foregoing principles and the evidence presented, it is determined that claimant met his burden in proving that his back disability was proximately caused by his October 25, 1975 injury.

* * *

Signed and filed this 29th day of July, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT L. FRANK,

Claimant,

vs.

EBASCO SERVICE, INC.,

Employer,

and

UNITED FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Claimant appeals from a review-reopening decision and a ruling. The review-reopening decision awarded claimant thirty weeks and three days of healing period benefits and certain transportation expenses. The ruling denied claimant's request for rehearing. The error alleged is in the extent of healing period to which claimant is entitled.

* * *

Claimant was injured in an industrial accident when his left knee was caught between a scaffold and a building on November 28, 1977. Because of complications claimant underwent an operation on March 28, 1978 for

realignment of his left patella. This procedure was performed by O. Max Jardon, M.D., at the University of Nebraska Medical Center in Omaha, Nebraska.

> . . . When he was last seen on June 29, 1978 he still had atrophy measuring 1 inch and it was verified that he had not been doing his physical therapy as prescribed. Usually a patient is started on these exercises immediately upon recovery from anesthetic and it is continued until there is no atrophy present. There is no need for further surgery and the only problem that remained was the patients' failure to do appropriate exercises.
>
> The average amount of time for an adult patient to recover from the atrophy that is present prior to surgery is approximately 3 months in most instances. It is my opinion from having examined the patient that he was not actively pursuing an exercise program as prescribed. Complaints involving the knee will continue as long as there is atrophy and the only way to alleviate this is to undertake appropriate physical exercise and this cannot be obtained by normal walking or running and so forth. It has to be a studied prescribed exercise program in order to gain hypertrophy of the quadriceps muscles.
>
> I have no idea what to do to motivate the patient to do his exercises as prescribed but would feel that this patient has had adequate time to have recovered.

In June of 1978 claimant moved to Colorado to attend a course in gunsmithing. In July, after an incident of falling in a bathtub, claimant came under the care of the University of Colorado Medical Center.

Claimant was treated three times a week at the Medical Center with progressive resistive exercises for both knees from July 28, 1978 to August 24, 1978. Frank Cenkovich, M.D., in a letter dated June 18, 1979, noted that the exercises resulted in a slight increase in strength, but that claimant still remained weak. Hospital records relating to this series of exercises indicate that claimant needed to be motivated to perform the exercises. On August 3, 1978 the claimant told the therapist that the rainy weather was hard on his knees and claimed "I don't want to get too much better until I settle with the insurance company." Notes dated August 17, 1978 indicate that claimant tolerated the traction well but needed "much encouragement" to use increasing weights in the exercise program.

In a letter dated December 21, 1978 James S. Miles, M.D., related that the claimant was seen in the orthopedic clinic on October 18, 1978. According to Dr. Miles, claimant felt his knee had not returned to normal and was discouraged by the physical therapy treatment. Upon examination Dr. Miles found that claimant had 2.5 cms. of atrophy of the left thigh and 1 cm. of atrophy of the left calf. This muscle weakness produced instability of claimant's left knee joint which resulted in claimant's complaint that the knee felt as if it "would give away."

Dr. Miles noted that the knee surgery had been performed well and that the patellar subluxation had been corrected but that claimant's muscle weakness was producing symptoms and disability. Dr. Miles emphasized claimant's need to work very vigorously in the physical therapy program and stated "I am quite certain that he will be able to build up the muscles of the left thigh and calf to the point where the knee joint should be completely asymptomatic. He then ought to be able to return to whatever type of work he desires."

Claimant returned January 17, 1979 for a progress check. At that time Dr. Miles noted that claimant "must be motivated to P.T. program." Claimant told Dr. Miles that he had been doing his exercises but examination revealed the same degree of atrophy measured at the October 1978 visit. Dr. Miles again emphasized the need for a vigorous continuous physical therapy program, stating that it did not appear to him that claimant had been performing the exercises on such a program since his surgery had been performed more than one year ago and muscles can generally be built up in six to eight weeks. Dr. Miles further stated "I do not know how to motivate someone to perform these exercises."

In July 1979 claimant slipped down a stream bank when his leg "gave out." An August 10, 1979 hospital record indicates that claimant had been performing muscle strengthening exercises at home until the stream incident. A letter from Dr. Miles dated August 6, 1979 indicates that claimant had been performing his therapy at home, but Dr. Miles did not know how much therapist supervision claimant was receiving. He advised claimant to return to the physical therapy department for such supervision. Claimant assured his cooperation.

Claimant was examined on August 10, 1979 by N. Cobble, M.D., for evaluation of left knee weakness after the slipping incident at the stream. Dr. Cobble noted that there was "vast" atrophy and that claimant failed to show evidence of improvement after eight physical therapy treatments. "It is not possible to ascertain the degree of preexisting arthritis, the degree of the patient's cooperation in his home program, or the degree of his improvement since his treatment one year prior (thirteen sessions)."

Claimant was examined in the orthopedic clinic again on August 29, 1979. Dr. Miles noted that claimant had undergone healing of his knee operation, but that claimanat had not yet reached maximum rehabilitation from the operative procedure. Quadriceps atrophy of 2 cms. was still present. Dr. Miles stated that claimant needed a "great deal" of physical therapy since he had not completely recouperated from the injury and operation. It was estimated that with a good physical therapy program and good cooperation on the patient's part, rehabilitation should be complete in three to four months.

Claimant was next seen by Dr. Miles on October 24, 1979. Claimant's complaint that his knee was still "giving out" was assessed as inadequate rehabilitation. In a letter dated December 13, 1979 Dr. Miles stated "[i]t is still my opinion that Mr. Frank must be placed on a good exercise program, and I fear very much that he is not going to be able to accomplish this himself." Dr. Miles indicated that he had urged claimant to complete a vigorous exercise program but he further noted that claimant failed to keep a return appointment in November. According to Dr. Miles, if claimant had not improved markedly at the time of the scheduled November visit he was going to refer claimant

to an athletic injury rehabilitation center. He felt claimant probably would fail to complete an exercise program without professional support.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 28, 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).

Healing period compensation is payable beginning on the date of the injury until the employee returns to work or competent medical evidence indicates that recuperation has been accomplished, whichever comes first. Iowa Code §85.33(1). The applicable portion of Industrial Commissioner Rule 500—8.3 states that recuperation occurs when no further improvement is anticipated from the injury.

In the present case Dr. Jardon stated that the average recovery period from the type of surgery and atrophy present in claimant's case is approximately three months. Dr. Miles estimate for the time required for recovery was also about three months. When claimant was examined by Dr. Jardon on June 29, 1978 his muscle atrophy measured one inch. At that time claimant verified that he had neglected to follow the prescribed physical therapy program. Claimant's left thigh atrophy measurement of .5 cms. when he was examined by Dr. Miles on October 18, 1978 showed no improvement. Upon examination by Dr. Miles on January 17, 1979 claimant continued to have 2.5 cms. of atrophy, precisely the same degree of atrophy measured previously.

On claimant's August 29, 1979 visit to the orthopedic clinic, shortly after his physical therapy sessions with Dr. Cobble, his thigh atrophy measured 2 cms. Dr. Cobble noted that there was little improvement. When the degree of atrophy was measured on October 24, 1979, claimant still showed 1.5 cms. atrophy. The assessment was inadequate rehabilitation; Dr. Miles feared that claimant would not accomplish the rehabilitation himself. Claimant neglected to keep his November appointment with Dr. Miles.

Claimant has been given approximately eighty-two (82) weeks since the date of his surgery until his last visit to Dr. Miles to rebuild his muscle strength. Between the time of his surgery and his bathtub slip in July claimant had over three months to increase his muscle strength. Nearly one year elapsed between the time claimant slipped in the bathtub and fell in the stream. At no time during these periods do medical reports indicate that claimant's degree of muscle atrophy had improved, although claimant had ample time to perform the prescribed exercises.

There is every indication that claimant's cooperation in the prescribed physical therapy programs was less than total. Dr. Miles repeatedly speaks about claimant's lack of motivation, as does Dr. Jardon. Claimant specifically told a physical therapist that he did not want his condition to improve until his case was settled.

Claimant's degree of muscle atrophy showed no improvement when there should have been some. Although none of the physicians' reports specifically state that claimant had reached maximum medical recuperation, both Dr. Miles and Dr. Jardon indicate maximum healing could be accomplished in approximately three months with claimant's cooperation. Dr. Miles, in his January 4, 1980 report did, in fact, state that "this patient has had adequate time to have recovered." Therefore, based upon the rehabilitation time period estimate, in addition to reports noting claimant's lack of motivation and cooperation, it can be inferred that claimant's medical condition cannot be expected to further improve. Claimant cannot be allowed to extend the length of his healing period for lack of improvement simply because he has repeatedly failed to fully perform the prescribed exercise program.

Had claimant engaged in the vigorous physical therapy program prescribed, he would have alleviated the muscle atrophy and the resulting leg weakness within three months following the March 28, 1978 surgery. Accordingly, claimant's healing period benefits would terminate as of June 28, 1978 when he should have reached maximum medical recuperation.

WHEREFORE, it is found:

That claimant has failed to fully cooperate in the prescribed physical therapy program through which he would have alleviated the muscle atrophy and resulting weakness.

That based upon medical evidence claimant should have reached maximum recuperation three months following his surgery.

That the sole reason for claimant's failure to further improve his condition was his noncooperation with prescribed care. That without the prescribed care, claimant's condition would not further improve and therefore recuperation was completed.

• • •

Signed and filed this 9th day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT L. FRANK,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

UNITED FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

The first full sentence on page 4 of the appeal decision filed January 9, 1981 should read, "Claimant's left thigh atrophy measurement of 2.5 cms., when he was examined by Dr. Miles On October 18, 1978, showed no improvement."

* * *

Signed and filed this 13th day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

SHARON FRIDOLFSON,,

Claimant,

vs.

ROSEWAY TRUCKING, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 14, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. This is an appeal by the employer and the claimant from that part of an arbitration decision of November 18, 1980 in which it was held that the employer had no insurance coverage in effect.

* * *

On January 27, 1980, while working as drivers for the employer, Roseway Trucking, Ralph Fridolfson and John Kaale were in a road accident in which Mr. Fridolfson was killed and Mr. Kaale was injured. On June 17 and July 18, 1980, a hearing was held in the *Kaale* case in Des Moines, Iowa, which is the correct venue [§86.17(2)]. On October 31, 1980, the deputy industrial commissioner ruled that there was no workers' compensation insurance policy in force between the employer and the Liberty Mutual Insurance Company. That result was affirmed by the undersigned deputy industrial commissioner in a final agency decision.

In the instant case, claimant filed a petition on February 20, 1980, showing judicial district 3A as the desired venue and to which defendants acquiesced. On November 17, 1980, defendant Liberty Mutual filed its amendment to answer:

> Defendant affirmatively states that, at the time of the Claimant's Decedent's death, there was in effect no policy of Workman's [sic] Compensation Insurance between the employer, Roseway Trucking, Inc., and Liberty Mutual Insurance Company.

At that same time, the Liberty Mutual filed a motion for summary judgment. The next day, November 18, a hearing was scheduled in Storm lake. The transcript shows that the hearing was colloquy between the hearing officer and the attorneys. The transcript clearly shows that claimant and the employer objected to the late filing of the answer and motion for summary judgment. Also formal resistances were filed by the employer on December 2 and the claimant on December 3.

On December 12, 1980 the deputy industrial commissioner issued an arbitration decision which sustained the Liberty Mutual's motion for summary judgment and ordered the employer to make compensation payments.

In the *Kaale* case, the facts showed that a one-year insurance policy expired and was not renewed for a number of days. During the hiatus in coverage, the injury to Mr. Kaale and death to Mr. Fridolfson occurred. Extensive evidence was taken by the deputy industrial commissioner (and reviewed by the undersigned deputy industrial commissioner) in the *Kaale* case. As stated above, as a result of that evidence, the decision favored the Liberty Mutual, which was held to have no insurance contract in force.

In the instant case, the basis of the change in answer and motion for summary judgment was that the coverage issue had been already decided and therefore was precluded as an issue in this case. (Of course, one recognizes the time squeeze experienced by the counsel for Liberty Mutual: the ruling in *Kaale* was not made until October 31, 1980, and the hearing in *Fridolfson* was just 2½ weeks away.) There was no application for a leave to amend as described in R.C.P. 88.

The employer's appeal brief describes the issue:

> The Deputy Industrial Commissioner erred in permitting Liberty Mutual Insurance Company to amend its answer and also in sustaining Liberty Mutual's motion for summary judgment.

Claimant's appeal brief states three issues:

I. Did the Deputy Industrial Commissioner err in overruling claimant's motion to strike amendment to answer and authorizing the insurance carrier to amend its answer the day before trial substantially changing the issues to be tried.

II. Did the Deputy Industrial Commissioner err when he failed to find that the defenses of issue preclusion and res judicata were not properly plead and therefore not available to the insurance carrier.

III. Did the Deputy Industrial Commissioner err in finding that no insurance coverage was available for claimant's loss of January 27, 1980, based on res

judicata and issue preclusion. That he further erred in finding that the carrier had proven the necessary elements of their defense.

The questions for decision in this final agency action, therefore, concern the late filing of the amendment to the answer, the lack of permission therefore, and the motion for summary judgment as well as the matter of issue preclusion.

The rules of civil procedure apply to the industrial commissioner in many instances. Rule 500—4.35, I.A.C. states:

> 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 commission."

R.C.P. 88 states:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires. [Report 1943; amendment 1976; amendment 1977]

R.C.P. 240 states, with respect to a motion for summary judgment:

> If motion under rule 239 is filed in an action already pending, the procedure shall be as in rule 237. Otherwise notice shall be served on the party against whom relief is sought at least ten days before the hearing thereof, stating when the motion will be filed and, in plain ordinary language, its nature and grounds, fixing the time and place of the hearing thereon. If the motion is not filed by the day specified it shall be deemed abandoned, if it is filed the court shall hear it at the time fixed in the notice without further pleadings, and give judgment according to the very right of the matter. [Report 1943; amendment 1967]

Generally, late amendments to pleadings are not favored. In *Parker v. Tuttle*, 260 N.W.2d 843, 846 (Iowa, 1977), the court states:

> Amendments to pleadings should not be allowed on the eve of trial or later if they substantially change the defense or any issue involved in the case. (Citations)

The trial court took the view that the addition of the words, "subject to his wife's approval" substantially changed the defense in this case by referring to a specific claim of defendant that could have been considered only as being ambiguously embraced in the term, "other relevant conditions", which was the phrase in the defendant's answer as originally cast and filed.

We are unable to perceive any abuse of discretion on the part of the trial court in its overruling of defendant's motion to amend his answer.

With respect to workers' compensation, in *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d, 777, 784 (Iowa, 1971), the court quotes *Coghlan v. Quinn Wire & Iron Works*, 164 N.W.2d 848, 852 (Iowa, 1969);

> "In an action of this kind in which formal pleadings are not required and which has as a goal 'rough justice—speedy, summary, informal and untechnical' Cross v. Hermanson Bros., 235 Iowa at 472, 16 N.W.2d at 618, proof of a causal connection between a known condition and an industrial accident discovered after the statute of limitations would have run, but while an application for review-reopening is pending, is properly admissible under such application."
>
> If surprise were claimed a continuance could have been granted. Of course surprise is negated in this case because both doctors, constituting all medical evidence, had made the examinations on behalf of and at the request of the employer. They knew of the second injury. It would be strange indeed if the employer did not know what the doctors it had retained were about to say.

With respect to issue preclusion, the Iowa Supreme Court stated in *Schneberger v. United States Fidelity & Guaranty Co.*, 213 N.W.2d 913, 917 (Iowa, 1973):

> To bar further litigation on a specific issue four requirements must be established:
>
> (1) The issue concluded must be identical.
>
> (2) The issue must have been raised and litigated in the prior action.
>
> (3) The issue must have been material and relevant to the disposition of the prior action, and
>
> (4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.
>
> * * *
>
> Identity of parties is not necessary to give validity to a claim of issue preclusion. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide. (Citations)

Goolsby v. Derby, 189 N.W.2d 909, 916 (Iowa, 1971) discusses the "most important factors" in the matter of issue preclusions:

> The most important factors is determining availability of the doctrine of collateral estoppel [issue preclusion] notwithstanding a lack of mutality of privity are whether the doctrine of collateral estoppel is used offensively or defensively, whether the party adversely affected by collateral estoppel had a full and fair opportunity to litigate the relevant issue effectively in the action resulting in the judgment. 31 A.L.R. 3d 1052.

Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa, 1981) holds that issue preclusion may be used offensively as well as defensively. That case also states at pp. 124-125:

> A similar position was taken by the Restatement (second) of Judgments. Under the Restatement approach, issue preclusion would properly be available in subsequent litigation by nonmutual parties under the following circumstances:
>
> A party precluded from relitigating an issue with an opposing party, in accordance with §§68 and 68.1, is also precluded from doing so with another person unless he lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in §68.1 and also whether:
>
> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined;
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
>
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;
>
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
>
> (7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.
>
> Restatement (Second) of Judgments §88.

There is no question but what the employer is precluded from again presenting evidence on the coverage issue. Whether claimant has a sufficient interest to be entitled to object to the late amendment to the answer, the motion for summary judgment, and the issue itself is another matter. The employer, as well as the claimant, argues that claimant has a sufficient interest in the matter. One would agree that claimant has a great interest in the object of the remedy and that the Liberty Mutual would be not only a second source of benefits but a source with greater financial assets.

At the time of the hearing, claimant and the employer had an opportunity to object to the late procedural maneuver and did so. However, neither party moved for an adjournment of the hearing to give them time to make further preparations. Finally, as the above authority shows, the matter of late-filed pleadings is in the discretion of the trial court, in this case the agency. The hearing deputy allowed the amendment and motion to be filed, and it does not appear that any great harm was done.

With respect to the matter of issue preclusion, all the elements thereof appear to be present. Claimant could easily have joined in the *Kaale* case and presented evidence about the insurance coverage. Instead, claimant chose to have the hearing in a different venue. The evidence in the *Kaale* case was ably and thoroughly presented, and, since claimant had the chance to be a part of that case, that evidence should suffice to preclude the issue from being again heard.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on January 27, 1980 Ralph Fridolfson sustained an injury which arose out of and in the course of his employment and which resulted in his death.

2. That the following persons are conclusively presumed dependent as of the date of the injury: the widow, Sharon Fridolfson, and the following minor children Deanna Lynn Fridolfson, date of birth of November 8, 1960; Rodney Lee Fridolfson, date of birth of May 21, 1962; Todd Wesley Fridolfson, date of birth of February 13, 1964; Wayne Keith Fridolfson, date of birth of May 5, 1966; and Mark Allen Fridolfson, date of birth of November 28, 1967.

3. That there was no workers' compensation contract insurance in force between Roseway Trucking, the employer, and Liberty Mutual Insurance Company, the alleged insurance carrier.

4. That the proper rate of weekly compensation is one hundred eighty-four and 38/100 dollars ($184.38).

* * *

Signed and filed at Des Moines, Iowa this 14th day of April, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending

CURTIS FUNK,

Claimant,

vs.

BEKINS VAN LINES COMPANY

Employer,

and

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed July 28, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

* * *

Defendants appeal from an arbitration award by the hearing deputy for temporary total disability and medical and allied expenses.

On review of the record, it is found that the hearing deputy's proposed findings of fact and conclusions of law are proper with the following amplification, except with respect to the ruling on the amount of the weekly compensation rate, which is reversed and remanded.

C & E Delivery and Moving was founded by claimant and his wife in January 1974 and was based on intrastate transportation of goods by truck. In September 1974 C & E Trucking signed on with Bekins Van Lines Company in order to take advantage of interstate hauling opportunities. Under the agreement, C & E Delivery and Moving leased vehicles to Bekins and was compensated on a percentage basis. Although the agreement called for C & E to furnish workers' compensation insurance, claimant's exhibit 14 shows that for the single year beginning January 1, 1977, Bekins provided such a policy for C & E.

The actual operation under the lease and operating contract differed somewhat from the contract itself. From the contract, one would expect C & E to furnish several drivers for Bekins. As a matter of practice, it appears claimant was almost the sole driver. On page 3 of their brief, defendants allege at least four other drivers drove for Bekins and C & E. However, the evidence with respect to two of those drivers is in a deposition which is not a part of the record and thus will not be considered. As to the reference to the transcript, page 96 and Dan Stacey being a driver, it is clear that he drove for C & E and Bekins *after* claimant's injury. Also, in the reference on page 80 of the transcript to Van Dusseldorp, it appears he drove for C & E and Bekins also after claimant was injured. Thus, there appears to be no evidence in the record of anyone other than claimant driving for Bekins and C & E.

Claimant wore a uniform, as prescribed.

As to the routing and returning, the following appears in the transcript:

Q. Then en route could you take any route you wanted:

A. No. We could take anything we wanted. We was required to call in once a day and let them know where we was at and approximate time of arrival at our destination and approximate time we could get unloaded so they could start finding us a return load or a load somewhere else.

Q. Did you have a definite time for your arrival?

A. Yes, there is a definite time. It was very liberal but there is definite delivery dates. You have to be within that spread or you will be fined.

Q. On return routes could you look for loads of your own and haul your own loads back?

A. No, ma'am, I could not.

Q. What could you do?

A. I had to call dispatch to see if they had a load. They would either tell me they had a load or they would send me home empty.

Q. It was their determination.

A. It was their determination (pp. 60-61).

Finally, of course, claimant was required to paint a Bekins design on his trucks and was injured while so painting.

The Workers' Compensation Act defines a "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, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer..." Code of Iowa §85.61(2).

Section 85.61(3), Code of Iowa, lists an "independent contractor" as one of the persons who shall not be deemed as a "worker" or "employee."

The supreme court of Iowa has stated there is no distinction between the terms "who has entered into the employment of" and "works under contract of service, express or implied... for" an employer. In order for a person to come within the terms of the Workers' Compensation Act as an employee it is essential that there be a "contract of service, express or implied," with the employer who is sought to be charged with liability. *Knudson v. Jackson*, 191 Iowa 947, 183 N.W.2d 391 (1921).

Section 85.18, Code of Iowa, states: "No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by

this chapter except as herein provided." The Iowa Supreme Court has further stated that "the law looks to the substance and not the form of the contract to determine the relationship" of the parties. *Stanford v. Goodridge*, 234 Iowa 1036, 1042, 13 N.W.2d 40, 43 (1944).

The fact that there exists a written agreement between the owner of a truck and a company to haul cargo for it does not warrant a holding that the truck owner is, as a matter of law, an independent contractor. *Daggett v. Nebraska-Eastern Exp., Inc.*, 252 Iowa 341, 107 N.W.2d 102 (1961).

"In the construction of a contract involving a contractor's relationship, the contract must be construed from its four corners and not from an isolated paragraph. Courts must declare the intention of the parties from the language employed in the entire instrument, regardless of the classification of the parties as determined by themselves, bearing in mind that it is not the nomenclature which the contract uses, but the provisions which it makes for control of the details of the work that determine the status of the parties." *Schlotter v. Leudt*, 255 Iowa 640, 645, 123 N.W.2d 434, 438 (1963); *Arne v. Western Silo Co.*, 214 Iowa 511, 517, 242 N.W. 539, 542.

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 to the five above-named elements is the overriding element of the intention of the parties as to the relationship they are creating. *Henderson v. Jennie Edmundson Hospital*, 178 N.W.2d 429, 431 (1970). Standing alone, this intention of the parties as to the relationship created may be somewhat misleading. However, community custom in thinking that a kind of service is rendered by employees is of importance. *Nelson v. Cities Service Oil Co.*, 259 Iowa 1209, 1216, 146 N.W.2d 261, 265 (1967).

Although the supreme court cases indicate the element of control is probably entitled to greater weight than the other elements, it is not clear that in order for a claimant to establish the employer-employee relationship by a preponderance of the evidence that one must preponderate on each of the elements, a majority of the elements or certain of the elements.

The fact that a stated commission is paid in lieu of wages is not in any sense controlling. *Mallinger v. Webster City Oil Co.*, 211 Iowa 847, 858, 234 N.W. 254, 260 (1931). In *Daggett*, for example, the trucker was paid a stipulated rate per one hundred pounds of cargo and was found to be an employee. These payments were referred to as "settlements" also. The cases also indicate that the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work but the right to exercise such control. *Lembke v. Fritz*, 223 Iowa 261, 266, 272 N.W. 300, 303 (1937).

In the event a prima facie case is established, the burden is upon the employer to go forward with the evidence to overcome or rebut the case. An independent contractor" allegation is an affirmative defense which must be established by the employer by a preponderance of the evidence. *Daggett v. Nebraska-Eastern Exp., Inc., supra*. The term "Independent contractor" is not defined in the Workers' Compensation Act and resort must be had to the common law to give the term its meaning. *Norton v. Day Coal Co.*, 192 Iowa 160 (1921).

The commonly recognized tests in Iowa for the existence of an independent contractor relationship are, although not necessarily concurrent or each in itself controlling: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of obligation to furnish necessary tools, supplies and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer. *Mallinger v. Webster City Oil Co., supra.*

As before, other factors which can be considered are the intention of the parties as to the relationship created and community custom in thinking that a service is rendered by servants.

At least one Iowa case has quoted from the Restatement of Agency, indicating that it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation of independent contractor. *Hassebrock v. Weaver Construction Co.*, 246 Iowa 622, 628, 67 N.W.2d 549, 553 (1955).

In case of doubt, the Workers' Compensation Act is liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it. *Usgaard v. Silvercrest Golf Club*, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964). Furthermore, In *Colwes v. J. C. Mardis Co.*, 192 Iowa 890, 919, 181 N.W. 872, 884 (1921), the court acknowledged the potential dual character or relation which may arise from varying degrees of control in different portions or phases of the work; that is, "that, as to some parts of the work, a party may be contractor, and yet be a mere agent or employee, as to other work." As a general rule, in a workers' compensation case it is the relationship of the parties at the time of the injury that controls.

In *Towers v. Watson Bros. Transp., supra*, the court identified the fact that claimant was hired for steady employment rather than for one specific job as indicative of an employer-employee relationship. *Towers* also pointed out that the work was part of the regular business of the employer, in holding the owner/operator to be an employee.

These, along with many other pronouncements by the courts, are what guide in determining the status of the parties to an employment relationship.

The question, then, is in what capacity the claimant was working when he was injured. In this respect, the deck is somewhat stacked against the alleged employer in these cases. That is, the trucking firms such as Bekins want to exert a great deal of control over their haulers. This action does two things: it makes for an employee-employer status and destroys the independent contractor status. Such is the case here.

Of the elements of the employee-employer

relationship, it is the right to control the work which is most indicative of that relationship. In the contract, paragraphs 5, 6, 12, 13, 14 and 21 all appear to illustrate control on behalf of Bekins. Under paragraph 5, C & E was to provide service exclusively to Bekins; under paragraph 6, Bekins assumed "possession and control" of the lease units; paragraph 12, concerned the painting and lettering requirements; paragraph 13, required equipment standards; paragraph 14, prescribed that the drivers and helpers would perform the work in a "courteous, proper and workmanlike manner"; paragraph 21, required the drivers and helpers to wear Bekins uniforms.

Such control, both under the contract and in practice, is indicative of a relationship between an employee and an employer. (Of course, in only slightly changed circumstances, the impact of the facts might dictate a contrary result, but here the entire mixture of the date points to an employment relationship.) For example, the right of selection or employment at will is restricted by the terms of the contract; responsibility for a payment of wages is also governed by the contract, as is the right to discharge or terminate the relationship. As for determining the party to be held responsible as the employer as the responsible authority in charge of the work or for whose benefit work is performed, it is clear that Bekins was both responsible and benefited from the work. So, although these four tests of the employer-employee relationship are not as conclusive as the test of the right to control, they are not counter-indicative of the relationship.

The right to discharge or terminate the relationship is an example. Although the contract specified that a thirty-day notice must be given, claimant testified that Bekins could effectively terminate the relatinship by simply withholding business. Although the evidence in this regard is somewhat speculative and therefore entitled to less weight, the common sense of the situation is appealing and illustrative of an employment situation.

Finally, the courts speak of the "overriding element of the intention of the parties." This test is most difficult to apply. The parties could both *say* they intended not to create an employment relationship, yet, if both were trying to avoid the consequences of the Workers' Compensation Law, such an "intention" would be bogus and therefore disregarded. Thus, in paragraph 9 of the contract which speaks of C & E being an independent contractor, one might suspect this provision to be in conflict with other provisions which exercise so much control over C & E.

The record is really unclear as to the intention of the parties. Most weight is given to the right to control, as indicated above.

With respect to the elements of independent contractor, the record is a bit more clear:

(1) A contract for the performance of a certain kind of work, namely hauling. The price was fixed according to the contract as a percentage of the charge made by Bekins for the haul. This test would indicate claimant was an independent contractor.

(2) The independent nature of claimant's business was severely restricted by the control exerted by Bekins, as discussed above.

(3) Claimant could employ drivers, apparently, but the record is not clear if he ever did so before the injury. Obviously, he could employ helpers. This test in inconclusive.

(4) As to claimant furnishing the necessary tools, supplies and materials, it is clear that he did so, and this test would indicate that he was an independent contractor.

(5) With respect to the element of control, little can be added to what was said up above with respect to employment status. Bekins exerted a great deal of control, little can be added to what was said up above with respect to employment status. Bekins exerted a great deal of control, and this test would indicate an employment status between the parties.

(6) With respect to the time which the workman is employed, it is clear claimant was not employed by the job but steadily under the contract. This evidence is not greatly helpful because both an employee and an independent contractor can be bound to extended work.

(7) The method of payment is neither by time nor by the job but by a percentage of the charge for the haul. Application of this test is also not very indicative of claimant's status because either an employee or independent contractor could be paid in this manner.

(8) Finally, the question as to whether the work is a part of the regular business of the employer is most empathically answered in the affirmative. Bekins is in the hauling business, albeit not in the business of owning tractors, etc. Nevertheless, they are in that business and control it from beginning to end.

Thus does the thread of control run throughout the relationship between claimant and Bekins. The result, obviously, is unsatisfactory to Bekins and its insurance carrier because they are unsure whether or not Bekins is an employer under the workers' compensation law. Thus they are the victims of a hybrid situation: The tests are somewhat indicative that claimant is an independent contractor but are more indicative that he was employed by Bekins.

The hearing deputy's decision as to the rate must be reversed and remanded. He based that decision on §85.36(5) which describes the basis of computing weekly earnings as follows: "In the case of an employee who is paid on a yearly pay period basis, the weekly earnings shall be the yearly earnings divided by fifty-two." The tax returns for 1977 were used to determine the yearly earnings. Defendants' exhibit F showed the partnership income for 1977 as $15,741.00; claimant's individual income tax return showed that same amount. Since at least some amount of the partership earnings were not claimant's, he cannot use the whole amount as a basis for his compensation rate.

There is insufficient evidence in the record upon which subsection of §85.36 should be used to determine the weekly compensation rate. Therefore, it will be necessary to have a further determination in this matter of weekly rate.

WHEREFORE, it is found and held as a finding of fact, to wit:

(1) That on April 19, 1978 claimant was an employee of Bekins Van Lines Company.

(2) That said employment relationship was based mainly on the amount of control exerted by Bekins over claimant's work.

(3) That claimant sustained an injury which arose out of and in the course of his employment and which resulted in temporary total disability of twenty-two and two-sevenths (22 2/7) weeks.

(4) That no determination of the weekly compensation rate can be made at this time.

(5) That the total amount of medical and allied expenses which were necessary to treat claimant's injuries was three thousand five hundred eighty-seven and 35/100 dollars ($3,587.35).

* * *

Signed and filed at Des Moines, Iowa this 12th day of December, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

HOWARD GARRISON,

Claimant,

vs.

SHEESLEY PLUMBING & HEATING COMPANY, INC.,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 6, 1980, the undersigned deputy industrial commissioner has been appointed under the privsions of section 86.3 to issue the final agency decision on appeal in this matter.

* * *

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded industrial disability to the extent of 55% of the body as a whole (275 weeks) at a weekly rate of $163.21.

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

Defendants' first contention is that claimant did not carry his burden of proof of establishing industrial disability.

This point is discussed well by the hearing deputy. It might be remarked that when the supreme court says that a claimant's disability is not to be measured functionally (in industrial disability cases), one should not lose sight of the fact that it is the functional injury itself which is the basis for all the trouble. In this case claimant received a very, very severe injury, and it is the resultant functional disability which is the largest component of his industrial disability. The hearing deputy was right to give the injury itself a great deal of emphasis.

Defendants' second contention is that the hearing deputy's decision was not supported by sufficient evidence. The progress notes by Dr. Bonfiglio and the other University of Iowa doctors emphasize the severity of the injury but the injury but says nothing about disability. Other than those notes, the only expert medical evidence admitted as a part of the record is that of Dr. Scheibe. Defendants claim there is insufficient evidence that the injury to the leg affected the spine. However, the following appears in Dr. Scheibe's description:

Q. Doctor, what do you mean when you say there is a tilt of the back?

A. Well, it's really a tilt of the shoulders and pelvic girdles and a rotatory scoliosis of the spine. There are very few pure scoliotic persons and those are usually congenital. In other words, where you have a tilt directly from one side to the other, most of them are on a rotatory basis. Because of the construction of the anatomy, you can't as the chiropractors say, bend it this way or that way. It has to be rotated.

Q. And when you say that you found a tilt to the left with rotoscoliosis, what is it exactly that you found?

A. I found that the back was not straight. The spinous processus, which are those that you see up and down the back in the center, were not aligned. They described a small "S".

Q. And were you able to determine what caused that in Mr. Garrison?

A. In some cases it is associated with a shortening or a lengthening of one of the extremities; however, in his case, the lower extremities measured out as equal in length, either from the umbilicus to the medical malleoli or from the anterior superior spine of the pelvis to the opposite malleolus. His were equal.

Now, it was my opinion that his rotatory processes was associated with his posture and gait since the record here shows that he had a minimal motion of his knee. He then walks with a stiff leg. And to do that you have to screw up your back a bit. (pages 11-12) * * *

Q. Now, based on those three things, were you able to determine whether or not the rotoscoliosis and the tilting to the left are consistent with the injury that he received?

A. Yes.

Q. And is it consistent?

A. It is.

* * *

THE WITNESS: Injuries of the type that he sustained result in a slowly progressive traumatic arthritis of the injured areas; and insofar as they produce additional stress on joints of the back or other portions of the anatomy, with particular reference to the joints, then they would be aggravated by this.

Q. Is the type of rotoscoliosis and the tilt that you found present in Mr. Garrison the type that would cause him pain?

A. It might. (pages 14-15)

Thus, the record is sufficient to support the hearing deputy's finding that the leg injury later extended to the body as a whole. Such an extension of disability is compensable industrially. *Daily v. Pooley Lumber*, 322 Iowa 78, 10 N.W.2d 569 (1943).

WHEREFORE, the proposed review-reopening decision is hereby adopted as the final decision of the agency as amplified. It is found:

1. That claimant sustained an injury which arose out of and in the course of his employment on November 21, 1977.

2. That this injury necessitated a healing period of eighty-seven (87) weeks.

3. That as a result of the injury to his leg, he developed a tilt of the shoulders and pelvic girdles and a rotoscoliosis of the spine.

4. That as a result thereof, claimant has sustained an industrial disability of 55 percent (55%) of the body as a whole.

* * *

Signed and filed at Des Moines, Iowa this 25th day of November, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ELBERT GLOVER,

Claimant,

vs.

ISAACSON ROOFING CO.,

Employer,

and

WESTERN CASUALTY & SURETY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed July 23, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

Claimant appeals from the hearing deputy's arbitration decision which denied him workers' compensation benefits as a result of a heart attack.

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

Claimant was a roofer who had a heart attack during his work hours. As to his work on that day, he testified, *inter alia*:

A. Well, we had some extra rock that spilled out of the hopper that came up over the edge of the wall, was laying on the deck, and it had to be moved, so I proceeded to load the wheelbarrows and wheel it to the front of the building.

Q. Now that normally would not be your job; normally that would be the crew?

A. Normally, it would not, no (p. 23).

Q. You say 250 pounds?

A. I would say loaded.

Q. Okay, and how many loads did you push?

A. At least two to three loads.

Q. And each one you pushed the total of a hundred and fifty feet?

A. That's right.

Q. In addition, who loaded the wheelbarrow for you?

A. I did.

Q. And you did with a shovel?

A. Yes, sir (p. 24).

A. On the third trip back, with an empty wheelbarrow, I got a terrific pain in my torso and I thought maybe it was the flu at the time. I stopped and I started perspiring real heavy and I threw up water, I vomited water. I thought, well, maybe it's the flu so I'll take and sit down a couple of minutes. And the longer I sat, the harder it came; the harder the pain was, so I told Jack Buffington I was going to leave the job and go home (p. 25).

Then, on cross-examination:

Q. Yeah, okay. What I'm really asking, in other words whether you were the foreman or whether you were the laborer, you were the hardest working guy on the roof?

A. No, I wouldn't say that.

Q. You wouldn't?

A. No, sir. Everybody works hard.

Q. Okay. Well, you worked as hard, let's say, as everybody else?

A. There you go.

Q. And during the seven years that you were with Isaacson Roofing, did your job include wheelbarrowing the rock?

A. Yes, sir.

Q. And as well as doing any of the other things?

A. Oh, sure.

Q. Have you been, during the seven years, a person who did all aspects of the roofing?

A. Right (p. 45).

Q. I asked you a question on page 9 of the deposition. "You were basically doing the usual and customary jobs?" Referring to October 30th. And your answer, "I was doing the usual job that that I was supposed to do in [sic] the roof as foreman of the job."

And then the question was "Things you have done before?" Answer: "Everyday for all those years." And is that true?

A. That's true.

Q. Would you say that October 30th, frankly, was any different than any other day you've spent working for Isaacson Roofing?

A. Nothing was any different.

Q. And had it been such that you'd experienced this kind of work for almost your entire working career clear back since 1964?

A. Uh-huh.

Q. And was October 30th the usual and customary day that you spent when you were roofing and working for Isaacson Roofing?

A. Same old day (pp. 46-47).

Jack Buffington, a man who worked with claimant on the job testified:

Q. And maybe you've even loaded gravel more than he has?

A. Yeah, I would say.

Q. But he's done that as well; is that true?

A. That's true.

Q. We've heard the term "working foreman." Does he work right along with all of you individually doing all the jobs?

A. Yes, he does.

Q. And has over that six-year period?

A. Yes, he has (pp. 64-65).

The medical evidence was split. The treating physician, John D. Birkett, M.D., stated "the very heavy labor that he did prior to the incident would definitely aggravate an underlying heart problem." On the other hand, Paul From, M.D., saw no causal relationship between the alleged incident and the heart attack.

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. * * * *

In *Sondag v. Ferris Hardware*, 220 N.W.2d 903 at page 905 (Iowa, 1974), with respect to recovery for an alleged job-caused heart attack, the court states:

> "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."
>
> * * *
>
> "In the second situation compensation is allowed when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a preexisting diseased condition, results in a heart injury."

Claimant in his statement of error took exception to the following assertion made in the Deputy's discussion, (p. 5):

> "It is obvious that the employment must contribute a factor greater than that evident in non-employment life."

One would agree with claimant that such an assertion is not necessarily a good paraphrase of the law governing recovery of workers' compensation benefits for heart attacks; however, the hearing deputy seems to have followed the precepts set down in *Sondag*, *supra*, and his result will be affirmed.

Further, under *Sondag*, where there is a preexisting condition, (claimant had preexisting arteriosclerosis, claimant's exhibit 5), there must be "an instance of unusually strenuous employment exertion" before recovery is permitted. In this case the testimony on the whole shows claimant's work was not unusually strenuous that day.

The lay evidence thus establishes that claimant's work on the day in question was not overly strenuous, although, of course, he was a good laborer as well as foreman. The medical evidence of Dr. Birkett would seem to establish the desired causal connection. However, there is more to the matter than appears in that one sentence.

First, the *history* taken *at the time* by Dr. Birkett said the "patient stated that he was at work on his usual job as a roofer when he developed sudden chest pain..." (claimant's exhibit 1, p. 3). One might conclude that a "usual job" was or was not "very heavy labor," but the inference to the undersigned deputy industrial commissioner is that claimant's actual activities, as described by him, were more on the order of *moderately* heavy, which conforms more to the notion of "usual." Second, the characterization of the labor as "very heavy" went from claimant's attorney to the doctor (claimant's exhibit 5), and one does not have the benefit of knowing whether or not the attorney's letter was accurate. Finally, Dr. From, who based his opinion on claimant's deposition, opined that there was no causal connection. It is not surprising that the hearing deputy likewise saw no causal connection.

Therefore, one must conclude claimant has not shown the necessary element of causal relationship between the work and any claimed disability and expenses.

WHEREFORE, it is found and held as a finding of fact, to wit:

That claimant's employment activities on October 30, 1978 did not constitute an injury which arose out of and in the course of the employment.

That claimant had preexisting arteriosclerosis and suffered a myocardial infarction on October 30, 1978.

That the myocardial infarction was not caused by any employment activity.

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

* * *

Signed and filed at Des Moines, Iowa this 26th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RICHARD CHARLES GODDARD,

Claimant,

vs.

ELTRA CORPORATION, PRESTOLITE BATTERY DIVISION

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Ruling

Now on this day, the matter of defendants' Special Appearance and claimant's Resistance thereto comes on for determination.

On February 4, 1981 defendants filed a Special Appearance pursuant to Iowa Rule of Civil Procedure 66 challenging the Iowa Industrial Commissioner's jurisdiction in this case. The defendants allege that no contract of hire was made in Iowa; that no injury occured in Iowa; that the claimant neither resided nor was domiciled in Iowa at the time of the injury or any time subsequent thereto; that the defendant-employer is not localized, domiciled or residing in Iowa; and that claimant was awarded benefits under the Illinois Workers' Compensation Act by the Illinois Industrial Commission. An amendment to the Special Appearance was filed on February 17, 1981 in which the defendants acknowledged that defendant-employer does have a place of business in Iowa.

Claimant admits, in his Resistance, that he neither was domiciled nor resided in Iowa at the time of the injury or thereafter and that he filed a claim with and was awarded benefits by the Illinois Industrial Commission. Claimant denies that no contract of hire was made in Iowa; denies that no personal injury occurred in Iowa; and denies that defendant-employer's business is not localized or domiciled or residing in Iowa. Claimant further asserts that he received a call from Georgia at his home in Illinois from an agent of the employer who instructed him to go to Davenport, Iowa, to pick up a load. He claims that he went to Davenport where he got instructions, the equipment and the load and was on his way to Michigan when an accident happened in Indiana.

Iowa Code Section 85.71 deals with extraterritorial jurisdiction of the Iowa Industrial Commissioner and provides:

> 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 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.

Opinions by the Iowa Supreme Court are consistent in stating that when jurisdiction is attacked by the defendant through a special appearance, the claimant carriers the burden of making a prima facie showing to sustain jurisdiction. At that point the defendant must overcome or rebut the prima facie showing. *Rath Packing v. Intercontinental Meat Traders*, 181 N.W.2d 184, 185 (Iowa 1970); *Jensen v. Harmon*, 164 N.W.2d 323, 326 (Iowa 1969); *Tice v. Wilmington Chemical Corp.*, 259 Iowa 27, 47, 141 N.W.2d 616, 143 N.W.2d 86, ___(1966). The allegations of a plaintiff's petition in a special appearance situation will be accepted as true. *DeCook v. Environmental Security Corp.*, 258 N.W.2d 721, 725 (Iowa 1977); *Tice, supra; Great Atlantic & Pacific Tea Co. v. Hill-Dodge Baking Co.*, 255 Iowa 272, 279, 122 N.W.2d 337, ___ (1963). The opinion in *Tice, supra*, citing Iowa Rules of Civil Procedure 80(b) and 116, suggests that verified affidavits either supporting or opposing the special appearance will also stand "as a verity unless controverted." That proposition was again presented in *Douglas Machine & Engineering Co., v. Hyflow Blanking Press Corp.*, 229 N.W.2d 784 (Iowa 1975).

Rule 80(b) provides in part that:

> any motion asserting facts as the basis of the order it seeks and any pleading seeking interlocutory relief, shall contain affidavit of the person or persons knowing the facts requisite to such relief. . . .

The claimant's petition filed in review-reopening on its face does not supply sufficient information to make a prima facie showing that this agency has jurisdiction over this matter in that it is not shown that defendant-employer has a place of business in Iowa, that claimant worked regularly in Iowa, that claimant is domiciled in Iowa or that claimant was working under a contract of hire made in Iowa at the time of the injury. Neither is sufficient showing made elsewhere in the pleadings.

Claimant's Petition gives no indication of where his contract of hire was entered. His Resistance states that he received a call from Georgia at his home in Illinois. His application for adjustment of claims filed with the Illinois Industrial Commission specifically alleges an Illinois contract of hire. The application which was signed by claimant contains the following: "This is a legal document. Be sure all the above blanks are filled in correctly and that you have read and understood the statements below [relating to prior filings and attorney's fees] before you sign." The opinion of the Iowa Supreme Court in *Haverly v. Union Construction Co.*, 236 Iowa 273, 274, 18 N.W.2d 629, ___ (1945) states the general rule that the place of completion of the contract of hire determines the place of the contract. No contract of hire exists for this claimant in Iowa.

Claimant admits that he neither resided nor was domiciled in Iowa on the date of his accident or at any time up until the present.

Although defendants initially alleged no place of business in Iowa, their Special Appearance has been amended to acknowledge a place of business in Iowa. Establishing that an employer has a place of business in Iowa meets only a part of the requirement of Section 85.71(1), Code of Iowa. Additionally, it must be shown that claimant regularly works in Iowa. Claimant's Petition states that he was employed by defendant-employer only one day when the injury occurred. His Resistance claims an accident enroute to Michigan, in Gary, Indiana. The claimant's one day employment, part of which was spent driving to Indiana, does not constitute employment principally localized in Iowa.

WHEREFORE,it is found:

That defendant-employer has a place of business in Iowa.

That claimant's employment was not principally localized in Iowa.

That claimant is not domiciled in Iowa.

That claimant was not working under a contract of hire made in Iowa.

That the Iowa Industrial Commissioner does not have jurisdiction over this matter.

THEREFORE, it is ordered:

That defendant's Special Appearance is hereby sustained.

* * *

Signed and filed this 24th day of February, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

SYLVIA GOODALE,

Claimant,

vs.

HUBINGER COMPANY

Employer,

and

AMERICAN MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed arbitration decision in which claimant was awarded temporary total disability benefits and medical benefits for an alleged "injury" arising out of and in the course of employment in April 1978.

* * *

The issues on appeal are whether claimant sustained an injury which arose out of and in the course of her employment and, if so, the nature and extent of the disability.

Claimant is presently 43 years old and unmarried. She has an eighth grade education and was employed at a number of different places before she began working for defendant-employer in 1976. Claimant testified that April 3, 1978 she bid on a job in the defendant-employer's refinery and began to work there as a filter operator three days later. Her job involved dumping eight, fifty pound bags of carbon powder into a vat of corn syrup every hour or so. Claimant testified that she was covered with the black powder after she dumped the bags. People who simply walked through the vat area emerged black with carbon residue.

Claimant testified that she first began experiencing respiratory problems after she had worked in the refinery approximately one month. Claimant's illness was characterized by coughing, shortness of breath and vomiting black phlegm.

Claimant was initially treated for these symptoms by B.J. Williamson, M.D., who prescribed medication and recommended that she use a breathing mist machine and remain off work until the condition cleared up. After the respiratory condition improved, claimant returned to work only to experience the same symptoms within two or three days. Claimant stated that because of the respiratory illness, she returned to Dr. Williamson approximately every other week.

Although the employer was notified that she was experiencing respiratory symptoms, claimant's testimony is conflicting as to whether Dr. Williamson's care was authorized. Claimant alleged that Dr. Williamson referred her to M. Nassery, M.D., because John Hauenstein, the company safety director, and Leo Sheppard, asked claimant to see a specialist. That this request was made by company personnel is disputed by Keith Fink, the company general manager of industrial relations. Mr. Fink was unsure whether the company ever asked claimant to see the company physician, however, Mr. Fink acknowledged that the company maintained a list of doctors to whom employees could go and that Dr. Williamson was possibly one of those physicians. Apparently, based on the employer's absenteeism report, claimant was finally sent to the company doctor in November 1978.

Claimant, upon her physician's recommendation, began to wear a mask about six months before she was terminated. The mask, however, inadequately filtered out the carbon dust. Claimant testified that she could have "bid" on jobs in other areas of the refinery but did not.

After following the advice of Dr. Nassery by remaining off work, claimant's condition improved and she suffered no lasting effects. Dr. Nassery told claimant to remain at home and did not release he to return to work.

Dr. Williamson also referred claimant to Hal Richerson, M.D., the Director of Allergy and Immunology at the University of Iowa Hospitals.

Dr. Richerson first saw claimant on April 2, 1979. The records of Dr. Nassary and claimant's own history were available to Dr. Richerson in addition to the results of his own examination and tests.

Since claimant had been symptom free for some time before being examined by Dr. Richerson, a methacholine test was administered. The negative results of this test eliminated asthma as an underlying basis for claimant's problems. Claimant was also requested to bring samples of substances to which she had been exposed in her work environment. Dr. Richerson determined that many of these substances were sufficiently irritating to have caused claimant's symptoms. In order to have positively identified the causative agent, it would have been necessary for claimant to expose herself to the substances, get ill again, and then be examined.

Based upon claimant's history and a comparison of test results, Dr. Richerson concluded that claimant's respiratory symptoms were associated with her work environment.

Claimant admitted that she had experienced respiratory problems prior to May 1978, but she characterized them as "different" from those she experienced while working in the refinery.

Claimant testified that she had applied for a number of factory and plant jobs and that she was unqualified for office work. At the time of the hearing, claimant was working part-time as a maid at a Holiday Inn.

The evidence, with respect to the dates claimant was ill and unable to work due to upper respiratory problems, is conflicting. Numerous instances exist in which claimant's testimony concerning her absences from work due to alleged respiratory illness is directly contradicted by the employer's confidential report (defendants' exhibit 1). That report recorded and summarized the dates and reasons for claimant's "excessive" absenteeism. Additionally, there are instances in which claimant's testimony is contradicted and the confidential absence report corroborated by the employee attendance records (claimant's exhibits B and C). The attendance records utilized a lettering system to distinguish between different excuses for an employee's absence. Considerable time and effort has been expended by the undersigned to attempt to clarify the times claimant was apparently off work due to respiratory difficulties. This clarification should have been made in the presentation of the evidence but was woefully inadequate.

The following is a summary of the dates on which the evidence with respect to the reasons for claimant's work absences is in definite conflict. On April 16 and 17, 1978 claimant's reluctantly stated testimony that she remained off work due to the respiratory problem was contradicted by both the employee attendance record and the absence report. Claimant overslept on the 16th and remained home the next day because of personal problems. May 13 through May 21, 1978 claimant missed work because of a sunburn and not a respiratory illness as she testified. Claimant stated that she was ill with the upper respiratory infection July 6, 1978 through July 31, 1978, whereas the employer's absence record indicates claimant remained home due to a "hurt leg" from June 27, 1978 through July 11, 1978. Claimant again explained that her absence through the entire month of August was due to her respiratory illness. However, based on the employer's absence record, apparently claimant underwent a hysterectomy and recuperation from July 12, 1978 through September 4, 1978. The record states "June" 12,

but the chronological order of the absence record indicates that the date should have read "July" 12. The October 4, 1978 and October 5, 1978 absences were due to claimant's oversleeping and the subsequent disciplinary action taken by the employer, rather than respiratory illness as indicated by claimant. Claimant was engaged in personal business on November 4, 1978 as indicated in the absence report, rather than home ill with the respiratory sickness.

In some instances the employer's absence report simply notes that claimant was absent from work due to "sickness". With the exception of a couple of days overlooked during claimant's testimony, the dates claimant missed work, listed in the absence report and recorded as sickness were, according to her testimony, due to the respiratory problem. These dates include May 30, 1978, June 12, 1978 through June 25, 1978, September 19, 1978 through September 26, 1978, and October 14, 1978.

Company records corroborate the specific dates claimant testified that she was absent due to her respiratory illness for the following dates: November 5, 1978 through November 12, 1978, November 17, 1978 through February 4, 1979 and February 11, 1979 through February 28, 1979. Claimant was given a non-disciplinary discharge on March 1, 1979 for being unavailable for work.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 1978 is the cause of the 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*, 257 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or "lighted up" so it results in a disability found to exist, she is entitled to compensation to the extent of the injury. *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 met her burden of proving that she did sustain an injury which arose out of and in the course of her employment. Dr. Richerson specifically testified that a causal relationship did exist between claimant's respiratory problems and her work environment. In addition, both Dr. Williamson and Dr. Nassery recommended that claimant remain away from her job when she experienced respiratory symptoms. In fact, Dr. Nassery never released claimant to return to her job with defendant-employer.

Claimant notified her employer when she began experiencing respiratory problems at work. She also testified that while at work, she vomited black phlegm a number of times each day. As a result of her symptoms, claimant sought the care of Dr. Williamson, who eventually referred her to Drs. Nassery and Richerson. Defendant-employer alleges that, although they were notified claimant was ill, they did not realize she was claiming exposure to substances in the air until she was advised to wear a mask. It was at that point, apparently in November of 1978, that defendant-employer sent claimant to Dr. Kemp, the company physician. The employer's absenteeism record, however, indicates that Dr. Kemp relied upon Dr. Nassery's recommendations and advised that claimant should wear a dust mask.

It is concluded that claimant received necessary and reasonable medical treatment from Dr. Williamson and, through his referrals, from Drs. Nassery and Richerson and, in addition that this care was authorized. The reasonable and necessary treatment received by claimant alleviated her temporary respiratory symptoms.

No evidence was submitted with respect to permanent partial disability, therefore none is found.

Claimant, through her own testimony, acknowledged that she could have bid on other jobs with defendant-employer, however, she did not. Her respiratory symptoms were alleviated, and as a result would not be a determining factor upon which future employers would deny claimant employment. Therefore, claimant's allegation that she suffered a loss of earning capacity as a result of her job related respiratory problems is unfounded.

Some of the medical charges for treatment must be denied since there is no evidence when or for what reason the treatment was received. The statement from Physicians and Surgeons indicates that claimant received an injection from Dr. E. Keys, Jr., on March 12, 1979. Through her own testimony, claimant admitted that she received hormone shots at intervals after her hysterectomy performed by Dr. Keys. Accordingly, this five dollar charge must be subtracted from the $114.00 balance, resulting in a balance of $109.00.

With respect to the bill from Dr. Kappmeyer, claimant alleges he only treated her for respiratory symptoms, however, the record indicates he also treated her for gastritis. The statement does not indicate for what treatment the charges were made. In addition, Dr. Kappmeyer was not one of the authorized physicians. This charge must be disallowed.

The Warsaw Clinic bill for $51.48 was testified to be for treatment received by Dr. Bruehsel. There is no evidence in the record to indicate that claimant was treated by Dr. Breuhsel after the injury date of April 1978. This charge therefore, is disallowed.

Defendants argue that Dr. Richerson's opinion is inadmissible since it was based upon heresay evidence of claimant's testimony and claimant's prior physician. Dr. Richerson did, in fact, perform tests on claimant. He then compared these test results with those obtained from claimant's prior physician and, based upon this comparison, along with claimant's history, he reached his own conclusion. Defendants had ample opportunity to cross-examine Dr. Richerson during his deposition but, even assuming Dr. Richerson's testimony was heresay, the Industrial Commissioner is allowed to consider evidence which would be inadmissible at a jury trial. Iowa Administrative Procedure Act §17A.14.

The fact is that much of this entire case was tried on heresay evidence. Defendants' witness, Keith Fink, did not have direct knowledge concerning certain facts to which he testified. Defendants themselves could have introduced more substantial evidence upon which to base a decision. The entire record in this case, unfortunately is inadequate.

To further add to the chaos in this record claimant's Original Notice and Petition filed March 8, 1979, stated an injury date of November 14, 1976. Defendants' answer affirmatively alleged, pursuant to Iowa Code section 85.26, that claimant's action was barred by the statute of limitations. Defendants subsequently filed a motion to dismiss based upon the statute of limitations. In response, claimant amended her original petition to state an injury date of November 14, 1977. After the conclusion of the presentation of evidence, claimant again amended her petition to reflect an injury date of April 3, 1978. Why this date was selected is not known as the employment records indicate claimant was hospitalized with respiratory infection from March 24 through April 9, 1978. It is not explained how claimant bid on the job in the refinery on April 3, 1979, started in that job three days later and had no "other injuries or illnesses up to the point of April 3, 1979, that (she is) complaining of" all while she was hopsitalized for respiratory infection. Thereafter defendants notified this office that American Mutual Insurance Company terminated their coverage of Hubinger Company as of January 1, 1978. At that time Liberty Mutual began insurance coverage for Hubinger. It was an attorney who normally represents the Liberty Mutual Insurance Company who originally filed the answer to claimant's petition. After claimant amended her petition to show a new injury date not barred by the statute of limitations this attorney withdrew as the present attorney for the defense represents American Mutual Insurance Company who provided coverage to the defendant-employer on the date alleged as the injury date in the petition. It was not until five months after the arbitration decision was filed and a month after the appeal brief was filed that this agency was advised that American Mutual did not provide coverage on the date now claimed to be the injury date.

It is indeed unfortunate that Liberty Mutual did not have the opportunity to provide the defense for defendant-employer for perhaps they would have taken a different approach. Defendant-employer, however, was represented by counsel and allowed to present its case. The award is against the defendant-employer.

Iowa Code section 87.10 provides in part that "jurisdiction of the insured shall be jurisdiction of the insurer, and the insurer shall be bound by every agreement, adjudication, award or judgment rendered against the insured." Whichever company was responsible for insurance coverage for the Hubinger Company at the time of the April 3, 1978 injury is therefore responsible to them for the award.

While weak at best, claimant has made a prima facie showing which is unrebutted that she received an injury in the nature of aggravation of a preexisting condition which caused periodic temporary disability.

WHEREFORE, it is found:

That claimant sustained an injury that arose out of and in the course of her employment in April 1978.

That this injury aggravated a preexisting condition.

That as a result of the injury claimant is entitled to temporary total disability compensation at a rate of one hundred seventy and 00/100 dollars ($170.00) per week for twenty and five-sevenths (20 5/7) weeks.

That claimant incurred reasonable and necessary medical expenses which were causally connected to the injury.

That claimant did not sustain a permanent partial disability as a result of the injury and suffered no loss of earning power.

* * *

Signed and filed this 26th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

OREN GORMAN,

Claimant,

vs.

ED MILLER AND SONS, INC.,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 3, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. That order outlined the procedure for filing briefs. Neither side filed an appeal brief; however, claimant's notice of appeal states his reasons with some detail.

Claimant appeals a review-reopening decision wherein he was granted 175 weeks of permanent partial disability for industrial purposes at the rate of $89.00 per week for a disability of 35% of the body as a whole. Defendants were given a credit of 161.875 weeks theretofore paid, leaving claimant a net award of only 13.125 weeks.

* * *

The decision of the hearing deputy will be affirmed with the following amplification.

Claimant sustained a serious head injury when two construction machines collided. The record shows that

the accident resulted in a 92½% permanent loss of hearing plus additional physical disability as a result of vertigo.

The issue concerns the extent of claimant's disability.

The hearing deputy adequately cited the propositions of law.

Claimant's first two points of appeal states that he "has always been engaged in the construction industry operating heavy equipment and is no longer capable of such an occupation" and that the deputy industrial commissioner "improperly concluded that claimant can still operate heavy equipment." At the hearing, claimant testified:

> I am classified as a supervisor where I work. However, small contractors have a way of—you fill more than one duty. I operate machinery some in the summertime. I supervise other personnel in the winter. I repair equipment, usually. (Record, p. 15)

Thus, claimant has been able to continue to a certain extent his occupation as a heavy equipment operator. The hearing deputy was therefore not wrong in reaching that conclusion.

The third particular of error mentioned by claimant states that the deputy erred in giving consideration to the report of Werner P. Jensen, M.D. Dr. Jensen had testified that there would be no residual difficulties to the body as a whole and that he would not give any opinion regarding the residuals of the fractured skull and hearing problem. Since the deputy clearly stated that claimant's disability stems from those two problems, it is clear he did not use Dr. Jensen's report to assess the disability because it had absolutely no opinion in that respect. The hearing deputy simply recited the evidence as it appeared in the record. The last two particulars of error state that the award should be based upon a "92½% loss of hearing and physical disability of 20% of the body as a whole" and that claimant should have a greater industrial award. The opinion by the hearing deputy clearly shows that he took the factors of both disabilities into account in arriving at the industrial disability. Further, he took the other elements of industrial disability, as defined by our supreme court, and also used them.

Claimant's main complaint apparently is that his almost total loss of hearing entitles him by a schedule under §85.34(2)(r) to virtually as much recovery as 35% disability to the body as a whole. However, that complaint is the chief reason for the existence of the schedules: A claimant often cannot show any great reduction of earning capacity because of the scheduled injury, yet the schedules mandate an amount which is often quite liberal. That is, the schedule may allow as much as or even more than the degree of industrial disability. Although that fortunate circumstance certainly does not carry through to every case, the existence of the schedule does guarantee a claimant with a permanent injury some permanent disability, regardless of whether that disability reduces earning capacity.

A reduction of earning capacity of 35% shows that claimant is compensated for a considerable disability. He is awarded this disability despite the fact that he is able to carry on a very similar occupation. Of course, he may not always be able to perform such work, but even so, if he were paid in Jaunary 1981 for instance, he could reopen his case until January 1984, a period of nearly ten years after the occurrence of the injury. Such a length of time for claimant to have his earning capacity determined and possibly redetermined is ample protection.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on October 7, 1974, claimant sustained an injury which arose out of and in the course of his employment.

2. That as a result of said injury, claimant sustained a permanent partial disability of ninety percent (90%) loss of hearing in his right ear and ninety-five percent (95%) loss of hearing in his left ear, said injury also causing a permanent problem with vertigo.

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

* * *

Signed and filed at Des Moines, Iowa this 29th day of December, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RICHARD W. GOSS,

Claimant,

vs.

SHARKEY TRANSPORTATION a/k/a, d/b/a SHIPPERS RENTAL COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Richard W. Goss, the claimant, against his employer, Sharkey Transportation a/k/a, d/b/a Shippers Rental Company, and the insurance carrier, Liberty Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on or about January 25, 1979.

* * *

The issues to be determined herein are whether the claimant on or about January 25, 1979 sustained an injury

which arose out of and in the course of his employment with the defendant, the causal connection between that injury and the alleged resulting disability, the length of healing period and the nature and extent of disability. The affirmative defense set out in section 85.16(3) is also an issue. There is no issue concerning the employer-employee relationship.

At the time of hearing the parties stipulated that claimant's average weekly gross earnings for the year 1978 were $369.47 per week. There was no stipulation as to the time off work because of the alleged injury and there was a stipulation that the medical charges were fair and reasonable.

During the course of the hearing various objections were made by counsel for both parties and are ruled on as follows: defendants' objection to claimant's exhibits 3 through 9 is overruled as these statements for services rendered to claimant are relevant and material to this case. The objection by defense counsel at page 18 of the transcript is overruled for reason that claimant is testifying as to what he knows and understands. Defendants' objection noted at page 21 and 22 of the transcript is overruled and claimant will be permitted to testify as to his observations of temperature. Claimant's counsel's objection at page 53 of the transcript is overruled as defendants' exhibit is relevant and material to the controversy. Claimant's counsel's objections at page 61, 62 and 82 are overruled as the information sought is relevant. Counsel's objections at page 124, 125, 129 and 134 of the transcript are overruled. Defendants' exhibits 7A and 7B are admitted for whatever probative value they might contain. A review of those exhibits reveals that they contain an abundance of heresay testimony and they are given little weight in the final disposition of this case. Defendants' exhibits 8A and 8B are admitted for whatever probative value they contain. It is noted that claimant's exhibit D9 is overruled. Counsel's objection to defendants' exhibit D9 is overruled. Counsel's objection to portions of defendants' exhibits D10 and D11 are sustained as this is an attempt to circumvent Commissioner's Rule 500—4.18. Counsel's objections at page 212, 215, 216 and 220 of the transcript are overruled. The objection at page 222 of the transcript is sustained and the objections at 223 and 224 are overruled. Official notice of other first reports of injury concerning this claimant is taken pursuant to the request of defense counsel. In addition, pursuant to the request of defense counsel, notice is taken of the pending litigation captioned *Richard Goss v. Don Holland and Auto-Owners Insurance Company*.

There is sufficient credible evidence in this record to support the following findings of fact, to wit:

Richard W. Goss, age 42, testified on direct-examination that he has been an over-the-road truck driver since 1968 and has been employed by the defendant Shippers Rental Company in that capacity since 1969. On or about January 18, 1979 claimant, while in the employ of defendant, was dispatched from Quincy, Illinois to Columbus, Georgia to deliver a load. Claimant was driving a relatively new tractor with built-in sleeper owned by the defendant. Claimant delivered his load in Columbus, picked up another load in Atlanta, and headed North to Madisonville, Kentucky. While in Atlanta claimant also picked up a passenger, one Louise Shirley Ellsworth, who was headed for Minnesota. Ms. Ellsworth remained with the claimant until after his injury on January 25, 1979. On the way to Kentucky claimant and Ms. Ellsworth stopped overnight in Monteagle, Tennessee.

Claimant made his delivery in Madisonville, Kentucky and was then directed home by the company dispatcher. In route to Quincy, Illinois claimant was directed by the dispatcher to go to East St. Louis to pick up a load of steel. Claimant changed course and headed for East St. Louis, arriving there on the evening of January 25, 1979. Upon arrival in East St. Louis claimant testified he called his dispatcher and was directed to pick up a load at an establishment known as B.V. & G. the next morning. Claimant accompanied by his passenger Ms. Ellsworth, drove to the Indian Mound Motel in Fairmont, Illinois which is in the immediate vicinity of East St. Louis, parked among other trucks with the intent of staying over night. Claiment left the truck with the engine idling as he stated the weather was cold and he intended to sleep in the truck that evening. Claimant's exhibit 2, the U.S. Department of Commerce Climatological Data for St. Louis, covering the month of January 1979, indicates the temperature for the time period when the incident occured ranged generally from 20 to 30 degrees above zero.

During the next several hours claimant and Ms. Ellsworth had a drink together in the motel bar. Claimant testified he went to the motel restaurant and had dinner alone. He also rented a room for Ms. Ellsworth at the motel. Claimant stated that around 10:00 p.m. on January 25 he left the motel and went out to the parking lot to check the idling truck. He indicated the weather was cold, between zero and nine above, and he wanted to be sure the engine was idling satisfactorily so he could stay in the sleeper portion of the vehicle later that evening. He also had a relatively new truck and the trailer had tarps and chains on board and he wanted to be sure everything was secure. Claimant stated he checked the truck tires and the positioning of the vehicle to be sure it was not sticking out in the road. He got into the truck from the passenger side and checked the idling of the engine and the truck instruments. Claimant was, at the same time, getting Ms. Ellsworth's suit case from the truck cab. As claimant climbed down from the cab he was struck several times and rendered unconscious by an unknown assailant.

Claimant recalled regaining consciousness in a St. Louis Hospital where he remained two days. He was then transferred to Keokuk Hospital where he remained ten days under the care of his family physician, C. W. Bruehsel, M.D. He was again transferred to the Quincy Blessing Hospital in Quincy, Illinois where he remained a period of eight days. At the time of his transfer to Quincy Blessing Hospital claimant related that he was having difficulty hearing with his left ear. He had difficulty with his right knee and was unable to maintain his balance. Mr. Goss remained off work from the date of injury through August 1979. Claimant returned to work in August 1979 as an over-the-road driver for Don Holland Trucking. Claimant states he was unable satisfactorily to do the work of an over-the-road driver for Holland because he needed to sleep after three hours work and was unable to unload his truck. He had trouble with coordination when

walking, could not climb and his reflexes were bad. Claimant complained of a ringing in his left ear which increases in intensity over two or three hours requiring him to stop what he was doing.

It is important to note that the claimant was involved in another truck accident on September 24, 1979 while in the employ of Don Holland Trucking. In December 1980 claimant filed an original notice and petition in review-reopening against Don Holland Trucking and Auto-Owners Insurance Company seeking additional benefits for this September 1979 injury. Claimant alleges in his pleadings injuries to his "Body as a whole, extreme psychological impact after physical injury or concussion." Clearly, claimant's statement at the hearing that he sustained no injuries in this subsequent incident is inaccurate.

At the time of the hearing in this case *(Goss v. Sharkey, et al.,)* claimant had sustained these alleged subsequent injuries and was receiving compensation benefits. The defendants herein, of course, are not responsible for the results of subsequent injuries sustained while claimant worked for Don Holland Trucking.

Claimant does not feel he can drive over-the-road trucks now because of his inability to work more than a couple of hours without lying down and going to sleep. Also, his lack of balance and lack of strength prohibits his return to this line of work. Claimant testified he had none of the aforedescribed physical problems prior to the assault on January 25, 1979. Claimant had a physical examination for his work within two years prior to January 25, 1979 and stated he was not functioning under any medical restrictions.

Since the claimant's employment with Don Holland ended, he states he has attempted to secure other employment without success. He inquired at local factories, Job Service of Iowa and the City, for work. He filled out an application to be a garbage man for the City, listed his physical problems and was not offered the job. He also made application at two machine shops, revealed his physical incapacity and was not hired. The record is not clear as to whether claimant's alleged inability to secure employment is as a result of the injuries he sustained in this incident or the accident while he worked for Don Holland Trucking. Claimant has an eight grade education and has taken some night classes but does not have a G.E.D. Other than driving a truck he has worked in construction, run a restaurant and worked as a trainee in a machine shop.

On cross-examination claimant acknowledged that defendant had a form which is to be completed when a driver is going to take a passenger with him and claimant stated he used these forms on occasion. He also stated he had hauled passengers without completing the form. Claimant stated that on prior occasions when he picked a passenger up on the road, he reported this to his dispatcher and would receive oral authority to carry the passenger. Claimant stated when he arrived in Madisonville, Kentucky he called his dispatcher, David Kiser, advised him he picked up a hitchhiker, and requested a run to Minnesota. Kiser is alleged by claimant to have authorized the presence of a passenger. Ms. Ellsworth remained with claimant for three days. She and claimant stayed together in the same motel room in Mount Eagle, Tennessee and again in Madisonville, Kentucky. Claimant stated however, on both of these occasions he was in and out of the room all night checking the load on his truck.

Claimant insisted he was going to check the truck on the night in question as well as get Ms. Ellsworth's suitcase and he does not know who struck him. He did not talk with anyone in the motel except the bar maid and the desk clerk.

He stated that drivers are not automatically reimbursed if they stay in a motel at night. Claimant had not sought prior approval to rent a motel room the night of January 25, 1979 because he did not intend to stay in the motel. He planned on sleeping in the truck. Claimant stated he did receive permission for a motel room in Tennessee and Kentucky on the evenings prior to January 25.

Claimant stated that prior to starting work for Don Holland Trucking in August 1979 he did not have an I.C.C. physical and as far as claimant is concerned he is still an employee of Don Holland Trucking. However, he hasn't driven for them since the truck accident in August because that damaged piece of equipment has not been replaced. Don Holland is trying to get a job for claimant in the truck yard according to the testimony.

Arlene D. Goss testified on behalf of the claimant. She is 37 years of age and has been married to claimant for twelve years. There are two children in the home, one from this marriage and one by a prior marriage of the witness, who was not adopted by claimant. She first saw the claimant after the beating on January 28 when she picked him up at the hospital in East St. Louis. She described him as banged up, swollen and irrational. She transported claimant to the hospital in Keokuk and Dr. Bruehsel was consulted.

Prior to January 25, 1979 she indicated claimant was involved with remodeling their home but since then he stated he doesn't do much work because of his lack of balance. Claimant, in addition to his lack of balance, has a hearing problem now which he did not have prior to January 25, 1979. She described him as unsteady on his feet and sleepy all the time. He also has trouble judging distances between vehicles on the road. None of these difficulties existed prior to the beating. She had ridden with claimant, as a passenger while he worked for the defendant and stated she never completed any form authorizing her presence. However, each time she rode with him, claimant had to check with Jack Sharkey for permission.

On cross-examination this witness stated that claimant sustained a concussion in a prior accident. There may have been a second head injury but the witness was unclear on this. Dr. Bruehsel treated claimant for these injuries.

Jack R. Sharkey testified on behalf of the defendants. He is 36 years old and is the manager of Sharkey Transportation Company and Shipper Rental Company and has held that position for several years. Sharkey Transportation is a motor carrier authorized by the I.C.C. to travel various routes and haul commodities. Shippers Rental is a truck rental company. Claimant was a driver for and employee of Shippers Rental Company. Shippers Rental Company is, according to this witness, the entity this case concerns and not Sharkey Transportation as it is

only a dispatching entity and has no vehicles. This witness has exclusive control of the personnel records of all employees, generally and specifically those of the claimant. He stated claimant was hired by defendant in late 1972. He terminated his employment in 1973 and was rehired in 1974 and remained an employee of defendant until March 6, 1979.

The company policy on passengers, according to this witness, requires an authorization form to be signed in advance of carrying that passenger. This has been defendants' policy for many years and was the policy on January 25, 1979. Defendants' exhibit D1 is a specimen of the authorization form and defendants' exhibits D2, D3, and D4 are forms claimant has completed in the past. This witness was not aware at the time of this incident on January 25, 1979 that claimant was carrying a passenger, and he denied ever authorizing claimant to carry his wife as a passenger.

Defendant-company is described by Mr. Sharkey as a "single man" operation meaning that there is one driver per truck as opposed to two. Virtually all of defendants' vehicles are equipped with sleepers and he stated defendant requires, as part of their operation, that the driver stay with the vehicle and sleep in it. As a general rule the defendant does not pay motel bills for drivers except in the situation where the truck breaks down and the driver is stranded. In these situations the driver is required to call the dispatcher and secure advance approval to stay in a motel. He stated claimant had no prior approval from defendant to stay in a motel in East St. Louis, Tennessee, or Kentucky and defendant did not pay for any overnight lodging for claimant during the period of January 18 to January 25.

Defendants' exhibits D5 and D6 were identified by this witness as photos of a truck identical to that driven by claimant on January 25, 1979. The truck claimant was driving had 14,000 miles on it and is described as well broken in. The truck, according to Mr. Sharkey, will run on idle for hours or even days at a time without difficulty and Mr. Sharkey states there was no problem in leaving the truck unattended for several hours when the temperature is in the 26° range. At that temperature a driver could sleep in the idling truck eight to ten hours and never check the truck instrumentation. As far as the defendant is concerned, a driver is to sleep in his truck but "he is on his own."

All drivers keep a daily log of their activities. Off duty hours, according to this witness begin when the driver pulls in for the night until the next day when he starts out again. It is against company policy for a driver to consume alcoholic beverages in, on or around his truck during his "tour of duty."

East St. Louis is described by this witness as an unsafe place to be at night and further, in his opinion, a driver with good sense would not stay there. However, the company had no policy prohibiting drivers from doing so. This witness confirms that claimant was instructed by defendant to contact B.V. & G. in Granite City, Illinois, and attempt to get a load headed for Quincy. Granite City, Illinois, Fairmont, Illinois, and East St. Louis, Illinois are all in the same immediate vicinity. A driver arriving in the St. Louis area after B.V. & G. closed at 5:00 p.m. would follow defendants' alleged standard procedure and stays outside of St. Louis until the next morning and then comes in to town. The driver would have been expected to stay with his vehicle all night.

It is a violation of company rules, according to Mr. Sharkey, for a driver to be drinking with a female passenger and then go out and pick up her luggage from the vehicle, and claimant had no permission from his employer to do any of these activities.

On cross-examination Mr. Sharkey stated that each time a driver starts out "on a new tour of duty" he is required by the D.O.T. and I.C.C. to make a visual inspection of the truck consisting of walking around the unit checking for air leaks, lights and flat tires; checking to insure the tractor and trailer are properly hooked together; and checking air hoses, oil and fuel tanks. In 1977 or 78 claimant let the oil run low in one of defendants' trucks and it burned out. As a result of that incident the witness would expect claimant to pay close attention to oil and water at every stop.

Mr. Sharkey testified that claimant is paid 29 percent of the revenue derived from the freight he hauls.

With regard to staying in a motel, this witness stated that there is no company policy that requires a driver to sleep in the truck. If a driver desires to sleep in a motel and pay for it himself he may do so.

Defendant admittedly relies on the driver's judgment for many things. Mr. Sharkey stated on continuing cross-examination:

Q. And you would rely on the judgment of the driver if he considered that he should go out at some point and check his truck as to the number of revolutions he kept it running?

A. That's his—if he desires that, that's fine, if he was concerned about the safety of his truck and keeping it running. I wouldn't expect him to. It's not expected for him to do it, but if he wanted to do it, that's fine. It's not required of him. We don't check ours when we leave them running for two and three days.

David S. Kiser testified for the defendants. He has been employed by Sharkey Transportation Company for nine years and is the chief truck dispatcher. He directs the drivers on the road to pick up and deliver loads. This witness dispatched claimant to Columbus, Georgia on January 18, 1979. Claimant called this witness from Columbus on January 19, 1979 stating he had unloaded and was going to try and secure a load for the return to Quincy. Claimant later called this witness and advised he had secured a load and he was headed to Madisonville, Kentucky to make delivery. At this time, according to the witness, claimant did not mention the presence of a passenger or ask permission to carry one, nor did claimant request permission to stay in a motel. Claimant next called this witness from Madisonville, Kentucky indicating it was too late to unload and he was going to stay overnight. He did not mention the presence of a passenger, and he did not request to stay in a motel in this call.

In rebuttal, claimant testified that prior to the assault he entered his truck on the passenger side. He did this

because the driver's side door opened onto a street and there was potential truck traffic on that street and he was concerned he might not be seen. After entering the truck he sat on the "doghouse" which is the engine cover located in the center of the cab. From this position he stated he adjusted the truck throttle through the use of a throttle holder.

Louise Shirley Ellsworth testified by deposition on behalf of the claimant. She is 21 years of age and while hitchhiking from Tampa, Florida to Minneapolis, was picked up by the claimant in the vicinity of Atlanta, Georgia. She rode with him for the next few days until his injury of January 25, 1979. Claimant and this witness, according to her testimony, arrived in East St. Louis on the evening of January 25, 1979. She described the temperature at this time as very cold. She and claimant went to the Indian Mounds Motel, parked the truck and left it idling and went into the bar and had a drink. Later, claimant went outside to get Ms. Ellsworth's clothes from the truck, to check the vehicle and to check idle. Ms. Ellsworth followed him out and stated in her judgment the temperature, at this time, was about zero. She stated claimant entered the truck from the passenger side, and stayed in the truck long enough to see that it was running and idling properly. She saw claimant leaning over the doghouse checking the truck instrument panel. Claimant got this witness's suitcase while inside the cab, and as he started down out of the cab he was repeatedly struck in the head and severly beaten by an unknown assailant. This witness recognized the assailant as being present in the motel bar earlier and testified that the assailant was highly intoxicated. She stated the claimant had no contact with the assailant prior to the beating and is at a loss to explain why it occurred. His wounds were generally tended to at the motel by this witness. Claimant's condition had not improved by the next morning so an ambulance was called and claimant was taken to a local hospital. This was the last contact Ms. Ellsworth had with Mr. Goss.

On cross-examination she testified that she and claimant stayed in the same motel room in Monteagle, Tennessee and in Madisonville, Kentucky and claimant paid for the room on both occasions. Neither claimant or this witness had a conversation with anyone in the Indian Mounds Motel Bar except the bar maid. Claimant had a moderate amount to drink at the bar and was described as sober when he went to his truck prior to the beating.

Written objections were filed by the defense to some of the testimony of this witness and they are ruled on as follows: this objection #1 is sustained as this witness is not competent to answer the question; objection #2 is sustained as it calls for an opinion and conclusion of the witness; objection #3 is sustained as it calls for an opinion and conclusion of the witness which she does not appear competent to give; objection #4 is overruled; objection #5 is overruled as this witness was present when claimant was inside the truck checking the idle and may testify as to what she saw and her impressions; objection #6 is overruled and that testimony will be considered for whatever probative value it may contain; objection #7 is overruled.

The deposition of Richard J. Hart was submitted in connection with the reopening of the record in this case. He is employed by Auto-Owners Insurance carrier and is involved with claimant's September 1979 truck accident and the pending litigation in that case. Mr. Hart's testimony establishes his company has been paying claimant compensation benefits as a result of the September 1979 injuries. Attempts were made by counsel for the defense to introduce copies of Dr. Bruehsel's surgeon reports and copies of memoranda prepared by the adjuster in charge of this file, one Lester Allen, into this deposition. Claimant's counsel objected on the grounds of hearsay and not the best evidence, and those objections are sustained. That information will not be considered in the disposition of this case.

Claimant's deposition of November 25, 1980 was also read and considered in this case.

Claimant alleges in his original notice and petition "Head Injuries and left ear." With regard to the nature and extent of permanent partial disability, he alleges "Jacksonian Epilepsy, Labyrinthism from injury to ear." With respect to these injuries, the following medical testimony was elicited.

C. W. Bruehsel, M.D., testified on behalf of the claimant. He is a physician and surgeon and a Board Certified family practitioner. Claimant has been a patient of Dr. Bruehsel's since 1968. With regard to this incident Dr. Bruehsel commenced treating the claimant on January 28, 1979 at the Keokuk Area Hospital. His initial examination revealed:

A. At that time my findings were that the patient had suffered an assault while in St. Louis and at that time his eyes can't be made out, they are completely shut. The patient is breathing strenuously. The left ear is showing a large hematoma and there are signs of hematomata all about the head. On verbal examination, the patient answers to questions warily and says, "They kicked me about the head. They stomped on me." His speech was faintly audible. The admission diagnosis at that time was possible skull fracture, contusions about the face, contusions and concussion of the brain, possible loss of hearing and equilibrium. The man, at the time of the first examination, was in acute distress with severe bilateral aubecular [sic] hematoma.

Claimant continued to be treated in the hospital until February 10 at which time he was conditionally released, and described as in frail condition and unable to work. Claimant has continued under the care of Dr. Bruehsel, the last examination of claimant being March 3, 1980 at which time he describes claimant as follows:

A. I found that he was still lacking in judgment, with considerable degree of hearing loss and irreparable degree of loss of the organ of equilibrium, particularly on the left side, which made him unable to walk a straight line or determine at all times positioning of his body within space and of his equilibrium.

Dr. Bruehsel is of the opinion that the beating claimant sustained in East St. Louis in January 1979 is the cause of the injuries found on the examination of January 28, 1979.

Claimant was previously treated by this physician for gastric difficulties as well as for Jacksonian epilepsy with vascular type headaches. The epilepsy was caused by a truck accident in 1974. Claimant was off work a period of time as a result of this accident. As to causation, Dr. Bruehsel testifies:

A. That is that Richard sustained these injuries, mainly the injury to his hearing apparatus and the severe and irreparable injuries to his sensory of equilibrium were caused directly by the severe beating and pounding he sustained in St. Louis.

This physician is of the opinion that claimant is 75 percent to 80 percent permanently disabled to the body and the mind as a result of the beating. As of the examination of March 3, 1980 claimant would not be released by this physician to go back to work as a truck driver. Dr. Bruehsel testified as follows concerning work claimant would be suited for:

A. I feel at this time that the patient is not qualified to do any work for which he was trained, nor do any work which requires him to be working under a person's direct supervision, since he will not be able to draw valued conclusions, his judgment is almost nonexistent and his ability to connect and to discern is also gravely impaired.

He would not clear claimant to do common labor. Dr. Bruehsel stated:

A. At this time I don't feel that he would be eligible to do even very subordinate manual work since he can't be working, except under direct and immediate supervision at all times.

He does not feel claimant could do manual labor alone because:

A. The patient is only able to work while directly supervised and directly told what to do. He lacks sufficient judgment. He lacks sufficient discerning. He lacks the sufficient discern to see any possible dangerous situation or any degree of work which he can't handle. In other words, the patient severely lacks judgment.

The physician is of the opinion that while claimant might physically be able to do a small amount of manual labor, the problems he has with equilibrium will severely hamper his abilities along this line and as a result claimant may constitute a danger to himself and to other workers around him. There is no indication that this witness is qualified to express an opinion as to the type of work claimant could or could not do, however, the aforequoted testimony does go to the question of the type of work this physician would release claimant to perform.

On cross-examination Dr. Bruehsel indicated he treated claimant for a head injury which was the result of a truck accident in 1974. At that time claimant was discovered to have Jacksonian epilepsy or a vascular type of headache which was brought about by the 1974 accident. Dr. Bruehsel was of the opinion at that time that claimant had a ten percent permanent disability. Jacksonian epilepsy is described as a condition where the brain is scarred and usually results from an accident. Dr. Bruehsel admits claimant had a prior head injury and was treated for it but he never had a prior injury to "the organ of equilibrium or the organ of hearing."

On redirect-examination it was stated that there is a bill for Dr. Bruehsel's services still outstanding but no figure was given in the deposition as to its amount. Regarding aggravation of the preexisting Jacksonian epilepsy or any prior head injury, Dr. Bruehsel testified:

A. I do feel that the pounding and beating and kicking about the head definitely increased and intensified the degree of scarring already present on the brain, if they were present, and increased the severity of any pre-existing [sic] Jacksonian type of epilepsy, as well as vascular headache syndrome and definitely decreased the patient's competency.

Dr. Bruehsel stated he considered these preexisting factors in expressing his opinion as to the extent of permanent disability.

On recross-examination it was indicated that claimant is still receiving medication for Jacksonian epilepsy. All objections lodged by both claimant's and defense counsel to the testimony of Dr. Bruehsel are overruled. The testimony of this physician will be considered and weighed along with other expert testimony contained herein.

Dr. Bruehsel's deposition was taken in March 1980 some time after the intervening September 1979 accident when claimant worked for Don Holland. This physician appears to confuse the results of the two incidents when he speaks of claimant's judgment being impaired as there is no claim for that problem in this suit. Testimony of this nature may have greater applicability in the suit against Don Holland Trucking. This commingling of the additional factor in Dr. Bruehsel's testimony reduces the impact of his opinion as it relates to this litigation.

Thomas B. Summers, M.D., then testified by deposition on behalf of the defendant. He is a Board Certified Neurologist and practices that speciality in Des Moines. He examined claimant on September 6, 1979. Dr. Summers' clinical impression as a result of the September 6th examination was:

A. ...that of posttraumatic neuropathy involving the left eight cranial nerve with resulting hearing loss, tinnitus, and labyrinthine equilibratory disturbances. In other words, I felt that the injury to the eighth nerve on the left side had caused a hearing loss and tinnitus which is a ringing in the ear and a disturbance of the equilibrium.

Based on these impressions Dr. Summers ordered additional diagnostic tests on October 11, 1979, all of which were normal.

A hearing loss was noted in the right ear in the area of high frequency sound. This loss would not affect claimant in hearing normal conversational tapes. The left ear revealed a mild impairment in low frequencies to severe and profound impairment in the middle and high

frequencies. In the final analysis it was felt claimant had a severe hearing problem on the left. This loss was sensori-neural indicating the nerve to the left ear had been affected. This physician had been told by claimant that all of his hearing loss, dizziness and equilibrium problems had come about since the January 1979 beating. Dr. Summers stated there were no tests that could be used to dispute this claim.

An ENG was performed to evaluate the inner ear mechanism. That test conclusion was:

A. ...it indicated that the tests showed electrical abnormalities, and it was felt that the findings suggested peripheral, that means involvement of the nerve of the inner ear mechanism rather than the brain, which is central. It's peripheral meaning out, it involves the inner ear and the nerve rather than the brain, and as he indicated the possibility is this could have developed from a vascular disease, such as hardening of the arteries or a stroke, trauma or injury or inflammation such as infection, like meningitis or encephalitis. In other words, the doctor interpreting the tests indicates that's possible causes, and in the case of Mr. Goss I felt that the logical explanation was the trauma or injury as a cause of this.

The total findings of all tests were, according to Dr. Summers:

A. Well, he has a hearing loss, the ringing or tinnitus that he—in the ear, the dizziness or vertigo and the disturbance of equilibrium.

Dr. Summers is of the opinion that claimant has sustained a fifteen percent functional physical impairment to the body as a whole and that these injuries were the result of the January 1979 injury. No evidence was found by Dr. Summers that claimant's judgment was impaired. Claimant indicated to Dr. Summers that he was working on a part time basis at the time of examination. He was apparently at that time doing over-the-road driving and city driving.

On cross-examination Dr. Summers stated that in order for claimant to compensate for his loss of equilibrium, it was necessary for him to widen his gait. It is difficult for claimant to move about or stand with his feet close together. Dr. Summers' opinion regarding claimant's driving was:

Q. You then—you would not clear him as an over-the-road driver with—as you find him today?

A. If he still has symptoms like this you worry about him driving. I would not like him driving a truck.

Q. You would not clear him for a physical—

A. That's right.

Q. —to do that?
What other job would you not clear him to do?

A. I wouldn't want him to do work around moving machinery parts, you know, such as a lathe or moving machinery, or electrical work, I mean hazardous occupations, for fear that if he should become dizzy that he might lose balance and injure himself.

Q. Or others?

A. Or others.

Q. How about any other type of—would you clear him for common labor?

A. I think so.

Q. He could do common labor?

A. I think, yes, sir.

Q. Yes, sir. But as far as common labor, would you clear him for work around large excavations or on heights—

A. No, sir.

Q. —on buildings?

A. No.

Q. He would have to be a ground man?

A. Ground work, work on the ground and not—

Q. Would he have any carrying limitations that he could carry; could he carry lumber, could he use a wheelbarrow, those things?

A. I think so, Yes.

Q. But you wouldn't want him around any kind of machine or anything like that—

A. Not hazardous.

Q. —that was hazardous?

A. No, sir. No, I would not.

Q. Would it be a fair statement that you wouldn't clear him for any heavy industry that had machinery?

A. I suppose so, yes, sir.

Q. You wouldn't clear him for any industry that had any type of machines that could possibly be fallen into, have any—get your arms into in case he fell and lost his balance?

A. That's correct.

Q. Or be in any position in labor to where if he fell he could fall into a dangerous instrument that could injure him?

A. That is correct.

Claimant's counsel's objection noted on page 12 of Dr. Summers' deposition is overruled and the physician's response will be considered and weighed along with other expert testimony herein.

Section 85.3(1) of the Workers' Compensation Act requires payment of compensation "for any and all personal injuries sustained by an employee arising out of and in the course of the employment."

Defendants have urged the affirmative defense contained in section 85.16(3), Code of Iowa. That section provides:

> No compensation under this chapter shall be allowed for an injury caused:
>
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee.

In order for the defense to succeed in their attempt to defend this case based on Section 85.16(3), it must be established that the attack was motivated by reasons personal to Goss. See *Cedar Rapids Community School v. Cady*, 278 N.W.2d 298, 303 (Iowa 1979). The record does not support the contention because based on the testimony of Goss and Ellsworth, the attacker was unknown to them and may have been intoxicated, and there is no evidence that claimant had any prior contact with the attacker.

There is no issue involved herein that claimant was an employee of the defendant at the time of his injury.

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).

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 Supreme Court noted in *McClure v. Union County*, 188 N.W.2d 283, 287 (Iowa 1971):

> We have frequently said "in the course of" the employment refers to time, place and circumstances of the injury. "Arising out of" related to the cause and origin of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and which he is fulfilling those duties or engaged in doing something incidental thereto.

The Iowa Supreme Court, in the recent case of *Farmers Elevator Co., Kingsley v. Manning*, 286 N.W.2d 174 (1979), stated:

* * *

> ..."[t]he words 'personal injury arising out of and in the course of the employment' shall include... in places where their employer's business requires their presence and subjects them to dangers incident to the business."
>
> When faced on prior occasions with the argument that an injured employee's presence at the scene of an accident was not "required," this court has adopted a liberal interpretation of "course of employment" criterion. We have thus said that
>
> > [a]n injury occurs in the course of the employment when it is within the period of employment, at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. 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 to his usual work. *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. Bushing v. Iowa Railway & Light Co.*, 208 Iowa 1010, 1018, 226 N.W.2d 719, 723 (1929) (citations omitted, emphasis added by the court).

As noted in the claimant's testimony, it was cold on the evening of January 25, 1979 and he "deemed it necessary" to check his truck.

Claimant, as noted, is an over-the-road truck driver and has been so employed for a number of years prior to January 1979. This line of work, by its very nature, carries with it the responsibility of substantial independence on the part of the driver. When claimant left Quincy, Illinois he was operating an expensive piece of equipment which was owned by the defendant. Claimant, however, had more than a passing interest in that equipment for unlike employees generally paid by the hour, he was paid on a percentage basis of the revenues produced by that truck. The more money that could be derived through the operation of that vehicle, the more claimant would make and, not incidently, the more the defendant would make.

If, while on the road, the equipment could break down or be vandalized, thus prohibiting its full and prompt use to haul goods, both defendant and claimant would stand to lose financially.

Hence, a prudent over-the-road truck driver paid on a percentage basis would be particularly interested in insuring the safety of his equipment.

Claimant testified that just prior to his injury he left the Indian Mounds Motel, to check his idling vehicle as it was a cold night, and to get Louise Ellsworth's suitcase contained therein. Claimant indicated he entered the cab of the truck and checked the engine idle as well as the truck instrumentation. This is confirmed by Ms. Ellsworth. He also stated he generally checked the truck over. While claimant may have had another motive to visit the truck (i.e., pick up Ms. Ellsworth's suitcase) it is found that at the same time he was attending to the responsibilities of his employment. That is, he was doing that which he felt was necessary to insure the safety of his vehicle.

While there is testimony from Mr. Sharkey that there would be no particular reason for a driver to go out and check his truck, he concedes that if the driver wanted to do so, it was fine as far as the defendant was concerned.

There was testimony to the effect that claimant did not have authorization to carry Ms. Ellsworth as a passenger

in violation of company policy. It is argued that this violation of company policy caused or substantially contributed to the injury. However, despite the presence of Ms. Ellsworth, as the record stands, claimant was checking his vehicle at the time of the assault.

There is testimony in the record about the claimant staying in a motel on various nights during the trip from Atlanta, to East St. Louis. The fact that claimant may have stayed in a motel is of no consequence in this case because as Mr. Sharkey admitted, there is no company policy prohibiting it and the issue then boils down to one of who is paying for the lodging, the employer or the employee.

Based on the aforequoted case law, it is found that the record taken as a whole establishes that claimant sustained an injury which arose out and in the course of his employment with the defendant.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 25, 1979 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).

While a claimant is not entitled to compensation for 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 proof and established a causal relationship between the work-related beating of January 1979 and his resulting disability. This burden has been sustained through the testimony of Dr. Bruehsel as well as that of Dr. Summers as to causal connection.

Claimant, at the time of hearing, was 42 years old, had been an over-the-road trucker since 1968 and had been employed by defendant since 1969. He has limited education having completed the eighth grade and not secured a G.E.D. certificate. It would appear to the undersigned that the claimant has limited intellectual abilities. During the course of his testimony he had difficulty testifying and following the examiners line of questioning.

Claimant's condition has been diagnosed by both physicians examining him as hearing loss, ringing in the ear, dizziness and severe disturbances of equilibrium. Dr. Bruehsel is of the opinion that claimant's ability to exercise good judgment has been affected although there is no claim for that in this case. The record reflects that claimant suffered from Jacksonian epilepsy prior to January 1979 and had a ten percent disability rating as a result of this condition. He was, however, able to continue working.

Dr. Bruehsel, in his deposition, stated claimant is not qualified for any work for which he was trained and would not release him to drive a truck and would not clear claimant to do common labor. He is of the opinion that claimant has sustained a 75 to 80 percent disability to the body as a whole and that the severity of the underlying epilepsy was increased. The record is unclear as to whether Dr. Bruehsel, in expressing his opinion, was testifying purely in terms of functional disability or was basing his opinion on additional industrial disability considerations. The record is also unclear as to what percentage of this disability is attributable to the case, *sub judice*, and what percentage, if any, is attributable to the intervening truck accident which is presently in litigation.

There is also a lack of specific testimony by Dr. Bruehsel as to exactly what diagnostic testing was completed which would support his opinion as to disability. As a result of these deficiencies, Dr. Bruehsel's testimony is substantially diminished in weight.

Dr. Summers, a board certified neurologist, who conducted a physical exam of claimant on September 6, 1979 prior to the intervening accident, was of the opinion that claimant had a fifteen percent functional disability as a result of the January 1979 incident. He would not clear him to be an over-the-road truck driver if the symptoms persist. He would not clear claimant to work around any machinery with moving parts or any hazardous occupation. He would permit the claimant to do common labor on the ground but not around any excavations or at any heights.

Dr. Summers' opinion is of particular import because his exam was conducted prior to the second accident and his opinion is not clouded by the intervening event.

The evidence reflects that although claimant sustained this injury in January 1979 he was able to return to work at his truck driving occupation in August of that year. It was only after the accident of September 1979, while in the employ of another company, that he was allegedly no longer able to pursue that occupation.

Taking all of the testimony into consideration as well as claimant's age, educational background, experience, physical condition and prospects for further employment and the other industrial disability considerations, it is found that claimant has sustained an industrial disability to the extent of 40 percent of the body as a whole as a result of the January 1979 incident.

It was stipulated by the parties that the claimant's average gross weekly earnings for the year 1978 were $369.47 per week and the record indicates claimant has two children at home, one of whom was not adopted on the date of injury. The burden is on claimant to establish that he has provided the principle support for the stepchild pursuant to Section 85.42. Since claimant presented no evidence concerning this matter, the claimant is considered to have three exemptions. The applicable rate is $223.61 per week.

Various medical bills were introduced as claimant's exhibit C3 through C9 and it is found that these expenses were incurred to treat claimant's work-related injury within the contemplation of section 85.27.

WHEREFORE, it is found:

That claimant was an employee of the defendant on January 25, 1979.

That he sustained an injury on January 25, 1979 which arose out of and in the course of his employment with defendant.

That there is a causal connection between claimant's injury and his resulting disability.

That the healing period in this case extends from January 25, 1979 until the claimant returned to work for Don Holland Trucking on August 1, 1979.

That claimant is permanently partially disabled to the extent of forty (40) percent of the body as a whole.

That the medical expenses evidenced by claimant's exhibits C3 through C9 are reasonable and were incurred to treat the injury under the terms of section 85.27.

* * *

Signed and filed this 18th day of February, 1980.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

WILLIAM GRANT

Claimant,

vs.

SAMCO CONSTRUCTION
Employer,

and

HAWKEYE SECURITY INSURANCE CO.,

Insurance Carrier,
Defendants.

Remand Order

By order of the industrial commissioner filed November 24, 1980 the undersigned deputy industrial commissioner has been assigned to write the final agency decision on appeal in this matter. Defendants appeal from an adverse arbitration decision.

* * *

At the hearing, claimant's counsel indicated that he would be taking the post-hearing deposition of one Jim Perry, apparently for evidentiary purposes; also the deposition of Lyle Luckow was to be taken; also at that time, the discussion on the record between the attorneys and hearing deputy contemplated the taking of three medical depositions, apparently for evidentiary purposes: two doctors are listed above; the third was Peter Wirtz, M.D.

There were some problems in obtaining the medical depositions, and these were explained by letter. The hearing deputy apparently went along with the delay. The deposition of J. H. Dickens, M.D., was filed February 18, 1980; that of Thomas Lehman, M.D., on May 1, 1980; and that of Dr. Wirtz on June 10, 1980. The depositions of Jim Perry and Lyle Luckow are not in the file.

After claimant appealed, defendants on July 28, 1980 filed a request to introduce the depositions of Dr. Wirtz and Lyle Luckow as a part of the record on appeal.

Thus, at the time of the hearing, the attorneys and the hearing deputy assumed that the record would include the depositions of Dr. Wirtz, Jim Perry, and Lyle Luckow, none of which received any consideration in the decision. There is also some indication (Witke letter, December 15, 1980) that a deposition of one Carl Jones (filed June 17, 1980) was to be part of the original record.

Under these circumstances one cannot determine what should have constituted the original record, and the case must therefore be remanded to the hearing deputy for further consideration. *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa, 1976).

WHEREFORE, this matter is remanded to the hearing deputy to determine the proper contents of the record before him and, if the record should contain supplemental evidence, to render a supplemental decision. If no supplemental evidence is admitted into the record, then the original decision will stand.

* * *

Signed and filed at Des Moines, Iowa this 7th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RICHARD D. GRAVES,

Claimant,

vs.

EAGLE IRON WORKS,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Claimant appeals from a review-reopening decision in which he was denied further compensation benefits as a result of an injury he sustained on October 13, 1977.

* * *

The issues on appeal as stated by the claimant are whether or not the claimant is entitled to an evaluation of

his disability on an industrial basis and if so, what is the extent of his industrial disability.

The facts are substantially not in dispute. The claimant sustained a personal injury arising out of and in the course of his employment by the defendants on October 13, 1977. He was taken to Mercy Hospital Emergency Room where he was treated by Dr. Sinesio Misol and a diagnosis of "severe sprain of the ankle" was made. (Misol Deposition Exhibit 1). Weekly compensation was commenced and the claimant was paid temporary total disability benefits from October 14, 1977 through May 14, 1978, and May 18, 1978, through November 12, 1978, for a total of 56 weeks at the rate of $167.98 per week totaling $9,406.88. In addition, claimant has been paid permanent partial disability benefits based upon 20 percent permanent partial disability to the left leg totaling $7,391.12. (Form 2A filed September 9, 1980.

The claimanat has been released to return to work without restriction on two occasions. The first time being May 15, 1978, (Misol Deposition page 6, line 25 through page 7, line 25) and the second being October 13, 1978, (Misol Deposition page 12, line 22 through page 13, line 4). On both occasions, Mr. Graves had difficulty in performing his duties and returned to Dr. Misol who in November of 1979, placed restrictions upon the kind of work Mr. Graves should do (Misol Deposition page 18, line 7 through 17). Dr. Misol further rated the claimant's permanent physical impairment at 20 percent of the left lower extremity (Misol Deposition, Claimant's Exhibit 1—letter of December 11, 1979).

Defendant-employer requires a full release, without restriction, to allow an employee to return to his employment (Transcript page 17, line 19 through page 18, line 3). The employer has attempted to find Mr. Graves a job within the restrictions placed upon him by Dr. Misol in November of 1979 (Transcript page 46, line 11 through line 25). The employer has further stated that they would take him back if he were released to work without the restrictions placed upon him by Dr. Misol (Transcript page 29, line 20 through page 30, line 9; page 41, line 21 through 42, line 3; page 45, line 19 through page 24; page 49, line 9 through line 12). The employer has also stated that it is the restrictions described by Dr. Misol that impair his return to work, not the disability evaluated by Dr. Misol (Transcript page 29, line 23 through page 30, line 2).

Although claimant described to Dr. Misol complaints in his other leg, Dr. Misol testified that he did not find any permanent physical impairment resulting from this injury other than to the left leg (Misol Deposition page 27, line 17 through line 23; page 17, line 25 through page 18, line 3).

Claimant has testified that he wished to return to work and that he feels that he should not have restrictions placed upon him by Dr. Misol (Transcript page 126, line 25 through page 127, line 2). He has not, however, seen Dr. Misol since November of 1979 to see whether or not he shares that feeling (Transcript page 127, line 3 through line 5).

Claimant's brief from the second paragraph, page 1, under Division III Argument through the last full paragraph of page 3 sets out relevant facts concerning claimant's age, education, work experience and ability to carry on gainful employment since the injury. Due to the findings of fact and conclusions of law hereinafter set out, these facts are not reiterated herein.

Based upon the record the following finds of fact can be made.

1. That claimant's injury resulted in 20 percent permanent partial disability to his left leg.
2. That the disability did not extend beyond the left lower extremity.
3. That work restrictions were placed upon claimant as a result of the injury by the treating physician Dr. Misol.
4. That the employer will not reemploy the claimant with the imposed work restrictions.
5. That healing period benefits were paid in full.
6. That permanent partial disability benefits were paid based upon 20 percent permanent impairment of the left leg as rated by Dr. Misol.

The excellent briefs of the parties set out in detail the applicable law in Iowa and to some extent other jurisdictions regarding claimant's condition.

Virtually all of the Iowa cases which are applicable to this situation are cited by the parties in their briefs. From a reading of these cases it is clear that the Iowa law to this point is that when the loss due to injury is limited to a specified part of the body as defined in the schedules contained in section 85.34(2)(a) through (t) the disability is arbitrarily determined by use of the schedules without consideration of resultant loss of earning capacity. *Daily v. Pooley*, 233 Iowa 758, 10 N.W.2d 569; *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W.2d 598; Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660; *Kellogg v. Shute and Lewis Coal Co.*, 130 N.W.2d 667, 671 (Iowa 1964); *Schell v. Central Engineering Co.*, 232 Iowa 421, 4 N.W.2d 399; *Blizek v. Eagle Signal Co.*, 164 N.W.2d 84; *Spurgeon v. Iowa & Missouri Granite Works*, 196 Iowa 1268, 194 N.W.2d 286.

Conclusions of Law

1. That claimant is entitled to benefits for loss of use of the left leg pursuant to section 85.34(2)(o) and the second paragraph of section 85.34(u).

2. That claimant is entitled to benefits based only on the percentage of loss or loss of use of the left leg.

3. That loss of earning capacity is not a consideration as it is arbitrarily included in the schedule.

WHEREFORE, the proposed review-reopening decision is adopted as the final decision with the expansion provided herein.

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That costs of this proceeding are taxed to defendants.

. . .

Signed and filed this 30th day of June, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

DONALD R. GREEN (Deceased),
and added party, DOROTHY GREEN,

Claimant,

vs.

ACE LINES, INC.,
Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a combined proceeding in review-reopening and for Death Benefits. On May 26, 1978 Donald Green, the decedent, filed a review-reopening against his employer, Ace Lines, Inc., and the insurance carrier, Employers Insurance of Wausau, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on October 7, 1977. On July 17, 1977 Dorothy Green, surviving spouse of Donald Green, was added as a party seeking death benefits on account of decedent's death on May 17, 1979. This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on March 26, 1980. The record was considered fully submitted on May 9, 1980.

* * *

The issues to be resolved are whether decedent's alleged disability after the work injury and before his death is causally related to said injury; the nature and extent of such disability; and whether decedent's death is causally related to the work injury. Decedent has raised a notice issue pursuant to *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, (Iowa 1978) with respect to the first issue. Defendants have raised defenses pursuant to Code Section 85.16 (2) and (3) with respect to the latter issue. Certain medical expenses are also in issue.

During the course of his deposition on October 25, 1978, decedent testified that he first began having trouble with his nerves in 1968. Although he could not pinpoint a cause per se, decedent noted that he felt so much pressure (above the usual demands he found in any job) from the union at Massey Ferguson that he resigned his position on the union's executive board. Decedent testified that he was treated by a Dr. Linford at that time. He recalled taking 15 milligrams of Valium daily. He continued to work for Massey Ferguson until he was terminated in 1972 for failure to make a reasonable effort to return to work after running out of gas while away from the plant on a lunch break.

Decedent further testified that he had been doing some truck driving part-time while employed at Massey Ferguson. After the 1972 termination, decedent worked at numerous trucking jobs. He admitted that he continued taking Valium throughout that period of time. He recalled his dosage of Valium was increased to 30 milligrams per day after his son was killed in a motorcycle accident sometime before 1977.

Decedent stated that his nervous symptoms reappeared after his hospitalization following the truck accident on October 7, 1977, the injury in issue. Although he was released to return to work in December of 1977, the decedent explained he did not so return because tremors increased to the point that he had convulsions. At that point his family doctor referred him to Dr. Conklu. Decedent indicated that he was seeing Dr. Conklu every two to three weeks. Decedent did not believe he could go back to truck driving because he feared for his life. He preferred to let his wife do any family driving. Decedent had attempted to do some welding for two weeks in the immediately preceding summer but found that his hands were not steady. He likewise did not want to be around machinery, despite earlier training, because of his nervousness. Decedent stated that he recently completed his GED at Area XI and presently was enrolled in a 60 week diesel mechanics course at Lincoln Technical School in West Des Moines through the efforts of the State of Iowa Vocational Rehabilitation Department. He was attending school part-time but hoped to work into full-time so as to accelerate completion of the program.

Decendent explained that there was nothing wrong with him physically and that his difficulty was a nervous disorder. Decedent related that he felt better than a year ago and the tremors had decreased gradually. He indicated some concern over his wife's back disability for which she was receiving income. He stated he did not feel financial pressure because although he did not have money, he did not owe money. He had filed for social security income.

Dorothy Green, surviving spouse of Don Green, testified that she married the decedent on May 24, 1957. She related that on October 10, 1977 she received a phone call regarding her husband's truck accident near Sioux City, Iowa and that another trucker brought him home. She observed that the decedent looked tired. She recalled Carlton W. Van Natta, M.D., saw the decedent at Mercy Hospital where x-rays were taken and treatment administered for broken ribs. According to Dorothy, the decedent was not hospitalized at that time but did undergo surgical removal of a fibrosis tumor two months later. Dorothy Green commented that the decedent has not complained about such tumor prior to the truck accident.

Dorothy Green further testified that decedent did not return to work for some time after the December 1977 hospitalization. She verified that the decedent only worked a couple weeks as a welder and then quit. She related how he tried to drive a bus chartered by students on two or three occasions but became too nervous and upset to continue such work. Dorothy testified that although the decedent had had high blood pressure for

which he took medication, did use Valium, and did see a psychiatrist on one earlier occasion (she was unaware of the reason for such visit), she did not recall decedent's pre-date-of-injury work being affected by any such factors. She insisted that decedent was never unemployed for a mental health reason prior to the date of injury.

Dorothy Green observed that the decedent became so antisocial after the work injury that he did not wish to spend Christmas with any relatives or friends. According to Dorothy the decedent withdrew when a group of people were around, indicating that he felt nervous. She contrasted this attitude with his previously normal social behavior. She also remarked that the decedent used to drive all kinds of vehicles including race cars. Yet, after the work injury he became nervous when driving, and thus she did most of the family chauffeuring. She recalled that he did begin driving himself back and forth to the technical school sometime in November of 1978. With respect to the latter activity she noted the decedent had trouble remembering material and accordingly was not earning good grades. She pointed out that decedent's memory has been very good prior to the work injury.

Dorothy Green proceeded to testify regarding a number of bizarre incidents that occurred after the date of injury. The decedent apparently picked a fight with a close friend of 20 years. Dorothy next found the decedent threatening to attempt suicide by putting a gun barrel in his mouth. Decedent's brother-in-law talked him out of such action. However, two weeks later (in June 1978) the decedent called the police to report a fictional neighborhood shooting. Before the police arrived the decedent apologized to his friend about the argument and then got into the back of a pickup. When the police appeared the decedent taunted them with a gun but did not shoot. The decedent's brother was able to talk the decedent into surrendering. The police charged the decedent with assault with intent to commit murder. Thereafter decedent was hospitalized in the mental health unit at Lutheran Hospital. Dorothy noted that the decedent had been hospitalized in a mental health unit in February and March of 1978 and had been on medication at the time of the police incident. The second hospitalization lasted from June to August of 1978.

Dorothy Green related that after the decedent returned home in August of 1978 he was still nervous and broke out in hives. Court appearances connected with his suspended sentence and probation bothered him. He applied for social security disability benefits and enrolled in the technical school. He continued to visit his father almost daily, either before or after school. Decedent did not appear to resent his father marrying someone the family had known for a long time. (Decedent's mother died while he was hospitalized in the summer of 1978).

Finally, Dorothy Green testified that on May 11, 1979 the decedent left for school as usual. She did not recall the decedent acting differently that day. She testified that decedent stopped by his father's home after school. Around 10 p.m. she received a call from decedent's father's wife indicating that the decedent had been shot. Decedent was taken to Methodist Hospital where he died eight days later without regaining consciousness. Dorothy commented that the decedent never had a violent argument with his father in the past, had not indicated since his last hospitalization that he was contemplating suicide, and had not stated he was upset with his father or stepmother.

Regarding other disquieting factors, Dorothy Green testified that their son's death on May 22, 1975 had upset the decedent but did not necessitate any hospitalization or psychiatric treatment. She herself quit working in September of 1977 due to back surgery. She was not employed outside the home through the time of his death. She received social security disability benefits.

On cross-examination Dorothy Green testified that she could not recall when decedent first began to exhibit symptoms of anxiety, dry mouth, and dizziness or to take Valium but agreed that such matters covered many years. She noticed his loss of memory around the time of the 1978 summer hospitalization because the decedent had been studying for his G.E.D. She considered the loss of memory to be most evident and most significant. She agreed that decedent was a nervous individual even before the date of injury, but disputed that he left his work at Massey-Ferguson because of a nervous condition. She was unaware of any union problems.

Dorothy further testified on examination that she was aware her husband wanted to stop taking Valium. Her memory was poor with regard to when this matter was discussed or when decedent attempted withdrawal.

Regarding decedent's prior injuries, Dorothy Green told the examiner that decedent had been involved in a potato truck accident in the 50's or 60's, broadsided a telephone pole while driving a pickup sometime in the 70's, and was hit from behind while driving home on the freeway in March of 1979. She noted that decedent's brother died in the mid 60's and that their son's death in 1975 had a substantial effect on the decedent. She further agreed that decedent's mother's funeral in June of 1978 was especially upsetting in that decedent had to obtain a court ordered release from the mental health unit in order to attend. Dorothy Green denied any marital problems existed or that she ever threatened to leave the decedent. She did not know why a reference to decedent having difficulty with their fifteen year old son would be in the record, unless it concerned the son's desire to drop out of school.

On redirect examination, Dorothy Green recalled that in the 1970's decedent had broken his leg while trying to move a loose railroad track and had injured himself in connection with a fairground incident. After recovery from both injuries, he returned to work. She did not note any depression in the decedent prior to the date of injury. She thought decedent's anxiety increased after the date of injury in that the decedent became very isolated. She knew of no physical reason why the decedent could not have worked after recovery from the removal of the tumor.

Dorothy Green's deposition testimony taken on November 8, 1979 essentially is consistent with her testimony at the time of the hearing. She stated that the decedent had taken two milligrams of Ativan before leaving for school on May 11, 1979. She indicated that she had no personal knowledge regarding the altercation at her father-in-law's home that evening.

During the course of his deposition testimony, Fred Green, 71 year old father of the decedent, testified that he

had just concluded ordering another son, Robert, out of the house when the decedent arrived at the scene. Apparently the decedent took two beers out of the refrigerator and went outside to talk to his brother. According to Fred Green, the decedent came back inside and threatened to kill everyone present and to burn the house down. Fred Green continued to describe the episode:

> Well, he picked up a chair, and starting [sic] hitting me over the head with it. I grabbed onto that chair, and I wouldn't let loose. He drug me all over the house. I didn't know how I hung on, but I knew if I let loose, that was all of it. He finally let loose of it and grabbed up a big iron skillet out of the sink and started swinging that in the air.
>
> * * *
>
> I sat the chair down, and I went to the bedroom and got my shotgun.
>
> * * *
>
> He was on the floor swinging it around. He said, "I am a mental patient, and I have the power to do anything I have to do", only he was using his left hand to point up, because he had the skillet in his right one.
>
> * * *
>
> I came back around the table by the Frigidaire. I went and got the gun. If I had to use it, I was going to use it. I didn't intend for that gun to fire when it did. I don't know myself whether I hit it on the Frigidaire, or what, because I had it in one hand when it went off. (Fred Green's deposition, pages 27-29)

Fred Green insisted the shooting was not intentional:

> Q Were you aiming at him, or did you just have it?
>
> A. I had it in my hand like that, and it was pointing down to the floor, and when the gun went off, I guess it came up.
>
> Q. So you didn't actually try to shoot him?
>
> A. Oh, no.
>
> Q. It was accidental?
>
> A. Yes. (Fred Green deposition, page 29.)

Fred Green stated that he had not observed that the decedent had any emotional problems prior to the work injury. He thought the decedent was upset in the same way the rest of the family was over the death of the decedent's brother and son. He was unaware of any medication the decedent had taken prior to the date of such injury or of any psychiatric care the decedent had undergone before October of 1977. Fred Green was convinced the decedent had sustained brain damage as a result of the work injury. He noted, from assisting the decedent with his school work, that it was usually difficult for the decedent to study. He was unaware of the decedent's threat to commit suicide. Fred Green disagreed that decedent was in any way upset that he (Fred) had married Nadine, a friend of the family for 40 years on April 28, 1979, after the decedent's mother died in mid 1978.

Nadine E. Green testified by way of a deposition taken on October 11, 1979, that although she had nothing but casual contact with the decedent until April of 1979, she observed the decedent was not as friendly and appeared nervous beginning sometime in 1977. She was unaware of decedent's history of taking Valium.

Nadine Green described the May 11, 1979 incident in essentially the same framework (however, she thought it was Bob's decision, not Fred's request, that Bob completely move out from the upstairs apartment) but in obviously exaggerated detail:

> A. He came back in, and his dad turned around, and again asked him if he wanted to play cards, and he said, "no", and then he started in on his dad.
>
> * * *
>
> "You threw Bob out." And he said, "I didn't throw him out. I just told him to leave."
>
> Then he just started to—I don't know—look at the ceiling, and staring, and no expression—blank expression and big eyes, and just kept saying, "I am a mental spirit, and the spirits above tell me what to do, and they are telling me to burn this house down and kill everybody in it."
>
> * * *
>
> Fred tried to calm him down, and said, "Sit down. Bob's problem and my problem is ours."
>
> "I am his brother, and it is mine too", so he just kept looking at the ceiling, and going on, and then he went over, and Fred got up. He jerked the chair up under Fred, and started hitting Fred with the chair, and Fred wrestled the chair out of his hand. Then he picked up a frying pan.
>
> * * *
>
> Q. Did he knock Fred down when he pulled the chair?
>
> A. Yes. I turned around, and just as I turned, I saw—right down by the leg of the chair, I saw the gun.
>
> * * *
>
> Q. What was he doing?
>
> A. Standing with the frying pan.
>
> Q. Then what happened?
>
> A. I saw him there going back and forth, with the gun pointed towards the mopboard. I was hollering at Fred, and then the thing went off.
>
> Q. What were you hollering at Fred?

A. As soon as I seen the gun, "No, Fred", and that's—I mean it was pointed right down at the mopboard. When that thing went off, it went right straight in the air.

Q. Did it strike Don then?

A. Yes.

Q. Where did it strike him?

A. Right in the left groin. (Nadine Green deposition, pages 31-36)

The complications following the shooting incident are summarized by Joseph M. Torruella, M.D., in his May 21, 1979 letter to Dr. Van Natta:

> ...He was seen in the Emergency Room at Mercy Hospital on May 11, 1979. At that time, a tragic injury to the left thigh eventuated in an above-knee amputation later that evening in surgery. Intraoperatively, he developed a disseminated intravasular coagulation which mitigated over the ensuing 48 hours. However, he did develop renal shutdown and became decerebrate. He expired on May 17, 1979. (Claimant's exhibit 8.)

Darrell Bickel, 48, testified that he had been a friend of the decedent's since school days and a neighbor for the last nine years. He explained that the argument with the decedent in the spring of 1979 stemmed from Bickel's daughter parking her car slightly in decedent's yard. According to Bickel, the decedent grabbed and bruised him as he was attempting to move the car. As Dorothy Green testified, Bickel stated that the decedent apologized for this argument before the police incident. He noted this was the only fight he had ever had with the decedent.

Bickel verified Dorothy Green's observations about the decedent's antisocial behavior beginning at some point after the truck accident. He did not see the decedent working outside the home as much and did not converse with the decedent nearly as much as prior to the work injury. Bickel testified the decedent appeared ashamed and not as friendly upon returning home from the August 1978 hospitalization.

On cross-examination, Bickel agreed that the decedent had changed quite a bit in the last three years of decedent's life and that his observation in the summer of 1978 was on a casual basis.

Terry Hogan, transportation safety director for defendant-employer, was called by the claimants' attorney as an adverse witness to testify with respect to the determination of decedent's gross weekly wage. Insofar as the parties agreed that the rate of compensation should be $134.87 per week, Hogan's testimony will not be set forth herein.

In a letter dated January 2, 1979 and addressed to defense counsel, Paul T. Cash, M.D., states:

> Mr. Donald R. Green was seen by me on one occasion on April 4, 1975. At that time he was complaining of being shaky with a feeling of pressure in his head. He had not been sleeping well at all since September and was tired during the day. He had a sensation of numbness on the inside of his body. He complained of being depressed with no interest. He felt that he was under a lot of pressure from all sources and gave up his position on the Executive Board of the Union. He has not been on the job since September of 1974.
>
> Part of this time he had been taking Valium for about five or six years and had been feeling good. In December, 1974, he stopped his Valium. His physician found his blood pressure to be elevated. He was placed on Triavil and Norpramin which did not help.
>
> At the time of his first visit it was evident that he was suffering from emotional depression with a number of somatic complaints. He was advised to go back on Valium, 10 mg., three times daily; and to add Navane, 2 mg. three times daily. He was advised to continue on the Hydro-Diuril and the Potassium prescribed by his physician. He has not been seen since that initial visit. (Defendants' exhibit A.)

Carlton W. Van Natta, M.D., makes frequent references to the decedent being nervous and tense in office notes covering a period of time from September 1966 to September 1976. (Defendants' exhibit K.) Mercy Hospital records for decedent's March 1975 hospitalization contain a final diagnosis of essential hypertension and mild diabetes mellitus with a complication—anxiety. (Defendants' exhibit J.)

Dr. Van Natta explains his treatment of the decedent from the date of injury to April 17, 1978 in a letter dated June 29, 1978 and addressed to the Iowa Department of Public Instruction:

> Donald Green was admitted to Mercy Hospital on March 13, 1978 for treatment of essential hypertension and mild diabetes mellitus. He was placed on Catapres, Serax, and Diuril with some potassium. He discontinued the medication and his blood pressure gradually went back up. He had an automobile accident in the first of October of 1977 at which time he hurt the right side of his ribs and right shoulder and was seen in the Emergency Room on two occasions as well as in my office on October 20, 1977. Because of a fracture of the fifth and sixth ribs on the right side, he was unable to work and during that time he showed an increasing blood pressure and continued to have pain in his right lower chest area. He came to my office on November 29, at which time he was very tense and tight and said that he had been taking Valium to control his nerves as well as his blood pressure. He was continuing to have pain on the right chest which prevented him from doing any lifting. He also stated that he had a cyst which was very painful at the margin of the rib cage on the right side. He was admitted to Mercy Hospital on December 4, 1977 for treatment of essential hypertension, excision of a neurofibroma of the right lower chest, anxiety reaction and healing ribs on the right side. He returned to my office on January 5, 1978, for a follow-up of his hospitalization, at which

> time he had a fine tremor all over and was very tense. He stated that he had been seeing Dr. Conklu, Psychiatrist, and I referred him back to Dr. Conklu. He again returned to my office on April 17, 1978 for treatment of an upper respiratory infection. At that time his blood pressure was 154/104. I have not seen Mr. Green since that time but I understand that he continues to have psychiatric problems both with his family and with the law. (Claimant's exhibit 8.)

Dr. Van Natta initially found the decedent able to return to work on October 24, 1977 but later determined that the decedent's healing period ended, and his ability to return to work occurred as of November 29, 1977. (Defendants' exhibits E and F; defendants' exhibit K, office notes for October 20, 1977 and November 29, 1977.) Dr. Van Natta did not relate the hypertension to the work injury. (Defendants' exhibits E and F.)

Ilhan Conklu, M.D. psychiatrist, not board certified but board eligible, testified in his initial deposition (October 31, 1978), that he first saw the decedent in the office visit on December 29, 1977 upon Dr. Van Natta's referral. He found the decedent to be anxious, nervous, and depressed. He took the following history from the decedent:

> At that particular date, he complained of severe nervousness and depression. He stated that he has been seeing Dr. Van Natta since 1972, and he has been on a tranquilizer called Valium, and he stated that he was watching a TV program a few weeks ago—correction—a few weeks prior to my examination of him, and he got scared and stopped taking his Valium. I guess this TV program was about Valium; and he stated that since he has stopped his medications, he has been very anxious, had a dry mouth, tense muscles, dizziness. He also stated he saw another psychiatrist in Des Moines only once. (Conklu October 31, 1978 deposition, pages 4-5.)

Dr. Conklu's diagnosis at that time was one of anxiety neurosis. He noted decedent had reported having high blood pressure and mild diabetes. He recommended medication for (anxiety and depression) and psychotherapy.

Dr. Conklu was unaware of decedent's treatment for a nervous stomach since 1968, of the reason for Dr. Van Natta's treatment in 1972, or of the decedent's taking Valium since 1968. He explained that Valium reduces nervousness and anxiety. He agreed that part of decedent's problem could have been caused by the sudden stoppage of Valium. He was aware of the fact that the decedent had been taking 60-80 milligrams of Valium per day prior to the withdrawal.

Regarding the different medication the decedent had taken, Dr. Conklu testified that Elavil, an anti-depressant, was prescribed from December 29, 1977 through January 5, 1978 at which time he put the decedent on Librium through April 14, 1978. Dr. Conklu reported that Haldol, Mellaril, and Librium were tried while the decedent was hospitalized from February 1, 1978 through March 23, 1978 for anxiety and depression. As of April 14, 1978 Dr. Conklu put the decedent back on 5 milligrams of Valium four times a day. However, at the time of the October 31, 1978 deposition, the decedent had been taken off Valium for a few months and put on Ativan, a tranquilizer. Dr. Conklu anticipated that medication and office visits for psychotherapy every two to four weeks would continue indefinitely.

Dr. Conklu testified that he saw the decedent in nine office visits and two hospitalizations from December 1977 through October 1978. He thought the decedent's condition had improved. He ageed that the decedent was "very close" to being able to work as a mechanic if he were qualified. (Conklu October 31, 1978 deposition, page 15.) Dr. Conklu saw no reason why the decedent could not complete the diesel mechanic course and he encouraged the decedent to find some employment after school. However, he noted that how the decedent would handle the stress of working was something that was unknown and would have to be tested. Dr. Conklu was unaware of decedent's reaction to pressure when decedent was employed at Massey Ferguson. However, with regard to decedent's history of coping with pressure and future potential, Dr. Conklu testified:

> Q. Would it be your understanding this inability to cope with pressure had been present for many years with this individual?
>
> A. Well, when I talked to him, he mentioned about being a truck driver, and, as I recall, he has not been working for some time.
>
> Q. Right.
>
> A. And as I recall, he had an accident while he was on the road as a truck driver.
>
> Q. Yes.
>
> A. And since then, as I recall, he has not been able to work, to function at that capacity except I guess some several months ago, he went back to work, and he was driving a bus, I think, for a company, a chartered bus, and he just couldn't do it. He just couldn't drive that bus with people in it. He was very nervous. He kept taking more medications to calm himself down, and more and more medication, and then he told me that he was very afraid that, you know, he just was going to cause some accident, because he was extremely nervous.
>
> Q. Do you anticipate that with psychotherapy he will overcome these problems?
>
> A. Well, his anxiety will improve. We expect the anxiety to improve, which has improved; the depression to respond to treatment. As far as symptoms, I expect some response, but if you are asking about his capacity as a truck driver, that's a different question.
>
> Q. Well, do you anticipate that he will ever be able to return to driving?
>
> A. I doubt it. (Conklu October 31, 1978 deposition, pages 16-17.)

Regarding other matters that may have added to decedent's depression, Dr. Conklu testified:

A. Before this, prior to this last admission, I guess he had some family difficulties which made him more depressed. He felt that he might lose his wife, and he became very depressed, and consequently he had suicidal thoughts.

Q. Did he relate to you the loss of his son in 1974?

A. Yes, he has.

Q. Did that contribute to the condition he had?

A. Quite a bit.

Q. Can you be a little more specific, Doctor, if you can, how that would affect him?

A. His son died of a motorcycle accident, who was 18, and since the accident, when we talked about that son on several occasions, the Respondent would have a very sad facial expression, and it was obvious he was still thinking of that accident, and he talked about it now and then. It was still bothering him. (Conklu October 31, 1978 deposition, pages 12-13.)

On cross-examination by decedent's counsel, Dr. Conklu assumed decedent was attending school only part-time because the decedent was nervous, and that probably affected his concentration, attention, and tolerance. Dr. Conklu explained that his recommendation concerning the decedent's attempt to return to work contemplated part-time work at first to determine decedent's tolerance level. He recommended low demand jobs such as an ordinary mechanic or janitor. He did not believe decedent's medicated state would make employment impossible but noted that employment per se could increase decedent's anxiety level. With regard to the effect of the work injury on decedent's mental state, Dr. Conklu testified:

> I feel that he did have some mental symptoms, such as anxiety, nervousness, prior to that accident; and after that accident, it's most likely that his pre-existing symptoms became more severe. They are aggravated by the accident. (Conklu October 31, 1978 deposition, page 19.)

Dr. Conklu's progress records contained in Iowa Lutheran Hospital records for decedent's February 1, 1978 through March 23, 1978 hospitalization make reference to decedent's fear of height, dreams of falling, and fear of driving (February 11, 1978 entry) [in both his October 31, 1978 and December 3, 1978 depositions, Dr. Conklu does not recall decedent having a fear of heights or of falling], to decedent's son being arrested (February 21, 1978 entry), to decedent's concern over his child-rearing abilities (February 23, 1978 entry), to decedent's apparent manipulation for Valium (March 20,. 1978 entry), to decedent's discussions regarding his anxiety (passim). (Claimant's exhibit 1.) Decedent's concern about being on drugs and trying to withdraw from Valium for eight years and decedent's expressions of fear over his work injury are mentioned more than once in the nurse's notes. (Claimant's exhibit 1.)

Iowa Lutheran Hospital records for decedent's June 19, 1978 admission to the mental health unit contains the following history reported by Dr. Conklu:

> HISTORY: Patient was admitted to the Mental Health Unit because of severe depression with suicidal ideas. Prior to the admission the patient was arrested by the police after he was "shooting in the air" and was taken to the jail.
>
> I have been treating this patient in the past because of depression and other psychiatric complaints. He was treated at Iowa Lutheran Hospital and then was seen at the office.
>
> In spite of the psychiatric treatment, his depression and anxiety has persisted to a certain extent. Prior to the admission, he has been trying to work as a truck driver and was having a great deal of difficulty in doing so. He stated that he just could not drive the buses or trucks and got very nervous. He was on Valium and he started using more Valium every day. His anxiety and depression got progressively worse and he started having suicidal ideas. He stated that he could not kill himself because it was against his religion. He, however, thought if the police killed him, this way he would not go to Hell. (Claimant's exhibit 2.)

Progress notes indicate that claimant discussed the loss of his brother and son (June 20, 1978 entry), his fear of losing his wife (June 28, 1978 entry), and the loss of his mother (July 30, 1978 entry). A general review of the progress notes revealed that claimant had varying moods, a long-standing concern about drug addiction, and fear of truck driving since the work injury. (Claimant's exhibit 2.) Psychiatric nursing notes contain the following information:

> Pt. said he was on Valium for 9 yrs. and is bitter about being given that drug by doctors for so long. Pt. stated that whenever he had a problem or a stress he just took more Valium and walked around in a daze. Pt. talks about the pressure of a job at Massey Ferguson, the subsequent death of his father, and then of his son's death in a motorcycle accident. Pt. stayed with his son in intensive care and said, "It was living hell." Pt. said shortly after he had a truck accident: his truck fell from one highway down onto even a lower level. Pt. stated that he had a terror of falling during the accident and thought he was dead after the accident. Pt. was brought to the hospital. Pt. said at the time he was numb all over because "dead people can't feel anything." Pt. said his wife and doctor said he had unconsciously tried to kill himself and he said he agreed. Pt. said he tried out another job that involved even more pressure than the earlier one and, "then things really blew up." Pt. said he shot at the police so they would kill him. Pt. said that 2 weeks ago he could not have talked about his son's death, so he feels a little freer to talk about it. (Claimant's exhibit 2.)

In a letter dated September 19, 1979 and addressed to claimants' attorney, Dr. Conklu states:

> I last saw Mr. Donald Green on April 9, 1979 and found him anxious and depressed. He was to return

in two to four weeks. He was havig difficulties at school. He also complained of fatigue. I believe that he remained very depressed during May of 1979 and may have had suicidal ideas.

I, also, believe that his behavior (as described by his father's written statement, dated July 12, 1979) on May 11, 1979 when he visited his father, was related to his disturbed mental condition. During that time he may have lost contact with reality and perhaps became acutely psychotic with a strong desire to die.

As I stated in my letter dated September 15, 1978, the truck accident seemed to have aggravated his pre-existing mental illness, which continued until the time of his death. (Claimant's exhibit 11.)

On December 3, 1979 Dr. Conklu again testified by way of a deposition. He briefly described decedent's office visits from November 17, 1978 through April 9, 1979. He generally described decedent as exhibiting mild to moderate anxiety and depression. He noted that decedent had been depressed ever since he first saw him. Apparently, decedent continued to take Ativan and two anti-depressants, Pertofrane and Ritabin. (Which medication taken at what time is presented in a confusing manner. See Conklu December 3, 1979 deposition, pages 4-8.)

In response to a long hypothetical concerning decedent's mental state during the events leading up to the shooting on May 11, 1979 (which question was rephrased upon objection by defense counsel), Dr. Conklu opined:

> Well, in my opinion he acted very disturbed at one point. He came home—it looks like he came home not disturbed, quiet, calm, as I recall, from Mr. Duckworth's statement earlier.
>
> . . .
>
> That [sic] he became calmer. By the time he arrived at the house he was calmer, but somehow at one point he became very disturbed.
>
> . . .
>
> My opinion is that he was not acting the way he was at that particular point, and that he acted very disturbed and it looks like he—with the statement as you mentioned, staring, no expression, and saying that he was a mental spirit, and that the spirits told him what to do, such as burn the house and kill everybody, his relatives in it, that my opinion would be that he lost contact with reality and he acted in a psychotic, acutely psychotic manner.
>
> . . .
>
> Acutely psychotic, since he lost contact with reality, he couldn't—his judgment would be extremely poor.
>
> His reasoning would be extremely poor, and he wouldn't do things, say things that otherwise he wouldn't. He would believe that there are spirits and normally he wouldn't in a psychotic state.
>
> He mentioned that he was a mental spirit. This is what we call a delusion. It's a psychotic symptom, delusion. I am a mental spirit. Then he says they told him—he possibily, according to his statements, he may have heard the spirits talking to him.
>
> This is called hallucinations. It's another psychotic symptom. (Conklu December 3,d 1979 deposition, pages 19-22.)

[Defendants' objection to claimants' counsel's question regarding whether the decedent was in touch with reality between the time he returned inside and the moment he was shot on grounds of speculation and conjecture is overruled as to admissability. The objection, in this instance, goes to weight.] Dr. Conklu comments that unblinking eyes could be part of the psychiatric process and the foaming mouth reflected the extreme degree of anxiety, depression, and psychosis. Dr. Conklu concluded his direct examination by stating that he did not believe the anxiety and depression for which he had been treating the decedent ever would have been cured.

On cross-examination by defense counsel, Dr. Conklu again agrees that many of decedent's symptoms evident at the time of the initial interview were compatible with Valium withdrawal symptoms. He conceded that the death of decedent's son had a significant effect on decedent's mental condition. He did not recall the matter of decedent's fear that his wife would leave him (to which he previously testified).

In a letter dated February 28, 1979 and addressed to defense counsel, Michael J. Taylor, M.D., certified by the American Board of Psychiatry and Neurology, states:

> I write to summarize the results of my evaluation of Mr. Donald Green. Mr. Green was interviewed for two hours in my office on February 22, 1979. Prior to my evaluation of Mr. Green, I had reviewed the considerable body of medical information that you had made available to me. Included in that body of medical information were copies of the complete hospital records from Mr. Green's two hospitalizations at Iowa Lutheran Hospital; brief written reports from Dr. Ilhan Conklu, a local psychiatrist who is currently treating Mr. Green; a letter from Dr. Paul T. Cash, a local psychiatrist who saw Mr. Green on one occasion in December of 1974; brief letters from Carlton Van Natta, a Family Practitioner who has, at times past, provided care to Mr. Green; a transcript of a deposition of Mr. Green taken October 25, 1978; and a deposition of Dr. Conklu taken October 31, 1978.
>
> During my two hour interview with Mr. Green, I reviewed with him in considerable detail his past history; the emotional distress that he experienced prior to the October 7, 1977, truck accident and the treatment that he received for that distress; his emotional reaction to the death of his son in 1974; his physical and emotional reaction to the October 7, 1977, truck accident, the reasons for his two

hospitalizations; the emotional and physical symptoms which he is presently experiencing and the treatment that he is receiving for these symptoms; and his hopes (and fears) about the future.

* * *

For at least nine years prior to his October 7, 1977 truck accident, Mr. Green experienced sufficient emotional distress (manifested primarily by symptoms of anxiety) that he was motivated to seek tranquilizing medication from his family physician. Mr. Green took this tranquilizing medication (Valium) in relatively high doses on a fairly regular basis up until the time of his truck accident. The emotional distress which Mr. Green experienced prior to his truck accident was, by his description, quantitatively and qualitatively different from that which he experienced after the truck accident. It is probably, in my opinion, that the emotional distress that Mr. Green was experiencing prior to October 7, 1977, predisposed him to have a more significant reaction to the truck accident than might have been the case had he not been experiencing this emotional distress.

The period of time surrounding the death of Mr. Green's 18 year old son in a motorcycle accident in 1974 was clearly a stressful time for Mr. Green. Having elicited from Mr. Green a description of his emotional response to the circumstances surrounding his son's death, it is my opinion that Mr. Green handled this very stressful situation in a psychologically appropriate manner such that his psychological and emotional reaction to his son's death is not significantly influencing his current emotional state.

It is my opinion that Mr. Green suffered a significant depression following the October 7, 1977, truck accident. This depression was manifested by loss of appetite, extreme difficulty sleeping, a high level of anxiety, difficulty concentrating, forgetfulness, loss of sexual interest, loss of pep and energy, loss of interest, feelings of worthlessness, feelings of hopelessness, and, at one point, suicidal ideation. It is my opinion that the events which led to Mr. Green's second hospitalization at Iowa Lutheran Hospital from June 19, 1978, through August 24, 1978, represented a psychologically signficant attempt on Mr. Green's part to bring about his own death. Mr. Green reports that the above described symptoms of depression have gradually gotten better as time has passed. While he denies suicidal ideation at the present time, he continues to complain of poor memory, poor concentration, decreased appetite, a poor sleep pattern, lack of interest in interactions with others, increased anxiety, and lack of pep and energy. In my opinion, these symptoms indicate that Mr. Green continues to suffer from a depression.

Mr. Green is currently receiving psychiatric treatment from Dr. Ilhan Conklu whom he sees approximately every two weeks. Dr. Conklu is currently treating Mr. Green with psychotherapy and with Ativan (a minor tranquilizer) 2 milligrams six times per day. When Mr. Green reported recently to Dr. Conklu that he was continuing to suffer from decreased interest, pep, and energy, Dr. Conklu prescribed Ritalin (an amphetamine-like stimulant). According to Mr. Green, the Ritalin made him so much more uncomfortable that he stopped taking the medication after having taken just one tablet.

Mr. Green feels that, in general, Dr. Conklu has been helpful to him. Dr. Conklu apparently takes the time to listen to Mr. Green's description of his symptoms and his emotional reaction to his current life situation.

It is my opinion, based upon the course of Mr. Green's symptoms, the fact that he had not suffered any previous depressive episodes, and the fact that Mr. Green has no family history for affective disorder (depression), that Mr. Green would not have experienced this depression had the October 7, 1977 truck accident not occurred. As mentioned above, Mr. Green's previous emotional condition may well have predisposed him to react in the manner in which he did.

It is my firm opinion that Mr. Green's condition is by no means permanent. Mr. Green himself acknowledges gradual improvement, although he expresses some concern about the length of time that it has taken for this improvement to occur. It is my impression that Mr. Green is highly motivated for treatment and that he would like nothing better than to return to his previous level of functioning.

It is my opinion that Mr. Green would benefit from continued psychiatric treatment. I have some question as to whether or not the treatment that he is presently receiving is such that it will bring about recovery as rapidly as might some alternative modes of therapy. If Mr. Green does, in fact, continue to be depressed, the medication that he is presently receiving has absolutely no anti-depressant effect. He has had only one very brief trial on one anti-depressant medication. There are many anti-depressant medications which might be tried and which would have, in my opinion, a significantly greater probability of improving his condition than does the medication that he is currently taking. As Mr. Green describes to me his psychotherapy with Dr. Conklu, it sounds as though Dr. Conklu is doing an excellent job of listening to Mr. Green. The importance of psychotherapist's being a non-judgmental listener cannot be overemphasized. I wonder, however, if it might not be more helpful if, in addition to the listening, the psychotherapist might give Mr. Green more active feedback than apparently Dr. Conklu is currently offering regarding alternative ways by which Mr. Green might view and react to his environment. At the present time, Mr. Green appears to view his environment and the people with whom he comes in contact as judging him negatively. This perception causes Mr. Green to shy away from

interpersonal contacts. I need to reemphasize that, even should Mr. Green continue to pursue the avenue of treatment that he is currently pursuing, it is reasonable to expect, in my opinion, complete recovery. (Defendants' exhibit A.)

During the course of his deposition taken April 23, 1980, Dr. Taylor significantly changed his opinion regarding the causal relationship between the October 7, 1977 work injury and decedent's subsequent psychiatric state:

Based upon all the information that I now have available, it seems to me, and it is my opinion, that Mr. Green's psychiatric difficulties began in approximately 1967 or 1968 when he first consulted a doctor whom he identified as Dr. Linford, and at that time he was experiencing symptoms much the same as those that he continued to experience off and on between 1968 and the time of his death in May 1979. It's my impression that the fluctuations in Mr. Green's condition seemed to be directly related to his Valium intake, or more specifically, his bad periods. The periods where he experienced the most symptoms of his psychiatric condition were those periods when he was not taking Valium and that, by his own description, the periods which he functioned the best were those periods when he was taking Valium. So it is my opinion that Mr. Green had some sort of psychiatric condition which is now difficult for me to define, because the treatment that he's had has been so varied and so inconsistent, but that he has had some psychiatric condition which has existed almost continuously since 1967 or since 1968 at various times was at least partially controlled with Valium. (Taylor deposition, pages 10-11.)

Dr. Taylor likewise opined that there was no causal relationship between the work injury and the fatal shooting of the decedent. He referred back to his previous opinion with respect to the lack of causal connection between the injury and subsequent psychiatric state and added:

...to be a little more specific some of the information contained in the depositions of the various witnesses to the shooting describing Mr. Green's mental state on that day preceding the shooting and the events which transpired at the time of the shooting. I guess those are all included in the information you've already asked me to assume. (Taylor deposition, page 12.)

Dr. Taylor explained that reason for the discrepancy between his earlier written report and present testimony:

The information I obtained from Mr. Green at the time I interviewed him in February of 1979 is inconsistent with some of the information that I just recently reviewed; and specifically Dr. Van Natta's office notes, Dr. Conklu's office notes, and some information contained in the nursing records from his hospitalization at Iowa Lutheran Hospital. So, in specific answer to your question, I think I've gotten considerably more information since February of 1979 upon which to form my opinion. (Taylor deposition, page 12.)

He elaborated:

A. Dr. Conklu's office notes and specifically his initial evaluation of Mr. Green, which was dated December 29, 1979—

Q. '77, you mean?

A. Yes, I'm sorry; December 29, 1977. —indicated that Mr. Green reported to Dr. Conklu that his symptoms had been building up for approximately three weeks prior to 12-29-77, and that Mr. Green himself at that time attributed to Dr. Conklu—or indicated to Dr. Conklu that he, Mr. Green, attributed his symptoms to the fact that three weeks earlier he had stopped taking Valium after watching a television program which indicated some hazards of Valium use.

Mr. Green, in my interview with him, had indicated that his symptoms had started immediately after the truck accident. Mr. Green had indicated to me that immediately after the truck accident he had experienced convulsions, and he was unable to provide me any details about the convulsions except to tell me that he had them. In reviewing Dr. Van Natta's and Dr. Conklu's—I guess specifically Dr. Van Natta's office notes, I believe it's the January 5, 1979 office notes that indicate that while Mr. Green was in Dr. Van Natta's office, Mr. Green suffered something which Dr. Van Natta described as a grandmal like convulsion.

Q. Again, I want to make sure the years are right. Is that '78 or '79; the January 5th?

A. I'm sorry. January 5th, 1978.

Q. Okay.

A. So, I discovered that the convulsions, or whatever that episode was, had not occurred right after the truck accident, but in fact had occurred four months later, and also during a period of time when Mr. Green was not takng Valium.

Q. Now, did this pattern show up again in the hospital records of February of 1978 and June of 1978?

A. Yes. Mr. Green attributed to the nursing personnel who admitted him on both occasions that he had attempted to stop taking Valium, and he, Mr. Green, thought that that was the reason he had become nervous, and he stated that it was necessary for him to come into the hospital. I also discovered that Mr. Green had had some previous hospitalizations to those of the ones at Lutheran under the care of Dr. Van Natta, where he had symptoms similar to those that he was describing to me, and that these hospitalizations were, to the best of my recollection prior to the truck accident.

. . .

As I reviewed what Mr. Green told me in light of all the other information that has more recently become available to me, I can also see a pattern in what Mr. Green told me, of basically the same symptoms recurring. He told me, for example, that when he went to see Dr. Linford in 1967 or '68 that he was having trouble sleeping; that he was nervous and uptight; that he was awakening frequently, and he took up to two hours to get back to sleep. He couldn't remember what his appetite was like back then, so that's certainly the same symptom picture back then that he presented each time he got into trouble subsequently. By "getting into trouble" I mean seeking help of some sort; when he went to see Dr. Cash in 1975, when he consulted Dr. Conklu in 1977, and then when he had the two subsequent hospitalizations.

Q. How does the truck accident of October 7, 1979, fit in, if at all, in this case?

A. Well, it obviously fits in, because it was an event that took place in this man's life. I don't think it's any more significant than that. This is a man that I see as having chronic emotional difficulties that fluctuated depending upon how much Valium he was taking, and during the period of time subsequent to 1968 or '69 when difficulties apparently first started, a number of incidents took place in his life; the death of his son, the death of a brother, the truck accident. I see all of those as events which took place in his life conincident with his emotional problems.

Q. Okay. Coincidental rather than causative; is that what you're saying?

A. Yes. (Taylor deposition, pages 13-16.)

Dr. Taylor was consistent with his earlier report when he responded in the negative to an inquiry regarding whether the deaths of decedent's brother and son were causally connected to the symptoms decedent displayed on the date Dr. Taylor examined him.

On cross-examination, Dr. Taylor testified, in response to claimants' counsel's suggestion that decedent had his anxiety problem under control prior to the date of injury, that it was the substantial amounts of Valium the decedent was taking at that time that kept his anxiety under control. He explained this conclusion:

A. Right up until the day of the accident Mr. Green was taking Valium regularly. The amount that he gave me varied a little bit. At one point he would take up to ten five-milligram tablets, and then that changed a little bit, and he would say he took five or six a day. So, I don't know for sure how much he was taking, but right up until the time of the accident he was apparently getting as much Valium as he needed to provide him symptomatic relief, so I think that is the explanation for the fact that Mr. Green was able to work up until the time of the accident. Then according to Dr. Conklu's notes, Mr. Green stopped taking the Valium approximately three weeks before he saw Dr. Conklu in December of 1977, and Mr. Green was not taking Valium which, when I saw him in February of '79, and from the time of the truck accident—I don't know that for sure. From three weeks before he saw Dr. Conklu, and most of the time, it's my understanding, he was not taking Valium. The time that he was taking Valium it seems as though he did well; or the converse of that, anyway, is that when he goes into the hospital he says to the staff, "The reason I am now feeling bad again is that I'm not taking the Valium anymore." (Taylor deposition, pages 30-31.)

Dr. Taylor further explained the weight he gave claimant's statement:

> The behavior that Mr. Green exhibited when he attempted to get the police officers to kill him certainly displayed a considerable amount of bad judgment. I agree with that. I am not relying upon Mr. Green's statement—Let me start that sentence over. Mr. Green seems to be implying to the nursing staff that the reason he is in the hospital is because he stopped taking the Valium. I'm not relying on his judgment that that was in fact the reason that he was in the hospital. The reason he was in the hospital, it seems to me, was that he was depressed. The information that the nursing notes give me is that he had stopped taking the Valium. I think to that extent that information is reliable. Mr. Green said he had stopped taking his Valium. I think to that extent that information is reliable. His judgment as to whether or not that caused his hospitalization is not reliable. (Taylor deposition, pages 32-33.)

Regarding decedent's conduct on the night of the shooting at his father's home, Dr. Taylor told the cross-examiner:

> It's my opinion that Mr. Green was angry at his father and that a fight ensued, and that in the course of that fight, Mr. Green was accidentally shot.
>
> . . .
>
> I think it's reasonable to assume that the psychiatric condition that Mr. Green had been suffering for a long time continued to exist, but it's not my opinion that his behavior on that particular night was a product of that mental condition.
>
> . . .
>
> Well, Mr. Green was described by his wife as appearing his usual self the morning of the incident when he went to work. When Mr. Green came in to get the two beers out of the refrigerator to go back outside and supposedly talk to his brother, Bob, no one commented on any aberrations in his behavior whatsoever. So, it's my speculation that Bob was angry at his father, and that Don got angry at the father, and that the feeling that Mr. Fred Green was—I don't know what the best word is to use is—he was not in the best frame of mind, because he had just

had this argument with his son, Bob, and then it's my speculation that Don heard his brother's side of the story, and that Don had become angry and came in and confronted his father, and his father probably was not dealing with Don quite the same way that he would have on other occasions. (Taylor deposition, pages 37-40.)

The description by Mrs. Nadine Green is different from the description of Fred Green as to what Don said. Mrs. Nadine Green seems to have a propensity to give colorful descriptions. She commented that Fred's hair was standing on end when he came around the corner, so there's some doubt in my mind as to actually how accurate her representation of what happened was. I just want to make you aware of that reservation, but even assuming that he was drooling and staring at the ceiling, the behavior that he displayed was still relatively purposeful as far as being angry at Fred. I mean he did come in and he says, "I'm going to burn this house down, and I'm going to kill everybody here."

. . .

Well, he either said "mental spirits" or "I am a mental patient", and we have two different versions of that, and what we do know—I mean the story that seems consistent is that even though he did make a threat to burn the house down and to kill everybody there, the only person he indicated any threatening action to was Fred, and if he was psychotic and out of touch with reality, wild, crazy, whatever adjective you want to put on it, it doesn't make sense to me that he wouldn't have hurt somebody else in the house, but he maintained his focus on Fred. In fact, he didn't injure anybody.

. . .

Yes; but that's certainly not a reaction that's unique to Don Green, to get angry and to ventilate and to make overgeneralized statements and to threaten things. (Taylor transcript, pages 45-47.)

Dr. Taylor reiterates his opinion on causal connection in the following exchanges with claimants' counsel:

A. I'm saying that if the truck accident had not occurred—if, on October 7th, 1977, Mr. Green had driven right on over that bridge, not encountered any difficulties and had driven home, that there's a strong medical certainty that all the other things which have happened since October 7th, 1977 would have happened anyway.

Q. That he would have been unable to drive a truck?

A. He would have watched the television show. He would have stopped the Valium. He would have had the hospitalization.

. . .

Q. And my question is, are you saying that he would have had that same fear of driving had he not had that accident?

A. No, sir. I'm not saying that. So, I'm amending my answer to your summary question with that one exception. (Taylor deposition, pages 60-61.)

Q. Now, in your opinion, what effect would being deprived of the ability to carry out your normal occupation and having enforced idleness in effect have on a person who was subject to the depression and the anxiety that Mr. Green was prior to the accident, if any?

A. I think it's possible that the enforced idleness and not being able to return to usual employment could have an effect on a hypothetical person who experiences anxiety and depression. I just don't know—I'm granting you that it's possible that it could have had an effect, but I don't know what effect it had on Don Green, because the picture was so clouded by stopping the Valium and the many changes that took place in his treatment and regimen after that. (Taylor deposition, page 63.)

Q. Okay. The point that I'm trying to make and that I'd like to have you give your opinion about or explain to me, is that the apparent difference in the two time periods—He quit in '75 using Valium. He went back to medication. He was able to drive again, apparently at some time. In '77 he quit. He went back to Valium or some other medication that was prescribed. He was unable to drive again. Now, the one thing I see that's different is that he had a truck accident where he thought he was killed, and are you telling me that that is not a fact or—I just want to make sure that I'm understanding that you're saying that this truck accident had no causal connection with the inability to drive a truck, or did it, in fact, have a causal connection with his inability to drive a truck?

A. I'll do my best to answer your question. I may have to explain a little. I think the situations, Mr. Moore, were different. When he went back on the Valium—When he went to Dr. Cash in 1975 and went back on the Valium, he went back up to fifty milligrams a day. After he stopped the Valium in early December and then eventually went to see Dr. Conklu, it's my best recollection that the highest doses of Valium he ever got back up to was fifteen or twenty milligrams a day or equivalent doses of other minor tranquilizers, but it's my understanding that he never got to the very high dosage—in my opinion, excessive doses—of Valium that he was taking prior to October 7, 1977. So, I don't know whether if he'd been put back on fifty milligrams of Valium he'd been able to drive a truck or not, because he was not put back on fifty milligrams of Valium. That's a huge dose of Valium. (Taylor deposition, page 69.)

The claimant has the burden of proving by a preponderance of the evidence that an alleged injury is the cause of the alleged disability. *Bodish v. Fischer*, 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.)

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 makes no difference whether the incident was the sole cause of the disability or whether the incident aggravated a preexisting condition. Injuries resulting from both types of situations are compensable. *Musselman v. Central Telephone Co.*, 261 Iowa 352 (1967). The incident or activity need not be the sole proximate cause as long as the injury is directly traceable to it. *Langford v. Keller Excavating Inc.*, 191 N.W.2d 667 (Iowa 1971).

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.*

Preponderance of evidence means the greater weight of evidence, the evidence of superior influence or efficacy. *Bauer v. Reavell*, 219 Iowa 1212, 260 N.W. 39 (1935). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *City of Davenport v. Public Employees Relations Board*, 264 N.W.2d 307 (Iowa 1978); *Hawk v. Jim Hawk Chevrolet-Buick, Inc.*, 282 N.W.2d 84 (Iowa 1979).

The record viewed as a whole supports finding that the decedent was totally disabled from the date of injury through the date of death as a result of the work injury on October 7, 1977 (minus those brief periods when he was working). Although the decedent did testify that he did not return to work when released by Dr. Van Natta in late 1977 because he experienced convulsions and although Dr. Taylor testified that such revelation was part of the reason he changed his opinion about the work injury being responsible for claimant's ongoing psychological disability, nevertheless decedent's repeated expression of fear at the thought of returning to truck driving, an occupation he had been engaged in (albeit part-time on occasion) for a number of years, cannot be minimized. The decedent attempted to drive a charter bus without success. Even driving the family car made him nervous. Dr. Conklu doubted that the decedent would ever be able to return to such work and had encouraged the decedent to seek retraining. Even Dr. Taylor testified that he acknowledged a connection between claimant's work injury and the subsequent fear of driving. Whether Dr. Taylor agreed with Dr. Conklu's opinion that claimant's condition was permanent is unclear. Dr. Taylor does suggest that the effect of increased Valium might have allowed the claimant to return to truck driving. Indeed, Dr. Taylor's plan for treating the claimant's condition (Taylor deposition, pages 27-29) might have returned the claimant to pre-injury status. One only can speculate. The severity of the October 1977 accident on the decedent's psyche, decedent's unsuccessful attempt to return to driving despite the use of Valium, and the opinion of Dr. Conklu constitute substantial evidence in support of finding that the decedent's condition was permanent. With regard to the period of healing, the record indicates that the decedent attempted only short-term returns to work without success, decedent was unable to return to work similar to that in which he was engaged at the time of the injury, and no medical expert specifically addressed the question of when decedent reached maximum medical improvement. (Dr. Van Natta stated the healing period ended November 28, 1977, but it is clear that he was not taking more than decedent's physical condition into consideration.) Dr. Conklu suggests at the time of his October 31, 1978 deposition that decedent was very close to being ready to attempt a return to work part-time, not full-time, as long as any such work was not demanding. However, he would not guarantee that the decedent would succeed in such an attempt. Dr. Conklu also estimated that decedent's medication and psychotherapy would continue indefinitely. Both Drs. Conklu and Taylor, prior to decedent's death, seemed to anticipate some improvement. Thus, the record before the undersigned supports finding that decedent was still in a period of healing at the time of his death. Whether the March 29, 1979 car accident (referred to in defendants' exhibit L) for which decedent was treated with Tylenol and a brace might have prolonged decedent's recovery was not investigated or developed in the record. Parenthetically, it should be noted that even if the decedent had reached maximum recovery around the time of Dr. Conklu's first deposition, the Iowa Supreme Court's analysis of disability in such recent cases as *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980) and *Jack Blacksmith v. All-American Inc.*, 290 N.W.2d 348 (Iowa 1980) might have required a finding of some degree of disability. Although pursuant to Code section 85.29 the defendants would not have been required to pay the full amount of such disability—the unpaid balance or the period of time beyond the date of death, they would have been and are required to pay decedent's estate the compensation due and owing up to the date of death.

Careful consideration was given to the defendants' position that it was decedent's withdrawal from Valium at some point after the date of injury that was the cause of his disabling emotional distress. This is not a classic case of a preexisting condition being aggravated by a work injury. Here, the decedent, who already was a nervous individual by history, lives through a truck accident in which he

thinks he died. His preexisting emotional state is aggravated at least to the point where he truly fears to do any driving of trucks or buses and even dreads driving the family car. Perhaps the death of his son in a motorcycle accident and the death of his brother in a car accident constituted a separate preexisting mentality that caused the decedent to react so drastically to an accident which otherwise left him with little in the way of physical injuries. Such approach to the deaths is suggested by the record but not developed beyond the undersigned's mere conjecture; hence, it should be presumed that an overall distressful emotional state was aggravated by the injury. Furthermore, the record seemingly supports finding that the decedent was still taking Valium when he attempted not only to drive the chartered bus but to do the welding job. (Admittedly, the record is not as definitive as it could be with regard to the actual dates when such employments were attempted. However, reference to Dr. Van Natta's letter and Dr. Conklu's notes supports such time frame determinations.) This lead to the conclusion that the work injury did more than instill a fear of driving in the decedent. Unfortunately, the decedent further aggravates his emotional distress by deciding to withdraw abruptly from Valium which he had been taking for many years. What effect the Valium stoppage, as compared to the work injury, had on decedent's continuing disability cannot be ascertained with any degree of certainty. (For one example, the medical records indicate that the decedent mentioned his concern about withdrawal symptoms as much as he expressed fears about driving.) Yet, the *Langford* principle set forth above controls and dictates the conclusion that decedent's injury resulted in a disability from the date of injury through the time of death. Such rule does not assist in determining the causal relatedness between decedent's work injury and death because the death is not directly traceable to the work injury and the effect of such injury that can be gleaned from the record.

Claimants' counsel has argued that decedent's death should be viewed as an involuntary suicide. The facts do not support such approach. At the time his deposition was taken which was about three months after the two apparent suicide attempts, decedent was optimistic about his future and noted that his tremors had lessened. Likewise, as of October 31, 1978 Dr. Conklu noted improvement in decedent's condition. Decedent's wife denied that decedent had indicated in word or action since his second hospitalization in a mental health unit that he would attempt suicide as it appeared he had done in the two June 1978 incidents. She testified that decedent was in a usual state of mind when leaving for school on May 11, 1979. Those two earlier incidents may have necessitated analysis under *Schofield v. White*, 250 Iowa 571, 95 N.W.2d 40 (1959) or 1A Larson, *Workmen's Compensation Law* §36.10 et seq. However, thorough review of the facts in the present case will not allow finding that the shooting on May 11, 1979 amounted to a suicide in the first instance, irrespective of whether it was an involuntary suicide attempt by an individual deranged because of the effects of a work injury. Decedent was not taunting his father to kill him as he had done with the police a little less than one year earlier.

Claimants' counsel's second creative theory in support of his argument that decedent's death is causally connected to the work injury is that as a result of decedent's work injury he behaved in a psychotic manner toward his father so that his father was threatened and killed him, intentionally or accidentally, in self-defense. At the outset the undersigned finds that the record appears to be without dispute that the gun went off accidentally. This alone creates a causation problem. Compare *Schofield v. White, supra* at 575-576. Next, there is the matter of whether the decedent was extremely angry over what appeared to be the eviction of his brother from his father's home or whether he became psychotic. Dr. Taylor believes it was anger; Dr. Conklu believes the decedent was experiencing delusions and hallucinations. Dr. Conklu heavily relied on Nadine Green's vivid deposition testimony in reaching his opinion. There is no mention in Fred Green's deposition of the decedent thinking he was a mental spirit or acting under the direction of such a being. Likewise, Fred Green does not describe the decedent as unblinking or foaming at the mouth. (Dr. Conklu does refer to a statement made by Fred Green, but such statement was not offered into the record and accordingly cannot be compared, for corroboration purposes, with either Fred Green's deposition or that of Nadine Green.) It also cannot be overlooked that Dr. Taylor was convinced after receiving Drs. Conklu's and Van Natta's notes and reassessing decedent's history with respect to when he stopped taking Valium, that decedent's emotional distress, minus the fear of driving, was related to the stoppage of the Valium or at least of the high dosage and not to the work injury. Also of importance is the fact that Dr. Conklu does not deny at any point in the record that decedent's symptoms were compatible with symptoms observed in a patient withdrawing from Valium. Nor was Dr. Conklu as familiar as Dr. Taylor with claimant's course of anxiety flareups and treatments over the years. Additionally, the decedent's anti-social behavior (as opposed to his general nervousness) which was commented upon by all the lay witnesses seems to have commenced after the stoppage and later reduction in Valium. The weight of the record clearly suggests that any reaction displayed by the decedent on the night of the shooting that exceeded ordinary anger was related to the preexisting emotional distress as that had been aggravated by the withdrawal from Valium. Neither substantial evidence nor a preponderance of the evidence supports finding that decedent's death was causally connected to the work injury. See generally 1 Larson, *Workmen's Compensation Law* §1300 et seq.

In light of the above analysis and determinations, neither the *Auxier* issue raised by claimants' counsel nor the Code section 85.16 defenses raised by defendants need be addressed.

WHEREFORE, it is hereby found for all the reasons discussed above that decedent was entitled to healing period benefits from the date of injury to the date of death, minus those brief periods of time he was actually working.

It is further found that decedent's death was not causally related to the work injury.

With respect to the medical expenses in issue it is

hereby found that decedent's hospitalization and treatment by Dr. Van Natta for removal of the cyst on the right side of the rib cage were reasonable and necessary as contemplated by Code section 85.27. In that the decedent was also treated for hypertension, only half of such expenses will be allowed. The record viewed as a whole supports this conclusion: decedent's complaints with reference to the cyst did not begin until shortly after the truck accident; Dr. Van Natta specifically stated the hypertension was not related to the injury but said nothing about the cyst; and on page 62 of his deposition, Dr. Taylor suggests that the cyst was considered to be aggravated by the work injury. One half of the expenses for hospitalization and treatment connected with decedent's emotional distress will be allowed in accordance with the analysis of the work injury and non-work injury aggravations. Expenses related to treatment of decedent's fatal injury on May 11, 1979 are not contemplated by Code section 85.27 in light of the finding that the death was not connected to the work injury on October 7, 1977.

* * *

Signed and filed this 30th day of September, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

Appealed to Commissioner; Settled.

ALICE M. GREENE,

Claimant,

vs.

CHAMBERLAIN MANUFACTURING COMPANY,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Alice M. Greene, the claimant, against Chamberlain Manufacturing Company, her employer and holder of a certificate of exemption as contemplated by section 87.11, Code of Iowa, 1979, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrially incurred hernia which became disabling on August 13, 1979 and an alleged occupational disease which became disabling on December 3, 1979. This matter came on for hearing in Albia, Iowa, on July 23 and 24, 1980. Upon the filing of the evidentiary medical deposition of Ray Avera, D.O., and the transcript of these proceedings, the record in this matter was closed on September 22, 1980.

Defendant had not complied with the terms of section 86.11, Code of Iowa, 1979, in that this record fails to disclose the prior filings of the first reports of injury. Defendant is requested to so file same within ten (10) days from the date of this decision.

The issues presented are whether or not the claimant has established by a preponderance of the evidence that her incisional hernia and her allergic type reaction are causally connected to her work activities.

* * *

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

Claimant, single with 3 dependent children, a resident of Lovila, began her duties as a metal saw operator for the defendant-employer on August 8, 1977.

On September 1, 1978 claimant underwent a surgical procedure described, in part, by Ray Avera, D.O., as follows, to wit:

> Under general anesthetic the abdomen was prepped and draped in the usual manner. A midline incision was made. Pelvis was explored and the uterus was in the cul-de-sac. The uterus was brought into an anterior position and suspended in the anterior bringing the broad ligaments together in the anterior portion and attached them to the uterus. A cyst the size of a large grape was dissected from the left ovary. The bleeding was controlled with 00 chromic. The tubes were grasped and a section ligated. The right ovary had several cysts which were punctured and drained. The bleeding was controlled with 0 chromic.
>
> The appendix was located and dissected free. The stump was buried with a purse-string suture. Bleeding was controlled with 0 chromic.
>
> The abdomen was then closed in layers using 0 chromic on the peritoneum and fascia and 00 plain on the fat, 00 silk on the skin.

Thereupon claimant returned to her normal work activities on October 15, 1978 (claimant's exhibit 32), which the claimant describes as requiring "heavy work" (transcript, page 46, line 5). Claimant while under constant discomfort, concluded her condition worsened "doing the heavy lifting because at home I just didn't do it" (transcript, page 48, line 2).

On August 12, 1979 claimant underwent surgery for a "ventral hernia" performed by William P. Wellington, M.D., and Ray Avera, D. O. The operative record reported in part as follows (claimant's exhibit 42):

> OPERATION AND FINDINGS: Operation; repair of incisional hernia by layers.
>
> Under general endotracheal anesthesia the patient was placed in the supine position and the skin of the whole abdomen prepared with a 10 minute Betadine scrub and draped exposing the lower half of the abdomen from the unbilical scar area to the symphysis pubis. The abdominal wall was incised in the midline with an incision approximately 30 cm. long centered upon the reducible tumor. The

incision was carried down through the subcutaneous tissue. The hernial sac was reached and dissected around it until the fascia of the right and the left anterior rectus muscle was seen. To facilitate further dissection, the hernia sac was opened, the redundant portion resected with the scissors and the right and left anterior rectus muscle fibers exposed in the medial aspect of each. Adhesions of the omental fat to the hernial sac were transected between hemostats and ligated with 0 chromic catgut. The rest of the intra-abdominal contents appeared to be normal.

Finally the peritoneum was closed with a running suture of 0 chromic catgut, the muscles re-approximated in the midline with interrupted sutures of 0 chromic catgut and the fascia repaired in the midline from unbilical scar to the symphysis pubis after removing all the fatty tissue away from it by dissection. The fascia was repaired in the midline with interrupted sutures of 3-0 chromic catgut.

At the end of the procedure a strong wall had been achieved, hemostasis was complete and the area was washed with Normal Saline. A Penrose drain was left between the right and left rectus fascia and the sucutaneous [sic] tissue brought out through a separate stab wound in the pubic area. The subcutaneous tissue reaaproximated with 3-0 chromic catgut and the skin closed with ethicon clips.

Ray Avera, D.O., concluded that based upon the claimant's history that there was a possible causal connection between claimant's work activity and the hernia surgery (deposition, pages 19 and 20; and claimant's exhibit 41).

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 1979). 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 (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 expert 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 expert testimony only shows a possibility of causal connection, it must be buttressed with other evidence such as lay testimony that the described condition of which complaint is made did not exist before occurrence of those facts alleged to be the cause thereof.

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 abdominal strain. Claimant's own testimony was that she was required to do heavy lifting. The combination of medical testimony and claimant's testimony is sufficient to carry the burden of proof.

Dr. Avera's testimony stands uncontroverted by any other medical expert.

Thereupon, claimant was unable to perform acts of gainful employment until October 5, 1979 or a period of 8 weeks. A plant lay-off there occurred with the claimant being recalled November 6, 1979 whereupon she resumed her normal duties.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 13, 1979 is the cause of the 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.)

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 applying the foregoing legal principles to the hernia surgery it is apparent that the claimant has borne her burden of proof, due claimant's testimony as to the weight of the boxes containing her finished product and Dr. Avera's opinion.

This now brings us to the issue in this matter concerning claimant's alleged occupational disease.

Claimant, in support of her claim, testified that the condition at her work station was such so as to require a change in job assignments. She complained of weakness, dizziness, a burning sensation of the throat, nose, and lungs, together with severe anemia. Dr. Avera arranged for claimant's hospitalization on December 3, 1979 for an upper respiratory tract infection and severe anemia. Following discharge, Dr. Avera reported to the defendant-employer that in his opinion claimant was "apparently allergic to the solvent used on the saw. It would be advisable to put her on a different job" (claimant's exhibit 18).

In claimant's exhibit 26, Dr. Avera responded to defendant-employer's request for a further explanation or substantiation of the solvent involvement as follows:

Alice Green [sic] is allergic to the solvent used [with] the saw. She should not be on that job. Allergies come in many forms, from runny nose, skin rashes, headaches—gastritis, (unintelligible), visual difficulties, ect, ect [sic].

Defendant then arranged for a further medical examination by Kenneth R. Kingsbury, M.D., an internist, who reported, in part, as follows (defendant's exhibit C):

> Physical examination revealed an obese white woman who is cooperative in giving history and in the physical exam. Examination of the skin revealed numerous old scar marks over the face, arms, upper chest. Several of these had been picked recently. These were no abnormalities on examination of ears, eyes, or nose. Nasal mucous membrane was not swollen and was normal in color. There were upper and lower dentures. The neck was negative. Breasts were normal. There were no cardiac abnormalities. It was impossible to determine the size because of the patient's obesity. Examination of the lungs: There was no wheezing heard on forced expiration. Blood pressure was 125/85 sitting and standing. Pulse was of normal volume and contour. There were no abnormal palpable nodes. Abdominal examination was negative except for mild, generalized abdominal tenderness. The old surgical scars were evident. There was no hernia. Pelvic examination did not reveal any significant abnormalities, although it was impossible to determine the size of the uterus, again because of the patient's obesity. Extremities were normal. Neurological examination was normal.
>
> I felt that this patient's problems were related to nervous tension and that they were not work related.

It should be noted that neither of the two reporting physicians tested or examined any of the foreign material present at claimant's work station, nor made any attempt to establish scientifically their respective medical opinions.

The respective opinions of Drs. Avera and Kingsbury are necessarily given little weight in this decision resulting therefore in a rejection of claimant's allegation of occupational disease due to a lack of competent medical evidence.

In passing it should be noted that following sampling done by the Bureau of Labor on March 12 and 18, 1980 the total dust, oil mist, organic tin, and methylene bisphenyl isocyanate (claimant's exhibit 38) present at claimant's work station were well within the allowable limits as set by General Industry Standards, No. 1910.

WHEREFORE, after having seen and heard the witnesses in open hearing and after taking all of the credible evidence contained in this record, the following findings of fact are made:

1. That during the summer of 1979 claimant's work activity aggravated a preexisting surgical incision resulting in an eight (8) week period of temporary total disability.

2. That claimant's average weekly wage is two hundred eleven and 20/100 dollars ($211.20) (claimant's exhibit 17) resulting in a weekly entitlement of one hundred thirty-four and 46/100 dollars ($134.46).

3. That claimant has failed to produce sufficient credible evidence to support a finding that claimant's inability to perform acts of gainful employment after December 3, 1979 is causally connected to her work environment.

4. That based upon this deputy's personal inspection of defendant-employer's premises, this claimant is not exposed to chromic hydroxide.

* * *

Signed and filed this 7th day of November, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

RONALD L. GRUVER,

Claimant,

vs.

ALL-AMERICAN, INC.,
ALL-AMERICAN TRANSPORT, INC.,
AMERICAN FREIGHT SYSTEM, INC.,

Employer,

Self-Insured,
Defendant.

* * *

Defendant has appealed from a proposed arbitration decision in which it was determined that claimant was entitled to healing period compensation as well as compensation for a twenty-five percent permanent partial disability to the body as a whole.

* * *

The issues on appeal are whether claimant sustained an injury which arose out of and in the course of his employment; whether a causal relationship exists between the alleged injury and claimant's disability; and, if so, the nature and extent of the disability.

Claimant is presently thirty-nine years old, married and has three dependent children. He has an eighth grade education and has previously worked for one year as a baker's apprentice after attending baking school in 1960. With the exception of working in tire capping and repair between 1968 and 1972, claimant has predominantly been employed as a truck driver.

Claimant began working for defendant on November 19, 1977, approximately ten weeks before the alleged injury. Prior to that time, claimant was employed as a truck driver by Worcester Motor Lines, Robintech, Inc., Universal and Greenfield Transportation. Claimant testified that, with the exception of his move from Universal to Greenfield, his salary increased with each job change. Claimant is currently working once again for Universal.

Claimant testified that on the date of the accident, January 30, 1978, he was sleeping in the truck's berth when his co-driver hit a bridge near Hampton, Iowa. Claimant stated that he was thrown against the straps in the sleeping berth and felt immediate pain in his neck and back. Defendant was notified by claimant of the accident from the Hampton police station. According to claimant's testimony, he didn't wish to be examined by a doctor in Hampton since he preferred to see his own family doctor, Dr. Light, in Grinnell.

Claimant stated that a supervisor drove to the accident site from Des Moines and ordered him to drive the truck back to Des Moines. Although claimant was experiencing severe neck and back pain, he followed the supervisor's instructions and drove to Des Moines. Claimant testified that he was forced to pull off the road once due to the severity of pain; the 80 mile trip took three hours. After reaching Des Moines, the remainder of the trip to Grinnell was made in his co-driver's truck.

Once in Grinnell, claimant was examined by Dr. Light, and x-rays were taken. Dr. Light testified that claimant was suffering from whiplash, a musculo-fascial strain of the ligaments of the neck. He prescribed the use of heat, primarily to the neck. Claimant returned to work on February 5, 1978, although he was still experiencing pain. Claimant stated that he could not afford to stay home.

Claimant continued to work for defendant for approximately another three months. Claimant voluntarily terminated his employment with defendant after he refused to accept a load because he felt his co-driver was an unsafe and unfit driver. Claimant immediately returned to work for Universal.

Claimant testified that he reached an agreement with Universal concerning his inability to load and unload the trucks due to his back and neck pain. As a result, Universal did not expect claimant to perform any work other than driving. Claimant testified that when he previously worked for Universal he would, on occasion, load and unload freight, but that whether he loaded or unloaded the truck depended on what type of goods he was hauling. Claimant was paid extra for loading and unloading freight. At the time of the hearing, and during his previous Universal employment, claimant hauled "swinging beef or boxed meat" on the outgoing trips. According to claimant, the drivers never loaded the meat, and only on occasion unloaded the boxed meat. Swinging beef was never unloaded.

Claimant testified that since the January 30, 1977 accident, he has been unable to load or unload the trucks, and can no longer make long hauls due to the back and neck discomfort he experiences when driving. Claimant's testimony at the hearing indicated that his neck motion was restricted and that he continued to experience severe pain radiating from his spine down through his legs.

Claimant testified that he had experienced previous back problems, but that he fully recovered from these episodes.

Dr. Light saw claimant again on July 29, 1978. At that time claimant complained of severe pain in his neck and was started on physical therapy. Claimant was next examined by Dr. Light on November 11, 1978. The examination revealed that claimant could not extend his neck and flexion was reduced 50 percent. Dr. Light thought claimant was possibly developing a herniated disc in the neck. Dr. Light referred claimant to Robert A. Hayne, M.D., in Des Moines.

Dr. Hayne first examined claimant on November 29, 1978. X-rays of the cervical spine showed the interspace between the 5th and 6th cervical segments to be narrowed. Dr. Hayne next examined claimant on February 5, 1979 and recommended a myelogram. Claimant testified that he was reluctant to undergo a myelogram because of fear of spinal complications.

Claimant was finally admitted to the hospital on November 4, 1979, at which time a myelogram was performed. In a report dated November 27, 1979, Dr. Hayne stated that the findings were suggestive of a herniated lumbar disc. An electromyogram of the lower extremities "showed suspicious findings of a very low grade S1 nerve root irritation on the right." The discharge diagnosis was "cervical spondylosis involving the 4th cervical interspace and a probably mildl [sic] protruded disc at the 5th lumbar interspace." Dr. Hayne rated claimant's permanent disability to the body as a whole as 20 percent.

Dr. Light testified that the accident of January 30, 1978, was undoubtedly the cause of claimant's present neck problems and was an aggravation to claimant's preexisting back disease.

Claimant testified that defendant did not pay an Iowa Methodist Medical Center bill of $815.94 and a $70.00 bill from Dr. Hayne. Claimant stated that he was never notified that the treatment he received from Dr. Light was not authorized. Claimant is also requesting reimbursement for the trips he made from his home to the offices of Drs. Light and Hayne. Dr. Light's office was 106 miles roundtrip. Claimant made three trips to each.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 30, 1978 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 medical testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960).

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).

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 upon the evidence presented, it is determined that claimant sustained his burden of proof that the injury he received on January 20, 1978 arose out of and in the course of his employment. In addition, the evidence demonstrates the claimant's present physical condition is causally related to the work-related injury which occurred on January 30, 1978.

Claimant is thirty-nine years old and has only an eighth grade education. Truck driving has been his major field of employment. Claimant's additional training is limited to manual labor and baker's training.

Claimant returned to work shortly after the accident and continued to work for defendant for three months after the injury occurred. He voluntarily terminated his employment with defendant and immediately secured another job as a truck driver. The record presents little evidence with respect to a reduction in claimant's earning capacity as a result of his inability to load and unload freight. Actually, claimant's testimony indicates that very little loading and unloading of merchandise occurred due to the nature of the goods transported.

Claimant continues to experience neck and back pain and discomfort as a result of the work-related injury. Dr. Hayne rated claimant's functional impairment as twenty percent of the body as a whole. In view of the fact that claimant has suffered no apparent loss of earning capacity, it is determined that claimant's industrial disability is limited to twenty percent.

Claimant is entitled to compensation for healing period for the period of January 30, 1978 through February 4, 1978 and November 4, 1979 through November 7, 1979. Additionally, claimant is entitled to transportation expenses and to the medical expenses for Iowa Methodist Medical Center and Dr. Hayne's unpaid bill.

WHEREFORE, it is found:

That claimant sustained a cervical and lumbar back injury on January 30, 1978, which arose out of and in the course of his employment.

* * *

Signed and filed this 10th day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Settled.

ALVIN J. HACKETT,

Claimant,

vs.

OSCAR MAYER & COMPANY,

Employer,

Self-insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Alvin J. Hackett, against the self-insured employer, Oscar Mayer & Company. The case was heard June 10, 1980 in the industrial commissioner's office in Des Moines, Iowa and was considered fully submitted on August 26, 1980.

* * *

The issues to be determined are the extent of disability to claimant's right arm, whether the left arm injury arose out of and in the course of the claimant's employment with this defendant, the existence of a causal relationship between the left arm injury and claimant's employment as well as the extent of disability to the left arm, the applicability of sections 85.34(2)(s)(t) and (u) to this case, whether the claimed mental and emotional disturbances are causally related to the aforementioned work injuries, and if so, the extent of disability caused thereby. There is also an issue as to certain medical bills under section 85.27 as well as mileage.

There is sufficient credible evidence in this record to support the following findings of fact, to wit:

Claimant, age 49, is a resident of Fort Dodge, Iowa. On the date of this injury, August 14, 1978, he was an employee of the defendant, Oscar Mayer & Company. Claimant completed the seventh grade and has had no vocational or technical schooling since then. Claimant testified to some difficulty he has in reading and writing.

Claimant had been employed by the defendant, Oscar Mayer & Company, for slightly in excess of ten years before his injury on August 14, 1978. At the time of his injury he worked in the sanitation department washing tubs and racks. According to his work history, claimant performed a variety of jobs for defendant including bagger, belly skinner and work in the tankage room. All of his work for the defendant involved manual labor.

Prior to going to work for the defendant, claimant had experience driving a semi truck, working in a serum plant, working at gypsum mines and farm work. All of these positions as well as work for the defendant required claimant to use his hands.

On August 14, 1979 the claimant was injured at the defendant's plant in Perry when he was knocked off an electric mule machine. Claimant testified that he was dragged approximately ten feet across the floor as the mule ran out of control. He injured his hands as he threw them out in front of him to block his fall. Claimant stated that his right hand bothered him worse than his left after the fall. He went to the nurse's station and reported the incident and also reported the fall to his foreman. Claimant continued to work the day of the incident. He testified that his right hand continued to hurt severely and the left hand became noticeably painful a few days after the incident. He was referred to the company physician, Dr. Deranleau, by the plant nurse within a few days after the incident.

After examination and treatment by Dr. Deranleau, claimant returned to work, experienced continued discomfort and was subsequently referred to Dr. Arnis Grundberg. A first examination by Dr. Grundberg was in

September 1978. Claimant gave Dr. Grundberg a full history of his fall at work and tended to emphasize the right hand discomfort more than the left as the left was not bothering him as much. Dr. Grundberg hospitalized the claimant in November 1978 and performed a surgical procedure for release of carpal tunnel syndrome on the left hand. Claimant remained under the care and supervision of Dr. Grundberg and was rehospitalized in January 1979 and a surgical procedure was performed on the right hand to release the median and ulnar nerves of that appendage. In March 1979 the claimant was hospitalized for a third time and additional surgery was performed on his left hand by Dr. Grundberg. The additional surgery constituted "decompression of ulnar nerve left wrist."

Claimant stated that the last time he worked for the defendant was September 1978, just prior to his first hospitalization. Claimant states that during the period from August 1978 through March 1979, when the last surgery was performed, he had had no other accidents or injuries involving his hands. Claimant further testified that prior to the date of injury, August 14, 1978, he had not had any difficulties with either hand or wrist which prevented him from working.

Claimant testified and demonstrated during the hearing that he was unable to straighten the fingers of his left hand and described his hand as a "claw." His hand has been in that position since the first surgery. Claimant testified to a loss of sensitivity and strength in his left hand and experiences discomfort in cold weather as well as numbness. He can lift approximately 15 pounds with his left hand, but describes this left hand as "useless." With respect to the right hand, the claimant testified and demonstrated a lack of flexibility and motion. He also stated he has no feeling in the hand because it is numb all the time. He believes he has lost about half of the strength in his right hand and stated he has a lifting restriction of approximately ten pounds with that hand.

Claimant testified that immediately prior to his injury he had a hobby of raising Appaloosa horses and had in excess of 80 head. He states that because of the physical restrictions to his hands, he was no longer able to care for his horses and has sold all but three head.

Since the date of injury the claimant has moved to Fort Dodge and presently lives with his mother. His only daughter, whom he raised, is on her own. Claimant has not held a job since the date of his first hospitalization nor has he sought any other employment. He attributes his crippled hand condition as the reason for not seeking other employment.

In February 1979 the claimant was hospitalized by his family physician, Dr. John Beattie, because of possible suicidal tendencies. In connection with this hospitalization the claimant was also examined at the University Hospitals in Iowa City. The claimant testified that he believed the injury to his hands affected his mental condition. He has seen three psychiatrists with respect to this mental disturbance. He stated he began having mental problems after his wrist surgery. Claimant stated there are times he thinks about suicide and gets depressed. He is upset about not being able to work and the inability to raise his horses as he once did. In July 1979 he unsuccessfully attempted suicide.

The claimant stated that he was self-sufficient and has always provided for himself. His inability to do so now, he believes, has affected him mentally.

The claimant is a diabetic and suffered from this condition for six years. Claimant admitted receiving, on or about July 25, 1979, notice from Mayer & Company that he should return to a light duty work assignment. Claimant did not follow through with this direction and was terminated on September 4, 1979. It was during this time claimant was having mental problems, depression and attempted suicide.

On cross-examination claimant reiterated the facts of his work injury. Claimant denies that he had suicidal tendencies as early as 1976. Claimant did not tell either of the three psychiatrists involved in this case that he had suffered from depression prior to August 1978. On redirect examination the claimant indicated that he was never hospitalized for psychiatric problems prior to August 1978. He consulted a mental health center and resident psychiatrist in 1976 for counseling with respect to a problem he was having with his daughter.

Gertrude I. Perry testified on behalf of the claimant. She is the claimant's mother and confirmed that the claimant has lived with her since July 1979. This witness has a close relationship with her son and testified she did not know of any difficulties with either the claimant's right or left hand prior to August 1978. This witness confirmed the claimant's testimony as to the difficulties he is presently having with his hands. This witness testified that since August 1978 claimant is quick tempered and has crying spells. Since the claimant has lived with his mother he is able to answer the telephone in his brother's shop. Claimant has expressed displeasure with his inability to work and his inability to be independent as he once was.

Dorothy Lewis testified on behalf of the claimant. She is a friend of his and has known him for quite some time. She was acquainted with him prior to the August 1978 injury and saw him on various occasions both prior to and after this incident. She confirms the claimant's testimony that he had no prior difficulties with his hands before the date of injury. Since the date of injury this witness confirms the claimant's testimony as to the changes which have come over his hands and his inability to use them. According to this witness claimant has seemed depressed since August 1978.

Raymond Lewis testified on behalf of the claimant. He is a friend of claimant and knew him before the August 1978 injury. He characterized claimant as a good worker prior to August 1978 and an individual who was proud of his achievements. He had only done manual labor and confirmed the claimant's testimony as to his hobby. This witness was not aware of any problems claimant had prior to August 1978 with his hands. This witness further confirms the fact that after August 1978 the claimant had noticeable difficulties with both hands. He described the claimant as being an independent individual and states that after the August 1978 incident he had noticed a change in claimant's mental condition which he basically attributes to his hand injuries and his inability to function on his own.

James H. Cooper testified on behalf of the defense. He is the personnel manager for the Oscar Mayer plant in Perry, Iowa and held that position at all times material

hereto. This witness states that Dr. Beattie treated the claimant in 1976 for diabetes and later for depression. He received this information via medical reports because claimant was off work for this treatment. This witness had a conversation with the claimant after August 14, 1978, a general thrust of which was that the left wrist injury was not considered work related. Claimant apparently did not dispute this. The right hand and wrist injury were, however, admittedly work related. This witness indicates that the claimant was released to return to work on July 10, 1979 by the physician and that he did not so return. This witness confirms that Oscar Mayer had work available for the claimant which would have met the restrictions imposed by the physician.

Arnis B. Grundberg, M.D., an orthopedic surgeon, testified by deposition that he initially saw the claimant on September 19, 1978 when he was referred by Dr. Deranleau. He took a history from the claimant on the first examination which indicated in part: "Alvin is here with pain and swelling in the right wrist. The patient is 47 years old and twisted his wrist at work one month ago. He works for the Oscar Mayer Company. Most of his discomfort is in the proximal portion of the first web space." After the examination of the right wrist Dr. Grundberg's initial diagnosis was that of a sprain of the right wrist and an irritation of the ulnar nerve of the right upper extremity. According to Dr. Grundberg's notes there was no discussion during this first examination of injury to the left wrist. Claimant returned to Dr. Grundberg for reexamination on October 10, 1978 and at that time it was determined that he had an involvement concerning pinched nerves in both hands. To confirm this diagnosis, Dr. Grundberg had an electromyography study completed and then concluded that claimant had had a "left carpal tunnel syndrome, a compression of the ulnar nerve of the left wrist, a probable right carpal tunnel syndrome and probable compression of the ulnar nerve at the right wrist." Dr. Grundberg further indicates that at this October examination the left hand appeared to be causing the most discomfort. A surgical procedure was performed on the left on November 27, 1978. This surgery consisted of decompression of the nerves in the left wrist. Claimant continued to have problems with the right and on January 25 the right carpal tunnel and ulnar tunnel were decompressed. Dr. Grundberg indicates that because of further problems with the left wrist, the ulnar nerve was decompressed in the left wrist on March 26, 1979. Dr. Grundberg testified:

> A. * * * Even after this was all done, he continued with numbness and tingling in his hand, which I, in part, ascribe to residuals from these pinched nerves, but also, in part, due to injury of the nerves by the diabetes mellitus, which is a well recognized disease that can affect the nerves.

Dr. Grundberg reexamined the claimant on June 6, 1980 and testified:

> A. He told me that the whole right hand was still numb and the tips of the fingers of the left hand were still numb. The right hand didn't hurt, but the left hand still hurt with cold and wet weather. He did not have any night pain in either hand.

Grip strength was tested at this examination as well a range of motion. On that date Dr. Grundberg had the following impressions.

> A. * * *My impression, after examining him, was that: Number one, he had a left carpal and ulnar tunnel syndrome post-operative state, with some residuals; Number two, right carpal and ulnar tunnel syndrome post-operative state with some residuals; Number three, peripheral neuropathies of the right and left hands contributing to his problems; and, Number four, that he had diabetes mellitus.

With respect to the right and left hand injuries Dr. Grundberg indicates: "Then on the 21st of November, he still complained of his left hand and he mentioned at that time that all his problems started with a fall in which he hyperextended his wrist at work." Dr. Grundberg confirmed that the left and right hand carpel nerve and ulnar compressions were similar types of difficulties. As a result of the June 6, 1980 examination, Dr. Grundberg was of the opinion that claimant had suffered a permanent impairment to the extent of 15 percent of the left hand and ten percent of the right hand. Dr. Grundberg confirmed that claimant's diabetic condition contributes to the problems he is having with hands and he took this into account when expressing his opinion as to the extent of disability. That is, that opinion indicates "just what I thought was due to the pinched nerves, which seems to be work connected at this point." With respect to the causal relationship Dr. Grundberg testified:

> Q. Doctor, do you have an opinion as to whether the 15 percent disability to Mr. Hackett's left hand is related to the August 1978 work injury?
>
> A. According to the notes, Alvin did indicate to me in the past that he did injure it at work.

Dr. Grundberg had previously established a causal relationship between the right hand injury and the work related incident. He stated that it is not unusual for a patient's complaints to crop up several weeks or several months after injury. On cross-examination Dr. Grundberg admitted that his recollection as to history is limited to the contents of his notes. He admits writing to Dr. Deranleau on December 19, 1978 and indicating that the right wrist was work related and that the left wrist was not.

An examination of Dr. Grundberg's letters and/or reports to the claimant or to the defendant, Oscar Mayer, contained in the exhibits in this record indicate that he is inconsistent in his reporting. In some reports he indicates that both the left and right carpal tunnel syndrome situations are work related and in other reports he indicates that the right is work related while the left is not. According to Dr. Grundberg's oral testimony, which is given the greater weight, it is found that claimant's right and left hand injuries are related to his work for defendant and the fall of August 1978.

In a report submitted by John L. Beattie, M.D., dated

September 10, 1979, he states that in his opinion the claimant has a 60 percent impairment of the left hand and a 40 percent impairment to the right. This report indicates that Dr. Beattie is of the opinion that both the right and left hand difficulties were causally related to the August 14, 1978 work incident. While Dr. Beattie recognizes the presence of diabetes mellitus in this case, he does not, in the opinion of the undersigned, make a close examination or attempt to separate out the degree of disability, which is caused exclusively by this incident, from that disability which is precipitated by diabetes. Dr. Beattie's opinion with regard to causation will be given consideration in conjunction with the opinion of Dr. Grundberg, however, Dr. Grundberg's opinion as to the extent of disability to the appendages shall be given the greater weight in this decision based upon his position as an orthopedic specialist and the treating surgeon. His examination in the formulation of his opinion appear to the undersigned to be more thorough and exact than Dr. Beatties's opinion.

Donald W. Blair, M.D., an orthopedic surgeon, submitted two reports indicating that he does not recognize any functional impairment in the claimant's right hand and assesses a 15 percent permanent functional impairment to the left as a result of the carpal tunnel syndrome. This opinion will be considered in conjunction with the other medical testimony.

Paul M. Kersten, M.D., testified by deposition that he is a board certified psychiatrist and had occasion to examine the claimant on October 25, 1979. Throughout Dr. Kersten's deposition he makes reference to his report of November 27, 1979 and attachments thereto which are part of this record. Dr. Kersten relates that prior to his consultation with the claimant, he was provided clinical material concerning his past difficulties. He was aware of the injury at the Oscar Mayer plant in Perry and the subsequent surgical procedures on claimant's hands.

With respect to his examination of the claimant, Dr. Kersten testified:

Q. Okay. What type of mental examination did you conduct? How did you arrive at your diagnosis, what did you do?

A. I interviewed him. And as I said earlier, I evaluated his judgment, orientation, intellect, memory, affect, thinking.

Q. Following this clinical examination or interview, did you arrive at a diagnosis as relates his mental condition?

A. Yes.

Q. What was that diagnosis?

A. Saw this man as suffering from depressive neurosis of severe proportion.

. . .

A. Uh-huh. I see him as having—I state here that this man—Mental status determination shows this man to have a somewhat disturbed judgment as a result of his emotional disturbances; oriented in all spheres, and has an intellect which is well within the range of normal.

His memory seems spotty, and this could be a result of the diabetes taking its toll on the central nervous system. That's pure speculation. In addition his affect—that's his mood. —Is disturbed in that he is blue, sleepless, chronically unhappy, and he finds that he cries a lot for no reason.

This latter reaction causes him to lose patience with himself. He manifested this latter phenomena in the course of my conversation with him. On the basis primarily of his mood disturbance, you see, and the history and the way it all fits together, I saw him as suffering from a depressive neurosis.

With respect with claimant's prior episodes of depression, this physician testified:

Q. The record also indicates that back in—I think it was again in 1976, he was off work for approximately ten months because of his diabetes, which is a condition he has. And he was seen by Dr. Beattie, and Dr. Beattie made some type of notation in his office records or did indicate that he was suffering from some I think depression at that time. Would that make any difference in your evaluation of October 25, '79, and your diagnosis and conclusions in this case?

A. No, no. Because you see, coincidental with chronic illness, it's not uncommon for people to be emotionally disturbed as a result of being sick. You can expect such reactions, just commonly seen.

With respect to the issue of causal relationship, this physician testifies:

Q. Now you've attributed the cause of his present emotional state, which is diagnosed as a depressive neurosis of severe proportions, with the accident at Oscar Mayer involving the injury to his hands; is that correct?

A. That's correct.

Q. Okay. How did you rule out the diabetes or did that make any determination, the fact that he had diabetes?

A. well, I was not aware that he was significantly depressed at any time before, and the depression that I saw came after the injury and the questionable benefit that he obtained as a result of the surgical procedures.

Q. I guess are you telling us or is it basically your opinion that his—the mental condition you diagnosed is directly attributable to his hand injury or injury to his hands?

A. Injury to his hands and his subsequent inability to use them effectively and the poor prognosis that they seemed to have; in other words, that the chances would be not good that he was ever going to be able to function as he had functioned for years before. This was a real loss to this man who is a manually oriented man.

This physician further testifies:

A. * * *On the November 27 letter, I state here at the last paragraph the information available to me indicates that he has been able to function effectively on his job for a great many years and his working had been an important strength to him all of his life.

The accident and the subsequent condition which followed, the surgical intervention precipitated the emotional state which has been previously described. It had always been important to this man to be self-sufficient. How to be unable to work has been a terrible blow to him. This has been a significant factor in his present depressive state.

It is apparent that he has been a relatively uneducated and untrained man and has always relied upon his hands to make a living. With these no longer available to him, the prospects for the future seem dim indeed.

* * *

This physician expresses the opinion that the claimant is 100 percent disabled because of the emotional illness from which he suffers. Dr. Kersten is of the opinion that "this man is always going to be scarred because—emotionally because he is going to have some kind of physical impediment." This emotional reaction is going to last for the foreseeable future. If claimant had no physical limitations, this physician would expect his emotional condition to "completely go away." He is of the opinion that claimant's emotional condition is tied to the physical difficulties he has with his hands. Dr. Kersten is of the opinion that a psychotherapeutic course might help the claimant in dealing with his present problems.

On cross-examination by counsel for Oscar Mayer, Dr. Kersten admitted that he did not have medical information from Dr.Grundberg, the operating physician in this case. He did, however, have a variety of other medical reports set out in his letter of October 25, 1979 contained as part of defendants' exhibit A. He also did not conduct an independent examination of the claimant's hands on his own. The physician was aware that the claimant suffered from a rather poorly controlled diabetic condition but stated that this type of physical ailment would not cause a depressive state any more than any other type of physical illness although a diabetic condition does have an effect on a person's nervous system. Dr. Kersten doctor states that without further treatment of a psychotherapeutic nature, the claimant will probably deteriorate further and may even suicide.

Paul T. Cash, M.D., a board certified psychiatrist testified both by deposition and by written report. Dr. Cash examined the claimant on behalf of the defense. At the time of Dr. Cash's examination of the claimant on April 7, 1980, he presented the following complaints:

1. Both hands have become crippled and the left hand has become a "claw hand" with very little ability to extend or flex the fingers. The hand and fingers are numb except for some sensation on the top of the hand. The right hand is numb except for a little feeling in the right little finger. He is able to move the fingers. The fingers cramp with effort and he has no strength in either hand or the fingers of either hand. He is unable to lift any significant weight with either hand. When he grips the fingers of the left hand they become locked in that position and can be released only by a forcible extension of the left thumb.
2. He states that sometimes he has had some "arthritis" of both knees. In November, 1979, he slipped in the bathtub and bruised the right knee. He states that fluid has been aspirated from the right knee and that he is reluctant to try to walk without crutches because the right knee will buckle under him. The right knee is very sensitive to pressure.
3. He states that he has a cracking in the back of his neck. He states that this may have resulted from the fall in the bathtub and that for a time he required a neck brace.
4. He has been diabetic since 1974 and his diabetes is not well controlled.
5. He states that he was able to control his temper until after the accident which occurred at work on about September 12, 1978. He has always had a quick temper but since the accident he has become quite discouraged and now is unable to control his temper at times. On occasions he has attempted to take his temper out on others in a physical way. It concerns him that he does not have better control of his temper and his behavior.
6. He states that since the accident he has become quite depressed. He has not been able to work. He has had to give up most of the activities that were important to him. One of his important interests was the raising of horses and he has not been able to continue to do this and has had to give up his horses. In May, 1979, he took an overdose of antidiabetic pills and nerve pills. He was found by a neighbor who took him to the hospital in Perry, Iowa. The next day he was taken to Iowa City for a ten day period. After the accident he was not able to sleep.

In addition to registering the complaints that claimant had at present, Dr. Cash also took a history concerning the facts of the injury at Oscar Mayer on August 14, 1978. This physician also conducted a general physical examination as well as a neurological examination. With respect to the neurological examination Dr. Cash testified:

Q. All right. Regarding his hands and his fingers, or arms, what did the neurological examination show?

A. Well, the neurological examination showed primarily pronounced weakness in the fingers of the left hand, which locked when he was gripping my hands, and had to be released by forcible abduction of the left thumb.

Dr. Cash indicated that claimant has had a substantial loss of motion of his hands and fingers as well as loss of sensation.

Dr. Cash also conducted a mental evaluation or examination of the claimant and testified with respect to that examination:

A. Well, the mental status showed that he was—while he was fairly cooperative, he appeared to be a rather unhappy, somewhat hostile individual, and mildly irritable; but he seemed to control this fairly well. He did cooperate; and, objectively, he could be a depressed and unhappy individual, and he described subjective depression with much resentment over the fact that he was now disabled, and was unable to carry on his usual activities; and that he was unable to work and unable to maintain his horses any longer, and his other activities. He was very disappointed that the surgery did not restore his hands to normal.

The thought processes were actually intact. His content of thought was not distinctly abnormal in any way. He was concerned primarily with the loss of use of his hands and the fact that he was so severely handicapped in carrying out his usual activities.

During the course of the examination claimant advised Dr. Cash of the attempted suicide in May 1979.

Dr. Cash continued to testify:

Q. Did you reach a diagnosis as far as his mental condition after your examination of April 17, 1980, Doctor?

A. This man is one that is very difficult to categorize. It is better to describe his problem than it is to label him, but I would say that he has some personality traits that have always been with him, but at this time he has become a very depressed, unhappy individual, and I think that some of his symptomotology is hysterical in nature.

Q. What do you mean by "hysterical in nature" from, I guess, a layman's point of view?

A. This is where someone has loss of—usually it is loss of motor function. It can be, however, loss of sensory functions, such as vision or hearing, or almost any bodily function where they have lost this, or it has been interfered with, and without any disease process to account for it, or cause it.

Q. And what are you referring to here?

A. I think that in examining his hands, it is very difficult to explain all the findings and complaints that he presents, and I feel that some of his symptomotology is hysterical in nature.

Q. As relates to his loss of use of his hands?

A. Yes.

Q. In other words, there is no organic basis to explain that?

A. They have felt he had some ulnar nerve involvement and some median nerve involvement, and he had surgery for both of these, so I suppose this is true, but the surgery—results of the surgery were not what I expected, and I don't think that the—what has happened since his operation can be explained on any disease process.

* * *

A. In the case of this man, I would say it is my impression that he is basically an unhappy person, and has been. I think, however, that he was functioning. At least he was working. At least he had his horses, which were his primary interest next to his daughter, although she is 18 now and ran away from home, but he was functioning in these areas until the time of the injury. I would say that since this time he has been a more depressed person; that he has developed a great deal of hostility, although he has, I think, always been a hostile person, mildly.

He described having a temper, but nothing like it has been since the injury, so a lot of these undesirable traits have been exaggerated since the injury; and now, of course, along with that, the development of these physical symptoms in his hands and fingers.

Q. Would it be possible for a basically unhappy person to then attribute his self-seen failure in life to an injury, if the occasion arose?

A. Well, I think that with a lot of these people, this is an unconscious tendency that some people may have. If they have been unhappy and dissatisfied, and then they suffer an injury or a disability of some kind, oftentimes they may use this. I think that's true.

Q. Might it be true in this case?

A. I think that this previous personality, and the previous personality traits have a bearing on the way he is right now, yes, I believe that.

Q. Okay. Now, if that were the case, if he were diagnosed as having mental depression in 1976 by his family physician, who was concerned at that time about his suicidal tendencies and the very [sic] types of complaints that he made to you now, and 1976 having been prior to his alleged work injury, would that change at all your opinion as to the relationship between the work injury and his present mental state?

A. Only in this way: I had a feeling that this man has been an unhappy individual probably all his life. I wasn't aware that Dr. Beattie was concerned that he might be suicidal in 1976. I don't think that I was aware of that. But I think that there is this background of depression and a little bit of resentment towards society in general and some people in particular, and that forms a background for everything that has happened since that time. I think that the injury in itself was not the cause—the sole cause of everything—of his present condition necessarily, but acted as kind of a precipitating incident to further the development of it.

Dr. Cash describes claimant, both in his report and in his deposition, as "moderately and chronically and

emotionally depressed." Dr. Cash also indicates: "He is, of course, at this time disabled from any gainful occupation. It is felt that his prognosis for improvement is not good." Dr. Cash states in his deposition that by this sentence he means that the disability relates both to his loss of use of his hands as well as his mental condition.

At the time Dr. Cash found an opinion in this case he had Dr. Grundberg's records before him and was familiar with their content. He also had reports from Drs. Kersten, Shafer and Beattie.

This physician expresses an opinion that the claimant's present mental condition as previously described and diagnosed is causally related to his work injury at Oscar Mayer on August 14, 1978. It is his feeling that claimant's condition has become chronic, that his prognosis is poor. As of the time of his deposition he feels the claimant is totally disabled from any gainful occupation because of his hands and the status of his mental condition. This physician was very discouraged about the claimant's ability to improve. The condition noted is permanent in nature. He is presently 100 percent disabled from any gainful occupation.

This physician expresses the opinion that the claimant's present mental condition stabilized and became more or less permanent around September 1979.

On cross-examination by counsel for the defense, he stated that claimant was an individual who was chronically depressed and that this condition was a background for a lot of his symptoms. With regard to this Dr. Cash states:

A. * * * But I think that there is this background of depression and a little bit of resentment towards society in general and some people in particular, and that forms a background for everything that has happened since that time. I think that the injury in itself was not the cause—the sole cause of everything—of his present condition necessarily, but acted as kind of a precipitating incident to further the development of it.

He states that diabetes can have a profound effect on an individual's nervous system and that it can affect a person's mental condition. With respect to this Dr. Cash testifies: "In examining Mr. Hackett I had a feeling that his present condition—most everything he displayed was of long standing perhaps with recent exacerbation in many areas, and that it wasn't fundamentally something that was new or different—all that new and different."

Dr. Cash indicates that claimant is not a good candidate for psychiatric treatment.

Dr. Cash also indicates:

Q Now, if I understand your earlier testimony, you are saying that his depressed mental state is not entirely attributable to the work accident to either one or both hands?

A. I would say that's true.

With respect to his testimony concerning claimant's inability to function in a work atmosphere at this time, Dr. Cash was asked:

Q. * * * Were you meaning that this was due to both his hand problems and his mental problems?

A. That is correct.

Q. Not entirely to either one or the other?

A. It is hard to separate those two. I think that his hands are—a lot of the symptoms that he has in his hands, I believe are hysterical in nature and result from his depression.

Q. Rather than any physical reason?

A. This is true. So the depression and hysterical symptoms are kind of a part of the same package.

On redirect examination by counsel for the claimant Dr. Cash again described the August 14, 1978 work incident as a precipitating factor in bringing about the mental condition. He stated: "That's something you can have people that are not entirely, well, healthy people, and you add one more disability and one more factor, and they compensate a little further." He agreed with the description that it could be the final blow that puts someone over the edge.

Dr. Cash again reiterated that both the loss of the use of claimant's hands as well as his mental condition are substantial factors culminating in his disability and inability to work.

Roger D. Shafer, M.D., a psychiatrist, examined the claimant on July 11, 1979 and October 4, 1979. He indicates in his report dated October 17, 1979 and marked as claimant's exhibit 1:

> It is my opinion that Mr. Hackett will not be able to return to any form of gainful employment involving the use of his hands. I believe that his depression will persist and that he is completely disabled by that. I am recommending that he continue in counseling with Mr. Suhr in the Fort Dodge area and that perhape [sic] he be considered for medication monitored by a psychiatrist in that clinic. In addition to that I am recommending that he be considered for vocational rehabilitation training since he is relatively young and perhaps can learn to do some other occupation that would not involve to any extent fine motor coordination or strength in his hands. He agreed to such an evaluation. Until such an evaluation is complete and retraining is attempted I believe that he should be considered totally disabled with a combination of disabling factors being his arthritis, the hand problems, and the emotional disorder, his reactive depression.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 14, 1978 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).

By filing the memorandum of agreement in this case the defendant admitted that on August 14, 1978 claimant sustained an injury to his right arm which arose out of and in the course of his employment. Based on the testimony of claimant as well as that of Dr. Grunewald, it is determined that the injury to claimant's left arm arose out of the same work incident of August 14, 1978. The record is clear that claimant did not have the carpal tunnel affliction prior to that date and there is no evidence of an intervening incident. It is interesting to note that his left arm was the first to be operated on by Dr. Grundberg and subsequently has required additional surgery.

Claimant urges that under section 85.34(2)(s) the simultaneous injury to claimant's arms requires that the resulting disability be evaluated industrially rather than merely on a scheduled basis. The Iowa Industrial Commissioner dealt with this issue in the case captioned *Delbert Prusia v. Armstrong Rubber Co.*, filed September 4, 1979 in which he held that under the present statute the disability in a case of this nature is based on the schedule and is not evaluated industrially. In light of *Prusia, supra*, the injuries to claimant's arms will be considered scheduled injuries and evaluated as such.

The present case involving Mr. Hackett contains the additional allegation of a psychological disability as a result of the August 1978 incident. With respect to this allegation the claimant continues to carry the burden of proof by a preponderance of the evidence, *Bodish v. Fischer, Inc., supra; Lindahl v. L. O. Boggs, Inc., supra.* A review of the testimony of all the psychiatrists herein leads the undersigned to conclude that there is a causal relationship between the injuries to claimant's arms on August 14, 1978, the disability resulting therefrom and his present psychological difficulties. All psychiatrists are in agreement on this part.

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).

Historically, it appears from the various psychiatric testimony that claimant had some preexisting psychological problems due to his general state in life and in part due to his chronic preexisting diabetic condition. This is generally borne out by claimant's testimony. The record, however, is clear that despite any mental imbalance or prior health difficulties claimant worked for the defendant for a number of years and was productive. This is a status which he does not now enjoy.

The psychiatric opinion is varied as to the value of psychotherapeutic's or other therapy in this case. In addition, the record, as it now stands, is that claimant has not undergone any psychiatric treatment and none is apparently contemplated in the foreseeable future. Rehabilitation has been suggested by Dr. Shafer but none was undertaken to date.

Defendent offered claimant light work which he elected not to accept. While this occurred during his apparent period of mental distress, sometimes the best cure fo problem is returning to productivity of the same natu

It is further clear that the claimant has sustained industrial disability which is defined in *Diederich v. T City Railway Co.*, 219 Iowa 587, 593, 258 N.W.2d 8 (1935), as follows:

> It is, therefore, plain that the legislature intend the term "disability" or loss of earning capacity a not a mere "functional disability" to be computed the terms of percentages of the total physical a mental ability of a normal man.

This doctrine was further noted in *Martin v. Skelly C* 252 Iowa 128, 106 N.W.2d 95, and again in *Olson Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 2 This department is charged with the statutory duty determining a claimant's industrial disability. In attempt to further clarify this issue, we quote from *Olso supra*, at page 1021:

> Disability * * * as defined by the Compensati Act means industrial disability, although functio disability is an element to be considered [c *Martin, supra,*]. In determining industrial disabili consideration may be given to the inju employee's age, education, qualificatic experience and his inability, because of the injury, engage in employment for which he is fitted. * *

Prior to the date of injury claimant was a product individual. Since that date his physical as well as men condition has dissipated. Defendant's action in offeri claimant a light duty position is commendable but in lig of his mental condition at the time, his refusal understandable. The record does not reflect that a rehabilitation program has been undertaken in this ca One psychiatrist records psychotherapeutics but t record evidences no such procedure has be undertaken. While Dr. Cash indicates a date on which thought the healing period concluded, the undersigne not necessarily bound by that opinion. There is sufficie medical testimony in this record to support t proposition that claimant has not recuperated from work related injuries as contemplated in section 85.34(Particularly when Dr. Kersten discusses the potential u of therapy.

Based on the record as a whole, it is determined th claimant has not returned to work or recuperated und the terms of section 85.34(1) and is therefore entitled to running healing period award.

WHEREFORE, it is found:

That claimant sustained an injury to his left arm whi arose out of and in the course of his employment with th defendant on August 14, 1978. According to t memorandum of agreement on file, defendant adm claimant sustained an injury to his right arm which aro out of and in the course of his employment on August 1 1978.

That claimant has sustained a psychologic impairment as a result of his work related incident August 14, 1978.

hat claimant has not returned to work or recuperated contemplated in section 85.34(1), Code of Iowa.

HEREFORE, it is ordered:

hat defendant shall pay claimant a running healing iod award commencing August 14, 1978 and ntinuing until the requirements of section 85.34(1) are t.

is further ordered that when defendant has any dence that either of the tests for the termination of ling period benefits has been met, it is to submit the dence to claimant's counsel and this office. If the ties are unable to reach an agreement as to the sation of healing period and amount of permanent bility, a hearing shall be requested by defendant on se issues. Giving due consideration to the prompt aining of rebuttal evidence by claimant, a hearing shall set at the earliest possible time. Defendant shall pay ling period benefits until either an agreement between parties is reached and this office is given written ce or until defendant, with a prima facie showing that ling period benefits shall cease, shall file a request for ediate hearing for a determination of the cessation of healing period.

* * *

gned and filed this 15th day of April, 1981.

E. J. KELLY
Deputy Industrial Commissioner

Appeal.

LIAM L. HANEY,

laimant,

VERSITY OF IOWA —
DALE BRANCH,

mployer,

TE OF IOWA,

surance Carrier,
efendants.

Arbitration Decision

is is a proceeding in arbitration brought by William ey, the claimant, against his employer, University of —Oakdale Branch, and the insurance carrier, State wa, to recover benefits under the Iowa Workers' pensation Act on account of an injury he sustained larch 4, 1977. This matter came on for hearing before undersigned at the Linn County Juvenile County thouse Facility in Cedar Rapids, Iowa on July 8, . The record was considered fully submitted on ust 19, 1980.

* * *

The issues to be determined are whether the injury arose out of and in the course of claimant's employment; whether the alleged disability is causally related to the injury; and the extent of the permanent disability, if any. Defendants have raised an affirmative defense—whether claimant willfully intended to injure himself or another [Code section 85.16(1)]. Certain medical expenses are also in issue. At the time of the hearing the parties stipulated that at the time of the injury the claimant was earning $170 a week, was married and had one dependent child and that the claimant had no lost time as a result of in the injury.

Claimant testified that on March 4, 1977, while performing his duties as a custodian for defendant-employer, he was approached by another employee. He described the confrontation that took place:

> Well, I had finished or I was mopping the hall part there at the entrance of the room that had the supplies, and Mr. Demory had come out of the T.V. room, I believe, and said in a very loud voice, "You know what I told you yesterday," and I said what? I talked to him in I thought a very friendly voice. He said about being in the elevator. I said how many hours a day do you work. He said why. I said I don't see why you ask that. Well, I said, I was just curious because I work usually more than eight hours a day here. Sometimes I work twelve hours.
>
> He said well, sometimes I work an hour or two overtime, and I said well, I think it's my business because of the fact that I work the time that I do that I use the elevator if I wish to, and at that he came over and stood less than a foot away from me.
>
> I could see he was very intense and I had been around people who are in various stages of health, and sometimes these people by having a reassuring contact can stop being very excited, and I put my hand limply on his shoulder and I found that he was very tense.
>
> I mean, immediately he withdrew. He grabbed me around the waist, but in the split interval of time that I had for the feeling of tension on his part, I immediately put my hand on his hand although he was not as big an individual as I am, and I made no effort in any way to give him any opportunity to say that I had done anything aggressive because I have never at anytime of work appeared to give this impression as far as I know.
>
> As a result of my doing that, he swung me around and I hit another door that was inside standing open, a very heavy door, on the forehead. At that time, I didn't know it but it was cut. My glasses were knocked off and he swung me around to some windows that had metal in them. I don't know whether this was just an effort to try to release his hands or whether he had decided that he was going to try to get away from the hold that I had on his hands which prevented him from doing anything else as far as I was concerned, but when he swung me around towards the window, I merely put my feet down aggressive and I said my glasses are knocked

off and I said please don't step on my glasses, and he said, "Oh, I wouldn't think of doing that," and I relaxed and he left. (Hearing transcript, pages 6-7)

Claimant explained that Mr. Demory and he had an exchange at the elevator the day before. Apparently, the employees had been urged to conserve energy and, according to the claimant, Mr. Demory advised the claimant not to use the elevator. Claimant stated that he used the elevator anyway since the door was open. Claimant noted that he had never been directed by his supervisor, a Mr. Murphy, to follow any instructions given by Mr. Demory.

Claimant likewise recalled an incident six weeks earlier in which Mr. Demory, again, according to the claimant, grabbed his hand to shake it and tried to squeeze it to the point of pain.

Claimant recalled that after the episode on March 4, 1977 he was taken to the emergency room for tests and observations. He returned to the hospital later in the evening because he developed a headache and neckache. When he left the hospital that same night he was disoriented and dizzy. Claimant also noted trouble using his legs following an inner ear examination taken on a later date.

During cross-examination claimant testified that he was 72 years old and stopped working for defendant-employer in June of 1978 when he reached the mandatory retirement age of 70. He admitted having worked for Younkers at the same time he was working for defendant-employer and commented that he missed time from this second job when he went to the hospital for tests. Claimant also agreed that after leaving defendant-employer he went to work as a maintenance man at an apartment complex for almost a year. Claimant then began working for a car dealer—his present employer.

Claimant further testified on cross-examination that he sustained a whiplash injury in June of 1970. He denied any lasting disability from such injury.

Claimant agreed with the cross-examiner regarding the fact that he did not loose consciousness and did not need stitches as a result of the March 4, 1977 incident. He pointed out that his glasses were bent in the scuffle and he had to take them to an optometrist for repair. Claimant disagreed with a reference in the medical records to his having told Dr. Namba that he was accosted by an alcoholic. (Defendant's exhibit 1-B)

Defense witness, Dan Demory, a nursing assistant with defendant-employer, testified that as he was walking down the hall on the date of injury he saw the claimant getting out of the elevator and inquired in a normal tone: "Mr. Haney, are you getting enough exercise?" (Hearing transcript, page 27.) Demory explained that he and the claimant had talked about exercise on previous occasions. Demory testified that he proceeded to turn the corner when "...all of a sudden he [claimant] was right in front of me yelling and saying something about what do you mean do I get enough exercise, I work two jobs a day..." (Transcript, page 28.) According to Demory the claimant was poking him in the chest with his finger while talking. Demory explained what next happened:

A. Well, then we started—he was walking down the hall and I was walking down the hall, and I guess we got down to his place of work right down there and he said something about this isn't finished or I can't remember what he said, the exact words, and I said, "Mr. Haney, I didn't say anything to you." All I said was something about exercises and what right you have poking me around and yelling in my face and like that.

Q. Were you irritated at this point?

A. I was upset. I was upset it happened. I wasn't irritated.

Q. And did Mr. Haney reply to your statement?

A. No, I don't think he did anything or said anything.

Q. Did anything happen after that point?

A. Well, then he grabbed me.

Q. How did he grab you?

A. Right in the arms here with his arms.

Q. Excuse me, when you say here, you are going to have to describe that.

A. Like this with both arms forward.

Q. With both arms forward? What were his hands on?

A. Well, the hands were right above my elbows.

Q. So both of his hands were on your arms?

A. Right.

Q. And once he grabbed you like that, what happened.

A. Well, then I just went like this and I grabbed him.

Q. When you say like this, you are going to have to explain.

A. Well, I turned. I took my hands and put them over his hands like that.

Q. All right, why did you do that?

A. Well, God, he was so close to me I just wanted to get him away from me.

Q. And what happened when you pushed him away?

A. Well, then he took his hands and he wrapped them around my back like this.

Q. In a bear hug type?

A. Well, I mean not close, but around kind of like this kind of.

Q. Were his arms around your waist and his arms locked together, is that what you are describing now?

A. Pretty close, yeah.

Q. All right, and after he put his arms around you, did he do anything further or did you do anything?

A. Well, then he started swinging both of us around really.

Q. Was he swinging you around?

A. Yeah, swinging both of us around really.

Q. And what happened as he swung you arond.

A. Well, I don't know, I couldn't believe it. So we swung around maybe three or four times and then I grabbed him and tried to shake him loose like this, and like this, and finally we got loose.

Q. Why did you grab him? I mean, were you scared or what was going on in your mind?

A. Yeah, I mean either one of us could have got hurt in that situation.

Q. All right, and as you broke, you say you broke his grip at that point?

A. Uh-huh.

Q. And what happened when you broke his grip?

A. Well, that was it. Then he just kind of got like this and I held on to him and he stood up and his glases were on the floor. I picked them up and gave them to him.

Q. Did he hit the wall or did he hit a door? I'm not sure exactly what happened.

A. Well, we were by the window. I don't know about a door, but we were pretty close to the window. Now, whether he hit that window or not, he could have.

Q. Did he fall down?

A. No.

Q. Do you remember whether he had a cut or not on his forehead?

A. Oh, I think he did.

Q. Did he lose consciousness at that time?

A. No, I don't think so. He just kind of looked at me and then when I handed him the glasses, he looked at me and then just walked out the door.

Q. Did he say anything further to you?

A. No.

Q. Did you say anthing to him?

A. No.

Q. Did you ever speak to him later about this matter?

A. I don't think so. (Transcript pp. 29-32)

Demory did not recall either of the other two incidents described by the claimant. He thought he and the claimant previously got along okay.

No cross-examination of Demory was conducted.

Defense witness, Wayne Lacina, associate director for defendant-employer, testified that Mr. Haney was hired by a Mr. Murphy with Lacina's approval. Lacina related that he learned about the incident through an accident report and he then talked to the claimant and Mr. Demory about the matter. He noted that both their stories were substantially similar to their testimony at the hearing. He could not locate any eyewitnesses. He testified regarding complaints he had received about the claimant and from the claimant and characterized the claimant as a marginal to poor employee. According to Lacina, claimant's work record was relatively good but sometimes the claimant did not agree with the supervisors. Lacina has no qualms about, or problems, with Demory.

On cross-examination, Lacina mentioned that claimant had to be disciplined on several occasions for counseling the alcoholics. He agreed that the incident was work-related in that it occurred during claimant's job, on the defendant-employer's premises and involved two employees.

Upon completion of defendant's case, claimant took the stand again and testified that Demory's voice "was loud, irritating, and unfriendly." (Hearing Transcript p. 47) He essentially updated his description of the incident noting that Demory came to his work area and initiated the physical contact.

An emergency service record from the University of Iowa Hospitals and Clinics, dated March 4, 1977, indicates that examination of the claimant on that day resulted in the diagnosis of minor head abrasion, nasal abrasion and right elbow abrasion (Defendant's Exhibit 1). A continuation sheet states that the claimant returned at 10:30 p.m. when he developed headaches and dizziness and he had some neckache. (Defendant's Exhibit 1—A) A skull series was taken and yielded normal findings. (Defendant's Exhibit 1-B) Claimant was seen at the same institution on March 25, 1977 for persistent ringing in his ears since the injury on March 4, 1977. Upon examination, the impression was: "Tinnitus probably related to sensorineural hearing loss of questionable relationship to basilar skull trauma. Questionable cervical vertigo by history." (Defendant's Exhibit 1-D) Further tests were conducted. (Defendant's Exhibits 1-E through 1-L) Garry P. Sherman, M.D., summarized these results in a May 4, 1978 letter to the State Comptroller.

> Our investigation showed that he had a completely normal ear-nose-and-throat examination. An angiogram showed that he had a mild notching at 4000 hz. in each ear, and this is quite consistent with noise trauma. Some asymmetry was found of his internal auditory canals on routine examination, but a posterior fossa myelogram showed this area was quite within normal limits. An x-ray of his cervical spine showed some changes consistent with cervical spondylosis. From our standpoint, the only abnormal finding is on the audiogram, and these changes may well have been present for some time. He insists, however, that the tinnitus came on only after the altercation. (Defendnt's Exhibit 1-M)

In a letter dated May 7, 1979 Richard F. Neiman, M.D., stated that he examined the claimant on May 4, 1979. He related the following history regarding the injury and course of treatment:

> * * * The patient was well until May 4, 1977 when working as a maintenance man at Oakdale he apparently got into a discussion with another gentleman employed by the University and was picked up by the waist and was swung forcefully into the door. He struck his left frontal region and had broken glasses. He had a minor laceration of the left frontal region treated with butterfly sutures. Later that day he had headaches that developed around

2200. X-rays of the skull were negative. He complained of ringing in both ears and was seen by the ENT department and had a posterior fossa myelogram. The myelogram was negative but the patient had residual irritation from the dye in the lower back. At the present time he is still complaining of ringing in both ears as well as mild hearing loss, poor balance, and tends to fall posteriorly. His neck is not stiff although it will occasionally get somewhat tense. (Claimant's exhibit 1, page 1)

Dr. Neiman's examination of the claimant revealed:

...a somewhat hostile appearing male who calmed down more during the examination. The patient had a mild hearing loss and some mild limitation as far as flexion and extension on lateral rotation of the neck. I could find no other problem as far as the general physical examination or neurological examination. With the dizziness and poor balance, I thought at least an x-ray of the neck might be reasonable. Such was performed revealing extensive degenerative arthritis at C5-6, 6-7. It is conceivable that some of his complaints are related to cervical osteoarthritis. I suggested a trial of intermittent cervical traction 8 to 10 pounds in a slightly flexed position with a hydrocular twice a day. Reexamination was suggested in about three weeks. (Claimant's Exhibit 1, p. 1)

Dr. Neiman concluded:

I think Mr. Haney is more than casually seeking legal retribution against the University. I am not at all convinced that his injury is sufficient to cause his present complaints. Looking back through the records of 1977, I find a report of degenerative arthritis which was treated with cervical collar. The resident on the case was Dr. Namba. (Claimant's Exhibit 1, page 2)

In a follow-up letter report dated June 13, 1979 Dr. Neiman reports that he again examined the claimant on June 11, 1979. He related his findings and conclusions at that time:

Your patient, William Haney, returned for examination on June 11, 1979. He is perhaps mildly improved since being on the traction. This gentleman is still seeking legal retribution against the University. He is a most difficult patient, being extremely hostile. I believe that he probably has a 5% disability based upon his neck injury and so advised him. I don't know whether this will placate the patient. I certainly didn't give this degree of disability in a desire to placate him, rather based it on the neurological examination and x-rays of the neck. Reexamination was suggested in about two months. (Claimant's Exhibit 2)

The claimant must prove by a preponderance of evidence that his injury arose out of and in the course of his employment. *Musselman v. Central Telephone Co.*, 261 Iowa 352 (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 injury of March 4, 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.)

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.*

There does not appear to be any dispute that the altercation between the claimant and Demory occurred while the claimant was performing his employment duties and that the encounter resulted in some immediate visible injury to the claimant for which he was treated on an outpatient basis at the University of Iowa Hospitals and Clinics.

However, pursuant to Code Section 85.16(1), Code of Iowa, defendants contend that claimant's injury is not compensable because he willfully intended to injure Demory. Although the undersigned found the claimant to be an incredible witness who displayed extreme paranoia about many aspects of his employment (which were irrelevant and immaterial to the issues of this proceeding), the merits of the affirmative defense do not turn on whether the claimant's version of what occurred or that of Demory's is accepted as true. The Industrial Commissioner set forth his views on the Code, Section 85.16(1) defense and that of horseplay in the case of *Lavern Felder v. Howard Steel Company and Bituminous Insurance Companies*, 32nd Biennial Report of the Industrial Commissioner pages 67-68:

Defendants argue on appeal that *Ford v. Barcus*, 261 Iowa 616, 155 N.W.2d 507 (1968) and *Wittmer v. Dexter Manufacturing Co.*, 204 Iowa 181, 214 N.W. 700 (1927) are applicable here on the basis that claimant's conduct constituted horseplay. These

cases stand for the proposition that an employee who voluntarily initiates and aggressively participates in horseplay and who is injured does not sustain an injury arising out of and in the course of his employment. The facts of *Ford* and *Wittmer, supra*, are distinguishable from the case *sub judice*.

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

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

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

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

Defendants have raised the affirmative defense provided in Iowa Code §85.16(1) which reads: "No compensation under this chapter shall be allowed for an injury caused: 1. By the employee's intent to injure himself or to willfully injure another." The key phrase to be interpreted is what constitutes "willful intent to injure." Larson in his treatise, supra, at 3-155 suggests the phrase contemplates "behavior of greater deliberations, gravity and culpability that the sort of thing that has sometimes qualified as aggression." According to Larson, the factors to be examined in evaluating this defense are: the seriousness of claimant's initial assault and the weighing of premeditation against impulsiveness. Larson sees consistency in decisions construing "willful intent to injure" in that "[p]rofanity, suffering, showing, rough handling, or other physical force not designed to inflict real injury." do not arise to the requisite degree of seriousness.

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

There is no Iowa Supreme Court case discussing Code Section 85.16(1). [Compare *Cedar Rapids Community Schools v. Cady*, 278 N.W.2d 298, 300 and 301 (Iowa 1979) wherein the Court in analyzing Code Section 85.16(3) refers to the sufficiency of establishing that the assault occurred because of the employment and was not independent of it.] Hence, the above cited agency case law must be applied to the facts of the case. Clearly, the confrontation was not carried out in a spirit of horseplay so the question of who initiated the argument is not relevant. Both claimant and Demory related the disagreement to an aspect of their employment. Claimant linked the March 4, 1977 matter with an alleged earlier dispute over the elevator; Demory thought claimant's outburst was related to a comparison of their working hours. Furthermore, claimant's poking Demory in the chest and grabbing him around the arms and waist may amount to rough handling but do not appear to have been intended to inflict actual injury. Finally, Demory seemingly was in claimant's general work area at least when he made an initial comment. Thus, applying the earlier mentioned standards to these facts, the undersigned must find that defendants' affirmative defense of willful intent to injure is without merit in this case.

The parties stipulated that there was no issue of time loss. Hence, the matter left for consideration is whether the claimant sustained any permanent disability as a result of the work injury. The record does not support a finding in the claimant's favor. The only suggestion that the injury may have resulted in some permanent impairment to his neck is found in Dr. Neiman's brief letter of June 13, 1979 (Claimant's Exhibit 2). Such exhibit does not amount to a preponderance of the evidence especially in light of Dr. Neiman's earlier May 7, 1979 letter which was more detailed and indicated that claimant had only mild limitation of neck movement and extensive degenerative arthritis at C5-6, 6-7 which might be related to cervical osteoarthritis. Upon the first visit, he was not at all convinced that claimant's injury was sufficient to cause his present complaints. It should be noted that claimant's complaints to Dr. Neiman appeared to be concerned with ringing in both ears and dizziness rather than neck impairment per se. Dr. Neiman does not explain a relationship between such symptoms and the alleged 5 percent disability based on the neck injury. Furthermore, the history Dr. Neiman relied upon seems to be hyperbolized and at least partially incorrect. The undersigned questioned how "forcefully" claimant was swung into the door in light of claimant's attitude previously discussed. Also, the records from the University of Iowa Hospitals and Clinics do not indicate that claimant's forehead cut was treated with sutures or

that his glasses were broken. Claimant's testimony at the hearing was consistent with such records yet, Dr. Neiman somehow received an opposite impression from his examination of the claimant 2 years after the injury.

Finally, the reports of the treating physicians at the time of the injury find only cervical changes consistent with cervical spondylosis. No mention is made of an aggravation by the injury of such preexisting condition. There was one abnormal finding on the audiogram thought to have been present for some time. The doctors do note that claimant insisted tinnitus came on only after the altercation. The possiblity that the tinnitus might be related to the work injury and the extent of such disability was not explored or developed by the claimant. To render any award for such condition would be triggered by claimant's allegation that he suffered such condition only since the injury and would find meager support in the medical evidence. Such finding would be based on mere conjecture and surmise.

WHEREFORE, it is hereby found that claimant has met his burden of proving that he sustained an injury in the course of and arising out of his employment on March 4, 1977, but he has failed to prove by a preponderance of the evidence that said injury resulted in any temporary disability or permanent impairment.

It is further found that defendant has failed to establish that claimant willfully intended to injure another as that affirmative defense has been construed by agency case law.

With respect to the medical expenses offered at the time of the hearing, it is hereby found (with the exception of 2 entries on page 6 of Claimant's Exhibit 3 for dates prior to the date of injury) that such expenses were reasonable and necessary in treating the claimant for his alleged complaints after the altercation. Claimant is entitled to be reimbursed by the defendant. However, the exhibits are repleat with handwritten figures which makes interpretation less than accurate. The parties shall confer with respect to Claimant's Exhibit 3. In the event any dispute arises over what should be reimbursed, the parties shall submit the matter (and clarification of their respective arguments) to the undersigned.

THEREFORE, it is hereby ordered that claimant shall take nothing in weekly benefits from this proceeding. However, defendants are ordered to pay unto the claimant the medical expenses indicated on Claimant's Exhibit 3 and dated as of or after the date of injury.

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner's Rules 500—4.33.

A final report shall be filed within twenty (20) days of the filing of this decision.

* * *

Signed and filed this 15th day of December, 1980.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JOHN P. HANLON,

Claimant,

vs.

OWENS-CORNING FIBERGLAS CORP.,

Employer,

and

AETNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Ruling

Now on this day the matter of defendants' special appearance comes on for determination. No resistance has been filed by claimant.

On May 28, 1980 claimant filed a petition in arbitration alleging an injury date of December 1, 1971 from the handling of asbestosis. That petition further alleges that the disease has just been discovered.

On November 4, 1980 defendants filed a special appearance alleging the industrial commissionoer has no jurisdiction as more than two years have passed since the date of the occurrence of the injury and that proper service has not been made on the non-resident employer under chapter 17A and Iowa Code section 86.36.

On February 12, 1981 defendants filed an amendment to that apearance with further allegations. More specifically they claim that claimant asserts an occupational disease and that claimant's last exposure to the hazard was not in his employment with defendant-employer.

Industrial Commissioner Rule 500—4.35 permits application of the Iowa Rules of Civil Procedure to contested case proceedings before this agency unless the provisions are in conflict with Chapters 85, 85A, 85B, 86, 87, or 17A or obviously inapplicable.

Iowa Rule of Civil Procedure 66 allows:

> A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error.

Opinions of the Iowa Supreme Court are consistent in stating that when jurisdiction is attacked by the defendant through a special appearance, the claimant carries the burden of making a prima facie showing to sustain jurisdiction. At that point the defendant must overcome or rebut the prima facie showing. *Rath Packing Co. v. Intercontinental Meat Traders*, 181 N.W.2d 184, 185 (Iowa 1970); *Jensen v. Harmon*, 164 N.W.2d 323, 326 (Iowa 1969); *Tice v. Wilmington Chemical Corp.*, 259 Iowa 27, 47, 141 N.W.2d 616, 143 N.W.2d 86;____ (1966). The allegations of a plaintiff's petition in a special appearance

situation will be accepted as true. *DeCook v. Environmental Security Corp.*, 258 N.W.2d 721, 725 (Iowa 1977); *Tice, supra; Great Atlantic & Pacific Tea Co. v. Hill-Dodge Baking Co.*, 255 Iowa 272, 279, 122 N.W.2d 337, ___ (1963). The opinion in *Tice, supra,* citing Iowa Rules of Civil Procedure 80(b) and 116, suggests that verified affidavits either supporting or opposing the special appearance will also stand "as a verity unless controverted." That proposition was again presented in *Douglas Machine & Engineering Co. v. Hyflow Blanking Press Corp.*, 229 N.W.2d 784 (Iowa 1975).

Rule 80(b) provides in part that:

> Any motion asserting facts as the basis of the order it seeks and any pleading seeking interlocutory relief, shall contain affidavit of the person or persons knowing the facts requisite to such relief....

Defendants' first challenge subject matter jurisdiction on the basis that claimant's last injurious exposure was not in the employment of defendant-employer. In support of that contention, defendants Owens-Corning have supplied claimant's sworn testimony that he was exposed to asbestos for five months in 1978 while he was employed by Ebasco. Iowa Code section 85A.10 states in pertinent part: "Where compensation is payable for an occupation disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, shall be liable therefor." While defendants may have no liability in this matter, such a finding would not divest this agency of subject matter jurisdiction.

Defendants' second contention is that the Iowa Industrial Commission does not have jurisdiction over the person of defendant-employer as service was not made in compliance with Chapter 17A and section 86.36. Section 86.36 becomes applicable through section 85.3(2) which states:

> 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 the state.
>
> In addition to those persons authorized to receive personal service as in civil actions as permitted by chapter 17A, such employer shall be deemed to have appointed the secretary of the state of this state as its lawful attorney upon whom may be served or delivered any and all notices authorized or required by the provisions of this chapter, chapters 85A, 86, 87,and 17A, and to agree that any and all such services or deliveries of notice on the secretary of state shall be of the same legal force and validity as if personally served upon or delivered to such nonresident employer in this state.

Section 86.36 (1) provides:

> 1. In addition to the manner provided in chapter 17A, whenever service or delivery of any notice is made on a nonresident employer under the provisions of section 85.3, subsection 2, the same shall be done in the following manner:
>
> a. By filing a copy of said notice with the secretary of state.
>
> b. By mailing to such employer within ten days after said filing with the secretary of state, by certified mail with return receipt requested addressed to the nonresident employer at his last known address or place of abode, a copy of said notice on which shall be noted the date of filing of the copy with the secretary of state.

Nothing in this record indicates claimant filed a copy of any notice with the secretary of state. Therefore, proper service has not been had and defendants' special appearance must be sustained.

WHEREFORE, it is found:

That this agency has subject matter jurisdiction over this matter.

That defendant-employer is a nonresident.

That claimant performed services within the state.

That claimant has not filed notice with the secretary of state as required by Iowa Code section 86.36(1).

THEREFORE, it is ordered:

That defendants' special appearance is hereby sustained.

* * *

Signed and filed this 20th day of May, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

DENNIS D. HANSON,

Claimant,

vs.

FROZEN FOODS PLUS, INC.,

Employer,

and

AID INSURANCE SERVICES,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Dennis D. Hanson, the claimant, against his employer,

Frozen Foods Plus, Inc., and the insurance carrier, Aid Insurance Services, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on January 11, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner in Mason City, Iowa on August 1, 1980. The record was considered fully submitted on August 1, 1980.

This issue contained in this matter is the nature and extent of claimant's disability, if any.

* * *

This record contains sufficient credible evidence to support the following statement of facts, to wit:

Claimant, age 21, single and a ninth grade "drop-out", after a short period as a short order cook, began his duties as a route truck driver for the defendant-employer in November 1977. Beginning in July 1978, claimant was unable to perform his normal work assignments following a work-induced hernia, for an eight week period. In 1979, claimant sustained an elbow injury following a non-work connected fall, resulting in a three to four day period of time lost from employment.

On January 11, 1980, while making a delivery of approximately 237 pounds of frozen food in Cresco, Iowa, claimant fell backwards striking his hips and spine on the concrete approach to the customer's building. The claimant was using a two-wheeled cart to assist in the transport of the delivery of frozen food, which load then fell on the claimant striking him in the chest. Upon return to his employer's premises at the end of the route, claimant noticed an increased amount of discomfort for which he sought medical attention the following day from G. Travis Westly, M.D., who hospitalized the claimant for an eight day period of time (defendants' exhibit A) (claimant's exhibit 1). Upon examination including x-ray, a diagnosis of a non-displaced fracture of the coccyx was made, together with "contusion and sprain lumbar spine and pelvis" (claimant's exhibit 3). Claimant was discharged from the hospital January 21, 1980. However, following an increase of discomfort, claimant's exhibit 3). Claimant was discharged from the hospital January 21, 1980. However, following an increase of discomfort, claimant was readmitted on January 28, 1980 for observation and bed rest. After discharge claimant attempted to comply with the directions of Dr. Westly by doing the prescribed knee bends and knee to chest exercise. This activity caused a "weak and shakey" feeling in claimant's legs. Dr. Westly hospitalized the claimant again on February 13, 1980, at which time Wayne D. Janda, M.D., an orthopedic surgeon was called in for consultation, who, following a negative EMG and a negative amipaque [sic] myelogram reported his findings, in part, as follows (claimant's exhibit 10):

> * * * In stance, he has a slight list to the left. The pelvis is level. Lumbar flexion is 75 degrees with pain extension 5 degrees with pain, lateral flexion 10 degrees with pain in rotation 20 degrees with pain. There is tenderness in the erector spiny muscles bilaterally from the rib cage down to the pelvis. There is slight tenderness in either sciatic notch. Straight leg raising 75/75 degrees with hamstring and gastrocnemius tightness. There is tenderness over the tensor on the left side. I detect nonsignificant hip restriction of motion. Knee and ankle deep tendon reflexes are physiologic and equal. No significant motor weakness demonstrated in the lower extremities. Patient is able to heel toe walk and hop without significant pain. When he does a deep knee bend, he does use support when he gets up, suggesting slight weakness of the quadriceps muscle.
>
> History of a work injury January 1980 with fracture of his coccyx and residual [sic] muscular back strain. No evidence for neurologic deficit.
>
> Would continue with the current medications; namely, Butazolidin and Soma. He may require Tylenol #3 for postmyelogram headache. In addition to the diathermy and massage, will start William's exercises and physiotherapy. May continue walking activities as tolerated. Will follow while hospitalized.

Upon discharge he received a back corset with the admonition that the belt is to be worn for "heavy lifting." Claimant was returned to his regular employment status April 21, 1980 together with a functional impairment rating of five percent of the body as a whole (claimant's 16 and 18).

That same day claimant was advised by the defendant-employer that his services were no longer required. On May 21, 1980 some two weeks after filing his application for review-reopening, claimant was examined by John Walker, M.D., who reported the results of such examination, in part, as follows (claimant's exhibit 17):

> OPINION: This is a rather confusing situation and the confusion I believe is due to the fact that this man probably has a fairly unusual injury, which basically in my opinion consists of a direct contusion and probably a stretch torsion injury to the cauda equina occurring pretty much in the entire lumbar spine area. Secondly; he appears to have suffered some injury to the coccyx which is still symptomatic and thirdly; he has a sprain reaction with some symptomatology of a so called whiplash type of injury to the cervical spine. All of these appear to have been a result of the fall that he describes as really a bad, traumatic incident and tells me that at first he was pretty much numb all over in the area described and as the day went on the pain increased. This fits pretty well with a stretch type of injury or contusion type of injury to the cauda equina, and/or even possibly the lower, lumbar spinal cord.
>
> I would call your attention particularly to the muscle spasm and the tautness and extreme discomfort displayed by the hamstring muscles particularly on the right. These muscles are innervated by nerve fibers from the 5th lumbar and 1st sacral nerves, basically in the low back region and also to some extent in the region that we find the congenital anomaly of namely the partial lumbarization of the 1st sacral segment.

The patient has really had fairly good treatment and I think the misunderstanding is the true nature of his problem and probably an underestimation of his disability at this time.

I believe that the patient would do well on high potency vitamin-B. I would personally give him some injections of Folbesyn 2 cc. IM, a couple three times a week along with Viobec 1, t.i.d. and Sigtabs, consisting of physical therapy, stretching of the hamstrings, heat and massage, back exercises and Isometric exercises to the cervical spine would also be efficacious.

Today I have given him a prescription for Viobec which is a vitamin-B complex and I have asked him to take one of these three times daily. I have also given him a prescription for Sigtabs, 1 daily which may also help this whole problem and is also a multi-vitamin.

Sitting in hot bath tubs and showers are easily done and he can do these at home.

At this time, I do not feel that he is able to return to his job.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 11, 1980 is the cause of the disability on which he now bases his claim. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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 apparent that the claimant has established his burden of proof. The claimant testified that he has constant pain at the shoulder blade level of his spine, low back stiffness, together with tingling in both upper and lower extremities. This testimony when taken together with the objective medical findings of Dr. Walker, couples such a finding, especially when compounded with the minimal report of Dr. Janda. Based upon the evidence it is concluded that the report of Dr. Walker must be given the greater weight in this decision.

Claimant also asks that his future medical treatment be performed by Dr. Walker. Section 85.27, Iowa Code, 1978, reads, in part, as follows:

> 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 and 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.

Claimant testified that he has lost confidence in Dr. Janda, in particular the doctor's statement, "that I have nothing more to offer you." Claimant also testified that in addition to the tingling in his extremities and his general shakiness, he is experiencing an involuntary curling of his toes very similar to cramping.

This young man appears to be very concerned about his physical condition. Based upon the medical evidence present in this record and the testimony of the claimant and Mike Bergan, corroborative witness as to the toe curling condition it seems appropriate to allow the claimant to seek the necessary medical care he needs at the hands of John Walker, M.D., an experienced orthopedic surgeon.

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

1. That on January 11, 1980 the claimant sustained an admitted industrial injury.

2. That following three periods of hospitalizations the claimant became a patient of Wayne Janda, M.D., who released the claimant as fit to resume acts of gainful employment on April 21, 1980.

3. That Dr. Janda expressed the medical opinion that this claimant has a five percent (5%) impairment of the body as a whole.

4. That the claimant has a lack of confidence in the ability of Dr. Janda to provide future medical care.

5. That the claimant is currently unable to perform acts of gainful employment.

6. That the claimant now seeks necessary future medical care from John Walker, M.D.

* * *

Signed and filed at Des Moines, Iowa this 26th day of August, 1980.

HELMET MUELLER
Deputy Industrial Commissioner

No Appeal.

MICKELLE HARTER,

Claimant,

vs.

FRUEHAUF CORPORATION,

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 2, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

* * *

Claimant appeals from an adverse ruling on defendants' motion for a summary judgment wherein the hearing deputy ruled that the three-year statute of limitations had run.

That ruling must be reversed.

The facts are well stated in defendant's letter brief of January 28, 1980:

> As a result of a previous agreement among the parties, the last payment of weekly benefits made to claimant Mickelle D. Harter was on September 24, 1976...
>
> On September 13, 1979, a copy of the original notice and petition for review reopening was served on employer Fruehauf Corporation by the Lee County Sheriff.
>
> On September 27, 1979, the petition for review reopening was filed in the office of the Industrial Commissioner in Des Moines. The petition was sent by mail from the office of claimant's attorney, being mailed on September 24, 1979.
>
> Section 85.26(3) states:
>
> 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.

However, §85.26(3) was not in existence in 1976 (it was passed by the 67th General Assembly and effective in 1977). The law in 1976 was that delivery of the original notice constituted commencement of the action. Section 17A.12(1). The question, therefore, is whether the effect of §85.26(3) is retroactive to when claimant's rights began to accrue on September 24, 1976.

In *Secrest v. Galloway Co.*, 239 Iowa 168, 30 N.W.2d 793 (1948), the court held that when §1457 (later §86.34) was amended to shorten the reopening period from five to three years that the change was not retroactive to a claimant whose time exceeded three years but not five years. In so doing, the court said at page 176 of the Iowa Report:

> It is our judgment and we so hold that, notwithstanding our pronouncement in the Tischer case, section 1457, so far as the time limitation is concerned, is a limitation statute; that in accordance with our rule of "liberal and broad construction to attain the purposes of the Act," said limitation is not retroactive, and the trial court was in error in so holding.

The court ruled, therefore, that the law in effect was the one which existed at the time the rights began to accrue. In accordance with the principles announced above, one must rule that §17A.12(1) governs, and since claimant served the defendant-employer prior to the expiration of three years, the statue of limitations did not expire.

THEREFORE, the ordered filed February 15, 1980 is hereby reversed. This matter is remanded for assignment for hearing in the regular schedule of cases.

* * *

Signed and filed at Des Moines, Iowa this 23rd day of October, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

WILLIAM P. HEIN,

Claimant,

vs.

QUALITY PAINTERS,

Employer,

and

IOWA MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed February 6, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse review-reopening decision which awarded 75% of the whole man for industrial purposed as a result of claimant's injury of August 23, 1977.

* * *

The hearing deputy's findings of fact and conclusions of law are correct, and his decision is affirmed. However, defendants' brief raises a question which deserves some discussion.

The issue is stated in defendants' brief:

When a claimant is suffering a disability of fifty per cent of his whole body, attributable to a permanent infirm condition, and the claimant suffers a subsequent work-related injury that aggravates the permanent condition, is the claimant entitled to anything more than compensation commesurate with the extent of the resulting increase in disability? (p. 4)

Briefly, the facts show claimant, a painter, fell some nine feet and injured himself on August 23, 1977. The testimony shows that claimant had pre-existing arthritis and that the fall aggravated that condition.

The hearing deputy explained the law well, except for two cases which might apply here: *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961), and *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d 777 (Iowa 1971). Both cases discuss what claimant must establish when he has a pre-existing disability. In the *Yeager* case, claimant was injured in 1956 when he fell to a concrete floor; that injury caused blackout spells. Claimant was again injured in 1958, and the question was the extent of compensation owed, considering that the claimant had a pre-existing condition. In that regard, the court stated, "if his condition was aggravated, accelerated, worsened or 'lighted up' by the injury of July 2, 1958, so it resulted in the disability found to exist, plaintiff was entitled to recover therefor. Of course he was not entitled to compensation for the result of a pre-existing injury" (citations).

The *DeShaw* case in no way overrules *Yeager*. In that case, claimant had a pre-existing spondylolisthesis. The real question in *DeShaw* was whether the pre-existing condition was aggravated by the compensable injury. The industrial commissioner held that there was *no* causal relationship and that decision was upheld by the Supreme court. One notes in this case that the way the issue is phrased by defendants, a causal connection is assumed.

The instant case is one wherein claimant had a moderately severe pre-existing arthritic conditon; however, he was able to work full time and had a good earning capacity. The fall of August 1977 was the direct cause of his lesser ability to earn. The question, then, is often one of causal relationship. Even though a claimant may have a moderately severe pre-existing condition, if he or she is able to work full time a compensation injury aggravates that condition (and causal relationship is shown), then claimant may be compensated to the extent of the loss of earning capacity. Such is the case here.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on August 23, 1977, claimant sustained an injury which arose out of and in the course of the employment in which he damaged his right neck, right arm, and cervical spine.

2. That the injury aggravated a pre-existing arthritic condition in the spine.

3. That claimant's industrial disability is seventy-five percent (75%).

4. That claimant's proper permanent partial disability rate is two hundred twenty-eight dollars ($228).

* * *

Signed and filed at Des Moines, Iowa this 30th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

JAMES HEMPHILL,

Claimant,

vs.

ROYAL MACHINE AND FOUNDRY,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision wherein claimant was denied compensation for failure to establish by a preponderance of the evidence that his diasability was causally related to an injury on November 1, 1977.

* * *

On September 22, 1980, claimant's brief notice of appeal was filed with this agency placing into contention "every ruling of the deputy industrial commissioner adverse to the claimant." On Februrary 19, 1979, claimant's attorney was granted permission to withdraw from the representation of the claimant in the present action. The claimant, unable to acquire new counsel, now proceeds pro se. On May 4, 1981, the claimant was ordered pursuant to Iowa Industrial Commissioner Rule 500—4.28 to submit briefs and exceptions with the defendants to reply. Claimant and his wife wrote a letter indicating they did not think claimant had "got a fair deal" and indicating they had been told by a lawyer that claimant "should get at least 10 percent of Jim's [claimant] back wages." The letter from the attorney was enclosed in a prior correspondence to the agency and was not accurately quoted. Neither this letter nor the letter from the attorney to the claimant were provided to the defendants although they were sent to the agency. As a result, no reply was received from the defendants. In any event, they cannot be considered for evidentiary purposes. No such briefs and exceptions as such were filed and this case was considered fully submitted on June 10, 1981.

Findings of Fact

1. That in November 1, 1977 claimant suffered an industrial injury to his back and right shoulder (transcript, page 32).

2. That claimant was temporarily totally disabled from November 17 to November 20, 1977 and also for the period of April 26, 1979 until September 5, 1979 (Lee deposition exhibits A and B).

3. That claimant suffered from a preexisting rotator cuff degeneration of his right shoulder which was aggravated by the injury of November 1, 1977 (Lee deposition, pages 11 and 12).

4. That claimant suffered from a preexisting condition of scoliosis of the spine which was aggravated by the injury of November 1, 1977 (Lee deposition, pages 35 and 36).

5. That claimant is presently able of performing acts of gainful employment to which he was suited prior to his injury (Lee deposition, page 8).

6. That no permanent disability related to the injury exists.

7. That defendants have paid to the claimant $10,270.45 in compensation for lost wages for the period of November 17 through November 20, 1977, and from April 7, 1978 through December 12, 1979 (stipulated).

Conclusions of Law

1. That on November 1, 1977 claimant sustained an injury which arose out of and in the course of his employment.

2. That claimant failed to prove that a causal relationship exists between the forementioned injury and any disability remaining after December 12, 1979.

3. That claimant has already received more compensation than the record shows he is entitled.

WHEREFORE, it is found:

That the findings of fact and conclusions of law of the review-reopening decision filed July 31, 1980 are proper and they are adopted along with the findings and conclusions herein as the final decision of this agency.

THEREFORE, it is ordered:

That the claimant is to receive nothing further from these proceedings. That the costs of this action are charged to the claimant.

* * *

Signed and filed at Des Moines, Iowa this 23rd day of June, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JAMES HERMSEN,

Claimant,

vs.

CENTURY ENGINEERING CORP.,

Employer,

and

WAUSAU INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed September 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from an adverse ruling on defendants' special appearance which dismissed claimant's petition for arbitration and §85.27 benefits.

* * *

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

As to the employee's claim that the statute of limitations under §85.26(1) should not begin to run until his visit with John Walker, M.D., the record shows claimant had clear knowledge of what appeared to be a palpable injury and there appears to be no reason why the statute of limitations would not immediately start.

With respect to the issue of estoppel, claimant must show four essential elements:

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 reply thereon.

D. Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice. *Paveglio v. Firestone Tire & Rubber Co.*, 167 N.W.2d 636, 638 (Iowa, 1969).

In his brief, claimant states that C. H. Stark, M.D., either made a false representation or an accidentally false statement. The record contains no evidence of the truth of either assertion. There is certainly no indication that Dr. Stark falsely represented a material fact or concealed the same; likewise, there is no evidence that he accidentally did so. If one accepts Dr. Walker's opinion which connects up the injury and the disability, one can only conclude that Dr. Stark was mistaken in his diagnosis. The *Paveglio* case does not include mistake as one of the elements of the estoppel.

WHEREFORE, it is found that claimant failed to file his original notice and petition for arbitration and §85.27

benefits within the two years statute of limitation set out in §85.26 and that his cause of action is barred.

THEREFORE, it is ordered that defendants' special appearance is sustained and claimant's petition for arbitration and §85.27 benefits is dismissed.

* * *

Signed and filed at Des Moines, Iowa this 23rd day of October, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court;
Reversed and Remanded for Application
of Discovery Rule.

EDWARD F. HICKSON,

Claimant,

vs.

W. A. KLINGER CO., INC.,

Employer,

and

NORTHWESTERN NATIONAL INS. CO.,

Insurance Carrier,

and

SECOND INJURY FUND AND STATE OF IOWA,

Insurance Carrier,

Defendants.

Arbitration Decision

This matter was considered fully submitted on June 3, 1980. It had been heard previously by Deputy Industrial Commissioner Helmut Mueller and an Arbitration Decision was rendered on September 26, 1977 wherein Second Injury Fund ws ordered to pay claimant $97.00 per week commencing on April 24, 1977. On the ensuing appeal, the case was remanded in order to determine the nature and extent of claimant's disability as a result of the January 3, 1975 injury.

* * *

The facts are set forth in Commissioner Landess's August 4, 1978 appeal decision:

> 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 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 on 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 additonal medical reports are included with claimant's anwers 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 [sic] 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 to the 1975 incident, claimant had received treatment for both shoulders and had been advised to seek retirement.

Joe M. Kingsten [sic], 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 [sic], 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 where in claimant was awarded benefits from the Fund based upon a finding of permanent and total disability.

The Commissioner found that the previous finding of the injury's nature and extent which were determined with the Second Injury Fund not being a party, were not binding upon the Fund.

Since the promulgation of Commissioner Landess's decision, the Supreme Court issued the case of *Second Injury Fund v. Mich. Coal Company*, 274 N.W.2d 300 (Iowa 1979). This case held that in a second injury fund case when it is found that claimant's condition is an industrial disability to the body as a whole a factual finding must be made as to the degree of disability to the body as a whole caused by the second injury.

Before we approach the eligibility for Second Injury Fund benefits we must first determine what the employer's obligation is in the instant case.

Claimant was employed by defendants when he suffered his second injury. He was also employed when he sustained his first injury. It would therefore appear that the bulk of the industrial disability assigned to this claimant can be attached to the second injury's effect upon claimant. The factual issue in this case concerns the inquiry whether Hickson's present disability results from the second injury, in which event defendants bear the costs or results from a combination of the prior injuries and the second injury, and the Second Injury Fund bears the costs of the disability which would have resulted if there had been no preexisting disability. Therefore, there is no industrial disability to be attributed to the second injury.

The evidence before the undersigned indicated the following:

1. Claimant sustained an injury in 1965 wherein he sustained a fracture to his right shoulder and sprain to this right knee. The credible evidence indicates that as a result of this injury claimant sustained a disability to the extent of 45 percent of the right arm.

2. That claimant sustained another industrial injury on January 31, 1975 which resulted in a settlement based upon a permanent partial disability to the extent of 50 percent of the left arm. This award has been paid. However, Dr. William Krigsten testified that the aggravation caused by the injury accounted for a disability of 5 percent of the left arm.

3. That claimant was gainfully employed between the two injuries. Because of this fact, coupled with the fact that the majority, if not all of the industrial disability sustained in this case can be attributed to the second injury, indicated that claimant is entitled to a disability for industrial purposes.

Although it would appear that much industrial disability should be attached to the second injury in accordance with *Mich., supra*, it is apparent to the undersigned that claimant's second injury is an aggravation of a pre-existing condition. After reviewing this evidence, it is apparent that much of the industrial disability is apportioned to that pre-existing condition rather than the injury itself. It therefore follows that no disability for industrial purposes can be attached to the injury itself.

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).

All of the evidence in this case leads to the conclusion that claimant is permanently and totally disabled for industrial purposes.

The State of Iowa through the Second Injury Fund is, of course, implicated in this action because the claimant had 45 percent disability of the right arm which predated the industrial injury of January 31, 1975. Iowa Code Section 85.64 reads:

Limitation of benefits. If an employee who has previously lost, or lost the use of, one hand, one arm,

one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there has been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Any benefits received by any such employee, or to which he may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid.

The Iowa position on total disability was presented in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 594, 258 N.W. 899, 902 (1935) in which the court said that "disability may be only a twenty-five or thirty percent disability compared with the one hundred percent perfect man, but, from the standpoint of his ability to go back to work to earn a living for himself and his family, his disability is a total disability..." This position was reiterated in *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 764-65, 10 N.W.2nd 569, 573 (1943) wherein (although recognizing that injury to a scheduled member is arbitrarily compensable according to the schedule) total disability was described as:

> An inability of the individual... to earn—not a mere inability of a certain member to function. It may arise solely from some injury to or loss of a scheduled member; or it may result from some injury of wider extent.
>
> ...Permanent total disability... may be caused by some scheduled injury, even though no other part of the body except the scheduled member be affected. This may happen because of lack of training, age, or other condition peculiar to the individual.

Professor Arthur Larson in *2 Larson, Workmen's Compensation Law*, Section 58.51 at 10—107 (1976) states total disability "is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial." *Larson* further suggests the modern rule may be summarized as follows: "An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled.

Prior to a change in statute, payments for permanent total disability were limited to a mixiumum of five hundred weeks. The current law provides for lifetime benefits. Under the former law when the Second Injury Fund was involved, calculations were made by deducting the compensable value of the previously lost member or organ from the five hundred weeks allowed for a permanent total disability. Payments would then commence immediately and be paid for the remainder of the weeks allowed. Applying current law leads to an anomalous result. Compensable value and rate of compensation are different as permanent partial disability and permanent total disability benefits are payable for life, there is no way to give credit for the compensable value from the beginning of the period in which Second Injury Fund payments are to be made. Furthermore, the statute suggests that the value of the previously lost member be "first" deducted. Applying this to the instant case results in a suspension of benefits during the period which the Second Injury Fund is entitled to credit as a result of the prior loss of the right upper extremity. Although this result is contrary to the intent of compensating an injured worker during his period of incapacity from earning, it is necessitated by a failure to alter the Second Injury fund provisions at the time a change was made in permanent total disability benefits.

The Second Injury Fund is entitled to credit for the "compensable value" of the previously lost member. Under the workers' compensation scheme, the "compensable value" is determined by multiplying the allowable number of weeks times the applicable number of weeks times the applicable rate of weekly benefits. The period of suspension would be less than 112 1/2 weeks (which is 45 percent of the left arm) because the rate of permanent partial disability ($89.00) is less than the rate for permament total disability ($97.00). The compensable value of the previously lost member is a total of $10,012.50 (112 1/2 times $89.00). This result in a suspension of benefits for 103.22 weeks.

WHEREFORE, it is found:

1. That claimant sustained an industrial injury on March 23, 1965, in which he received an award of forty-five (45%) percent permanent partial disability to the right arm.

2. That claimant sustained another industrial injury on January 31, 1975 in which he received a permanent partial disability to the left upper extremity of fifty (50%) percent and a commutation therefor was entered.

3. However, upon a review of the credible evidence, it is now found that the true disability to the left upper extremity is five (5%) percent of that member.

4. That claimant is now permanently and totally disabled due to the pain he experiences.

5. That the period of suspension of benefits should be one hundred three and twenty-two hundredths (103.22) weeks after claimant's entitlement to compensation for the second injury ceased (one and two-sevenths [1 2/7] weeks healing period and twelve and one-half [12 1/2] weeks—thirteen and eleven-fourteenths

[13 11/14] which equals thirteen and six-sevenths [13 6/7], or from February 1, 1975 through May 9, 1975). The one hundred three and twenty-two hundredths (103.22) weeks [one hundred three and two-sevenths (103 2/7) weeks] is then computed to April 16, 1977 at which time the liability for the Second Injury Fund will commence at the rate of ninety-seven and 00/100 dollars ($97.00) per week.

THEREFORE, defendant-Second Injury Fund is ordered to pay claimant ninety-seven and 00/100 dollars ($97.00) per week commencing on April 16, 1977 with statutory interest to attach on accrued amount.

Defendants are to file a final report upon payment of this award.

Costs are taxed to the Second Injury Fund.

* * *

Signed and filed at Des Moines, Iowa this 16th day of September, 1980.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

JOHN J. HILD,

Claimant,

vs.

NATKIN AND COMPANY,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision in which it was determined that, as a result of a March 4, 1977 work injury, he sustained a 35 percent industrial disability. Claimant also appeals from the ruling denying rehearing.

* * *

Fifty-eight year old married claimant has an eighth grade education and no dependent children. He has worked as a licensed plumber for twenty years; however, he trained in the plumbing field for about 10 years before qualifying for his license. Claimant worked for defendant-employer approximately 15 years before his injury on March 4, 1977. On that date claimant was attempting to move four feet of heavy soil pipe through a sleeve in the floor to men on the floor above, when he felt something pop in his back.

Claimant was hospitalized after the injury by Russell Beran, M.D., a general practitioner, for approximately three weeks. Traction therapy relieved the pain somewhat according to claimant's testimony. Claimant returned to work approximately March 27, 1977, and worked until August 18, 1977, when the continuous pain forced him to quit. Claimant has not returned to work.

According to claimant, his job as plumber supervisor and plumber foreman required reading plans and blueprints, coordinating activities of engineering, and supervising the plumbers' work. He testified that if the plumbers needed help, he was there to do it. Claimant testified, "You're not asked to work. You don't have to work but if it calls for it, you got to get in there and give it a hand." Claimant stated that he did "plumber work" right along with the men he supervised and that now, as a result of his back problems, he would be unable to return to work as a plumber foreman or supervisor since he would be incapable of helping the plumbers.

Claimant was hospitalized on August 19, 1977, and underwent a laminectomy on September 2, 1977. His treating physicians were Dr. Beran and William W. Smith, M.D. Claimant developed a post-operative *Staphylococcus aureaus* infection which did not heal until December 1977. Dr. Smith testified that after claimant developed the wound infection things steadily went downhill. The infection, however, according to Dr. Smith, contributed only a very small percentage to claimant's current back problems. Claimant was last seen by Dr. Smith in April 1978. In August 1978, Dr. Smith rated claimant as having a 30 percent permanent partial disability of the body as a whole as a result of the injury and the subsequent surgery.

When Dr. Smith was cross-examined during his deposition, office notes of April 4, 1978 were referred to which indicated that claimant has probably progressed to a degree of stability where his back would not improve.

In a report dated December 29, 1978, Dr. Smith again rated claimant's disability as 30 percent. He did not expect claimant's disability to either get worse or to improve. Dr. Smith testified that claimant would be unable to lift more than 10 to 15 pounds, would have difficulty sitting for any length of time, could not bend or stoop, and could only perform a job requiring no heavy physical activity.

Claimant testified that he pulled a back ligament about 10 years prior to his work-related injury. This injury, however caused him no problems after it healed. Claimant was very active before his work-related injury, but now he is unable to mow the lawn or lift small items without experiencing pain. Claimant's wife confirmed his testimony concerning his past and present levels of physical activity. Claimant watches television, does crossword puzzles and little else. According to claimant, defendant-employer has not contacted him or offered his job back, nor has anyone suggested vocational rehabilitation.

Claimant's niece, a registered nurse, suggested that he see Stanley M. Bach, M.D., to help relieve his back pain. Dr. Bach first examined claimant on February 5, 1979. He determined that claimant has back pain and moderate

restriction of back motion in all directions and positive straight leg raising at 60 degrees. After a Williams back brace failed to alleviate the pain, Dr. Bach prescribed an electric stimulator. Claimant stated that this stimulator unit has relieved his pain somewhat and has allowed him to reduce his drug intake. Dr. Bach determined as of August 29, 1979, claimant had a 20-25 percent permanent partial disability to the body as a whole as of the date of the deposition. However, Dr. Bach felt that it was too soon to estimate the permanency since claimant was improving "little by little."

Claimant was examined by Bernard L. Kratochvil, M.D., on June 9, 1978, for social security purposes. His diagnosis was "post-operative laminectomy, symptomatic, with low back strain." Dr. Kratochvil stated in a report dated June 9, 1978, that because of persistent lower back pain, claimant could not return to his former type of work at that time. He felt sedentary work could be considered.

Werner P. Jensen, M.D., examined claimant on May 23, 1978, at the request of the insurance company. Dr. Jensen estimated permanent impairment with regard to the disc problem as 20-25 percent. He felt there was an emotional element which made evaluation difficult. In addition, Dr. Jensen stated "[m]otivation regards returning to work is not good."

The record contains substantial evidence to support claimant's contention that his present disability is causally related to the work-related injury he sustained on March 4, 1977.

When an injury is to the body as a whole, the claimant's disability must be evaluted industrially and not just functionally. *Martin v. Skelly Oil Co.*, 252 Iowa 128, 196 N.W.2d 95 (1961). The determination of industrial disability is based upon a number of factors.

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).

A further clarification was presented in *Maulorico v. Wilson Foods Corp.*, Appeal Decision filed October 3, 1979, as to exactly what factors are collectively considered before a conclusion as to the degree of industrial disability is reached. Taken into consideration are the employee's medical condition prior to and after the injury, as well as his present medical condition; the severity of the injury and the required length of healing period; the employee's work experience prior to and after the injury in addition to his rehabilitation potential; the employee's physical, mental and emotional qualifications; earnings both before and after the injury; the age, education, and motivation of the employee; the functional impairment sustained as a result of the injury and inability due to the injury to engage in employment for which the employee is fitted. It was further noted in *Maulorico*, that an employee is not considered fitted for every line of employment. Consideration is given only to occupations, based on the employee's age, education, qualifications and experience, for which the employee was qualified prior to the injury.

Claimant's testimony indicated that he has been a plumber for most of his adult life, and has never held any type of secondary occupation. A plumber's job, according to claimant, involves heavy lifting, stooping and bending, all activities which claimant is incapable of engaging due to his back injury. Claimant's testimony is somewhat contradictory as to what his exact duties as a plumber supervisor/foreman entailed. He stated that his duties required supervising the plumbers and that physically helping them was a minor portion of his job. On the other hand he also testified that he worked along with the people he was supervising if it was required.

Dr. Smith testified that claimant could only perform a job requiring no heavy physical activity. Sedentary work was considered appropriate for claimant by Dr. Kratochvil and Dr. Bach felt claimant should supervise plumbers without performing any of the physical work himself.

After claimant's injury on March 4, 1977, he returned to work for approximately five months. Claimant, on his own initiative, terminated his employment with defendant-employer on August 18, 1977, because of continual pain. However, even though claimant subsequently underwent a laminectomy and progressed to a degree of stability, claimant never contacted his former employer about the possibility of returning to his former supervisory position. Although claimant did state that he felt unable to perform the physical labor of a plumber he failed to make any bona fide attempt to discuss with his employer the feasibility of a strictly supervisory position involving no physical labor.

It is clear from the testimony and reports of the physicians that claimant has suffered a degree of permanent impairment and is unable to perform the physical duties required of a plumber. It is also apparent, when claimant's education, age and experience are considered, that he is not qualified for any type of employment other than in the plumbing field. Certainly, when claimant compares his present condition with that of his good physical health prior to the injury he must be frustrated, however, in light of his failure to take any affirmative action to contact his former employer about a possible job opportunity, it is impossible to reach the conclusion that claimant is wholly unable to obtain employment for which he is fitted.

As to the issue of the length of healing period, Dr. Smith's testimony with regard to the stability of claimant's condition on April 4, 1978, will be given more weight since Dr. Smith was claimant's treating physician.

WHEREFORE, it is determined:

That claimant has sustained a fifty percent (50%) industrial disability as a result of his March 4, 1977 work-related injury.

That claimant's healing period terminated April 4, 1978, when Dr. Smith indicated that claimant's condition had progressed to a degree of stability with no further improvement in his back expected. Claimant's return to work from March 28, 1977 through April 28, 1977, resulted in a gap in healing period compensation for that period.

* * *

Signed and filed this 30th day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Settled.

LEN A. HILL,

Claimant,

vs.

ALLSTATE INSURANCE COMPANY,

Employer,

and

ALLSTATE COMMERCIAL CLAIMS,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Len A. Hill, the claimant, against his employer, Allstate Insurance Company, and the insurance carrier, Allstate Commercial Claims, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on June 7, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa, on November 18, 1980. The record was considered fully submitted on March 4, 1981.

* * *

The issues to be determined herein are whether the claimant, on June 7, 1979, sustained an injury arising out of and in the course of his employment with the defendant-employer, Allstate Insurance Company; the existence of a causal relationship between that injury and the resulting disability as well as the nature and extent of that disability.

Findings of Fact

There is sufficient credible evidence in this record to support the following findings of fact, to wit:

Claimant, Len A. Hill, was on the date of injury, June 7, 1979, an employee of Allstate Insurance Company. On that date, as the claimant was entering the Sears Southridge Store and heading toward his insurance sales booth located in that Sears facility, he slipped on the wet floor and fell landing on his back. The claimant testified that his complaints after the June 7 fall included difficulty sleeping and lower back and upper back problems.

According to the first report of injury filed July 29, 1980, this incident was reported to the employer on June 8, 1979. The claimant was then directed by his employer to Dr. Harold Eklund for examination and treatment. Claimant was examined by Dr. Eklund on one occasion, that being June 8, 1979. According to Dr. Eklund's report dated June 12, 1979, marked defendant's exhibit 2, he diagnosed the claimant's malady as a contusion to the low back and medication was prescribed. At that initial examination, the physician was of the opinion that there would not be any permanent disability manifested as a result of the injury in question.

The claimant did not consult another physician or practitioner until January 1, 1980. On that date, the record reflects that the claimant was operating his automobile and making a left hand turn when he experienced what he described as "my whole left side went out." The claimant went to the emergency room at Mercy Hospital in Des Moines. The claimant's complaints at Mercy Hospital were paralysis in the left arm and pain in the left arm. The claimant admitted that the pain experienced on January 1, 1980 had not been experienced before. Defendants' exhibit 4, the Mercy Hospital admitting form, confirms the claimant's testimony as to his January 1 visit to the emergency room of that facility. The emergency room diagnosis was, "acute torticollis... no evidence [of] trauma."

On January 10, 1980 the claimant came under the care of Dr. Daniel Alan Keat, D.C. The claimant continued treatments administered by Dr. Keat for an extended period of time. The evidence reflects that the claimant went to Dr. Keat on his own accord. Dr. Keat released the claimant to return to regular work duties on February 21, 1980.

Claimant was also examined by David B. McClain, D.O., on June 18, 1980. Dr. McClain's impression based on that examination was "traumatic cervical syndrome." He recommended conservative treatment. Nowhere in his report of August 1980 does he speak to the issue of causation nor the extent of any permanent disability.

Jerome E. Hahn testified on behalf of the defense. He was the claimant's supervisor during the period June 1979 through September 1980. The record reflects that the claimant did not request an alteration in his work schedule after the incident of early June 1979 nor did he request any sick leave as a result of the June incident. The claimant was terminated by the defendant-employer on September 19, 1980 because of his lack of production in the insurance business.

The record reflects that the claimant continued to work after the June 1979 fall until January 1, 1980. He was off work January 1, 1980 through February 21, 1980 at which time he returned to work. As previously noted, he was terminated from the defendent's employ in September 1980.

Daniel Alan Keat, D.C., testified by deposition that he first examined the claimant on January 10, 1980. His testimony as well as the statement for services rendered, marked claimant's exhibit 3, reflects that he treated the claimant with chiropractic manipulation on a wide variety of dates. Dr. Keat is of the opinion that there could be a causal relationship between the fall of June 7, 1979 and the incident of January 1, 1980. He does not, however, express an opinion as to the extent of permanent partial disability.

Harold Eklund, M.D., a board certified family practitioner, examined the claimant the day after his fall in the Sears store. At the time, he made a diagnosis of contusion to the low back. Dr. Eklund, after reviewing the Mercy Hospital emergency room admission data, Dr. Keat's report, Dr. McClain's report, and his examination of the claimant, expresses the opinion that there is no causal relationship between his physical findings on June 8, 1979 and the subsequent findings in January 1980 at Mercy Hospital and by Dr. Keat and Dr. McClain.

William R. Boulden, M.D., a board certified orthopedic surgeon, examined the claimant on October 20, 1980 on behalf of the defense. He expressed the opinion that there was no permanent partial disability whatsoever presently experienced by the claimant. Dr. Boulden, after examining the Mercy Hospital admission data for the January 1 incident as well as Dr. Eklund's report, Dr. McClain's report and Dr. Keat's report, and based upon his own examination of the claimant, expressed the professional opinion based upon a reasonable degree of medical certainty, that there was no causal relationship between the physical findings of Dr. Eklund on June 8 and the findings upon entry to Mercy Hospital and subsequent findings by Dr. Keat and Dr. McClain.

Applicable Law

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.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

Arising out of suggests a causal relationship between the employment and the injury. *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402, 68 N.W.2d 63 (1955).

The general rule is that, absent certain circumstances, an employee is not entitled to compensation for injuries occurring off the employer's premises on the way to and from work. *Farmers Elevator Company, Kinsley v. Manning*, 286 N.W.2d 174; *Frost v. S. S. Kresge Company*, 299 N.W.2d 646. This is known as the "going and coming" rule.

Conceptually, it is clear that the employment is the *cause* of injuries in going and coming: if not for the job, there would be no reason, in most cases, to approach or leave the premises. 1 Larson, *The Law of Workmen's Compensation*, paragraph 1500 at 4-12. The going and coming rule pertains to the second prong of the coverage test, requiring that the injury arise "in the course of" the employment. This test measures the work connection of the incident as to time, place and activity.

Several exceptions are recognized to the rule of nonliability in going and coming cases. In effect, these exceptions extend the employer's premises under certain circumstances when it would be unduly restrictive to limit coverage of compensation statutes to the physical perimeters of the employer's premises. Under one exception it is held that any "special hazards" of an employee's route become hazards of the employment where an injury occurs on the only available route to reach the premises or at least on the normal route. 1 Larson, *The Law of Workmen's Compensation*, paragraph 1500 at 4-18; *Frost v. S. S. Kresge Company*, 299 N.W.2d 646.

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 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. * * * *

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 7, 1979 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).

Analysis

Initially, it has been acknowledged that the claimant, on the date of injury, was an employee of the defendant-employer.

The facts of this case establish that the claimant sold insurance for the defendant-employer from the booth located inside a Sears store. The claimant had entered the Sears store and was headed for his sales booth at the time of his slip and fall. The record is somewhat unclear as to precisely where he entered the Sears store, but suffice it to say, it appears that the entrance used was normally accessible to employees of the Sears store generally. The facts make it apparent that there was no other way that the claimant was to reach his sales booth except to pass through the Sears store proper. It is further clear that the defendant-employer in this case leased space from Sears got its booth. The general going and coming rule has been previously cited but in light of the necessity of passing through the Sears store to reach his sales booth, the undersigned deputy considers the water on the Sears floor a special hazard of the route to his specific place of employment, thus expanding or extending the employer's premises. In light of this position, it can be seen that this injury occurred in the course of the claimant's employment.

Clearly, as noted in *Frost, supra*, the employment is the

cause of injuries in this situation in that if it were not for the claimant's employment with Allstate, there would be no reason for him to approach or leave the sales booth in question.

Despite the determination of the "arising out of—in the course of" question in favor of the claimant, his case, in the opinion of the undersigned, must fail based on the medical aspects of the litigation and specifically the issue of causation.

The injury in question occurred in June of 1978. The claimant was able to continue working without difficulty. Not until January of 1980, as he was driving his automobile, did the claimant notice symptoms in his neck which precipitated a visit to the Mercy Hospital emergency room. He then was off work for a period of time.

Daniel Alan Keat, D.C., testifies that, in his opinion, a causal connection exists between the work incident and the later difficulties claimant noted. However, Dr. Eklund, who initially saw claimant in June of 1979 after the work related fall, testified that there was no causal relationship between these incidents. In addition, Dr. Boulden, who is a highly qualified othropedic specialist, testified to the lack of causal relationship between the incidents in question.

Both Dr. Eklund and Dr. Boulden's testimony will be given the greater weight in this decision because of their expertise over that of Dr. Keat.

There is no testimony in this record that the claimant has suffered any form of permanent impairment.

Conclusions of Law

WHEREFORE, it is found:

That on June 7, 1979 the claimant was an employee of the defendant-employer, Allstate Insurance Company.

That on that date he sustained a slip and fall incident which arose out of and in the course of his employment with the defendant-employer, Allstate Insurance Company.

That the claimant failed to establish by a preponderance of the evidence the existence of a causal relationship between that alleged disability.

THEREFORE, it is ordered:

That the claimant shall take nothing further from these proceedings.

That costs are taxed to the defendants pursuant to Industrial Commissioner Rule 500—4.33

* * *

Signed and filed at Des Moines, Iowa this 25th day of June, 1981.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

RONALD E. HODGES,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO., AND TRAVELERS INSURANCE CO.,

Insurance Carriers,
Defendants.

Appeal Decision

By order of the industrial commissioner filed June 30, 1980 the undersigned deputy commissioner has been appointed under the provisions of section 86.3 to issue the final agency decision on appeal in this matter.

The industrial commissioner's file shows a memorandum of agreement was filed for an injury of August 2, 1974. On November 29, 1977 claimant filed an action in arbitration and review-reopening alleging injury dates of June 1974 and June 1976. Liberty Mutual Insurance Company was named as the insurer. Later, it turned out that Liberty Mutual had coverage for 1974 and the Travelers Insurance Company had coverage for 1976. On September 7, 1978 claimant amended his petition to state that the second injury occurred on January 9, 1976.

On November 29, 1979 the deputy industrial commissioner made an award in review-reopening for 15% of the body as a whole as a result of the August 2, 1974 injury. The hearing deputy held that the statute of limitations had expired on claimant's filing for the January 9, 1976 injury and that claimant did not show any causal relationship between a claimed disability and the incident of January 1976. The award, therefore, was for two additional days of healing period benefits and for 75 weeks of permanent partial disability.

Claimant appealed. In his brief, claimant states that the deputy erred in the amount of disability awarded in ruling that the statute of limitations had expired, and in ruling that there was no compensable disability as a result of the January 1976. The issues will be discussed in the order presented in claimant's brief.

Claimant hurt his back in 1967 while bowling and had surgery as a result thereof. In 1974, he injured his back while working for the employer and was paid compensation for temporary disability. He again had surgery. In January 1976 he again hurt his back at work. However, this time no memorandum of agreement was filed and he drew no weekly compensation. As stated above, when he filed his petition, he recited September 1976 as the date. By the time he filed an amendment, the two-year statute of limitations had run out. Section 85.25(1).

In determining the industrial disability, the deputy considered only the 1974 injury as a basis for the award.

Claimant was 38 years old, married and had two children. He earned his GED in 1970. After quitting school, claimant had worked at Pittsburgh Steel

Company for two years before beginning to work for Firestone in 1958. Except for another two year period, claimant has been continually employed by Firestone, primarily as a tire builder. Sidney Robinow, M.D., a qualified orthopedic surgeon, testified that claimant's functional disability was 30%. He apportioned the 30% among three injuries: 1967, 1974 and January 1976. The apportionment was 10% for each injury. Thus, functional disability for the award the deputy made was 10%.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 2, 1974 and the injury of January 9, 1976 are 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, 699, 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).

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 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. * * * *

Claimant argues that *Hamilton v. Johnson and Sons*, 224 Iowa 1097, 276 N.W. 841 (1938) stands for the proposition that claimant's 1967 functional disability should also be taken into account in considering the industrial disability. In that case, in 1922, claimant received an injury to one eye which all but removed the vision. However, there was gradual improvement of the eye, and by 1933, it had one-third vision. As a result of the 1922 injury, claimant had made a compromise settlement with his employer. In 1933, while working for a different employer he suffered another injury to the *same* eye which resulted in complete loss of the eye. The industrial commissioner denied recovery on the basis that claimant lost no useful vision. The Supreme Court reversed ruling that claimant could recover for the whole eye and, stating, at pages 1104-1105 that "[t]hough an eye may have subnormal vision at the time of the injury for which compensation is sought, due to injury or natural defects, if there is useful industrial vision and such vision is lost, there is 'loss of an eye' under section 1396, subsection 16" [now §85.34(2)(q)].

However, the above authorities show, the Supreme Court has often stated that claimant may be compensated for an aggravation of a pre-existing condition only to the extent of that aggravation. See also *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d 777 (Iowa 1971). Thus, Liberty Mutual takes the claimant "as he is" as to claimant's earning capacity. Then, if claimant is injured on the job and is entitled to industrial disability, Liberty Mutual owes claimant to the extent of the loss of the earning capacity caused by that injury.

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

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

The deputy was correct, therefore, when he did not include the prior functional or industrial disability from the 1967 injury as a part of claimant's industrial disability for the 1974 injury.

One final aspect of disability should be discussed. In his brief, pp. 6-7, claimant states:

> The deputy was clearly mistaken in his determination that the claimant was only 15% disabled. The medical testimony shows the extent of disability to be 30 percent. In arriving at the extent of industrial loss it appears the deputy first reduced the 30 percent functional disability by 10 percent because he felt the 1967 injury and disability should not be part of the claimant's industrial loss. Second, it seems the deputy reduced the disability by another 5 percent because he felt the claimant's age, education and experience were positive employment factors that would reduce his industrial loss.

As the above authorities show, functional disability is an *element* of industrial disability. The court has even come close to claimant's position on the nature of functional as opposed to industrial disability:

> The commissioner's finding of 10 percent is thus within the range of the doctor's estimates, is warranted by the evidence as a whole, and is conclusive upon the courts (*Olson, supra*, at 119).

But on the next page, the court says:

> It is true the kind of disability with which the Compensation Act is concerned is industrial, not functional, disability. It is a disability which reduces earning capacity, not merely bodily functions. Functional disability is an element to be considered in determining the reduction of earning capacity but it is not the final criterion (citing several cases).

Recently, the court suggested that industrial disability could be awarded even if there were *no* functional disability:

> This is the case of an employee who has no apparent functional impairment and who wants to work at the job he had before but is precluded from doing so because his employer believes the past injury disqualifies him, resulting in a palpable reduction in earning capacity. The extent of Blacksmith's industrial disability is an issue of fact for the commissioner to resolve. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 354 (Iowa, 1980).

Although this rule in *Blacksmith* may have limited application because of the peculiar factual situation, it points up the nature of functional disability. If present, that form of disability is only one of several elements to be used in determining industrial disability. For example, consider the use of three elements of the overall industrial disability: age, education, and functional disability: A middle-aged, poorly educated laborer with a moderate functional impairment might be well nigh totaled out by a moderate injury. And, of course, the opposite is true. With a similar injury a well-educated, young laborer might easily have a low amount of industrial disability. The deputy industrial commissioner should, as he did, consider the interrelationship of all the aspects of disability, not start with the functional disability and add to or subtract from it.

The above analysis results from *Rose, supra*, and many other cases. It does not, however, take into account the remark in *Rose* at 1119, cited above, concerning the range of estimates of functional impairment. The theories seem mutually exclusive, even at odds with one another unless one considers the origin of an employee's problem: the injury. The industrial disability is a derivative of the functional impairment and in many cases can be a kind of touchstone to determine the importance of the other elements. Thus, functional disability (wherewith one has the benefit of expert opinion testimony) may assume an importance which justifies much consideration to the medical impairment ratings.

In short, one should consider all the aspects of industrial disability while realizing that one or another, usually functional impairment, may be a greater importance.

Claimant cites many cases to support his claim that the amendment to the petition was not substantive and therefore not subject to the statute of limitations. Importantly, he states "[a]mendments to a petition do not raise a statute of limitations problem unless they introduce a new cause of action. *Johnson v. Percy Construction, Inc.*, 258 N.W.2d 366, (Iowa 1977); *Swartz v. Bly*, 183 N.W.2d 733 (Iowa 1971)." Claimant's problem precisely is that he did introduce a new cause of action.

This fact is shown most strikingly in the Travelers' brief:

> The original Petition alleged an injury in September of 1976 while lifting and jerking to strip a tire. The Amendment alleges an injury on January 9, 1976 while putting on tread—an incident clearly distinguishable from that alleged in the original Petition both in terms of date and in terms of factual circumstances or modality of the injury.

Additionally, *Swartz*, cited above, states on page 737:

> But amendment to the pleadings which sets forth a new and distinct cause of action based on a wholly different legal theory of liability or obligation does not relate back to date of original pleading and date of filing amendment is regarded as date of commencement of action and if bar of statute of limitations or bar to the right to maintain new cause of action has intervened, new cause of action cannot be maintained.

One can only hold that claimant's amendment was "a new and distinct cause of action" and was of course subject to the two-year statute of limitations.

Claimant also urges that the workers' compensation statutes are to apply broadly and liberally in favor of claimant and technical exactness is not necessary. Claimant particularly relies on *Patten v. City of Waterloo*, 260 N.W.2d 840 Iowa, (1977), which construes Rule of Civil Procedure 59.1 and holds that plaintiff could amend a petition. However, in Patten, there was no change of the date of the occurrence and no change in the nature of the occurrence. Further, *Swartz* was not mentioned, let alone overruled. Therefore, *Patten* is not dispositive of the statute of limitations issue in this case. Finally, with respect to the statute of limitations, claimant states that the statute was tolled because the employer did not file a memorandum of agreement when compensation was commenced in October of 1976. The record clearly shows that these payments were made as the result of the 1974 injury, not as the result of the 1976 injury. Further, they were made by the Liberty Mutual Insurance Company and not Travelers Insurance Company (the latter having the coverage in 1976).

Claimant's last brief point states that the deputy erred in finding the claimant showed no causal relationship between the 1976 injury and the industrial disability. In his rationale, the deputy stated on page four:

> As indicated previously, claimant amended his petition too late for the undersigned to have jurisdiction of the January 9, 1976 injury. However, it is noted that claimant failed to show a causal

connection between the injury and any disability. Claimant failed to give a history of that injury to Dr. Robinow and failed to see Dr. Robinow until nine months later.

Claimant testified that on January 9, 1976, he injured himself when he and his partner were pulling on a tread center. Although he apparently did not give this history to Dr. Robinow, the latter thought enough of it to apportion 10% of the functional disability to that event. It is therefore held, that the claimant did sustain an injury on January 9, 1976, which arose out of and in the course of his employment and which caused industrial disability. That disability, considering the authority cited above, claimant's age, education and other factors, is held to be 15% to the body as a whole. However, claimant cannot recover for the additional disability because the statute of limitations expired before he filed his petition, as explained above.

Although the causal connection is found, it is *not* found for the reasons cited by claimant on page twelve of his brief wherein he states that the "deputy is required to consider this evidence in the light most favorable to the claimant" (citing cases, brief, p. 14). That construction is a misstatement of the law. In *Bodish v. Fischer*, 257 Iowa 516, 133 N.W.2d 867 (1965), the court says on page 519 that "we are required to consider the evidence in the light most favorable to the claimant." By use of the word "we" the court means itself, not the deputy industrial commissioner. The same applies to claimant's citation of *Burt v. John Deere Waterloo Works*, 247 Iowa 591, 73 N.W.2d 732 (1956). The deputy industrial commissioner is to consider the evidence impartially, not in favor of one side or the other.

WHEREFORE, it is found and held as a finding of fact,to wit:

1. Claimant sustained an injury on August 2, 1974, which arose in permanent partial disability to the body as a whole for industrial purposes in the amount of fifteen percent (15%).

2. That as the hearing deputy stated, claimant is owed two extra days of healing period.

3. The claimant's amendment to the petition, said amendment filed September 7, 1978, for an injury of January 9, 1976, was a new and distinct cause of action different from that described in the original petition and that the two-year statute of limitations in section 86.26(1) expired before the filing of the amendment.

4. Claimant proved that he sustained an injury on January 9, 1976, which arose out of and in the course of his employment in which resulted in a fifteen percent (15%) permanent partial disability to the body as a whole for industrial purposes, but that recovery for such injury is barred by the statute of limitations as found paragraph three, just above.

THEREFORE, the employer and Liberty Mutual are hereby ordered to pay weekly compensation benefits for two days healing period at the rate of ninety-seven dollars ($97) per week and seventy-five (75) weeks permanent partial disability at the rate of eighty-nine dollars ($89), accrued payments to be made in a lump sum together with statutory interest as provided in section 85.30 Code.

Claimant must be and is hereby denied recovery of compensation benefits for the January 9, 1976, injury.

Liberty Mutual Insurance Company and Travelers Insurance Company are each to pay half the cost of this action which shall include the cost of the trial transcript and witness fees of Dr. Robinow up to one hundred fifty dollars ($150) and the reporting fees for taking and transcribing the same.

. . .

Signed and filed at Des Moines, Iowa this 30th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appeal ot District Court;
Pending.

KATHLEEN M. HOEGH,

Claimant,

vs.

EMBASSY CLUB,

Employer,

and

EMPLOYERS MUTUAL CASUALTY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from an order filed March 31, 1981 authorizing claimants to obtain a medical examination from Richard Sanders, M.D., in Denver, Colorado and for defendants to pay the reasonable cost of said examination.

The examination was requested pursuant to the second unnumbered paragraph of section 85.39, The Code. The prerequisite of an evaluation by an employer-retained physician which the employee believed to be too low is conceded. The limited issue on appeal is whether or not the claimant is entitled to an examination outside the state of Iowa under the provisions of section 85.39, Code.

Defendant-appellant asserts that the language of section 85.39 in the first unnumbered paragraph which restricts examinations by employers geographically but not in frequency should be carried over to the second unnumbered paragraph of section 85.39 which allows the employee one examination by a self chosen physician without any mention of geographical restraint.

This issue has been previously discussed in *Shannon v. Department of Job Service*, 33rd Biennial Report of the Industrial Commissioner, p. 98.

Iowa Code §85.39 expressly reveals the legislature's intent to distinguish between the obligation to submit to examination imposed upon employees and those imposed upon employers when it is the employee who is requesting the evaluation. The statute clearly limits the employer-requested employee exam to "some reasonable time and place within the state" and "to a physician or physicians authorized to practice under the laws of this state. "This restriction has been seen as a protective shield for the employees who are submitting to an examination by physicians who are not chosen by them. When the employee is choosing the physician, as in the case in an employee-requested evaluation the safeguard provided by requiring an examination within the state by an Iowa doctor is unnecessary. It is to be noted that the element of reasonableness pervades the employee-requested examination section and operates as a protective device for the employer.

Defendants further question the constitutionality of section 85.39, Code, as not affording equal protection.

Although it is recognized a constitutional issue must be preserved throughout an administrative proceeding it is equally recognized that an administrative agency must presume the laws under which it operates are valid and does not have authority to rule on the constitutionality of such statutes.

Nothing in this order should be construed as predetermining whether or not the fee for the employee-requested examination is "reasonable" or that the transportation expenses incurred are "reasonably necessary." In other words the statute is not interpreted as directing all costs to be paid by the employer for an examination requested to be conducted at some remote and exotic place merely on whim. In such a case it could be determined that the fee for the examination was not "reasonable" and that the transportation expenses incurred were not "reasonably necessary."

Nevertheless, it is concluded the section 85.39 does not restrict evaluations to be made by a physician of the employee's choice, when the prerequisite conditions have been met, to a physician authorized to practice under the laws of this state and located in this state.

WHEREFORE, defendants' appeal is dismissed.

* * *

Signed and filed at Des Moines, Iowa this 12th day of June, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JEFF HOFFMAN,

Claimant,

vs.

MID CONTINENT BOTTLERS,

Employer,

and

COMMERCIAL UNION ASSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling and Order

On February 20, 1981 defendant-employer and defendant-insurance carrier (hereinafter referred to as defendants) filed a Motion for Ruling Regarding the Joining of the Second Injury Fund of Iowa As a Defendant and In the Alternative Cross Petition Against the Second Injury Fund of Iowa and Request for Oral Hearing. On March 6, 1981 the Second Injury Fund (hereinafter referred to as the Fund) filed a Special Appearance.

Review of the file contents is in order before ruling on the motion and special appearance.

On February 22, 1980 claimant filed an Original Notice and Petition in arbitration seeking benefits from defendants for a December 7, 1979 knee injury. Defendants appeared and the case otherwise proceeded to the point where it was set down for hearing in mid-November of 1980. The issues specified in the pre-hearing order were limited to those found in the typical arbitration case.

On November 7, 1980 defendants filed an Amendment to Answer (interwoven with a Request to Amend) alleging that the October 20, 1980 report from L. C. Stratham, M.D., which had been sent to them by the claimant on or about October 20, 1980, revealed that the Fund was a proper party to the action. In their second paragraph defendants state: "[t]hat the Claimant affirmatively alleges that the issues involved in the instant action cannot be properly determined by the Industrial Commissioner without the Second Injury Fund as a party to this action." There is no indication in the agency file that claimant in any way joined the defendants in such amendment to the answer. On the same day defendants filed a Motion to Add Indispensable Party and Motion for Continuance. Defendants again alleged that the report of Dr. Stratham indicated that the Fund was a proper and indispensable party to the instant action and that the issues in the instant action could not be properly decided without the Fund being a party. Again, there is no indication that the claimant joined in such motion. The hearing was continued pending ruling on the motion.

The medical report in question reads:

> 10-6-80: This lad returns for evaluation of both knees.
>
> The left knee bothers occasionally after a long day's work, walking in cement or stooping. He states that maybe it swells a little bit sometimes but he's not sure that he's had any effusion. There has been no catching or locking of the left knee. His history goes

back to 1974 when he injured this left one playing basketball and subsequently underwent medial meniscectomy. He did well until mid 1978. At that time I saw him in June and the left knee bothered him but history was very vague. He continued to have intermittent problems. In December, 1979 an arthrogram was carried out which showed a tear of the lateral meniscus and a suggestion of some regrowth of tissue on the medial side. In January, 1980 an arthrotomy was carried out and the torn lateral meniscus removed and a remnant of posteromedial fragment removed. He did well post-operatively and can be released from treatment at this time.

His disability is 15% of the left knee secondary to loss of both menisci.

On the right knee he tells me that he injured this in November, 1978 while working in California. He was cut on a skill saw and has an irregular wo [sic] extending from the lateral aspect of the patella to the suprapatellar are measuring approximately three inches in greatest length. He states that he now is having some soreness on the medical side of this right knee.

EXAMINATION: Reveals this previously mentioned scar well healed. His quads show good tone. He shows full range of motion about this knee. There is no tenderness laterally. With full flexion and rotation, however, a click is produced at the medial side of the knee consistent with a tear of the medial meniscus. His ligaments are stable and there is no effusion.

Insofar as the right knee is concerned, he most probably has a posterior horn tear of this medial meniscus and if symptoms become more pronounced he may require a meniscectomy. Discussed this with him today.

I do not relate his meniscal problems on the right knee to his previous injury that occurred in California. He has made good recovery from that injury and has minimal disability relating only to the scar which would be not more than 1 to 2% of the right lower extremity. His function on the right knee has not been affected by this previous injury.

Another deputy industrial commissioner ruled as follows:

> Now on this 20 day of November, 1980 the undersigned deputy industrial commissioner having reviewed the defendants' motion to add indispensable party, and being fully advised in the premises, finds that said motion is unresisted.
>
> The defendants are hereby given leave, pursuant to the Iowa Rules of Civil Procedure, to add the Second Injury Fund as an additional party to the above captioned litigation.

On December 17, 1980 defendants filed a Notification of Filing with regard to the motion to add, the motion for continuance, the amendment, and the Original Notice and Petition pursuant to Industrial Commissioner's Rule 500—4.8. On December 22, 1980 the same Notification was filed but also was addressed to the Fund in care of the Industrial Commissioner. (Said motions and pleadings were attached to the Notification.) On February 20, 1981 defendants filed an Affidavit In Proof of Delivery stating that the motions and pleadings attached to the Notification had been mailed to the Fund in care of the Industrial Commissioner on or about November 11, 1980 and had been received by the Fund on or about November 12, 1980. An attached return receipt addressed to Robert C. Landess, Second Injury fund at the agency's present location bore a November 12, 1980 delivery date. (Obviously, the alleged delivery occurred prior to the Ruling on defendants' motion to add the Fund. Additionally, no pleadings or motions appear to be filed stamped as received by this office on or about November 12, 1980. On the same day the defendants filed the proof of delivery and the motion and cross-petition presently before the undersigned, they filed another Notification of Filing referrable to the same motions and pleadings as in the prior Notification. On February 26, 1981 defendants filed an Affidavit In Proof Of Delivery alleging that on or about February 19, 1981 defendants mailed a true copy of the motions and pleadings specified in the prior Notifications of Filing along with such Notification and that the Fund in care of the Industrial Commissioner received the same on or about February 20, 1981. [No reference was made to the present motion and cross-petition.] The attached returned receipt, which was addressed to the Second Injury Fund, Iowa Industrial Commissioner without specifying the present location, bore a February 20, 1981 delivery date.)

Defendants' present motion filed February 20, 1981 alleges that at this stage in the proceedings, and based on the December 1980 Notification of Filing, the Fund has been properly joined and asks this agency to confirm such fact by ruling. In the alternative, and only if the Fund is found not to be joined properly, the defendants' cross-petition against the Fund alleging the claimant's cause of action involves "injury to both the left and right legs" as indicated in Dr. Stratham's report, that defendants have a claim against the Fund "for and disability assessed in excess of the scheduled disability to the legs as allowed under the Code of Iowa" and that the issues of the instant case cannot be decided without the Fund joined as a party. No formal proof of delivery of the cross-petition upon the Fund appears in the agency file.

The Fund specially appeared on March 6, 1981 for the sole purpose of challenging the sufficiency of the service of the defendants' cross-petition upon the Fund and the sufficiency of the Original Notice and Petition or lack thereof. The Fund alleges, in part, that defendants' motion and cross-petition were sent to the Fund by regular mail and were not served with the Original Notice and Petition by personal service or by certified return receipt requested as required by Iowa Rule 34 of Civil Procedure, Section 17A.12(1) and Industrial Commissioneer's Rule 500—4.6. Accordingly, the Fund asks that its Special Appearance be sustained and that defendants' cross-petition be dismissed.

The Fund appears to interpret Rule 34(a) being the only way of enforcing a ruling pursuant to Rule 25(c).

Rule 25(c) provides:

> Indispensable party not before court. If an indispensable party is not before the court, it shall order him brought in. When persons are not before the court who, although not indispensable, ought to be parties if complete relief is to be accorded between those already parties, and when necessary jurisdiction can be obtained by service of original notice in any manner provided by these rules or by statute, the court shall order their names added as parties and original notice served upon them. If such jurisdiction cannot be had except by their consent or voluntary appearance, the court may proceed with the hearing and determination of the cause, but the judgment rendered therein shall not affect their rights or liabilities.

Rule 34(a) provides:

> When defendant may bring in third party. At any time after commencement of the action a defending party, as a third-party plaintiff, may file a cross-petition and cause an original notice to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the cross-petition nct later than 10 days after he files his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the original notice, hereinafter called the third-party defendant, shall make his defense to the third-party plaintiff's claim as provided in rule 85 and his counterclaims against the third-party plaintiff as provided in rule 29 and cross-claims against other third party defendants as provided in rule 33. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the plaintiff thereupon shall assert his defenses as provided in rule 85 and his counter-claims under rule 29. Any party may move to strike the third-party claim or for its severance or for separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

Although the Rules of Civil Procedure do not contain a reference note following Rule 25 which states "[f]or method of bringing in parties see Rule 34," such comment does not mean Rule 34 is the exclusive means of bringing in parties. Rule 25(c) seemingly anticipates that a court may order an indispensable party joined, in effect, on its own motion. Essentially, this is what occurred here even though the matter of the Fund being allegedly indispensable was brought to the attention of this agency by defendants' motion to join the Fund as an indispensable party. Defendants were not cross-petitioning and have done so only recently if the Fund is found not to be properly joined. Apparently, the deputy industrial commissioner's Ruling on the motion to join implicitly intended that the Fund be added as a party and the Original Notice served upon it as provided in Rule 25(c).

The defendants have complied with the directive of the prior Ruling by their February 20, 1981 Notification along with the February 26, 1981 affidavit of delivery. Accordingly, the Fund has been joined properly insofar as the prior Ruling determined it should be added as a party. Hence, the matter of the cross-petition is not before the undersigned and hence the Fund's Special Appearance attacking such a cross-petition is moot.

However, the matter of the Fund being a proper party does not end at this juncture. Just as the Rules of Civil Procedure anticipates that a court may discover that a party should be joined to an action and so order, the rules likewise foresee the possibility that a court may discover that a party was misjoined. Iowa Rule 27(a) of Civil Procedure provides:

> Parties. Misjoinder of parties is no ground for dismissal of the action, but parties may be dropped by order of the court on its own motion or that of any party at any stage of the action, on such terms as are just, or any claim against a party improperly joined may be served and proceeded with separately.

Code section 85.64 provides:

> If an employee, who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.
>
> 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.

Both from a procedural standpoint and from a substantive vantage, the Fund has been misjoined in the present proceeding. At the outset it should be noted that

the defendants have no right to indemnification or contribution against the Fund as is true in some other jurisdiction where the defendant employer brings an action against the Fund after the claimant's disability has been established in a proceeding brought by the claimant against the employer, 2 A Larson, *The Law of Workmen's Compensation*, §59.31. In Iowa only the claimant has standing to bring an action against the Fund. The employer's liability is limited to that disability attributable to the second injury and does not extend to the disability resulting from the combination of the prior and subsequent injuries. *Second Injury Fund v. Mich. Coal Co.*, 274 N.W.2d 300 (Iowa 1979). Hence, whether the claimant had any right of recovery against the Fund would not constitute an affirmative defense per se for the employer nor be the basis for a cross-petition (even if the claimant did bring an action against the Fund). Contrast the legislative scheme of recovery for the employer in Code Section 85.22

However, since establishing the liability of the employer and the Fund are usually interwoven in the typical combined arbitration/review-reopening and Fund proceeding, it is conceivable that a deputy industrial commissioner might order the Fund to be joined in an action where the claimant had not joined the Fund (as in the present proceeding—see blank paragraph 26 of claimant's Original Notice and Petition) and there otherwise appeared to be a cause of action for the claimant against the Fund. Accordingly, Dr. Stratham's report must be reviewed to see if it otherwise justifies the essence of the prior Ruling on the motion to add the Fund as a party.

The prior impairment must be permanent in nature and must have hindered the claimant's ability to obtain or retain effective employment. *Anderson v. Second Injury Fund*, 262 N.W.2d 789 (Iowa 1978); 2 A *Larson, supra*, at §59.32. Dr. Stratham clearly indicates that claimant's only "disability" as a result of the prior injury to the right leg is minor and is attributable solely to the scar pe se. Dr. Stratham verifies that the function of the right leg was not affected. Dr. Stratham does allude to claimant's present complaints of soreness of the medial side of the right knee and suggests that he most probably had a posterior tear of the medial meniscus which might require surgery if the symptoms become more pronounced in the future. He does not relate the present complaints to the November 1978 injury.

Dr. Stratham's report does not suggest that claimant has a prior impairment that contributes to his present disability. At best the claimant has a problem with the right knee which Dr. Stratham relates to a tear of unknown occurrence and which seemingly is in the process of becoming an impairment. Parenthetically, it is noted that there is some question as to the origin of the left leg problems which appear to be part of claimant's case against the employer. It may be that the left leg injury will predate any right leg problems.

Thus, Dr. Stratham's report does not justify requiring the Fund to go through the expense of appearing and defending a claim which at this juncture does not appear to be meritorious and which the claimant himself does not appear ready to develop and pursue. Should the claimant later wish to join the Fund or if the evidence otherwise is developed to warrant joining the Fund as a party, such claim or joinder may be appropriate. Such is not the case at present.

WHEREFORE, it is hereby found that pursuant to the directive of another deputy industrial commissioner's Ruling on November 20, 1980, the defendants properly added the Second Injury Fund as a party by serving it in care of the Industrial Commissioner with the Original Notice and Petition by certified mail return receipt requested.

It is further found that whereas the claimant has not pursued a cause of action against the Fund nor joined in the defendants' motion to add the Fund, whereas the defendants do not have a right of indemnity or contribution against the Fund and whereas the only evidence in support of defendants' motion fails to suggest Fund exposure in the present matter, the undersigned on her own motion, pursuant to Iowa Rule 27 of Civil Procedure, orders that the Second Injury Fund be dropped as a party to the present proceeding.

It is further found that defendants' request to amend their answer to affirmatively defend on the basis of the Second Injury Fund involvement is an improper affirmative defense and would not, in any event at present, conform to the proof.

THEREFORE, it is hereby ordered that the Second Injury Fund be dropped as a party to the present proceeding pursuant to Iowa Rule 27 of Civil Procedure.

Furthermore, defendants' request to amend their answer is hereby denied.

* * *

Signed and filed at Des Moines, Iowa this 7th day of April, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

SALLY HOOVER,

Claimant,

vs.

EMBASSY CLUB

Employer,

and

EMPLOYERS MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling

Now on this day, the matter of claimant's Application to Receive Professional Services Under Section 85.27 comes on for determination.

Section 85.27 requires the employer to furnish professional and hospital service for all injuries *compensable* under either Chapter 85 or Chapter 85A. This is a proceeding in arbitration in which no determination as to whether or not claimant has suffered a compensable injury has been made. An order approving compensation for medical expenses would be inappropriate at this time.

This deputy industrial commissioner notes that the Original Notice and Petition in a contested case proceeding before this agency makes provision for requesting 85.27 benefits and further provides for the listing of these expenses. Although the box for 85.27 benefits has not been checked in claimant's Petition which was not filed by her present attorney, paragraph 21 lists doctor and hospital expenses.

WHEREFORE, it is found that no determination has been made as to the compensability of claimant's injury.

THEREFORE, claimant's Application to Receive Professional Services Under Section 85.27 is hereby denied.

* * *

Signed and filed this 19th day of February, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

RUTH HOTH,

Claimant,

vs.

IRVIN EILORS,

Employer,

and

NEW HAMPSHIRE INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision wherein claimant was awarded temporary total disability and medical expenses. The record on appeal consists of the record of the arbitration proceeding together with claimant's exhibits 1-4 (exhibit 4 is not in the commissioner's file and apparently is still in the possession of defendant's counsel, transcript page 88) and the evidentiary depositions of Joel D. Janssen, D.C. and Edward J. Sitz, M.D. with exhibits 1 and 2. The parties were allowed time to file briefs and exceptions to the arbitration decision on appeal. None were filed.

A review of the pertinent evidence discloses:

Claimant, a sixty-two year old widow with no dependents at the time of the hearing, alleges she was injured in the course of her employment on February 7, 1977. Claimant was a housekeeper for the Eilors, the defendant employer. She did general housekeeping jobs at the Lazy H Motel and at some rental property in Waterloo, all owned by the defendant employer. At the time of her alleged injury claimant was cleaning a bathroom in one of the "town" apartments in Waterloo. She testified that she was cleaning underneath an old-fashioned bathtub (one standing off the floor on feet) and attempted to stand up. As she arose she states she struck her back in the lumbar region on the bottom edge of the sink, which was in close proximity to the tub. Claimant reported the incident to Muriel Eilors. On February 8, the next day, claimant sought out Joel D. Janssen, D.C. for relief of her increasing pain. Claimant voluntarily quit her employment with the Eilors allegedly because of her pain. She was paid up to March 1, 1977.

Dr. Janssen, claimant's family chiropractor, saw claimant the day after the injury and on frequent occasions thereafter. (See claimant's exhibit 1). In his medical report dated August 16, 1977 Dr. Janssen lists claimant's diagnosis as "acute lumbosacral strain with possible disc involvement." Dr. Janssen treated claimant over a period of time with manipulations. In a letter dated August 17, 1977 Dr. Janssen stated he did not want to get involved with any percentage of claimant's disability. However, he opined that due to the evidence of ligamentous and muscular strain and sprain to the spine with possible disc involvement, claimant may experience pain and discomfort for a period of six to twelve months following her injury. He also states that permanent arthritic degeneration changes of the spine may also result. Hence, Dr. Janssen's prognosis remained guarded and he stated that claimant may never be able to return to the type of work she had been doing.

Claimant was examined by Edward J. Sitz, M.D. on April 27, 1977. In a letter dated April 28 Dr. Sitz states:

> Presumably the episode that occurred in early February was that of a contusion and sprain. This was superimposed upon a mildly degenerative arthritis of the lower lumbar spine. The patient seems to be improving some. I find no evidence of disc herniation or rupture at this time. (See deposition exhibit 1).

Dr. Sitz at that time did not find any evidence of serious injury and felt claimant could return to gainful employment some time in the not too distant future. He also advised that any employment should not require gross lifting, bending, or twisting.

Dr. Sitz saw claimant in his office again on August 28, 1978. Claimant related to him that her acute pain and symptoms had gone away, but that she continues to have lower back pain. As a result of her visit Dr. Sitz wrote:

The symptoms remain that of residual symptoms from a contusion and sprain of the lumbar spine from February 1977 with underlying degenerative joint changes. I see no reason that the patient cannot be employed at this time, with the exception as noted in April 1977. That is, gross lifting, bending, and twisting would be unadvisable. I am sure that Mrs. Hoth was experiencing some discomfort by being on her feet for extended periods, but I do not feel that she would be harming or injuring herself. (Employer's deposition exhibit 2).

As for compensation for her work, claimant received $300 a month for the month of February in which she was injured. In the month prior she was paid $250, was provided a furnished room in the defendant-employer's house, and was allowed three meals per day as well as laundry privileges. In early February claimant moved from the provided room in defendant-employer's home. The record does not disclose whether or not the increase in monthly pay in February was because of no longer providing housing and providing less meals. Claimant testified she'd be willing to pay $15 a week for her room, while the defendant, Irvin Eilors, said it was worth anywhere from $9 to $12 a week. Claimant testified the meals were worth $3.50 per day. Defendant-employer testified they were worth $2.50 per day. No testimony was elicited on the value of the laundry privileges.

The defendants claim that claimant was not a credible witness and that she may have fabricated her story. They cite as evidence some conflicting stories about whether or not claimant had ever been an army nurse.

Findings of Fact and Conclusions of Law

Claimant sustained an injury arising out of and in the course of her employment on February 7, 1977.

Claimant's average weekly wage is based upon cash received plus the value of room, board, and laundry privileges.

The cash received at the time of the injury was $69.23 per week ($300 x 12 divided by 52). The value of the room was $15 per week. The value of the meals was $24.50 per week ($3.50 x 7). The value of the laundry privileges was $3.75 per week. Claimant's gross average weekly wage was thus $112.48.

Claimant was single with no other dependents entitling her to a weekly benefit of $72.38.

Claimant's injury resulted in temporary total disability from March 1, 1977 through August 28, 1978 or a period of 78 weeks.

Claimant gave timely notice to the defendant-employer of her injury.

Claimant's possible Walter Mitty existence does not affect her credibility with regard to this claim.

Claimant has $399 of chiropractic care related to her injury.

* * *

Signed and filed this 31st day of July, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RICHARD M. HUBLER,

Claimant,

vs.

JAMES BARNHART,

Employer,

and

FARM BUREAU MUTUAL INS.,

Insurance Carrier,
Defendants.

Review—Reopening Decision

This is a proceeding in review-reopening brought by Richard M. Hubler, the claimant, against his employer, James Barnhart, and the insurance carrier, Farm Bureau Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of injuries he sustained on October 5, 1976 and February 22, 1977.

* * *

The issue for resolution is the causal relationship between claimant's injuries and his resulting disability, the nature and extent of that disability, the length of healing period as well as the appropriateness of certain medical treatment and statements for said treatments.

The parties stipulated that the proper rate for Workers' Compensation purposes should be based on $3.75 per hour rather than the $3.50 figure previously utilized.

There is sufficient credible evidence in the record to support the following findings of fact to wit:

Claimant sustained an injury to his back which arose out of and in the course of his employment with defendant on or about October 5, 1976 while lifting a bucket of corn. Claimant sustained a second injury which arose out of and in the course of his employment with defendant on or about February 22, 1977 when he reinjured his back while lifting bales of hay.

Claimant testified that he is a farm laborer and has worked for the defendant in that capacity for 17 or 18 years. Claimant's work included general farm chores, field work, and the operation of farm machinery. Claimant initially injured his back on or about October 5, 1976 and continued to work until October 25, 1976 when he went to Dr. Walter D. Gilbey, a chiropractor, who advised him to discontinue working for a period of time. Defendants' exhibit 2 also reflects that claimant suffers from high blood pressure and hypertension. Claimant was not hospitalized but treated by Dr. Gilbey through the use of spinal manipulation on several occasions in October, November, and December of 1976. Claimant testified he

did not return to work until January 1, 1977 as claimant did not feel he was in a condition to return to work in December as indicated by his doctor. Defendants' exhibit 8 reflects that claimant was paid benefits for the period from October 25, 1976 to December 20, 1976.

Claimant worked during the period from January 1, 1977 through February 22, 1977 but needed help with the heavy lifting. Claimant's children helped him with the chores during this period. Claimant indicated that prior to this injury his wife and children helped him with his work.

Claimant reinjured his back on or about February 22, 1977 and was again treated by Dr. Gilbey. Defendants' exhibit 3, a surgeon's report prepared by Dr. Gilbey, reflects that while no x-rays were taken, Dr. Gilbey diagnosed the problem as a "reinjury of the 4th lumbar disc." Dr. Gilbey indicated this injury would result in no permanency. Claimant was not hospitalized but received treatment by way of spinal manipulation. Dr. Gilbey indicates claimant would be able to return to light work on March 14, 1977. Defendants' exhibit 9 reflects the claimant was paid compensation for 1 6/7 weeks covering the period of February 22, 1977 to March 13, 1977.

Upon claimant's return to work in March 1977, he continued to avoid heavy lifting because of his low back. His wife and family continued to help with the farm chores. The family has, according to the claimant, helped with the farm chores through October of 1979. His children became involved in school activities at that time and since then claimant has had to do all the farm work himself. He continued to avoid heavy lifting.

Claimant stated he had no physical limitations prior to the October 5th injury and did not have his present low back pain. He was able to work eight or nine hours per day, six days per week without apparent difficulty. He is now unable to work those hours and states he now works few 40-hour weeks. The defendant-employer, however, has not complained to claimant about his work, and claimant is still employed.

Prior to his alleged injury claimant fished and participated in some social activities. Today he does none of these things because his back aches.

Claimant's medical expenses for an Iowa City examination by Dr. Richard A. Brand remain unpaid at this time. Claimant testified that his former legal counsel sent him to Iowa City for an evaluation, and it does not appear that the mandates of §85.39 were followed.

On cross-examination claimant admitted that he had been treated by Dr. Hines, a chiropractor, as early as 1969. This treatment consisted of general health care as well as chiropractic adjustment for his arms, neck, and shoulder. Claimant received regular chiropractic adjustments from Dr. Hines for a period of approximately six months, until Dr. Hines left town. Claimant denies Dr. Hines ever treated him for the lower back pain he is now experiencing. Claimant then began receiving treatment from Dr. Gilbey which consisted of chiropractic adjustments for neck and arm pain as well as for his whole body on an as needed basis. Claimant denies Dr. Gilbey ever treated him for back pain.

At some time before October 1976, claimant strained his back lifting an outboard motor. Dr. Gilbey treated him for this, and claimant states his ability to work was not affected by this incident. Claimant was also involved in a fist fight incident and spent three days at University Hospitals in Iowa City. Claimant received chiropractic adjustments from Dr. Gilbey after this incident but states he suffered no back injury. Claimant also injured his arm and fingers prior to 1976 in a garage door accident but states his back was not involved, and his ability to work was not affected.

Claimant continued to testify on cross-examination that he is paid on an hourly basis and was receiving $3.75 per hour at the time of his injuries. He lives in a house furnished by defendant-employer. Claimant keeps track of his own hours and submits them to defendant on a weekly basis and is paid weekly. There are three children living with claimant now, ranging in ages from 15 to 18 years.

There is certain work claimant alleges he now avoids such as cleaning barns, heavy lifting and digging. He is able to do corn picking without apparent restriction.

Paula Hubler, the claimant's wife, testified on his behalf and corroborated his testimony.

James Barnhart, the defendant, testified that he is a farmer and has been so engaged for thirty years. He is the claimant's employer and has been since 1961. He produces grain and raises livestock.

The defendant directs claimant in his work, but claimant is also aware of what needs to be done and will do certain work without direction. Claimant furnishes defendant a written weekly report of his hours worked and claimant is paid based on this report. Claimant's seven children have assisted him with the farm work over the last ten years, usually for no compensation.

Defendant was aware as early as 1969 that claimant was seeing a chiropractor. He also states that prior to 1976 claimant stated his back was bothering him and defendant understood this was the reason for some of the chiropractic treatments.

This witness corroborated claimant's testimony concerning the October 5, 1976 low back injury. After this incident claimant did not return to work until January 1, 1977. He was able to do the farm work but needed some help and there was some work that was not completed. Claimant's exhibit 7 indicates claimant worked two hours on October 26 and 27. The weeks of November 1-12 claimant had a friend assist him and a total of 98 hours were charged. The defendant is not sure if claimant worked during this period or merely supervised his friend. The weeks of November 13-27 with claimant's wife and son doing the chores, a total of 20.5 hours were logged. This witness generally corroborated the fact that there had been a February 22, 1977 injury. Claimant returned to work on March 14, 1977. From the employer's point of view, from mid March 1977 to date the claimant has worked the same way he did prior to the 1976 injury. His family helps him with the work now, but they helped him prior to 1976. During the 1979 harvest, claimant could do all he did prior to 1976. Claimant did not tell his employer there was work he could not do, and defendant considers claimant a satisfactory employee. Exhibit 7 reflects that in 1977 claimant was paid for 1334.5 hours of work, and in 1978 he was paid for 1801.0 hours.

On cross-examination this witness admitted there is

work that is not being done on his farm that needs to be done but that the farm work generally is completed through the claimant's efforts, sometimes with the assistance of defendant.

From the record it appears that claimant received his last chiropractic treatment in March 1977 and has not received one since. In July 1977 Dr. Gilbey prepared a hand written note, claimant's exhibit 3, wherein he states:

> Mr. Hubler has a continued partial disability due to his injury in October of 1976 as he has lumbar disc herniation. This limits him in his employment as he cannot lift heavy objects or over extend or flex his lumbar spine due to the ligamentous weakness caused by his injury. Mr. Hubler has previously been a patient of mine but his prior troubles have been in the cervical region of his spine and not in the low back.

Nowhere in this most recent report does Dr. Gilbey establish that claimant is in any way permanently afflicted by this condition. In fact, the phrase "continued partial disability" sounds more in terms of a temporary condition rather than a permanent one.

Claimant was sent to University Hospitals in Iowa City by his former attorney for examination and evaluation. Dr. Brand reports in defendants' exhibit 6:

> . . .Mr. Hubler does have degenerative changes in the lower lumbar spine. This problem is not in all likelihood caused by his work; however, it could be aggravated by his work. Mr. Hubler has been more disabled than the average patient with these sort of physical findings and x-ray changes. Therefore, it is my opinion that while the history of some pain is consistent with his condition, he complains of more pain than I would expect on the average, and in this sense the history is inconsistent.
>
> In response to your questions about degree of partial disability, I would say that the patient has five percent permanent partial impairment of the whole man as a result of this degenerative disease. The majority of this impairment is due to his condition, and not to the injury which he sustained.

It is noted that the radiological consultation request and report notes a "severe narrowing and osteophytic spurring of the L5-S1 joint space. . ." Nowhere in this report is there mention of the "lumbar disc herniation" that Dr. Gilbey relies on as to the cause of claimant's difficulties, nor does Dr. Gilbey in any report mention the existence of degenerative changes in claimant's lumbar spine.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 5, 1976 and February 22, 1977 are 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).

Claimant has failed to sustain his burden of proof and has not established that he was any more than temporarily disabled from the low back injury of October 5, 1976 and the subsequent reinjury in February of 1977.

The claimant continued to work after the October 5, 1976 injury until October 25, 1976 when he went to Dr. Gilbey for chiropractic adjustment. Dr. Gilbey, who treated claimant reports in defendants' exhibit 2 that this injury would not result in any permanent defect. Claimant reinjured his low back in February 1977 and was off work for a few days. Dr. Gilbey who again treated claimant reports in defendants' exhibit 3 that this injury would not result in any permanency. Dr. Gilbey's report of July 11, 1977 speaks in terms of "continued partial disability" and not in terms of a permanent defect. Claimant has worked continuously and, according to his employer, satisfactorily since his return on March 14, 1977.

Dr. Brand of the University Hospitals is of the opinion that claimant's work could aggravate the degenerative changes taking place in his spine but states that the degeneration was not caused by claimant's work and that the majority of claimant's present 5 percent permanent partial disability relates to the degenerative condition and not to the injuries claimant sustained. Dr. Brand is also of the opinion that claimant's complaints are inconsistent with his degenerative condition, thus making claimant's credibility as to history of complaints questionable. Based on Dr. Gilbey's continuing position that the injuries would not produce any permanency and Dr. Brand's statement that the majority of claimant's difficulties are caused by a degenerative condition, it is determined that claimant failed to carry his burden of proof.

The evidence in this case establishes that claimant's family assisted him with farm work both prior to and subsequent to October 1976 and February 1977. In the farming community the family pitching in and doing farm labor is a way of life and is expected of all family members. The mere fact that claimant now has fewer children at home to help with this labor, thus requiring claimant to do more work and possibly resulting in some jobs being unfinished is not grounds for an award of permanent disability.

The record also establishes that the claimant worked and was paid for a total of 1334 hours in 1977 and 1801 hours in 1978.

Claimant's employer considers claimant a satisfactory employee and stated the work is getting done one way or another.

WHEREFORE, it is found:

That claimant has failed to sustain his burden of proof and has not established he is in any way permanently disabled from the injuries of October 5, 1976 or February 22, 1977.

That claimant was temporarily disabled for the period October 25, 1976 thru December 20, 1976, the date Dr. Gilbey stated claimant could return to light work.

That the claimant was temporarily disabled for the period February 22, 1977 through March 13, 1977.

That the parties agree the basis for establishing the rate for workers' compensation is $3.75 per hours.

That the examination by Dr. Brand in Iowa City and the resulting bill were not incurred pursuant to the terms of §85.39 and are disallowed.

THEREFORE, it is ordered:

That defendant shall pay claimant temporary disability benefits pursuant to §85.33 for the period October 25, 1976 to December 20, 1976 and February 22, 1977 to March 13, 1977 on the basis of $3.75 per hour. Defendant shall receive credit for all sums previously paid. Claimant shall take nothing further from these proceedings.

• • •

Signed and filed this 12th day of August, 1980.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

FLORENCE HUNTSMAN,

Claimant,

vs.

EATON CORPORATION,

Employer,
Defendant.

Ruling

Now on this day, the matter of claimant's Motion to Strike and the defendant's Resistance thereto comes on for determination.

On February 6, 1981 claimant filed a Motion to Strike the appearance and answer filed by defendant asserting that the defendant's attorney has not filed an appointment of resident attorney. The defendant's response on February 10, 1981 states that its attorney is a member of the Iowa State Bar Association who has practiced before the Iowa Industrial Commissioner in the past.

The clerk of the Iowa Supreme Court acknowledges that defendant's attorney has active status as an attorney licensed to practice within the state. Claimant cites Iowa Code Section 610.13 as authority for her requested relief. That section is not entirely applicable in the situation here presented as defendant's attorney is licensed to practice in this state. No other section has been found which speaks to this case; however, it has been the practice of this agency to allow attorneys licensed in Iowa to appear before it without requiring the appointment of a resident attorney for service.

THEREFORE claimant's Motion to Strike is hereby overruled.

• • •

Signed and filed at this 19th day of February, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

TERRY HUNTZINGER,

Claimant,

vs.

MOORE BUSINESS FORMS, INC.,

Employer,

and

SENTRY INSURANCE and LIBERTY MUTUAL INS. CO.,

Insurance Carriers,
Defendants.

Appeal Decision

By order of the industrial commissioner filed June 25, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appealed on December 24, 1979 the proposed arbitration and review-reopening and §85.27 decision. The defendant-employer and Sentry Insurance Company filed a special appearance on December 28, 1979, challenging the jurisdiction of the hearing deputy to enter the proposed decision of December 11, 1979, and challenging the jurisdiction of the industrial commissioner with respect to the notice of appeal and request to take additional evidence filed by claimant December 24, 1979.

• • •

On May 21, 1971 claimant hurt his back while working for the employer. He was off work one week, two days and was paid two days compensation by a draft dated July 14, 1971 (there being a one-week waiting period at that time). The insurance company, Sentry, duly filed on July 16, 1971 its first report, memorandum of agreement and report of benefits paid.

On June 26, 1979 claimant filed his petition for arbitration review-reopening and §85.27 benefits. Named as defendants were the employer, Sentry, and Liberty Mutual Insurance Company. The record shows Sentry had the coverage at the time of the original injury in 1971 and maintained such coverage until August 1, 1976 when Liberty took over.

After answers were filed and interrogatories were answered, defendant-employer and Sentry filed a motion for a summary judgment on September 24, 1979. No ruling was made on that motion until after the hearing.

On October 3, 1979 a hearing was held in Cedar Rapids. Besides the deputy industrial commissioner, present

were representatives of the three parties. As a result of an on-the-record discussion, the deputy industrial commissioner ruled from the bench, as it were, as follows:

> It will be the ruling of the Deputy Commissioner that Sentry Insurance Company, as an insurance carrier named in the petition and claim, shall be dismissed as a liability carrier for Moore Business Forms, Incorporated, the named employer, and that the motion for summary judgment as to Sentry Insurance Company will be granted (transcript, p. 16).

Thus relieved, the attorney for the employer and Sentry stayed to observe the hearing but did not participate further.

On October 17, 1979 the deputy industrial ruled in writing as follows:

> WHEREFORE, defendant Sentry's Motion to Dismiss [sic] 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 [sic] pertaining to medical benefits is overruled.

On October 24, 1979 the employer and Sentry filed a motion for rehearing on the above ruling. No ruling was made on the motion for rehearing.

The written order of the deputy industrial commissioner appears at once to be a confirmation of the oral ruling and at odds with that ruling.

At any rate, a hearing was held on the merits between claimant and the employer and Liberty Mutual. It may be said, briefly, that the record shows no compensable injury having occurred during the term of Liberty Mutual's coverage. In the decision filed December 11, 1979, the hearing deputy commented as follows:

> Since there is insufficient medical evidence to support the claim in favor of the claimant for medical expenses incurred after June, 1971 and before January, 1979, it is found that Sentry Insurance Company would be liable only for those medical benefits after December, 1978 and at the hands of Dr. Gelman including the hospitalization at Mercy Hospital in January and February, 1979. No award however, may be given herein because no bills where [sic] submitted in evidence.
>
> It is therefore suggested that the claimant confer with Sentry Insurance Company and determine those bills which are the liability of the carrier. Upon failure to resolve this issue the parties are granted leave to submit said controversy to the undersigned for subsequent determination.

And, in that same decision, he ruled as follows:

> THEREFORE, it is ordered that claimant's application for arbitration and for review-reopening is hereby dismissed with prejudice.
>
> It is further ordered that claimant is to confer with the carrier, Sentry Insurance Company and submit to it those medical bills incurred subsequent to December, 1978 for payment. Should a controversy still remain over any such disputed bills they shall be submitted to the undersigned for final determination.
>
> It is further ordered that Liberty Mutual Insurance Company is relieved of any liability herein.
>
> Costs of the proceedings are taxed to defendant, Sentry Insurance Company. Said defendant is directed to file a report within twenty (20) days from payment of the medical bills submitted to it for payment.

The main question pertains to the liability, if any, of Sentry (and the employer) for the 1971 injury. It is clear that no award against Sentry and the employer can be made based on any evidence taken on October 3, 1979, because by that time the bird had flown the coop, so to say. That is, because of the hearing deputy's ruling, Sentry was no longer a party.

It is equally clear that Sentry and the employer owe lifetime medical and allied benefits under §85.27.

In relevant part, the 1966 Code section stated:

> The employer, with notice of knowledge of injury, shall furnish reasonable surgical, medical, osteopathic, chiropractic, podiatrial, nursing and hospital services and supplies therefor. 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. The total amount which may be allowed for medical, surgical, and 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 dollars, application for the allowance of such additional amounts shall be made to the commissioner by the claimant, and the commissioner may, upon reasonable proof being furnished of real necessity therefor, allow and order payment for additional surgical, medical, osteopathic, chiropractic, podiatrial and hospital services and supplies, and no statutory period of limitation shall be applicable thereto.

The argument against so-called lifetime benefits under this section, at least in some cases, is that the $7,500.00 is a threshold figure which must be exceeded and that if treatment has resulted in less than $7,500.00 in charges, there is no right to lifetime treatment. The industrial commissioner has ruled, however, and this deputy industrial commissioner rules that no statutory period of

limitation restricts claimant's right to recovery of benefits under §85.27. See *Jacobsen v. Iowa Paint*, 33rd Biennial Report at page 112, 116 (1976).

The case is otherwise with respect to recovery of weekly compensation benefits. Claimant's able brief points to cases which support the "discovery rule," which holds that a claim does not accrue (therefore the statute of limitation does not run) until claimant becomes aware of the extent or exact nature of his injury. To support this theory, claimant cites *Jacques v. Farmers Lumber and Supply Co.*, 242 Iowa 548, 47 N.W.2d 236 (1951) and *Chrischilles v. Griswold*, 260 Iowa 453, 150 N.W.2d 94 (1967). The former case concerns the notice provision (§85.23) of the law, not the statute of limitation, and the latter deals with the tort statute. Claimant also cites the *dissent* in *Montgomery v. Polk County*, 278 N.W.2d 911 (1979) which it concerns Code chapter 613, the Municipal Tort Claims Act.

However, the clearest precedent is *Otis v. Parrott*, 233 Iowa 1039, 8 N.W.2d 708 (1943). That case concerned §85.26 which, in relevant part, remained the same through the time of claimant's injury:

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

In that case, the court refused to extend the commencing of the two-year statute beyond the injury date to a time when a tubercular condition was lighted up. In the instant case, claimant's condition was diagnosed as a muscle pull at the time of the injury in 1971, and it was not until 1979 that a herniated disc was diagnosed. Thus claimant sustained a palpable injury in 1971. The fact that the condition grew worse or was worse than he knew does not take it out of the clear rule in *Otis*. See also *Mousel v. Bituminous Material and Supply Co.*, 1969 N.W.2d 763 (Iowa, 1969) and *Bever v. Collins*, 242 Iowa 1192, 49 N.W.2d 877 (1951).

Finally, at the risk of being repetitious, certain parts of the record are again summarized:

(1) September 24, 1979. Motion for summary judgment filed by employer and Sentry.

(2) October 3, 1979. The hearing, at which time the hearing deputy on the record dismissed the action as against Sentry.

(3) October 17, 1979. The hearing deputy ruled on the motion for summary judgment, implying that Sentry was liable for medical charges which related to the original injury.

(4) December 11, 1979. The hearing deputy filed his decision, again implying that Sentry would owe the bills which related to the original injury.

The hearing deputy ought not to have made the rulings in (3) and (4), in view of his ruling in (2); in fact, he ought not to have made the ruling in (2) because, as shown above, Sentry, as well as the employer, would owe lifetime medical and added benefits under §85.27.

WHEREFORE, it is found:

1. That the hearing deputy's decision with respect to claimant's case against Liberty Mutual is correct and that the record contained no evidence to show any work injury after August 1, 1976, which is when Liberty Mutual's coverage began.

2. That the industrial commissioner's file contains a memorandum of agreement with respect to an injury of May 21, 1971, said memorandum having been filed by the employer and Sentry Insurance.

3. That the employer and Sentry Insurance would be liable for all benefits due under §85.27 which can be related causally to the compensable injury but that said employer and insurance carrier would owe no weekly benefits because the two-year statute of limitations under §85.26 has expired.

THEREFORE, the decision filed December 11, 1979 is affirmed in part and reversed and remanded in part. That part which relieved the Liberty Mutual Insurance Company of liability is affirmed. All other findings and orders in that decision are reversed. The ruling of October 17, 1979 is reversed. This matter is hereby remanded to a deputy industrial commissioner to be placed in the assignment of cases for the purpose of determining the necessity and reasonableness of the claim under §85.27.

* * *

Signed and filed at Des Moines, Iowa this 29th day of August, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court;
Affirmed in part;
Reversed in Part; Remanded.
Appealed to Supreme Court; Pending.

JOHN E. JACOBSEN,

Claimant,

vs.

MEMORIAL PARK CEMETERY,

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal a proposed decision in arbitration wherein claimant was awarded healing period and permanent partial disability payments for an injury to his left leg.

The issue is whether or not the claimant received an injury arising out of and in the course of employment. Defendants have raised the defense that claimant's injury was the result of claimant's willful intent to injury another.

Forty-seven year old married claimant was employed by defendant-employer (hereinafter Memorial) as a burial lot salesman on the date of his injury, July 5, 1978. The employment procedure was for the salesman to arrive at the main administration office around noon to be assigned to sales leads. Throughout the remainder of the day and evening the salesman would pursue these leads, make personal contacts, and complete the sale. Salesmen were paid on a commission basis.

Prior to July 5, 1978 claimant missed a few days of work owing to the death of a relative. Claimant stated that his manager informed him that due to a lag in business they would not be working until after July 4. When claimant returned to work on July 5, leads had been assigned to some of the other salesmen by William Brace, sales manager, but not to claimant. Claimant left the office and went to the lagoon of the cemetery searching for John Beekman, owner of the business. He returned to the office a short time later and spoke with sales manager Bill Brace instead. In the course of the conversation it was alleged that claimant could not be counted on to keep appointments and that he was fired. An incident ensued which is alleged to have been the precipitating cause of claimant's injury.

The fact that an incident occurred on July 5, 1978 in the office of Memorial in which claimant either tripped, fell, or sat down while being ushered out the door is not in dispute. The fact that claimant was picked up by an ambulance in front of the courthouse and taken to St. Vincent's Hospital at sometime after this incident is uncontroverted. The fact that this hospitalization revealed a comminuted basilar neck and intertrochanteric fracture of the left femur which underwent open reduction and internal fixation is uncontroverted.

Claimant alleges that during the incident at Memorial he injured his left leg and hip. He was observed limping from Memorial by more than one witness, although one thought this to be his normal gait.

The question is whether or not the fracture was caused by the incident at Memorial or whether or not the unexplained fall was caused by an injury received in the incident at Memorial and that this then caused the fracture.

If an injury resulted from the incident at Memorial and if the fall near the courthouse was occasioned by the injury it is immaterial whether or not the facture occurred at the time of the first incident or second fall. See *DeShaw v. Energy*, 192 N.W.2d 777, 780 (1971).

There is no evidence to indicate that the fall outside the courthouse was caused by anything other than his left leg giving away either because it was weakened in the incident at Memorial or already fractured.

Much is made by the parties and in the proposed arbitration decision of the time when events occurred. This emphasis is misplaced. Whether the events in the office of Memorial occurred at twelve o'clock or two o'clock is not important. Whether the ambulance picked up the claimant at 2:08 or later is not important.

The brouhaha over what time events occurred has little to do with whose account of what took place is to be accepted. The versions are not at great variance. All versions indicate an incident took place in which claimant ended up on the floor. We are not concerned with the reason for the dispute which resulted in the incident beyond the fact that it did occur and was job related. Workers' compensation is a no fault concept.

There is just as much reason to believe the uncross-examined ambulance call sheet could be in error than to think that the uncontroverted facts are in error. If the actual time when events occurred were so important, perhaps a police report or hospital admitting notes could have been submitted into evidence to substantiate the ambulance call sheet.

There is no reason to believe that the incident which occurred at Memorial did not arise out of and in the course of employment. The argument between claimant and Brace was about the work. Although Brace allegedly fired claimant before the incident, it is well recognized that an employee remains in the course of his employment for a reasonable time thereafter to conclude his affairs. This would at least include the period of time necessary to remove himself from the employer's premise by a direct route.

Therefore it is found that claimant received an injury arising out of and in the course of his employment.

The defense is an affirmative one, and therefore defendants have the burden of proof of willful intent to injure another as the cause of claimant's injury. The defense must fail as the only evidence, other than verbal abuse, of claimant's intent to injure another is the laying of his hand upon the arm of Bill Brace while across the desk from him. Defendant's own witnesses don't give much support to any contention that this was done with any intent to injure Brace. The defense is therefore without merit.

The extent of claimant's disability as found by the deputy was not excepted to and therefore will stand as found in the proposed arbitration decision.

The matter of the rate of compensation is in dispute. The record only reflects the following regarding the average weekly wage upon which the compensation rate is to be determined (Transcript page 7, line 20 through page 8, line 5):

Q. Well, I believe maybe we can stipulate to this at the same time. Can we stipulate that his salary was not less than $275 a week?

MR. RAWLINGS: No. But we could stipulate that his commissions came from $275 per week.

MR. MARGOLIN: Q. Would that be—would you say that's correct?

THE WITNESS: A. Yes.

Q. And would that be true for at least the last 13 weeks prior to termination?

A. Yes.

The commission rate was fifteen percent at the time of the injury.

It would seem that this is a matter that even if misunderstood by the parties at the time of the original proceeding could be resolved between the parties without the necessity of further hearing. What the claimant was actually paid should be a matter of record with the employer and verifiable by the records of the employee.

The parties are therefore ordered to confer within twenty (20) days from the filing of this decision and agree to a stipulation of the average weekly wage and rate applicable thereto. The stipulation is to be submitted to the undersigned for incorporation in this opinion in a supplemental decision.

* * *

Signed and filed this 1st day of July, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOHN E. JACOBSEN,

Claimant,

vs.

MEMORIAL PARK CEMETERY,

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Supplemental Appeal Decision

In compliance with the appeal decision filed July 1, 1980 the parties have stipulated that the average weekly wage and rate of compensation which appeared in the arbitration decision is proper.

WHEREFORE, it is found that claimant sustained an injury arising out of and in the course of his employment on July 5, 1978 which resulted in seven and one-half (7½) percent of permanent partial disability to the left leg and healing period disability from July 7, 1978 through January 2, 1979 plus related hospital and medical expenses.

That claimant's average weekly wage is stipulated to be $275.00, that he was married with three applicable exemptions and that his rate of compensation is $172.69 per week.

* * *

Signed and filed this 18th day of July, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

HOWARD GALE JOENS,

Claimant,

vs.

CARNATION FRESH MILK, et al.,

Employer,

and

AMERICAN MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Howard Gale Joens, claimant, against Carnation Fresh Milk, et al., employer, and American Mutual Insurance Company, insurance carrier, for benefits as a result of an injury on October 21, 1977. On January 13, 1981 this case was heard by the undersigned. This case was considered fully submitted upon receipt of claimant's brief on January 23, 1981.

Issues

The issue presented by the parties at the time of the pre-hearing and the hearing is whether defendant is entitled to summary judgment.

Facts

Claimant testified that on October 21, 1977 he received an injury while working for defendant when while cleaning the front portion of his machine he slipped and fell injuring his back and neck. Claimant stated that within a couple of minutes his back was hurting to the extent he reported the injury to his foreman and saw a physician at Schoitz Memorial Hospital that same evening. Claimant stated he told the doctor he had injured his neck, back and right hand. Claimant disclosed that the doctor instructed him to stay home from work but after calling the defendant by phone, claimant felt he better go to work or he would lose his job. Claimant indicated he had no prior back problems and was first informed by the physician on October 22, 1977 that his problems were attributable to his fall at work. Claimant indicated he thought the doctor or hospital bill on October 21, 1977 was paid by workers' compensation insurance. Claimant testified that his back and neck problems have continued since the date of his injury.

On July 29, 1978 claimant left defendant. The record also discloses that on October 12, 1979 claimant filed a petition at law against the defendant covering the same injury in question here. That case was dismissed by the District Court on January 22, 1980 and claimant's appeal from that decision was dismissed on April 25, 1980. This action for arbitration was filed on November 20, 1980.

Applicable Law

Section 85.26, Code of Iowa, states in part:

1. 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. * * * *

The limitation period under the above section starts to run when the employee discovered or in the exercise of reasonable diligence should have discovered the nature, seriousness, and probable compensable character of the injury. *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256 (Iowa 1980).

Analysis

A letter from John L. Walker, M.D., dated August 12, 1977 attached to claimant's brief, is not part of the record since it was not introduced or received at the time of hearing and no reservation by claimant was made to have the same introduced.

The issue being decided at this time is not whether claimant received an injury arising out of and in the course of his employment with defendant-employer but, can he obtain any recovery even if he proves an injury on the date alleged?

Claimant's own testimony disclosed that he knew he was injured on October 21, 1977. Claimant even reported the injury to his foreman that same evening. Claimant revealed that a doctor told him the following day that his back and neck problems were caused by the October 21, 1977 injury and even though he had no prior back or neck problems before the injury, he states he has had continual problems since. However, claimant argues that he did not know the extent of his injuries until a later date and did not know they were permanent in nature until May of 1980.

It is noted that claimant's credibility regarding when he first knew his injuries were permanent in nature is destroyed by the petition in law which he filed in October of 1979. That petition not only alleges claimant's condition was permanent but contains a sworn statement by claimant that the facts contained therein were true.

The undersigned finds that claimant knew the nature, seriousness, and probable compensable character of the injury on October 21 or 22, 1977. This is supported by the fact that he reported the injury to defendant. The fact that doctors' letters agreed or disagreed as to courses or treatment does not affect the claimant's knowledge on October 21 or 22.

If claimant had filed this action when he filed the petition at law in the District Court the statute of limitations would not have run. Filing in District Court does not extend the statute of limitations before this agency.

Findings of Fact

WHEREFORE, it is found that even if claimant was able to prove he received an injury arising out of and in the course of his employment on October 21, 1977, claimant knew the nature, seriousness, and probable compensable character of the injury on October 21 or 22, 1977.

THEREFORE, defendants' Motion for Summary Judgment is sustained and claimant is to take nothing from this proceeding.

Claimant is also ordered to pay the costs of this action.

* * *

Signed and filed this 28th day of January, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

LEROY JOHNSON,

Claimant,

vs.

ELWOOD MILLER,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by the claimant from a proposed review-reopening decision wherein the claimant was awarded permanent partial disability and healing period benefits.

* * *

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

It is alleged on appeal that the deputy erred in failing to find industrial disability where there is a demonstrated loss of earning capacity. However, before an injury can be evaluated industrially, the claimant has the burden of showing that there resulted from the injury an ailment extending beyond the scheduled loss, into the body as a whole. If the claimant fails to meet this burden, the Iowa Code §85.34 will limit the compensation for the scheduled injury. *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W. 598 (1936); *Daily v. Pooley Lumber Co.*, 222 Iowa 272, 268 N.W. 598 (1936); *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 600 (1961); *Kellogg v. Shute and Lewis Coal Company*, 256 Iowa 1257, 130 N.W.2d 667 (1964).

In this case there is no evidence from any source, either medical or lay testimony, which would indicate that the claimant's injury extended beyond his right leg. On page 37 of the hearing transcript the following discussion may be found:

> THE COMMISSIONER: Okay. For the record, too, does the Claimant in any way indicate that the pathology is beyond the one extremity?
>
> BY MR. SWEET: Your Honor, for the purpose of advancing the theory that the Claimant has suffered

industrial disability, we do not claim that there is any evidence of effects of the injury in a functional sense or physical medical sense beyond the extremity. That is limited to that.

Clearly, claimant has failed to show that his injury extends beyond the scheduled member.

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

* * *

Signed and filed this 16th day of June, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LOIS L. JOHNSON,

Claimant,

vs.

CHAMBERLAIN MFG. CORPORATION/ COLLIS DIVISION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision in which it was determined that as a result of the injury claimant sustained on June 29, 1977 she received permanent partial disability of twenty (20) percent of the body as a whole.

The issues on appeal are whether a causal relationship exists between claimant's injury and her disability, and the extent of healing period and permanent partial disability.

* * *

Fifty-seven year old claimant is married and has no dependent children. She has an eighth grade education and worked on an assembly line for ten years before her employment in 1965 as a resistance welder for defendant. Claimant also sold Queensway Clothes at home but testified she is no longer able to do this.

Claimant sustained a work-related injury on June 29, 1977 when a forklift carrying a tub of wire weighing approximately 4,800 pounds ran into her. A forklift was used to remove the tub which had fallen on claimant and pinned her to the floor from the waist down. X-rays showed that nothing was broken, but claimant testified that she was bruised and hurt all over, particularly her left hip and leg.

Claimant was hospitalized under the care of Dr. Meyer, a company doctor, for approximately three weeks. She underwent whirlpool therapy, heat treatments, exercises and massage. This therapy continued after her release from the hospital. Claimant initially used a walker and then crutches to get around.

Dr. Meyer referred claimant to John P. Albright, M.D. and Randall F. Dryer, M.D. Claimant was hospitalized under their care from October 24, 1977 through November 4, 1977. She has continued to see Dr. Albright.

Defendant specifically created a clerical, light-duty job for claimant in the summer of 1978. The job involved working for one hour, receiving heat treatments for 15 minutes, and then working for another hour. Her wages were to supplement the workers' compensation payments. This job was approved by Dr. Albright. Claimant called defendant on the morning she was to return to work and said she would be late. After noon claimant's attorney called defendant and told them she had injured her back lifting a pail of water and home and would not return to work. Claimant testified that she would have returned to work that summer if she thought she could have. However, she felt she couldn't sit long enough to do the job since she experienced constant pain. Additional testimony revealed that claimant did not want to return to work for defendant at all. Her husband testified that he was very negative about her resuming work since he did not think she was capable of performing the described job.

After claimant refused to return to work, defendant requested she undergo a psychiatric examination at Franciscan Hospital in Rock Island, Illinois. Claimant refused to do so. Her husband testified that he did not think his wife was crazy and did not want her to go.

Claimant testified that she is in constant pain and cannot sit for more than five to ten minutes without discomfort. Her left leg and hip hurt, and she is unable to bear any weight on her left leg. She always uses a crutch as an aid in getting around. She can't pick anything up, even if it weighs as little as five pounds. Although she takes sleeping pills, she never gets an uninterrupted night of sleep. Claimant sits on her right side and cannot stand any pressure on her tailbone. She is able to get simple meals, dust, and do the wash. She has taken a one-week vacation; however, she traveled wrapped in pillows. Claimant went on four weekend camping trips in the fall of 1978. Claimant and her husband testified she does drive the car when she must go somewhere. Both claimant and her husband testified in their depositions that they continue to see friends, although at the hearing, claimant said she was referring to her children whenever she mentioned her friends. They no longer go dancing, a pasttime they engaged in frequently prior to the accident.

Claimant and her husband apparently feel hostility toward defendant. Testimony indicated the compensation payments did not commence on time, and they were terminated for periods of time. Consequently, University Hospitals threatened to put the late payments into debt collection. Stephen Thompson, a personnel director at Collis, contended that if payments were delayed it was because claimant would go to Iowa City without defendant's knowledge, and they would have to check the bills before paying them. Payments were terminated when claimant refused the psychiatric examination.

Claimant also testified that the company nurse called her at 10:10 p.m. to change an Iowa City appointment. The nurse, Sharon Hackney, testified she had attempted to call the previous day and again in the morning of the same day to notify claimant of a cancellation but was unable to reach anyone.

Claimant's spouse stated that when he was notified of claimant's injury, he was told she had two broken legs and a possible broken back. Thompson absolutely denied having said this. Thompson alleges that Mr. Johnson told him at the hospital that "this is going to cost Collis a million dollars" before he had even inquired about his wife's condition. Johnson testifed that he doesn't remember making this statement but that under the circumstances he could have out of frustration.

Defendants hired Victor Laughlin for a two-day surveillance of claimant. Laughlin had been given a description of claimant and had been told that her left leg was injured.

Laughlin and his wife parked about 50 yards from claimant's back door at 11 a.m. on April 7, 1979. He used binoculars and a camera and kept notes. About 2 p.m. Laughlin testified that he observed claimant sitting in a padded swivel chair. He stated she appeared to be relaxed, sitting normally and in no pain. He did not notice anything abnormal about the way she got out of the chair. At 2:50 p.m. he saw claimant approach the back door without crutches where she used both hands to shake out a rug and sweep the porch, bending 12 to 15 inches to reach the first step. Claimant and her husband contend the stairs are carpeted and do not own a broom. Claimant then moved outside, using her crutch under her right arm. Laughlin first noticed a limp at this point. The limp became more pronounced as time passed. He testified claimant noticed the van and kept glancing at it when she was outside. She returned to the house and talked to her husband. At that time she was sitting on her right hip. Laughlin was unable to determine whether she supported herself while walking in the house. Visitors came and claimant sat in the same chair for over two hours, shifting her weight back and forth according the Laughlin. Since she used her crutch under her right arm Laughlin assumed he had been given erroneous information and that her right leg was injured. The interior of the house was observed through a double glass door. The curtains were drawn the following day, so he did not stay.

At the time of the surveillance Laughlin had been licensed for a detective for about 30 days. He was also a juvenile probation officer which he testified also involved investigative work. Laughlin's wife confirmed his observations.

Dr. Albright, an orthopedic surgeon, first saw claimant October 24, 1977. He testified that claimant has "no damage to her nerves, that give objective findings, permanent problem." He further stated, however, that there may be some physiological changes not detected by examination. Claimant was not observed in any inconsistent behavior at the hospital during her stay in 1977. He noted techniques used to determine whether claimant's pain was real. They included nurses' observations, testing the same reponse in different situations, and putting a heel counter in her shoe. Dr. Albright stated that there was no doubt in his mind that claimant was feeling pain and that this was consistent with his observations. He described claimant's pain as "a causalgia type of pain . . . which again is a minor injury to the neurologic system." Although Dr. Albright felt he was unqualified to give a psychological diagnosis, feeling the was better left to an expert in that field, he did state "that there is a definite psychological problem here, and that is compounding her present status."

Dr. Albright defined malingering as a conscious effort at fooling another person and stated that neurosis was not under voluntary control. Refusal to work or to see a psychiatrist might indicate someone was malingering. Dr. Albright stated that shaking rugs, sweeping, walking without a limp, and getting in and out of a chair without any great impairment (claimant denied all of these) would be inconsistent with his medical opinion. Dr. Albright did not know of Mr. Johnson's statement about costing the company a million dollars, but said that this would raise the index of suspicion of malingering.

Claimant properly uses her crutch under her right arm according to Dr. Albright. This benefits her left extremity.

Dr. Albright stated that claimant does have left calf and thigh atrophy from lack of muscle use; this is consistent with her pain syndrome. Despite his earlier observations he saw no reason not to take claimant at face value.

In a letter dated March 2, 1979 Dr. Albright stated that claimant "did sustain very serious trauma and her present disability is legitimate and was caused by that injury on the job. He noted that claimant had reached her maximum recovery since her condition had been stable over the past year. He considered her 80% disabled on a functional and industrial basis. Defendants object to this rating because it is for the commissioner to determine industrial disability and because it is only a subjective evaluation based upon pain.

Dr. Dryer would not rate claimant's disability but did state she could not return to heavy manual labor.

Stanton L. Goldstein, M.D., a neurological surgeon, also noted a 1cm. left leg atrophy but was unable to access claimant's pain, motor power, and sensory perception. He felt she would never return to work.

The deputy determined that a causal connection existed between the disability and the injury. However, he noted claimant's demeanor during the hearing. Claimant evidently sat still through one half hour of Mr. Laughlin's testimony whereas during other testimony she appeared disinterested and in great pain. He noted claimant evidently never intended to return to work and that she lacked motivation. It appeared to the deputy that claimant's husband and possibly claimant saw this injury as an opportunity for personal gain. Defendant, attempting to work with claimant, created a position which Dr. Albright authorized to which she has never returned.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 29, 1977 is the cause of the 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).

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).

The deputy's proposed decision correctly determines that claimant sustained her burden in proving that she had permanent partial disability which was causally connected to the injury she received on June 2, 1977.

It is not clear that the request that claimant go to Franciscan was for treatment or examination. However, as no definitive diagnosis had been made that claimant was in need of psychiatric treatment, an examination would necessarily take place first. Therefore, claimant's refusal was of a psychiatric examination outside of the state. Benefits cannot be suspended except for a refusal to take part in a reasonable examination within the state. Code §85.39.

As claimant's refusal was not of offered medical or surgical treatment that does not endanger a claimant's life or health and that is shown to cure the disability for which compensation is sought, then the theory of *Stufflebean v. City of Fort Dodge*, 233 Iowa 438, 9 N.W.2d 281 (1943) (if it in fact stands for the proposition that under such circumstances compensation may be reduced, suspended or forfeited) does not apply.

Iowa Code §85.34(1) provides that healing period compensation continues until the employee has returned to work or competent medical evidence indicates that recuperation from the injury has been accomplished, whichever comes first. Industrial Commissioner's Rule 500—8.3 states that "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 comes first." Therefore, healing period should have continued until March 2, 1979, when Dr. Albright stated that claimant's condition had been stable over the past year and that she had reached maximum recovery.

In addition, it should be noted that defendant made efforts to create a clerical, light-duty position specifically tailored to claimant's physical needs in order to facilitate claimant's return to the work force. The position was approved by Dr. Albright. For no perceivable reason, claimant refused to return to the created position. Defendant made great efforts to accommodate claimant's needs and should not be penalized for claimant's refusal to accept the offered work. If employers are to be held accountable for their failure to accommodate an employee after an injury, they should not be held unduly liable when acceptable attempts at rehabilitation and reemployment are arbitrarily rejected. Claimant's loss of earning capacity or industrial disability is therefore diminished accordingly. *Cf. McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980); *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980).

WHEREFORE, it is found:

That claimant received a permanent partial disability of twenty (20) percent of the body as a whole as a result of the injury sustained on June 29, 1977.

That medical evidence indicated that recuperation had occurred from the injury on March 2, 1979.

* * *

Signed and filed this 31st day of October, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROGER ALLEN JOHNSON,

Claimant,

vs.

BRADY MOVING AND STORAGE COMPANY,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

Introduction

This is a proceeding in review-reopening brought by Roger Allen Johnson, claimant, against Brady Moving and Storage Company, employer, and CNA Insurance, insurance carrier, for the recovery of further benefits as the result of an injury on May 25, 1977. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding is $91.06. A hearing was held before the undersigned on September 25, 1979. The case was considered fully submitted on November 13, 1979.

The record consists of the testimony of claimant and John Duvall; claimant's exhibits 1—5; and the deposition of John A. Grant, M.D.

Facts

Claimant, who started working for defendant-employer in September or October of 1976, received an injury which arose out of and in the course of his employment with defendant-employer on May 25, 1977. Claimant testified he worked on defendant-employer's loading dock with another employee and was trying to fill an order of large tires when a heavy tire, with cleats weighing approximately 700 pounds, came off the top of a pile of

tires and hit him on the shoulder pushing him to the ground. Claimant stated that he was sore after the incident and that evening had a sore back, but finished out the work week. Claimant indicated that the following week he drove a forklift truck but went to the hospital on June 6, 1977 as a result of "freezing up" on his way from his bedroom to his bathroom. Claimant disclosed that while in the hospital his pain decreased until he again got on his feet.

On July 7, 1977 claimant saw Robert A. Hayne, M.D., in Des Moines and was admitted to the hospital with sharp pain in his lower back, left hip and down the front of his left leg. A myelogram was taken and an operation was performed. Claimant testified he was in the hospital for two to three weeks. Claimant indicated that after the operation he had numbness in his left leg below the knee as well as the top of his foot and toes. After leaving the hospital, he was seen by Dr. Grant who again put him in the hospital on bed rest and therapy. Claimant stated that he continuted to be treated by Dr. Grant until he went to Arkansas. Claimant revealed that he has not worked or attempted any job since June 6, 1977. Claimant testified he presently has constant pain in his lumbar region, left hip and leg. Claimant stated he does not sit very long or walk very far.

On cross-examination it was revealed by claimant that he had several injuries to his back prior to the injury in question and has also had several operations. Claimant revealed that as far back as 1964 he had a 25 pound weight restriction. Claimant disclosed that in April of 1968 he had at least been rated at 30 — 35 percent disabled and was advised to seek light duty employment or sedentary employment by his doctor.

John Duvall, who is president of defendant-employer, in answer to questions directed to him, testified:

Q. Did the information you receive in response to your questions reflect the same information that Mr. Johnson testified to here today?

A. To some extent.

Q. Are you saying to some extent it did not?

A. That's true.

Q. To what extent did it not reflect the testimony of Mr. Johnson this morning?

MR. GILL: Well, I think it calls for hearsay, but I am going to let it come in, because I am interested myself. So let's find out what you have to say.

A. My investigation revealed that the tire brushed the insured on the shoulder. It did not knock him to his knees. Mark asked him if he was all right, and he said, "Sure." It was nearly coffee break time, and he finished out the rest of the day. In fact, he worked the remaining days of that week.

Dr. Grant, in his report of March 17, 1978, stated:

History reveals that in the 5/25/77, a 700# tractor tire fell striking the patient from a distance of 8' above him. He was struck on the left shoulder and apparently hospitalized by Dr. Stitt in Fort Dodge. The pain continued in his back and radiated to his left leg and he was referred to Des Moines where he was operated upon by Dr. Robert Hayne, 7/11/77, with the finding of compression of the first sacral and fifth lumbar nerve roots on the left with a protruded disc at the fourth lumbar interspace. He states that the left leg has been numb following this surgery and although the pain improved for awhile, it has become progressively more severe. He now relates that he still has back, hip, and leg pain which radiates into the foot and the center of the toes. He has not worked since the injury and after he is on his feet for some period, all symptoms increase. He reportedly saw Dr. Hayne last on 1/78 and was considered by Dr. Hayne to be improving satisfactorily. Because of progressively increasing symptoms, he was referred to my office on 2/27/78, with the history as described. At this time, he was placed on Naprosyn and given IM Kenalog. Because of progressive increasing symptoms and pain, he was hospitalized by Dr. Lang.

On examination at this point, he gets up with a significant reluctance to bear much weight on the left. He stands slightly tilted to the right and essentially there is no tilt left and tilting to the right of the lumboscaral spine is only about 10 degrees. I can detect no extension and he flexes only within about 24-28" of the floor. There is some tenderness over the lower back scar. Deep tendon reflexes are hypoactive at the knees and there is a question of whether he had an absence of the left ankle jerk. Straight leg raising is possible to about 60 degrees right; 50 degrees left.

In his report "to whom it may concern," dated March 24, 1978, Dr. Grant stated:

Roger Johnson, age 40, has been seen off and on in my office since 1966 with problems referrable to his back. History reveals he underwent a spinal fusion in 1961 from L-4 to the sacrum performed by Doctor Sebek of Fort Dodge. He had an exploration of L-3, 4 in February, 1967, and a bulging disc was found. He was reoperated in October of 1967 exploring both right and left sides of L-3, 4 with significant scar tissue being encountered. From then until the present time he has been seen off and on in my office for recurring episodes of back discomfort. History further reveals that he was involved in an auto accident in October of 1968, another accident in April of 1969, another accident in June of 1970, another accident in October of 1972, in February of 1974 when he was working on a dock unloading tires and he slipped carrying a 60 pound box, and another accident in May of 1975 when he fell from an elevator. His most recent injury was when a 700 pound tire fell a distance of 8 feet striking him on the left shoulder. This resulted in repeat laminectomy by Dr. Hayne in Des Moines in July of 1977.

Presently, Mr. Johnson is in the Mary Greeley Hospital because of recent acute symptoms of back

distress. Without question, based on his past history, my acquaintance with this man over roughly 12 years, his penchant for recurring accidents, his intellectual limitations, and his rather significant limitations to motion imposed by these longstanding back complaints, I feel it is impossible that he will ever be able to perform significant laboring work. In my estimation he can tolerate work that does not require any heavy lifting, repeated bending or twisting, standing for long periods in one place or sitting for long periods in one place or any work that requires walking on slippery, uneven surfaces of [sic] climbing. I realize the limitations this imposes on job possibilities, but it would appear to this examiner that these are the restrictions demanded by his present situation.

On March 24, 1978 Dr. Grant also wrote a letter to claimant's attorney in which he stated:

> I appreciate the correspondence you forwarded referrable to Doctor Hayne's evaluation of Mr. Johnson. I am enclosing, furthermore, the social security letter and a second copy for your files. As you can see, I feel there is no way this man can do any heavy work in the future and it's based on many things. He is currently in the hospital and, as so often the case, he is difficult to evaluate. I appreciate your confusion in reference to establishing a percent of partial permanent physical impairment on this man. Doctor Hayne's comment of 8 percent disability as the usual amount of disability resulting from a lumbar laminectomy for a herniated disc or related involvement such as scar tissue or bony growth is close to what I usually establish for this procedure. I use the "Manual For Orthopedic Surgeons In Evaluating Permanent Physical Impairment" which is published by the American Academy of Orthopedic Surgeons. In that they establish a 10 percent whole body permanent physcial impairment and loss of function to the whole body based on surgical excision of disc, no fusion, good results and no persistent sciatic pain. Having had the opportunity of seeing Mr. Johnson for roughly 12 years with his back problems, I think awarding him an 8 percent rating is very optimistic. Certainly, in review of his history he has been through a great deal with his back problems. In my estimation he demonstrates the surgical excision of disc on multiple occasions with fusion, persistent pain and stiffness aggravated by even minimal lifting and necessitating significant modifications of all activities requires heavy lifting. On that basis my current rating would remain as it was in the past at 35 percent regardless of the result of his recent surgery but not increased by any factors of his recent surgery. I appreciate the significant discrepancy in this, and I can only state that this is the way I would interpret his present situation.

Dr. Grant's desposition reveals that he first saw claimant in May of 1966 after a history of back problems which included a previous laminectomy and fusion. Dr. Grant testified that subjectively claimant's motion was a little more restrictive after the injury in May of 1977 than before. He also indicated claimant had a negative ankle jerk. Dr. Grant disclosed that his notes did not reveal that claimant complained of numbness in the left leg. Dr. Grant testified that in February of 1977 he performed a second laminectomy on claimant. In September of 1967 claimant was complaining of pain down the front of the thigh of his left leg. On March 14, 1967 Dr. Grant wrote a letter indicating that claimant should seek work that did not involve heavy lifting or repetitive bending and testified that recommendation would not have changed. Dr. Grant also stated that Dr. Hayne's surgery was in the middle of part of the existing fusion rather than at one end of fusion. In regards to a report of February 9, 1974, Dr. Grant stated he opined at that time that claimant had a permanent disability of 40 percent of the body as a whole. Dr. Grant testified:

> Q. Okay. And lastly I would like to refer you to your letter of March 24th, 1978, just entitled "To whom it may concern". In the second paragraph of that letter, you stated that "In my estimation, he can tolerate work that does not require any heavy lifting, repeated bending or twisting, standing for long periods in one place, or sitting for long periods in one place, or any work that requires working on slippery uneven surfaces" and I believe that should be "or climbing".
>
> Doctor, are these essentially the same restrictions that you recommended for Mr. Johnson as early as 1966?
>
> A. Roughly the same, yes.

Dr. Hayne, in his history and physical examination of claimant on July 7, 1977, stated:

> The patient's PAST MEDICAL HISTORY reveals that he had a laminectomy in 1961 for a lumbar disc. This was carried out by Dr. Roy Sebek. He states that a spinal fusion was carried out at that time. In 1968, because of recurrent symptoms, exploration was carried out b [sic] Dr. Grant. He was told that some scar tissue was removed. Eight months later a second operative procedure was carried out by Dr. Grant in Ames. The patient then seemed to make quite a good recovery and returned to work after a period of several months and worked steadily up until the 6th of June of this year.

Dr. Hayne revealed, in a report dated November 28, 1977, that claimant would have reached maximum recovery on December 1, 1977. In his report of March 6, 1978, Dr. Hayne stated:

> Roger A. Johnson was given an 8% disability from the surgery which I carried out on July 11, 1977. This should not actually be stated to be an 8% over and above the 35% which has been previously given as an estimate of Mr. Johnson s [sic] disability, this is before the operation which was carried out on July

11, 1977. Hopefully this disability will be reduced with this surgery to below that which had been given him before the surgery was carried. In any case, I feel it will be necessary to wait a somewhat longer time, perhaps another month or two before giving an estimate of the permanent disability remaining after the surgery of last July. In other words his final disability will be the 8% resulting from the surgery of July, 1977, plus that which remains from the 35% disability which had been given to him before the operative procedure of July, 1977. The 8% disability is the usual amount of disability resulting from a lumbar laminectomy for a herniated disc or related involvement such as scar tissue or bony overgrowth.

Issues

The issues presented by the parties at the time of the pre-hearing and the hearing are 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. Also during the hearing, an issue arose as to whether defendants could amend their answer to include an affirmative defense.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 25, 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). However, the expert medical evidence must be considered with all other evidence introduced bearing on causal connection. *Burt v. John Deere Waterloo Tractor Works, supra*.

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). *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.

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 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. * * *

Also see *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181 (Iowa 1980).

Analysis

Defendants, during the hearing made the following motion:

> MS. KELLEY: Okay. Your Honor, at this time the Defendants would move, pursuant to Rule 88 of the Iowa Rules of Civil Procedure, to amend their answer to conform to proof and we would add to our answer, paragraph 10, that the Employer and Insurer allege further as a matter of defense, that the Claimant is barred from seeking compensation in this matter, in that he A, knowingly and willingly made fraudulent misrepresentation to the employer as to the status of his physical condition prior to their employing him; B, that the Defendants in the employment situation relied upon his representation to them, and that it was a substantial factor in their hiring them; and, C that there is a causal connection between his misrepresentation or omission and the injury for which he is claiming compensation today; and the employer would pray as previously in their answer.

The undersigned does not find any authority for the proposition that an employee's failure to tell the truth on an employment application is an affirmative defense. Furthermore, even if the above was an affirmative defense, defendants had knowledge of the contents of claimant's application and cannot claim surprise. Defendants' motion to amend their petition is overruled.

The failure of claimant to mention his previous back problems on the employment contract is considered in determining claimant's credibility. Claimant also failed to mention his employment where he received injuries. The

undersigned does not believe claimant when he states the reason he did not make mention of his physical problems is because he didn't know how to spell the words. All claimant would have had to do was write "bad back" on the application. On cross-examination claimant appeared to have a "convenient loss of memory." It was noted by the undersigned that during John Duvall's testimony, he did not look at witness, at either attorney or at the undersigned, but just sat with a bowed head, staring at the floor. Claimant did not appear to be a person in pain but one who could not look at the truth. For the above reasons and claimant's lack of candor, his credibility is destroyed.

Claimant's lack of credibility is important in that the only other evidence regarding the incident of the injury itself is the following hearsay testimony which was received without objection:

> My investigation revealed that the tire brushed the insured on the shoulder. It did not knock him to his knees. Mark asked him if he was all right, and he said, "Sure." It was nearly coffee break time, and he finished out the rest of the day. In fact, he worked the remaining days of that week.

This evidence, which is relied on, is not relevant as to whether or not an injury occurred which is not an issue before the undersigned but does shed light on the severity of that injury.

As indicated by the legal principles previously stated, claimant is entitled to recovery for the aggravation of a preexisting condition but only to the extent of that aggravation.

In his letter of March 6, 1978, Dr. Hayne, claimant's treating physician, rates claimant's permanent disability resulting from his surgery in July of 1977 as eight percent of the body as a whole. It is noted that this rating was given on an incomplete history. It appears that Dr. Hayne's history of July 7, 1977 reflected that claimant worked steadily from 1967 or 1970 to 1977 without other injury. In his letter "to whom it may concern," dated March 24, 1978, Dr. Grant, who was not shown to be a qualified expert in industrial disability, opined that claimant would not in the future be able to "perform significant laboring work." In his letter to Mr. Updegraff, dated March 24, 1978, Dr. Grant opined that claimant's permanent disability as a result of the operation in July 1977 would be greater than eight percent. Dr. Grant, however, qualifies that eight percent figure by saying that claimant's total disability would not be increased by the July 1977 surgery. As Dr. Grant pointed out in his deposition, the July 1977 surgery was in an area which had already been fused.

Claimant is entitled to have his disability rated industrially which takes into account factors other than just his functional disability. Claimant is 42 years old and only completed seven years of school. All of claimant's jobs have required heavy physical labor. Claimant testified that he has done construction work, laid field tile and has been a school custodian. Claimant also indicated he has done farm work and factory work. In September or October of 1976 he started with defendant-employer, working on the loading dock which required "a lot of lifting."

Another factor in determining a person's industrial disability is a person's ability to do a job for which he is fitted prior to the injury. This record is not totally unique but it reveals that claimant was not fitted for the work he was doing prior to his injury. It is clear from the medical evidence presented that claimant was not physically capable of doing the work.

In his deposition, Dr. Grant stated that the restrictions on claimant before and after this injury would have been essentially the same. Therefore, it cannot be said that after the accident claimant is no longer fitted for a position that he previously held because he wasn't fitted for that position prior to the injury.

Claimant may also contend that because of the holding in *McSpadden*, considerations should be given to the fact that defendants would not offer him a job after the injury. The problem with such a contention is that defendants would not have hired claimant before the injury if claimant had been truthful with them. Therefore, the fact that defendants would not have offered claimant a job after the injury does not in anyway reflect on the increase in claimant's industrial disability. It is determined that as a result of his injury on May 25, 1977, claimant received a ten percent permanent partial disability to the body as a whole.

Dr. Hayne, in his report of November 28, 1977, opined that claimant would reach maximum recovery on December 1, 1977. That date is found to be when claimant in fact reached maximum recovery.

Findings of Fact

WHEREFORE, it is found:

Defendants had knowledge of claimant's failure to indicate any previous medical problems on his application for employment at the time of the filing of their answer.

Claimant was not truthful when he filled out his employment application with defendant-employer.

The tire, which claimant contends caused his injury, brushed him on his shoulder but did not knock him to his knees.

Claimant was not physically fit to do the work he was engaged in prior to his injury.

Defendants would not have hired claimant if claimant had told them of his physical restrictions or previous injuries.

As a result of his injury on May 25, 1977, claimant reached maximum recovery on December 1, 1977.

As a result of his injury on May 25, 1977, claimant received a permanent partial disability of ten (10) percent of the body as a whole.

THEREFORE, defendants are to pay unto claimant twenty-five (25) weeks and four (4) days of healing period benefits at a rate of ninety-one and 06/100 dollars ($91.06) per week and fifty (50) weeks of permanent partial disability benefits at a rate of ninety-one and 06/100 dollars ($91.06) per week.

Defendants are to be given credit for any healing period benefits or permanent partial disability benefits previously paid.

Defendants are to pay the costs of this action.

Interest on this award is to be paid by defendants as provided by Section 85.30, Code of Iowa.

A final report is to be filed when this award is paid.

* * *

Signed and filed this 23rd day of July, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

WESLEY R. JOHNSON,

Claimant,

vs.

CHICAGO BRIDGE & IRON WORKS,

Employer,
Self-Insured,
Defendant.

Ruling

NOW on this day the matter of defendant's motion for more specific statement comes on for determination. No resistance to the motion has been filed by claimant.

On February 17, 1981, defendant filed a motion for a more specific statement requesting that claimant be more specific in stating the alleged amount of permanent disability, the names of doctors whom claimant has seen and the amount of section 85.27 expenses incurred.

Industrial Commissioner Rule 500—4.35 permits the application of the Iowa Rules of Civil Procedure to contested case proceedings before this agency unless the provisions are in conflict with chapters 85, 85A, 85B, 86, 87 or 17A or obviously inapplicable.

Iowa Rule of Civil Procedure 112 provides:

> A party may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him to plead to it and for no other purpose. It shall point out the insufficiency claimed and particulars desired.

Comments from the advisory committee relating to that rule are as follows:

> This motion will no longer lie to obtain evidence or information necessary to prepare for trial as distinct from preparation to plead. Discovery should be pursued under Rules 135-139, 124-134.
>
> "'By rephrasing the Code sections it is hoped to avoid the indiscriminate practice of moving for, and ordering, amendments not actually needed but which cause delay and expense. Rule 112 above was also adopted to correct a peculiarly needless abuse of the former practice.'"

The opinion of the Iowa Supreme Court in *Wunschel v. Hoefer*, 241 N.W.2d 393 (Iowa 1976) at page 896 states that "[a]n order sustaining a motion for more specific statement should be entered only if the movant shows the pleading to which the motion is addressed is so indefinite he is unable to respond to it."

This matter is not one in arbitration, but one in review-reopening. A final report received in this office on June 25, 1980 shows defendant has paid both weekly benefits including one hundred weeks of permanent partial disability and medical benefits. It is clear that defendant already has some information related to this claim. Discovery is available to defendant to obtain other information. Defendant has not alleged that claimant's petition is so indefinite that it is unable to respond and this deputy industrial commissioner cannot so find. On reaching that conclusion, the undersigned is not unaware of *Hoenig v. Mason & Hanger*, 162 N.W.2d 138 (Iowa 1968), a case dealing with a workers' compensation matter. That case is distinguishable from the one here presented in that it involved a petition for arbitration.

WHEREFORE, it is found:

That claimant's petition is not so indefinite as to render defendant unable to respond.

THEREFORE, it is ordered:

That defendant's motion for a more specific statement must be and is hereby overruled.

* * *

Signed and filed this 4th day of March, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

JOHN P. KAALE,

Claimant,

vs.

ROSE-WAY, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 14, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter.

The employer appeals from an adverse ruling on the special appearance filed by Liberty Mutual Insurance Company which held that the employer did not have insurance coverage for workers' compensation.

There was a hearing on the matter on June 17, 1980, and the record was reopened to take more evidence on July 18, 1980. At the first hearing, Doris Rosenberger, Richard A. Kennicker, Thomas Vernon Fry, and James Kerr testified. Also at that hearing, the following exhibits were taken into the record: Liberty exhibits 1, 2, 3, (exhibit 4 was not offered), and exhibits 5, 6, and 7, all of which were taken into the record. The following exhibits were taken from the employer, Rose-Way: A, B, C, D, E, F, G, H, I, J, K, (L was not offered), M, N, and O all of which were taken into the record.

At the second hearing, the testimony of Jeffrey Blodgett and James Kerr was taken. The following exhibits were introduced on behalf of the employer and taken into the record: 1, 2, 3, and 4; the following exhibits were introduced by Liberty Mutual and taken into the record: A, B, C, D, E, F, G, and H. All of the testimony was transcribed and is a part of the record on appeal. The deputy's ruling of October 31, 1980 contains a description of all the testimony and a list of the exhibits. This description was checked against the contents of the file, and the description was found to be accurate.

Strictly speaking, the appeal is interloculatory, but that fact does not mean the appeal cannot be decided. It is unclear that the paramount issue facing the parties is that of the insurance policy coverage. That matter will be decided without the necessity to resort to any other issues.

The findings of fact and conclusions of law of the hearing deputy are correct and his decision is affirmed with the following amplification. The issue on appeal, as before the hearing deputy, is that of insurance coverage; concurrently there is an issue of estoppel. The parties agreed that the issue could be decided by the special appearance, although that procedure is a doubtful way to raise the issue.

In January 1979, the employer became a part of an assigned risk pool for purposes of obtaining workers' compensation insurance coverage. The insurance company, Liberty Mutual, wrote a policy for one year. The employer, in order to renew the policy, was to make a deposit of $13,093.00 before January 24, 1980. Through inadvertence, the check was not mailed by the employer until January 29, 1980. (These facts are set out with detail and clarity in the hearing deputy's decision.)

In *Paveglio v. Firestone Tire & Rubber Co.*, 167 N.W.2d 636, 638 (Iowa 1969), the court lists the four 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.'"

The employer argues that it was at a disadvantage because its people had never dealt directly with an insurance company before, that during the period the policy was in effect, there was some confusion over rate classification, and that Liberty Mutual had accepted late payments in the past. The employer cites no authorities which are contrary to *Paveglio*. The plain facts appear to be that the employer knew it owed the $13,093.00 but that, through no fault of the Liberty Mutual, the check was not mailed until after the policy period had expired. An analysis of the evidence in this case fails to uncover a false representation or concealment was allegedly made, an intent of the party making the representation that the party to whom it is made shall rely thereon, or any reliance. The evidence does indicate that the policy was for a definite period of time and that the time expired before any renewal was effectuated.

WHEREFORE, it is hereby found and held as a finding of fact, to wit:

1. That the Liberty Mutual Insurance Company sold Rose-Way, Inc. a workers' compensation insurance policy covering the period January 24, 1979 to January 24, 1980.

2. That said policy of insurance was for a specific term and for a specific duration.

3. That renewal of said policy depended upon action by Rose-Way.

4. That the necessary act to renew the policy, payment of thirteen thousand ninety-three and 00/100 ($13,093.00) was not accomplished within the time limit.

5. That there was no workers' compensation insurance policy in force between Liberty Mutual and Rose-Way during the period of January 24, 1980 to February 1, 1980.

6. That the record contained no evidence of an estoppel by the Liberty Mutual Insurance Company.

THEREFORE, the special appearance filed by Liberty Mutual Insurance company is hereby sustained.

. . .

Signed and filed at Des Moines, Iowa this 25th day of February, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Settled.

FRED M. KAIL/fna "BROWN",

Claimant,

vs.

BANZHAF ROOFING & SHEET METAL,

Employer,

and

BITUMINOUS CASUALTY CORP.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse review-reopening decision.

This decision, which differs in result from the proposed decision, will constitute the final agency decision under §17A.15(4).

The question at issue in this final agency decision is the extent of claimant's disability as a result of a back injury of June 18, 1976.

The facts may be stated briefly because the question can only be resolved by analysis of the expert opinion found in the record. Claimant hurt his back in a lifting or pushing incident on June 10, 1968 and was paid 2 5/7 weeks compensation. On June 18, 1976, claimant again strained his back, this time while loading a truck; as a result of that incident, he was paid weekly compensation for 10 3/7 weeks. On June 19, 1978, claimant was severely burned with hot tar when his leg gave out, he fell, and spilled the hot liquid on his arms, trunk, and face.

There is in the instant case *no* claim for disability as a result of the 1978 injury. As stated above, the only issue concerns the 1976 injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 18, 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 *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 375, 112 N.W.2d 299, the court quotes with approval from C.J.S.:

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

"The opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra*, p. 907. Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances." *Bodish v. Fischer, Inc.*, 257 Iowa 516, 521, 133 N.W.2d 867 870 (1965).

Claimant testified that, even though he was released to return to work after the 1976 injury he had "continuous back pain and... had trouble with the left leg just going out completely" (Tr. 18). He ascribed his back pain and left numbness to the 1976 incident (Tr. 18-19).

Claimant was treated by a number of practitioners over the years; the only expert evidence concerning a 1976 injury comes from John W. Hughes, M.D. and Sinesio Misol, M.D.

Dr. Hughes saw claimant for his back pain five times in July and August 1976. According to Dr. Hughes, claimant recovered from the 1976 injury (Tr. 11, 12); even though Dr. Hughes diagnosed a protruded disc at L4-L5, claimant "responded well to conservative management" (Tr. 22). The whole tenor of that surgeon's testimony was that claimant recovered from the 1976 back incident.

Dr. Misol's opinion, in essence, is not much different. First, Dr. Misol's letter-report of March 15, 1979 does not use the 1976 injury as a premise for expert opinion. On the contrary, Dr. Misol says, "[i]t is also my opinion that based on the history given me by the patient that this [the disc herniation] *probably* took place while he was at work and *pushing that particular heavy barrel* because this is when the symptomatology apparently started" (emphasis supplied). The mention of the barrel is more constant with the 1968 incident.

This conclusion is borne out in Dr. Misol's deposition. In the history recital, he states:

> He was not very specific as to the date so, '66, '67 was the best that I could come up with. He said he was pushing a barrel that was approximately 65 pounds of weight and as he was doing this, his left foot slipped and he twisted his back.
>
> His back problems started at that point, he thought. Off and on there would be back discomfort so over the years he had been going to a chiropractor for treatment.
>
> In 1978 he said he was still having trouble with his spine, that once in a while his left leg would feel weak. It would give out and he was carrying some hot tar one day. Again he was at work and the left leg just gave away so he fell and he burned his right forearm, part of the arm and his chest (p. 5).

Dr. Misol also stated that claimant had a fall in 1975 (p. 7) and that in 1975 or 1976 when "he was bending over and felt something in the back like a little pop or a little snap. He continued to work, however" (p. 12). Later, claimant asks as follows:

> Q. Are you in a position to give any opinion based on your study of Mr. Kail, your examination, both the

myelogram, the EMG, the X-rays that have been done, the physical tests that you gave in your office and all of the other medical information that you have in front of you today, to give a reasonable degree of medical certainty any opinion as to the impairment, if any, that Mr. Kail may be suffering as a result of *this* injury and particularly, are you able to state to what percent of his whole body may be impaired?

A. Yes. What I can tell you, of course you will remember, is based on the information gathered one year ago in February—January and February of 1979.

Q. I'm asking your opinion, of course, as of that time.

A. Yes. At that time, based on the limitation of movement in his spine and based on the myelographic findings that did corroborate my opinion that he had this mild herniation of the disc, I think the amount of physical impairment would be in the neighborhood of 15 percent (pp. 20-21, emphasis supplied).

The referrent for "this injury" is a mystery. The questions and answers leading up to that particular question make no reference to the 1976 injury. In other words, the premise upon which Dr. Misol bases his assessment of disability is incomplete.

Even if it could be said that Dr. Misol's testimony favors claimant (and that is extremely doubtful), the testimony of Dr. Hughes carries more weight because, whereas the physicians are both orthopedic specialists, he was the treating doctor for the 1976 injury.

It is, of course, possible for a claimant to aggravate an intervertebral disc problem, return to work for almost two years, and then have a further problem result from the original injury. However there is no expression in the record of even remote clarity which would bring one to this conclusion, the only conclusion reachable if claimant is to recover.

WHEREFORE, it is hereby found as a finding of fact, to wit:

That on June 18, 1976, claimant sustained an injury in the nature of an aggravation of a protruding intervertebral disc when loading a truck for his employer.

That as a result of said injury, claimant was temporarily disabled from work for a period of ten and three-sevenths (10 3/7) weeks.

That claimant's correct compensation rate is one hundred forty-nine and 02/100 dollars ($149.02) and that he was paid this weekly amount for a period of ten (10) weeks, three (3) days.

That claimant's condition improved to the point that he recovered from the actual effects of the injury and that his underlying back problems are traceable to another time.

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

. . .

Signed and filed at Des Moines, Iowa this 19th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

GERALD KALER,

Claimant,

vs.

NORTH IOWA EXPRESS, INC.,

Employer,

and

GREAT WEST CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

I. INTRODUCTION

By order of the industrial commissioner filed February 6, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from an adverse review-reopening and §85.27 decision.

. . .

This appeal decision will be the final agency decision in this matter in that it modifies the review-reopening decision.

II. REVIEW OF EVIDENCE

It is the employee's claim that the injury of August 9, 1978, of the whiplash variety, caused continuing physical and mental disability. An early medical record is one of October 24, 1978, signed by A. G. Chanco, Jr., M.D., of Mason City, who diagnosed an acute strain of the cervical spine and ecchymosis of the right leg. Also, on November 20, 1978 Wayne E. Janda, M.D., a qualified orthopedic surgeon from Mason City, diagnosed a cervical strain. On December 14, 1978, Sant M. S. Hayreh, M.D., a neurologist from Mercy Hospital in Mason City, stated that the claimant's neurological examination was essentially normal, "although it is still possible he has post-traumatic headaches, but at present I think he has muscle contraction headaches along with musculo-skeletal pain due to degenerative disease of the cervical spine." Also, Dr. Hayreh stated that claimant had a compensation neurosis and some functional overlay.

W. Miles Wallace, M.D., a member of the department of neurology at the Mayo Clinic in Rochester, Minnesota, on February 27, 1979, reported that he did not find any neurologic deficit in claimant and that his impression was

that claimant was exaggerating his complaints "and his symptomatic complaints are out of proportion to his functional impairment."

On September 27, 1979, Dr. Janda reported that he had seen claimant August 21, 1979 and that the "healing period has terminated."

John R. Walker, M.D., of Waterloo, reported on October 31, 1979, that x-rays showed a "definite cervical spondylosis with some narrowing and spurring posteriorly between the bodies of C-5 and C-6." Dr. Walker added that it was his feeling that the claimant "does really have some functional overlay" and that a psychiatrist should diagnose it.

On January 7, 1980, Ronald M. Larsen, M.D., a psychiatrist from Mason City stated that it was his belief "that the secondary depression follows directly from the patient's inability to continue working and restriction of activity" and generally connects the psychgological problems to the injury. Then, on January 21, 1980, Dr. Janda comes around and states that "it would be fair to say that the latent condition of degenerative cervical disc with hypertrophic arthritis was aggravated by the work injury" and that his "secondary depression" effected the physical recovery. Likewise, on January 31, 1980, Dr. Walker ties up the claimant's mental complaints to the "inability to continue working in his restriction of activity."

Then, on July 11, 1980, Michael J. Taylor, M.D., a qualified psychiatrist, states:

> Based on all of the medical information available to me and based upon the information I received from Mr. Kaler during my interview with him, I can offer the following opinions and recommendations. It is my opinion that Mr. Kaler did suffer from a mild depression secondary to a number of causes including a number of personal and financial problems, a change in his employment status prior to his August, 1978 accident, and the sequalae to his August, 1978 accident. At the time of my evaluation of him, he displayed no psychiatric residual limitations of his functional capacities and, from a psychiatric point of view, was fully capable of returning to his usual and customary employment.

III. ISSUES

Claimant states the issues in his brief as follows:

1. Did the Deputy Industrial Commissioner err in determining that claimant had not sustained a permanent partial disability due to the fact that such matter was not properly before the Deputy Commissioner?

2. Did the Deputy Industrial Commissioner err in determining that claimant had sufficiently recovered as of June 14, 1979 so as to be able to resume acts of gainful employment, thereby limiting claimant's healing period benefits to 44 weeks and 2 days?

The following is taken from the hearing transcript:

MR. DUCKWORTH: Your Honor, just to clarify the record, I believe we should note that according to the pretrial order, that the issues to be resolved at this hearing are whether there is a causal relationship between the alleged injury and disability and whether the claimant is entitled to benefits for temporary or healing period, and whether or not the psychiatric treatment was authorized. This hearing we'll not go into the question of permanency (pp. 2-3).

Likewise, the pre-hearing order states that the issues are whether there is a causal relationship between the alleged injury and the disability, whether claimant is entitled to benefits for temporary/healing period disability and authorization of psychiatric care.

First, it is clear that the hearing deputy should have not decided the issue of permanent disability because it was not contemplated by any of the parties. For that reason, the issue of permanent disability will be left open in this final agency decision. Second, there was no appeal taken by either side from the award of mileage or the bill of the Mayo Clinic; therefore, the order of the payment of those bills will be incorporated into this final agency decision.

The only issue left remaining is the extent of temporary total or healing period disability.

IV. APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 5, 1978 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).

An employer is liable for all consequences that naturally and proximately flow from a work-injury. *Oldham v. Scofield & Welch*, 222 Iowa 764, 767-68, 266 N.W. 480, 482 (1936). When a claimant sustains an injury and later sustains another injury, such claimant must prove either that the disability for which additional compensation is sought was proximately caused by the first injury or that the second injury (and ensuing disability) was proximately caused by the first injury. *DeShaw v. Energy Manufacturing Co.*, 192 N.W.2d 777 (Iowa 1971).

"The opinion of experts need not be couched in definite positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa, 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra*, p. 907. Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances." *Bodish v. Fischer*, 257-516, 521, 133 N.W.2d 867, 870 (1965).

V. ANALYSIS

In addition to the evidence recited above, Dr. Larsen writes a rather strong opinion on July 30, 1980, and it is

this opinion which claimant emphasizes in his brief. In that letter, Dr. Larsen states most firmly that claimant's psychological problem comes from the injury. Taking the opinions, then, of Doctors Larsen and Taylor one finds their positions to be diametrically opposed.

Under the circumstances, it is well to look to the treating doctor, Dr. Janda. On September 27, 1979, he unequivocably states that claimant is able to return to work as of August 21, 1979. Then on January 21, 1980, he states that that a latent cervical condition was aggravated by the work injury and that claimant's "secondary depression" would make him unable to work" since June of 1979." The evidence given the most weight will be that which concerns Dr. Janda's specific area of expertise, orthopedics, and that evidence shows claimant could return to work as of August 21, 1979.

Like the hearing deputy, the undersigned deputy industrial commissioner agrees that Dr. Janda's opinion as to claimant's recovery from his cervical condition and his ability to work from a physical standpoint should have the greater weight. This opinion is chosen because Dr. Janda was the treating physician for quite some time.

VI. FINDINGS OF FACT

1. Claimant injured his knee and arm on August 9, 1978, (Memorandum of agreement filed September 27, 1978)

2. Claimant also sustained an acute strain of the cervical spine, and ecchymosis of the right leg. (Claimant exhibit 2)

3. Claimant was able to return to work on August 21, 1979. (Claimant exhibit 7)

4. The time elapse between August 9, 1978 and August 21, 1979 is fifty-four (54) weeks.

5. The correct rate of weekly compensation is two hundred and 04/100 dollars ($200.04) per week. (Tr. 3)

VII. CONCLUSIONS OF LAW

1. Claimant sustained an injury which arose out of and in the course of his employment on August 9, 1978.

2. Claimant was temporarily disabled from work from August 9, 1978 through August 21, 1979.

3. Claimant failed to show a causal relationship between the injury and any type of temporary psychiatric disability.

* * *

Signed and filed at Des Moines, Iowa this 15th day of May, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

JAYNE M. KINTZ,

Petitioner,

vs.

ROBERT C. LANDESS,
IOWA INDUSTRIAL COMMISSIONER,

Respondent,

Declaratory Ruling

Petitioner has requested a declaratory ruling authorizing Auto-Owners Insurance Company to honor an assignment of workers' compensation benefits and to make payments directly to the assignee in satisfaction of its liability to pay benefits which David B. Lorton is receiving and to which he may be entitled in the future as a result of an injury arising out of and in the course of his employment with Frank Kingery d/b/a/ Frank Kingery Construction insured by Auto-Owners Insurance Company.

The assignment reads as follows:

ASSIGNMENT OF BENEFITS

I, David B. Lorton, do hereby assign to Jayne M. Kintz Thirty dollars ($30.00) per week of my healing period benefits and also so much of any permanent partial disability benefits which I may receive as is necessary to eliminate the arrearage in my child support obligation in DD1-180 in the Iowa District Court for Jasper County.

This assignment is made pursuant to an Order of said Court and I waive the provisions of section 627.13 of the Code of Iowa in regards thereto and I authorize payment of such assigned benefits to be made directly to Jayne M. Kintz.

This assignment applies to my claim for Worker's [sic] Compensation benefits against Frank Kingery as employer and Auto-Owners Insurance Company for an injury sustained May 9, 1979 as recorded in file no. 609384 in the office of the Iowa Industrial Commissioner and any future claim for arbitration or review-reopening based thereon.

Signed at Colfax, Iowa this 22nd day of July, 1980.

/s/ _____
David B. Lorton

The assignment was made in response to a contempt of court citation for failure to pay child support which recited in part:

The respondent being in Contempt of Court should be incarcerated for a period of 30 days, that mitimus with regard to such incarceration should not issue, provided that the respondent complies with the following conditions of the Court:

(1) That he commence payment out of his Workmen's Compensation benefits in the amount of $30 per week each week thereafter.

(2) That in the event the insurance carrier will cooperate and agree to an assignment of the sum of $30 per week, that he should enter into such wage assignment and that wage assignment be payable to the petitioner for the payment of support. Further, in the event the respondent receives partial disability, that he assign at this time his rights to said partial disability payments to the petitioner to apply on the delinquency.

The petitioner for declaratory ruling contends in part:

6. The insurance carrier and payor of benefits, Auto-Owners Insurance Co., has refused to honor the assignment, but only on the ground that honoring the assignment may possibly violate the laws dealing with the duty to pay compensation.

7. Petitioner agrees that the laws dealing with workers [sic] compensation benefits (Iowa Code Sections 627.13, 85.55 and 85.18) restrict the ability of a worker to waive the employer's obligation to pay benefits and prohibit involuntary garnishment execution or attachment of benefits.

8. Petitioner contends, however, that there is no prohibition against a worker waiving the provision of Section 627.13 in order to permit distribution of payable benefits to someone other than himself where the proposed distributee is not the employer, the proposed distribution is for the benefit of his dependents in satisfaction of a court ordered support obligation and the waiver is valid under the laws dealing with waiver of exemptions.

9. Petitioner further contends that the assignment of payable benefits does not constitute a contract to avoid compensation or waiver of compensation which is prohibited by Section 85.54 and 85.55.

10. Petitioner further contends that the payor of benefits may lawfully honor the assignment and that any amounts so paid will constitute payments to the worker and discharge the payor from liability to the worker the same as if the payment had been paid to the worker rather than the assignee.

Code of Iowa, Section 85.18 provides:

Contract to relieve not operative. No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.

Code of Iowa, Section 85.54 provides:

Contracts to avoid compensation. Any contract of employment, relief benefit, or insurance, or other device whereby the employee is required to pay any premium or premiums for insurance against the compensation provided for in this chapter, shall be null and void; and any employer withholding from the wages of any employee any amount for the purpose of paying any such premium shall be guilty of a simple misdemeanor.

Code of Iowa, Section 85.55 provides in pertinent part:

Waivers prohibited-physical defects. No employee or dependent to whom this chapter applies, shall have power to waive any of the provisions of this chapter in regard to the amount of compensation which may be payable to such employee or dependent hereunder.

None of the above set out provisions would bar the assignment of benefits by the claimant as is it (1) does not relieve the employer of any liability to pay benefits (2) is not the withholding of funds by the employer for the purpose of paying premiums for insurance, and (3) is not a waiver of benefits by the employee of the amount of compensation payable to such employee.

Petitioner further asks for ruling regarding the applicability of Code of Iowa, Section 627.13.

627.13 *Workers' compensation.* Any compensation due or that may become due an employee or dependent under the provisions of chapter 85 shall be exempt from garnishment, attachment, and execution.

Interpretation of the applicability of this statute to the instant proceeding is beyond the scope of the jurisdiction of the industrial commissioner.

* * *

Signed and filed this 7th day of January, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

HELEN KLEIN,

Claimant,

vs.

FURNAS ELECTRIC COMPANY,

Employer,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening, Arbitration, and

Section 85.27 Benefits Decision

This is a combined proceeding in review-reopening, arbitration and Section 85.27 benefits brought by Helen Klein, the claimant, against her employer, Furnas Electric Company, and the insurance carrier, American Mutual

Liability Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on September 12, 1977.

This matter came on for hearing before the undersigned industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on September 2, 1980. This record was considered fully submitted on October 29, 1980.

. . .

The only issue to be determined herein is the extent of disability and the appropriateness of certain medical bills under Section 85.27.

There is sufficient credible evidence in the record to support the following statements of fact, to wit:

Claimant, age 46 and a resident of Woodburn, Iowa, sustained an injury to her right elbow which arose out of and in the course of her employment with the defendant-employer on September 12, 1977. This condition was diagnosed by David B. McClain, D.O., as lateral epicondylitis or tendonitis. Subsequently, the left upper extremity became impaired, which impairment, according to the stipulation of the parties, arose out of and in the course of her employment with the defendant-employer. The left arm condition was diagnosed by Dr. McClain as carpal tunnel syndrome.

Claimant's prior work experience mainly involved cashier and sales positions although she once worked at a turkey processing plant and in a nursing home. She began her employment with Furnas Electric in 1975 assembling pressure switches. This work process was done on a production line and was a continuous assembly process and it required claimant to use both hands and arms. She was, at various times, transferred to other assembly line jobs requiring the same type of hand motion to accomplish the work.

Claimant initially injured her right elbow, on the job, on September 12, 1977. She was examined by Dr. Kimball and noting no improvement in her discomfort, consulted her personal physician, Dr. Loren Herman. She testified the defendant-employer was aware of Dr. Herman's treatment. Dr. Herman referred claimant to Dr. David McClain who has continued to treat her to date.

According to the claimant, the discomfort in the left arm gradually came on as a result of using air guns in her work. She states it was Dr. McClain who identified the problem as carpal tunnel syndrome on the right. Claimant had been in good health prior to these incidents.

According to the reports of Dr. McClain, claimant's exhibit A, release of the carpal tunnel on the left was carried out on May 9, 1978. He states in his letter of July 6, 1979 that he is of the opinion that claimant has a carpal tunnel syndrome of the right extremity which will probably necessitate surgery in the future. At the hearing claimant indicated she had undergone a second operation on her left wrist to correct some continuing difficulties she was experiencing. At that time claimant had not been released to return to work by Dr. McClain and, the record reflects, the claimant has not worked since February 1978. Claimant consulted vocational rehabilitation in March 1979 and underwent counseling and testing. They attempted to find a job for her but were unable to do so and subsequently closed her case file.

Claimant testified to emotional difficulties she is presently encountering which she did not have prior to her injury. She has undergone testing and received some counseling from Todd Hines, Ph.D., for this emotional problem. Claimant attributes her emotional difficulties to financial problems which arose as a result of her inability to work because of her injuries. She describes herself as always self-reliant and independent but today she is limited physically and this appears to cause great consternation. The record reflects that claimant's husband has been disabled since 1973 due to a respiratory problem. Claimant has been the sole support for the family other than a Social Security disability pension he receives. She must now rely a great deal on her husband and others to assist her at home.

Claimant testified she has not been reimbursed for any of the following mileage incurred in receiving treatment:

Dr. McClain	644 miles
Hospital	248 miles
Vocational rehabilitation	260 miles
Dr. Summers	248 miles
Dr. Hines	248 miles
To pick up prescriptions	590 miles
Dr. Herman	288 miles

Dr. McClain's statement for the last surgery remains unpaid as well as the Des Moines General Hospital bill in the amount of $825.49. A statement for prior hospitalizations in the amount of $2,181.70 was not paid by defendants and claimant personally paid $22 for drugs and $12 related to meals on her various trips to Des Moines for treatment.

Claimant testified that today she experiences some pain in the right wrist and elbow as well as in the left wrist. She is unable to drive a car any distance because of arm pain and she has difficulty doing housework.

John Klein, claimant's husband, testified on her behalf and corroborated claimant's testimony as to her physical condition prior to injury and the difficulties she is presently experiencing.

Dr. David McClain, in his letter of December 12, 1979 (claimant's exhibit A), states:

> It is my opinion she is unable to return to her previous occupation as well as manual labor and repetitive types of work involving the use of her hands. Her present emotional instability could have been aggravated by her inability to return to work and the financial concern it may have caused. Professional counciling [sic] may be of some benefit to Mrs. Klein at this time. It is my opinion she has sustained a permanent partial impairment of the upper left extremity in the amount of 27 percent and a permanent partial impairment to the upper right extremity in the amount of 27 percent. I feel she is 100 percent totally disabled on an industrial basis due to the trauma sustained in September of 1977.

Tod Hines, Ph.D., a clinical psychologist, testified at length on behalf of claimant. He conducted an extensive

psychological evaluation of Mrs. Klein and reviewed in conjunction therewith the medical reports of Dr. McClain and Dr. Summers which are contained in this record. He testified in part in regard to her emotional difficulties:

Q. Would you tell us, do you have an opinion as to the prognosis in this case and whether you would recommend treatment?

A. Yes, I do have a very definite opinion in that regard. I think that at this juncture this woman, from a psychological perspective, is completely disabled. I think from a psychological perspective she is unable to work. She is depressed. She is anxious. She sees herself as disabled. She sees herself as essentially unable to function in this world. She sees herself as unable to accomplish typical domestic kinds of chores and she certainly sees herself as unable to be employed.

* * *

Q. Before you get into that, do you have an opinion within a reasonable degree of certainty as to whether or not that total psychological disability that you have found was either caused or precipitated by the injuries and the sequela of those injuries, that is, the pain and suffering and the physical limitations and that sort of thing?

A. In my opinion it was precipitated wholly by her preceived inability to work and that inability to work was precipitated by the events in September of 1977 and later in 1978 when she attempted to return to light duty and was unable to do that also successfully.

Q. Without further treatment, Doctor, do you have an opinion as to whether or not this is a permanent disability or a temporary one?

A. Without further treatment I think it is permanent. Without further treatment it will maintain essentially the course that I found in my evaluation of her, and that will maintain her psychologically completely disabled.

Dr. Hines recommends that claimant undergo psychotherapeutics in order to alleviate the aforementioned disability. He also recognizes the claimant's intellectual and potential and testified in that regard.

Q. In addition to that, what other rehabilitation program or treatment would you recommend?

A. I think her intellectual skills are quite encouraging and I think the fact that she basically held herself together in a rather adaptive way until 1977 is also very encouraging. That says to me that the woman has demonstrated in past history the skills to be a productive employee in a productive system. I think she also then has that intellectual potential that I spoke of before in the aptitude and interest testing that I administered to her. She shows good vocational potential and she shows the ability to derive good job satisfaction from employment. That says to me she is very employable but concomitant with that she is not able to do the kind of jobs she did in the past.

As I understand the medical records, and as I have watched her perform in the past, this lady simply is not very employable in an industrial setting and she is not employable—I am talking about potential because I am saying she is not employable at all right now, but in terms of future potential she is not employable in anything where she would have to primarily use her hands and arms. She needs to be in the kind of occupation where she could use her intellectual capacities to a greater degree. That might be a clerical occupation of some kind. It might be a white collar occupation of some kind, but some occupation where she could rely primarily on her intellectual skills and perhaps use her hands and arms and those kind of manual motor capacities to a much less degree than she ever has in her life previously.

That will take education. That will take not just a rehabilitation analysis. She has the potential to be able to be educated and trained.

To do that she is going to have to have the psychotherapy we talked about or she simply will not be accessible to those kinds of rehabilitation efforts.

Q. Would this then follow the psychological therapy?

A. Yes, it would. * * * *

Q. So you are aware of the fact that she has been under vocational rehabilitation for quite some period of time without success?

A. Yes, I am, and I would not expect that to be successful because psychotherapeutic effort has to come first. At no fault of hers and nobody else's that time and effort and money has been essentially wasted because she was not adequately prepared.

Q. So following this one year of psychological therapy, what educational program would you outline for her and what period of time would you expect it to take, and in what areas would you suggest it be directed?

A. I would see that as the educational effort being at least a two-part effort. Initially remedial education. While she has the potential, she has educational and academic skills that need to be brought up to a level where she could be a competent learner. I think subsequent to basic —

Q. About how long would you think that would take, Doctor? I realize it would vary with individuals, but approximately what period of time are we talking about?

A. I would expect that to be a three to six-month process for basic skills remediation.

* * *

Q. The therapy that you are talking about, strictly the therapy, you say that would take about one year and then three to six months for the remedial education?

A. Yes.

Q. Then this further education could range from what, six months to eighteen?

A. I would say six to eighteen months as I understand those educational programs.

Q. — can you say any more than it is your opinion if she is able to complete that from a psychological standpoint you feel she would then be employable to some extent in some areas? Can you say any more than that?

A. No, I can't say more specifically than that, Mr. Huebner. I can say I think she has good rehabilitation potential. I certainly know of some job areas where that would not be true. That would not be true in an industrial setting. It would not be true in the kind of employment that she has had previously in her life.

Q. Would that be probably because of the physical limitations?

A. It would be because of physical limitations. I think it would also be because of her belief that she is not employable in that kind of setting and I think if one endeavored to place her back in the situation you would very likely precipitate the anxiety, the depression and the fear responses that she shows now. I think that would be a big mistake.

Q. So in the areas for which she has had training and experience you don't think we can ever get her back into that setting even with the optimum of success?

A. No, I don't believe so. I think we are talking about training this lady for new job skills based on her potential.

Q. Have we eliminated then jobs requiring physical labor?

A. Yes, sir.

Q. We are in the area of clerical office type work?

A. Or some other kind of work where she could rely primarily on her intellectual capacities and capabilities.

Dr. Thomas B. Summers, a neurologist, examined claimant on behalf of the defendants and expressed an opinion in his letter of August 22, 1980 that she has a functional impairment of ten to fifteen percent of the body as a whole. Dr. McClain, the treating physician, herein expressed the opinion that there existed a 27 percent permanent partial disability to each upper extremity. His opinion is that claimant cannot return to her previous occupation nor can she do manual labor or repetitive type work involving the use of her hands. Claimant has not worked since February 1978 and the record reflects she has received workers' compensation benefits continuously since that date.

The testimony of Dr. Todd Hines as to the state of claimant's psychological condition is uncontroverted. In substance he is of the opinion that claimant's psychological problems are directly related to her work injury and resulting disability. At this juncture, he is of the opinion that she is completely disabled and totally unemployable. He proposed a course of psychotherapy treatments as well as follow-up education and training, the intent being to make claimant a productive individual and return her to some form of gainful employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 12, 1977 is the cause of the 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).

Section 85.34(1) provides:

> Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

There is testimony that claimant has sustained some form of permanent disabillity, hence, healing period rather than temporary total disability is the correct description of her present situation.

Industrial Commissioner Rule 500—8.3 provides:

> 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 comes first.

At this point a determination of the extent of claimant's permanent disability would be premature. She suffers from psychological complications which Dr. Hines causally relates to her employment injury. Claimant has not returned to any form of gainful employment. Based on the opinion of Dr. Hines, claimant has not recuperated from her work related injuries as contemplated in Section 85.34(1).

WHEREFORE, it is found:

That claimant sustained her burden of proof and established that on September 12, 1977 she sustained an injury to her right elbow which arose out of and in the course of her employment with defendant-employer.

That claimant sustained her burden of proof and established that subseuqently she sustained an injury to her left upper extremity which arose out of and in the course of her employment with the defendant-employer.

That claimant sustained her burden of proof and established that as a result of the aforementioned incidents, she sustained a psychological disability.

That claimant has not returned to work and has not recuperated as contemplated in Section 85.34(1).

THEREFORE, it is ordered:

That defendants shall pay claimant a running healing period award until the requirements of Section 85.34(1) are met, at the rate of ninety-six and 56/100 dollars ($96.57) per week.

That claimant shall promptly commence treatment with Dr. Todd Hines as outlined in his deposition and the cost of this treatment shall be borne by the defendants under the terms of Section 85.27.

It is further ordered that when defendants have any evidence that either of the tests for the termination of healing period benefits has been met, defendants are to submit the evidence to claimant's counsel and this office. If the parties are unable to reach an agreement as to the cessation of healing period and amount of permanent disability, a hearing shall be requested by defendants on these issues. Giving due consideration to the prompt obtaining of rebuttal evidence by claimant, a hearing shall be set at the earliest possible time. Defendants shall pay healing period benefits until either an agreement between the parties is reached and this office is given written notice or until defendants with a prima facie showing that healing period benefits shall cease shall file a request for immediate hearing for determination of the cessation of the healing period.

* * *

Signed and filed this 31st day of December, 1980.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

DEAN R. KNIGHT,

Claimant,

vs.

KOEHRING COMPANY, BANTAM DIVISION,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Claimant filed a review-reopening petition on October 20, 1978 in which he sought compensation for a condition related to an injury which arose out of and in the course of his employment on March 14, 1974. Claimant was denied compensation in the proposed review-reopening decision upon the deputy's determination that the claimant failed to establish a causal relation between his back condition and the original March 14, 1974 injury.

The issue on appeal is whether there is a causal relationship between the claimant's back disability and the March 8, 1974 work-related injury.

* * *

Claimant subsequently filed, on November 13, 1979, an application of rehearing contending, in addition to other points, that he possessed and wished to present previously unavailable evidence. No action was taken on the request for re-hearing; therefore, it was deemed denied. A notice of appeal was filed by claimant on December 20, 1979. Once again, claimant asserted that new and material evidence existed which was unavailable at the time of the hearing. Claimant requested that the case be remanded to the deputy industrial commissioner for the taking of this evidence or alternatively, that he be allowed to present the new evidence to the industrial commissioner. In addition, claimant requested a hearing on whether disability benefits should have been awarded on the basis of an aggravation, acceleration, or worsening of a preexisting condition. Claimant asserted that sufficient evidence existed in the record to support that contention. Claimant also contended that new evidence was available regarding the aggravation issue and requested that the case be remanded to the deputy for the taking of the additional evidence.

An order was filed July 23, 1980 by the industrial commissioner in which the request for presentation of additional evidence on appeal was denied. The denial was based upon the fact that an appeal in which submission of new evidence is allowed acquires the characteristics of a review-reopening, therefore defeating the purpose of the appeal process.

Claimant filed a motion for reconsideration on August 12, 1980 in which he noted the importance and relevance of the new evidence and requested the opportunity to present it. Defendants filed, on August 14, 1980, a resistance to claimant's motion for reconsideration.

The industrial commissioner filed a ruling on August 14, 1980 noting that an appeal includes both the review-reopening decision as well as the denial of a rehearing. The commissioner further stated that on appeal he may affirm, modify, reverse, or remand the decision to the deputy for further proceedings. Both claimant and defendants filed briefs on appeal.

David Poe, M.D., was equivocal with regard to the cause of claimant's back condition. However, he did note that

claimant had a pars defect at L4. In the history taken by Dr. Poe on August 7, 1978 when claimant was referred to him by Dr. MacMillan, he was unable to exclude the possibility that the pars defect at L4 was an acute fracture secondary to the original injury. Dr. Poe noted in his deposition that the Iowa City consultants, Drs. Mickelson and Tuck, also communicated the feeling that the L4 defect could possibly be related to trauma and not a congenital anomaly. In his referral letter to the Iowa City physicians, Dr. Poe stated claimant experienced low back pain "secondary to a *compensation* injury sustained on March 14, 1974..." (emphasis added).

Dr. Poe noted in his deposition that the tendency to slip is always present as long as a defect is there. He testified that he thought something had happened between 1974 and 1978 to predispose claimant to slip. The only incident Dr. Poe could relate to the forward slip between 1974 and 1978 was claimant's "traumatic injury." With respect to the "traumatic injury" Dr. Poe stated, "I can't tell you with all certainty, but it appears to be related." Dr. Poe's testimony and reports indicate that he is unsure whether a causal relationship exists between claimant's back condition and the March 14, 1974 injury.

Claimant was hospitalized at Allen Memorial Hospital for the injury of March 14, 1974. The hospital records for that day signed by the emergency room nurse indicate that claimant "[i]njured right hip and lower back and right arm and elbow." Nurses' progress notes for the hospitalization reflect that claimant complained that his right hip was tender and sore.

Edward Sitz, M.D., treated claimant during the hospitalization in March 1974. He noted that x-rays had been taken of claimant's spine in 1974. This fact indicated to Dr. Sitz that he was concerned enough about claimant's back to take x-rays. Dr. Sitz reasoned that he had made no notations concerning cliamants back complaints since he was primarily concerned about treating claimant's obvious elbow injury. Dr. Sitz noted that lesser problems often fail to be documented. Dr. Sitz does not deny that claimant may have experienced back pain at the time of the March 14, 1974 injury.

Drs. Tuck and Mickelson in a February 27, 1979 report stated that claimant had a spondylolysis at L4-5 with a Grade I spondylolisthesis. They felt it was possible that this was secondary to a traumatic injury, especially because of the fragments of pars area demonstrated on tomograms.

At the time of the hearing, claimant was still under the care of Dr. Poe. Dr. Poe first examined claimant in August 1978. Dr. Poe's deposition was taken May 23, 1979. At that time he testified he had seen claimant every three to four weeks. He noted he had been treating claimant conservatively for eight months and that his condition would probably be evaluated in the summer (the hearing was May 3, 1979) and that a second trip to Iowa City might be required. "I don't anticipate any great change in this therapy in the next several months. Probably by the end of the summer we will know whether he is going to improve or not." In his letter of referral dated January 15, 1979 to Iowa City, Dr. Poe stated, "My feeling is that he is not a candidate for an arthrodesis at this time. I would rather proceed with weight loss, further conservative treatment, and perhaps a second trial in the corset."

The recommendation from Drs. Tuck and Mickelson on February 27, 1979 stated: "We would agree with treatment of this along conservative lines until his weight returns to a more normal area... If the patient were not to respond to the conservative measures... we feel further diagnostic measures such as myelogram, lumbar venography... would be of use. Mr. Knight wishes to return to Dr. Poe for follow-up. If Dr. Poe would like to refer patient back to us sometime in the future, we would feel it appropriate to refer him to Dr. Lehmann's clinic because of the consideration of surgery for spinal stenosis or foraminal impingement."

Treatment of claimant's back condition was ongoing at the time of the hearing. It was predictable that further treatment would be required. Drs. Tuck and Mickelson noted that if conservative treatment filed, further diagnostic measures would be necessary. Claimant, subsequent to the hearing and after conservative treatment failed, underwent further examinations and ultimately spinal surgery.

In light of the previous factors in addition to claimant's predictable further medical treatment and surgery subsequent to the hearing, this case is being remanded to the deputy who presided over the review-reopening hearing for the presentation of the additional evidence claimant desires to present, along with any rebuttal evidence defendants wish to offer.

WHEREFORE, it is determined:

That additional evidence relevant to claimant's case exists which was not available at the time of the original review-reopening proceeding.

THEREFORE, it is ordered:

That this case be remanded to the deputy who presided over the original review-reopening proceeding in order that claimant may present the additional evidence sought to be presented, and defendants may present any rebuttal evidence thereto.

* * *

Signed and filed this 30th day of September, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOSEPH W. KOEHLY,

Claimant,

vs.

CUNNINGHAM-LIMP CO.,

Employer,

and

THE TRAVELERS INS. CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed June 30, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. The claimant has appealed from a proposed review-reopening decision wherein it was found that claimant was entitled to certain healing period benefits and to 125 weeks of permanent partial disability for industrial purposes.

* * *

On June 25, 1980 the parties were advised they could file briefs and exceptions. Only claimant responded.

The hearing deputy's decision sets out in detail the facts and proper law but for one exception. That is, in the rationale section on page eight, claimant's age is recited as "45". The record clearly shows claimant was age 55 at the time of the hearing (for example, see p. 4 of claimant's deposition). Whether the mistake was typographical or otherwise cannot be guessed. Therefore, claimant's industrial disability will be considered in the light of his age being 55 instead of 45.

Applying those principles recited by the hearing deputy, it is clear that claimant's age (as well as the other elements of industrial disability) work against his earning capacity. Of course, the employer owes compensation only to the extent of the injury. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812 (1962), and *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961). Also, a claimant must make a "bona fide" attempt to find work for which he or she is suited. *McSapdden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980). The record contains no evidence of any attempt to return to some form of employment, although, as recited by the hearing deputy a letter of April 21, 1977 from the Department of Public Instructions advised claimant that he was able to do sedentary and light level work.

Therefore, considering the entire record and the applicable law, claimant's industrial disability is found to be 30%.

WHEREFORE, the proposed review-reopening decision is hereby modified. It is found that claimant has sustained his burden of proving that his preexisting condition of spondylolisthesis was aggravated by the November 27, 1973 work-related injury. The record viewed as a whole supports a finding that as a result of such work injury claimant is thirty percent (30%) industrially disabled.

It is further found that the medical evidence suggests that claimant would have reached maximum recovery approximately six months after the December 12, 1974 surgery, or around June 12, 1975.

* * *

Signed and filed at Des Moines, Iowa this 29th day of August, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

KEVIN LEE KUELPER,

Claimant,

vs.

FRENCH AND HECHT,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Kevin Kuelper, the claimant, against his self-insured employer, French and Hecht, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on January 24, 1980. This matter came on for hearing before the undersigned at the Scott County Courthouse in Davenport, Iowa, on February 18, 1981. The record was considered fully submitted on the same day.

According to the pre-hearing order, the issues to be determined are whether the claimant sustained an injury in the course of and arising out of employment; whether there is a causal relationship between the alleged injury and the disability; and whether claimant is entitled to benefits for healing period and permanent partial disability. At the time of the hearing the parties stipulated that the applicable rate of compensation was $187.28 and that claimant was off work from the date of injury through February 1, 1980.

Claimant, 23 years old, who began working for defendant on January 7, 1980 as a painter, was injured on Thursday, January 24, 1980, around 10:00 p.m., when he tried to kick loose a 20 to 25 pound piece of metal from defendant's edge trimmer and fell in the process, striking his right shoulder on the concrete floor. (Claimant later testified upon cross-examination that he turned as he fell and hit the side more than the front of his shoulder. He did not recall the side of his body hitting the floor first.) Claimant testified that he noticed no pain or difficulty in carrying out his duties the remainder of his shift, but later at home he began to experience pain in the front of the right shoulder and in his mid-lower neck. He also suffered from a headache.

The following day claimant returned to the same job but found he could hardly move or lift the 20 to 25 pound rims. He spoke with his assistant foreman and another individual named Al about his fall the previous day and about the subsequent shoulder pain and neck pain which were interfering with his work performance. (Upon cross-examination, claimant conceded defendant offered him

another job but claimant declined it because he felt it was as difficult as his regular assignment.) Claimant left work at noon that Friday because his neck and shoulder were hurting so much. (Upon cross-examination, claimant indicated that he did not tell anyone he was leaving because he was in pain nor even that he was leaving for the day.) When he called defendant on the following Monday he was directed to come in to work to fill out an accident report. An appointment with Paul H. Beckman, M.D. was arranged.

In a letter dated March 10, 1980 Dr. Beckman states that he saw the claimant on February 1, 1980 for complaints of pain in the right posterior shoulder. Palpation revealed tenderness of C 6-7-8 and of the right trapezius muscle. X-rays demonstrated no significant abnormality. Dr. Beckman placed the claimant on light duty for that Friday. On Monday, February 4, 1980 he re-examined the claimant, found full range of motion and released the claimant for regular duty (claimant's exhibit 4). (Claimant testified upon cross-examination that he was given a release slip only on the first, not on the fourth.)

Claimant testified that when he was released to return to work he reported back to defendant and was advised no job was available. His complaints, as of February 1, 1980, consisted of constant pain in the right side and middle of the neck and in the front part of his right shoulder. (Upon cross-examination, claimant denied ever having pain on the left side of his neck.) He experienced severe pain upon lifting above his head.

Claimant testified that he had no prior neck problems. He admitted being in an auto collision in late February 1980. He denied any part of his body was thrown against his car. He commented that his automobile was only dented on the right rear side and that he drove it away from the scene of the accident. Claimant testified that he had no new problems but more shoulder pain following the accident.

Upon cross-examination, claimant agreed that his '74 Nova was stationary at the moment of impact. A passenger received injuries and the damage to his car was estimated at $221.00. He went to Joseph C. Azer, M.D. the following day because of increased neck pain. (Claimant had not sought medical care since Dr. Beckman's release on February 4, 1980. On redirect examination, claimant explained he had no money for treatment. Then upon further cross-examination, he agreed that defendant never indicated it would not pay for Dr. Beckman's treatment. Apparently the claimant assumed Dr. Beckman's release foreclosed any follow-up visits.) Claimant denied any low back problem or lightheadedness after the auto accident. Claimant did agree that he had blackout spells for a period of time following an eye injury three years ago. He recalled that Dr. Azer treated him for about two months with cervical traction and with medication for increased headaches. (Claimant testified on redirect examination that earlier problems with headaches had cleared by the date of the work injury but began again after that incident. Their frequency increased after the car accident.) Claimant seemed to agree that he might have been disoriented some of the time Dr. Azer treated him. He denied receiving care from Dr. Azer for his shoulder problem.

In a letter dated January 27, 1981, Dr. Azer states:

Mr. Kuelper was first seen in the office on February 26, 1980, at which time he stated that on January 24, 1980, while at work at French & Hecht in Walcott, Iowa, he fell and hurt his right shoulder and neck. He was seen by Dr. Beckman in Davenport for this injury. He stated that he was able to pick up 10-15 pounds with his right hand. On February 25, 1980, he further stated that he was involved in an auto accident and the pain in the right shoulder and neck increased after this accident. He stated that he was the driver of the auto and was hit from behind by another auto. He experienced no loss of consciousness, complained of headaches and pain in low back. Examination revealved [sic] tenderness in the cervical and lumbar areas. He was given a muscle relaxer and started in physical therapy with heat to the cervical spine.

Dr. Azer's list of treatment by date indicates that claimant received cervical traction and ultra therm several times a week until mid-April of 1980. On March 7, 1980 Dr. Azer records claimant's past eye injury and subsequent blackout spells and notes claimant "was light headed in office today." Dr. Azer's letter makes reference to claimant's headaches, pain in the right side of the neck, shoulder and scapula, and pain in the dorsal and lumbar spine on various dates. Waxing a car and dancing triggered flare-up of shoulder and neck pain on two occasions. On April 29, 1980 Dr. Azer released the claimant for three months commenting that claimant experienced pain from the neck to mid-dorsal spine after one-half hour of work, suffered pain in the middle of his back upon bending, realized occasional leg buckling as well as pain between the shoulder blades and reached maximum lifting at 25 pounds. On August 1, 1980 Dr. Azer again reports that claimant had residual pain in the shoulder blades and low back. Endodyn was administered to the shoulder and low back. He released the claimant to light work with a 25 pound weight restriction. He next treated the claimant on three occasions in December 1980 for right shoulder pain. Dr. Azer did not differentiate between the work injury and the automobile accident in setting forth his diagnosis and opinion on permanency:

Diagnosis:

Sprain lumbar dorsal, cervical spine
Sprain right shoulder
Post traumatic myositis right side of neck, between shoulder blades

Permanent disability:

residual pain right shoulder
right side of neck after standing
or lifting over 25 pounds
legs buckle at times

(Claimant's exhibit 1).

Claimant could not recall when he first went to F. Dale Wilson, M.D., nor whether he advised Dr. Wilson that his shoulder did not hurt too often.

Dr. Wilson, a general surgeon, saw the claimant in April and in November of 1980 and summarized his findings in two letters addressed to claimant's counsel (claimant's exhibits 2 and 3). Dr. Wilson was questioned at length by defense counsel regarding these letter reports. In essence, Dr. Wilson verbally negated his written positive opinion regarding causal connection between the work injury and claimant's present disability. Dr. Wilson agreed that one injury followed by a second injury to the same general area may have cumulative effects that are difficult to separate as to cause especially when the patient is first seen after the second injury has taken place. He had no report from Dr. Beckman in his file and presumed he either read a report or spoke with Dr. Beckman before he prepared his first report. He had no records from Dr. Azer and agreed it would be fair to assume that Dr. Azer would be the best source of information regarding claimant's whiplash injury and course of treatment for the injury. Dr. Wilson was under the impression, presumably from taking claimant's history, that claimant was never treated for low back pain. Dr. Wilson noted claimant was satisfied with the settlement he received from the car accident matter.

Dr. Wilson testified that headache and neck pain such as that described by the claimant usually arise from muscle tightening and tension or spasm that in turn irritates the greater occipital nerve which extends from the base of the skull over the back of the head and neck. He affirmed that traumatic insults to the upper cervical region can cause headaches and problems with the occipital nerve. He conceded that a rear-end auto collision could qualify as such a trauma and that a fall on the right shoulder would not result in such symptoms. He recalled claimant describing the work injury as a rolling fall with most of the impact on the right shoulder. He testified he did not have the impression that claimant sustained neck or head injuries in the January 24, 1980 injury. [In his April 29, 1980 report Dr. Wilson notes claimant landed "with a thud on his right shoulder" (claimant's exhibit 3); in his November 14, 1980 report he states that claimant landed on "his right shoulder head and neck" (claimant's exhibit 2).]

Although Dr. Wilson was not sure what the relationship was between damage to the musculature of the neck and cervical region and pain in the arm and shoulder, he thought there was some connection. He confirmed having treated whiplash injuries which entailed shoulder pain. Then Dr. Wilson opined that the cause was a strain on the shoulder muscle or more probably an irritation of the nerves supplying the area.

Dr. Wilson noted that between visits claimant's headaches and low neck problems had not abated, claimant's left side of the neck was bothering him only on the later visit, claimant's surpraspinatus muscle became moderately painful on the left by the time of the second visit and subsided on the right, and claimant's lower rhomboid and trapezius on the right remained tender. Dr. Wilson explained that the development of more generalized pain over time commonly was found in whiplash injuries. Since claimant's problems had persisted between visits, Dr. Wilson changed his original anticipation of complete recovery to an opinion that claimant's condition was permanent. Based on an analysis of the restricted motion and pain in the neck and arms and of the weakness of the upper extremity, Dr. Wilson opined that claimant's impairment was 9 percent of the body as a whole.

Finally, a radiology report of the cervical spine prepared by D. A. Losasso, M.D., and dated April 28, 1980, reveals a normal curve, bodies of good density and contour, and no narrowing of the disc spaces although there was slight narrowing of the intervertebral foramen between C4 and C5 on the right (defendant's exhibit B).

Claimant's present complaints include neck and shoulder pain on the right side. He testified on direct examination that his pain is the same as it was on the date of injury and that he experiences neck pain when he lifts over 25 pounds or bends to do a tune up and suffers shoulder pain when he puts starters in cars. Aside from occasionally working on friends' cars, claimant has been unable to secure employment. He has a ninth grade education and no vocational or technical skills. Claimant thought one Illinois employer did not hire him because of the neck and shoulder problem. He explained that he did not challenge defendant terminating him for his voluntary leave because he did leave voluntarily.

Upon cross-examination, claimant added that he did not contact the defendant about the voluntary leave despite his attorney's suggestion that he do so. He further testified that he did not register for unemployment until June 1980 and did not look for a job until after his deposition was taken in that same month. He further told the cross-examiner that his shoulder does not pain him that often (only when he has done strenuous work), that his neck bothers him most of the time, and that the frequency of his headaches has decreased to once every two weeks.

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 injury of January 24, 1980 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).

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. A possibility is insufficient; a probability is necessary. *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*.

Preponderance of the evidence means the greater weight of evidence, the evidence of superior influence or efficacy. *Bauer v. Reavall*, 219 Iowa 1212, 260 N.W. 39 (1935).

A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. *Burt, supra*.

Claimant has sustained his burden of proving that he was injured in the course of and arising out of his employment on January 24, 1980. Claimant's testimony and the report of Dr. Beckman support such finding.

Claimant has not established by a preponderance of the evidence that he was permanently disabled as a result of such injury. Dr. Beckman, the treating physician at the time of the work injury, clearly found no limitation of motion when he released claimant from his care, and x-rays taken at that time demonstrated no evidence of injury (although a soft tissue injury is not necessarily decipherable by x-ray). Claimant did attempt a return to work either on the first or the fourth of February. He claimed defendant told him nothing was available. In light of claimant's questionable ability to recall events (demonstrated by the discrepancies in his testimony and histories and complaints reported by Dr. Azer and Dr. Wilson), his testimony is suspect but does demonstrate that he did approach the defendant as being able to work. It may be that whether he attempted to return to work on the first or fourth, he brought the light work release with him and this might have been a reason why no work was available (if such fact were otherwise determinable). This matter might have required further testimony or evidential development but for the admission of the claimant that he was terminated due to his leaving on January 25, 1980. Hence this case does not fall within the rationale of industrial disability set forth in *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980).

Neither the opinion of Dr. Azer nor Dr. Wilson assist the claimant in proving his disability is permanent in nature. Dr. Azer does not differentiate between the work injury and the automobile accident in describing claimant's condition. Claimant conceded increased shoulder pain following the car accident and sought out Dr. Azer's care the day after the impact. Dr. Azer, the only treating physician at that time, clearly delineates his treatment of claimant's condition at that time and later in the year. Dr. Azer cared for a low back problem and claimant's shoulder problem in addition to the cervical matter. Despite claimant's denial of such treatment, his own exhibit presents the fact (claimant's exhibits 1). Likewise, although claimant denied at the time of the hearing that the auto collision was a serious accident, he conveyed the idea it was "severe" to Dr. Wilson (claimant's exhibit 2, p. 1). Dr. Wilson, the evaluating physician, is the only medical expert who finds causation. However, his deposition testimony clearly negated his earlier written opinion and in effect made the whiplash injury appear to be the more plausable cause of claimant's present problems. The medical evidence fails to support claimant's contention that he was permanently disabled as a result of the work injury. Nor does a review of the record as a whole remedy the lack of medical support. To determine that claimant would not have been able to return to work upon Dr. Beckman's release amounts to speculation especially in light of the subsequent accident which was not related to the original work injury. Compare *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d 777, 780 (1971). Although the work injury need not be the sole proximate cause of the disability, the permanent disability in the present case cannot be directly traced to the work injury without engaging in conjecture, speculation, or surmise.

WHEREFORE, it is hereby found for all the reasons stated above that claimant has sustained his burden of proving that he was injured in the course of and arising out of his employment on January 24, 1980 and as a result was totally temporarily disabled from January 25, 1980 through February 1, 1980. It is further found that claimant has failed to establish that said injury resulted in any permanent impairment.

With respect to the medical bill offered at the time of the hearing (claimant's exhibit 5), it is hereby found that it represents charges for treatment that was not related to the work injury.

* * *

Signed and filed this 11th day of March, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

WILLIE LEROY LACEY,

Claimant,

vs.

MONSANTO AGRICULTURAL PROD. CO.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

This is a proceeding in arbitration and section 85.27 benefits brought by Willie LeRoy Lacey, against Monsanto Agricultural Products Company, employer and the Travelers Insurance Company, insurance carrier, for benefits as a result of an injury on March 2, 1978. On June 2, 1980 this case was heard by the undersigned. This case was considered fully submitted upon receipt of the trial transcript on November 14, 1980.

The record consists of the testimony of claimant, Lydia Lacey, Grace Askam, and Carl Smith; claimant's exhibits 1-13; defendant's exhibits A-K; and the depositions of Floyd Andrew Lacey, William Ray French, Robert Allen Poyer, Roger D. Cielley, M.D., Robert Godwin, M.D., and Robert Klein, M.D.

Issues

The issues presented by the parties at the time of the 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; the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; section 85.27 expenses; and claimant's rate of compensation.

Facts

Claimant testified he started working for defendant-employer on June 29, 1976 in the bagging warehouse where he loaded bags of herbicides on pallets and loaded boxcars and trucks. Claimant stated he came into contact with Avadex herbicide in the process. Claimant testified that approximately 3 weeks after starting the job he bagan to break out in a rash on his arms, chest and the front part of his legs. Claimant indicated he told his foreman about his rash but he was informed rashes were common and no problem. Claimant's supervisor gave claimant a tube of cream to put on the areas affected but claimant stated his problem presented and worsened when loading Ramrod flake in the middle or latter part of July 1976. Claimant stated:

Q. How long did that last?

A. Well, I never really ever completely cleared up from it. It would be—there would be times—I went from—then I was given medication to control the itching. I had an extreme itching with it and it started getting worse and I was given medication to control the itching and also another cream to apply to the area.

After the problem worsened, claimant went to first aid and was seen by the company nurse who gave claimant additional cream and a few pills. Claimant testified he was later sent home from work because of the rash and was off work several days but doesn't recall the number missed. Claimant indicated he was seen by Robert Klein, M.D. Claimant stated:

Q. Now, during this period of time in the latter part of the summer of 1976, where, primarily, were the rashes located; can you describe them?

A. Well, I had them on my arms, through the—from my wrist up. I had trouble with the rash developing between my fingers and on the back of my hand. I had it on the front part of my legs between my knees and the—hips. I had it down the sides under my arms and I had it especially bad on the tops of my feet.

Q. Did it cause you to—did it cause you any difficulty in getting around, for instance?

A. Well, because of the soreness, the rash was a rawness of the skin with kind of a clear fluid that would ooze out of it and because of this, anything that touched it made it very difficult for me to move, and the areas on my feet, then, were very sensitive and, of course, the company policy at Monsanto is that you wear steel-toed shoes and it's, you know, it was very difficult to put on any type of footwear, socks or shoes or anything along this line.

Dr. Klein informed the company that claimant could not work around Ramrod or Lasso.

Claimant disclosed that he was transferred to the clean up crew in the latter part of the summer of 1976, where he had such tasks as cutting weeds, painting pipes and moving gravel. Claimant testified that one of his first tasks in the clean up crew was painting pipes in the boiler building. Claimant indicated the heat tended to irritate his rash. Claimant continued to report his problems to his supervisor and the company nurse and occasionally missed work because of his rash.

In the fall of 1976 claimant transferred, to maintenance first worked in the C.A.C. maintenance shop and was transferred to the main maintenance shop.

Claimant testified that in June and July of 1977 he had a severe eruption of rash and blisters which he reported to his supervisor. Claimant indicated he again saw the company nurse and Dr. Klein. Claimant stated he was sent home by the company nurse and missed several several days work.

On his own, claimant went to the University of Iowa Hospitals on June 17, 1977 where he was given pills and outpatient treatment. Claimant contends he continued to miss some work. Claimant also testified that he had severe headaches dating back to starting to work for defendant.

Claimant testified that through the rest of 1977 he continued to have small outbreaks of rash. Claimant stated he last saw Dr. Klein on June 20 or 21, 1977 but was not given any medication.

Claimant revealed that defendants sent him to Robert Godwin, M.D. for treatment on January 27, 1978 after he expressed dissatisfaction with the treatment of Dr. Klein. Claimant stated he saw Dr. Godwin only once and was in his presence for only about 2 minutes. In March of 1978 defendants had claimant go to the University of Iowa Hospitals for patch tests. Claimant revealed that the tests showed he reacted with the two chemicals sent by defendants to be tested.

Claimant testified that in 1978 his condition started in January or February and began to be under control in May or June. In November of 1978 claimant saw Hugh Baker, D.O. in Miller, Missouri because of an outbreak of rash. Claimant indicated he also saw Dr. Baker in August of

1979. On November 12, 1979 claimant was also seen by Dr. Gentry.

Claimant left defendant-employer's employment on April 18, 1978. He was shown a letter from Iowa City which indicated he had to quit working around certain chemicals. Claimant testified he tried to find other work in the area but was unable to find any. Claimant stated he sold his property in Muscatine and moved to Missouri. Claimant disclosed that he was unsuccessful in getting work in Missouri. Claimant stated he has just done menial work and mainly odd jobs since his termination such as overhauling automobile engines. Claimant revealed that the intensity of his rash is not as great as when working for defendant-employer, but still continues. At the time of the hearing claimant did not have any rashes on him.

On cross-examination, claimant indicated that Dr. Godwin did not really examine him and did not want any history. Claimant indicated he was paid for all the days he missed work because of his rash.

On redirect, claimant stated he presently has the headaches and rash almost continually.

Lydia Lacey, claimant's mother, testified she had never seen claimant with a rash until his employment with defendant-employer. Claimant's mother also indicated she was aware that claimant was having headaches.

Grace Askam testified she is employed by defendant-employer as an occupational nurse and first saw claimant on July 21, 1976 for his rash. At the time, claimant's rash was on his arms, thighs and abdomen and was given medication. Ms. Askam stated she continued to see claimant who was also seen by doctors. Ms. Askam stated:

> Q. Now, tell the judge, when is the last time that you saw Mr. Lacy [sic] for a skin rash in 1976?
>
> A. The last date I have is the 12th of August of 1976, and I have that most of his redness and rash is gone from his arms; still has small areas on his thighs, most of his ankles are cleared up and he was on cortisone daily.

Ms. Askam indicated she next saw claimant on June 16, 1977 at which time "he had a welty rash under both of his arms and from the elbows up." Claimant also complained of his ankles itching and a headache which affected his eyesight. Ms. Askam disclosed that she did not know claimant was going to go to Iowa City until the following week and had scheduled an appointment for the same day with Dr. Klein. Ms. Askam stated the last time she saw claimant regarding his rash was on August 9, 1977 and that at that time his condition had improved.

Carl Smith testified he was a job maintenance supervisor for defendant-employer in 1976, 1977 and 1978. Mr. Smith stated he first talked to claimant regarding his rash after claimant's trip to Iowa City in June of 1977. Mr. Smith revealed that ultimately they referred claimant to Iowa City for a patch test.

Robert Allen Poyer, who testified by way of deposition, stated he was the defendant-employer's agricultural manufacturing superintendent and, at the time claimant was employed by defendant-employer, he was the supervisor of the maintenance department. Mr. Poyer disclosed that claimant had bid into the maintenance training program which was a two-year program which involved on-the-job training and supplementary classroom training. Upon completion of the course, a person would have a senior technician status. Mr. Poyer knew of claimant's dermatitis prior to going into maintenance and was aware that claimant had a recurrence after about a year in the maintenance department. This recurrence happened when claimant handled a "call out" in an area different from his normal assignment. Mr. Poyer testified claimant had expressed his dissatisfaction with the treatment of Dr. Klein. Mr. Poyer revealed the circumstances around claimant's first trip to Iowa City. Mr. Poyer stated:

> Q. Okay. After you learned that Mr. Lacy [sic] had been at the University of Iowa, did either you or the company nurse attempt to find out what had transpired out at Iowa City?
>
> A. Yes.
>
> Q. Had Mr. Lacy [sic], when he reported back to work, indicated he was to remain off work?
>
> A. He responded back to us that same day following his return from Iowa City that he had gone to Iowa City; that the doctor there had looked at his condition and had recommended that he not return to work.
>
> Q. Did you try to find out if that was accurate or not?
>
> A. Yes, we did.
>
> Q. Would you describe what vehicle Monsanto used to secure that information from the university?
>
> A. Okay. Without knowing the doctor, we told LeRoy that until we get something straightened around that we wanted him to remain off work like he had indicated the doctor had told him. We then asked Dr. Klein to contact the doctor that he saw in Iowa City and for the two of them to confer in determining what was the proper thing to do in this case. It took a little over a week, if I remember right, for Dr. Klein to contact this doctor in Iowa City, and after the discussions between the two doctors, Dr. Klein got back with us and indicated that the doctor in Iowa City had not told LeRoy that he could not return to work.
>
> Q. When you were advised of that fact, did you take some action at that point in time?
>
> A. Yes, we did.
>
> Q. What did you do?
>
> A. We called LeRoy and asked him to come back in; that Dr. Klein had, in fact, been able to talk to the doctor in Iowa City and that the doctor indicated that no, he had not recommended that LeRoy—or that there was any medical reason that LeRoy could not return to work.
>
> Q. . . .at any timedid [sic] you tell Mr. Lacy [sic] that if he wanted to take time off work because of his sickness that he would have to use his vacation pay—or vacation time in order to remain off work?
>
> A. No.

Mr. Poyer was aware of claimant's next flareup of dermatitis and was informed by Dr. Klein that claimant had a fungus reaction which was not work related. Because of claimant's continued dissatisfaction, they had claimant seen at Iowa City.

William Ray French, who testified by way of deposition, indicated he works for defendant-employer and at one time was safety supervisor at defendant-employer's plant in Muscatine. Mr. French disclosed he talked to claimant regarding his rash in August of 1977 and informed claimant that Dr. Klein would have to refer claimant to Iowa City. Later in 1978, defendants furnished Iowa City with relevant data and samples. Mr. French indicated other employees also had reactions or rashes.

Floyd Andrew Lacey, who testified by way of deposition, stated he was claimant's brother and worked as a foreman for defendant-employer from February 1, 1975 until February 1, 1977 until February 1, 1977. Mr. Lacey indicated he saw a rash on claimant's arms when claimant was working in the bagging department during the summer. Mr. Lacey testified he saw claimant's rash again when he saw claimant working in the boiler room. Mr. Lacey also saw claimant's rash upon visiting him in Missouri after leaving the defendant-employer's employment. Mr. Lacey saw claimant on two other occasions but did not notice any rash.

Robert F. Klein, M.D., who testified by way of deposition, stated that he is a general practitioner, the defendant-employer's physician and first saw claimant on June 16, 1977 because of dermatitis on claimant's arms. Dr. Klein then revealed that his records did not indicate he saw claimant in 1976. Dr. Klein stated:

Q. When Mr. Lacy [sic] first presented himself at your office, did you obtain a history of any sort from the man?

A. He had been working with chemicals at this time. I don't have it written down, what chemicals it was, but he had been exposed to the chemicals.

Claimant was given medication and scheduled to return on June 17, 1977. Dr. Klein testified claimant missed his appointment on June 17 but was again seen on July 8, 1977 at which time claimant had sores on the top of his feet that Dr. Klein did not feel was contact dermatitis. Dr. Klein opined this was not contact dermatitis because there was no history of chemicals coming into contact with that area. Dr. Klein saw claimant on July 15, 1977 at which time he had improved. Dr. Klein stated that on July 22, 1977 claimant again failed to appear for a scheduled appointment. Dr. Klein disclosed that he next saw claimant on January 20, 1978 when he had a problem on his hands. Dr. Klein stated:

A. At that time he had no major rash, there was no rash present. He did complain of some small bumpy areas on his fingers. At that time I felt it was suggestive of what we call an id reaction, that's spelled i-d.

Q. What's that mean?

A. That is a fungus infection, and the patient was told to try Tinactin Cream. This would have had nothing to do with his occupation.

A. . . .That was my last contact with Mr. Lacy [sic].

Q. When we talk about an id reaction and designate it as a fungus, would that be the type of fungus one could encounter virtually anywhere?

A. That's right, in the nature of an athlete's foot, epidermophytosis is the technical name for that.

Q. I won't attempt to pronounce that name again, doctor. Having seen Mr. Lacy [sic] on one occasion, when you diagnosed a contact dermatitis, back in June of '77, do we gather these bumpy areas on his fingers in January of '78 looked different or appeared different than his earlier contact?

A. Were completely different—completely different than the original visits and with the original dermatitis.

Q. So I gather an id reaction fungus, even perhaps to a layman such as myself, has a different appearance than a contact dermatitis?

A. That's right . . . .

Dr. Klein revealed that at the time of his pre-employment physical which was taken on June 29, 1976, claimant had a rash on his abdomen and was questioned about contact dermatitis.

Robert Godwin, M.D., who testified by way of deposition, disclosed that he is a specialist in dermatology and saw claimant on January 27, 1978 as a result of a referral from Dr. Klein. Dr. Godwin stated he took claimant's history and examined his skin. Dr. Godwin stated:

Q. Okay. Could you tell us what areas of Mr. Lacy's [sic] skin you examined?

A. Well, I examined his face, neck, trunk and extremities.

Q. By "extremities," would that include his arms, doctor?

A. Yes, sir, it would; his arms and hands and forearms and his thighs and legs and feet.

Q. Did you have occasion during this inspection to look specifically at the man's chest, as well?

A. Yes, I did.

Q. And, doctor, I want you to listen to this question I am going to ask you because it's kind of a peculiar question. When you say that you inspected his skin, can we correctly infer that you looked at his skin in the sense that I might look at your arm as it is exposed right now in a short-sleeved shirt?

A. Yes. I had him remove his shirt and undershirt and I inspected his skin visually.

* * *

Q. . . .Doctor, were there areas that showed what I as a layman might call a rash condition?

A. Yes. He had a very faint but perceptible pinkness and slight dryness of the skin of the proximal lateral arms, which would be over the deltoid portion, and it was a little more prominent on the left than on the right; and in specific, examination of the chest and hands and feet were normal, all except for the fact that his palms were a little dry.

Q. Doctor, so the Commissioner doesn't have to get out his medical dictionary, tell us where the deltoid portion of the arms are.

A. It's the lateral upper portion of the upper arm.

Q. Outside portion of the arm below the shoulder?

Q. Outside portion of the upper arm, right.

Dr. Godwin opined that claimant has asteatopic eczema. Dr. Godwin indicated that such a condition would be caused by dryness of the skin as a result of the dryness of winter and frequent bathing. Dr. Godwin stated his conclusions were partially based on the locations of claimant's rash at the time he saw claimant. Dr. Godwin also disclosed that he thought claimant's condition was mild. Dr. Godwin stated:

Q. Doctor, from your knowledge of contact dermatitis, in particular, exposure to perhaps chemical irritants, in the ordinary case would you expect that if the patient removes himself from the source of the chemical irritant, that the contact dermatitis would subside, or the rash or the symptoms of the dermatitis would subside?

A. Normally this would be true. There are two types of contact dermatitis. There is primary irritant dermatitis, caused by a chemical irritant phenomenon, and there is allergic contact dermatitis. The second kind is allergic contact dermatitis, which is caused by an allergic reaction to the substance. Both kinds most probably would improve with removal of the offending agent and would probably clear. Particularly, primary irritant eczema would. Secondary—or the allergic contact eczemas sometimes will recur and be off and on problems even though we cannot get a good adequate history of re-exposure to that particular substance. So it is possible sometimes for people to be removed from the source of the original sensitization and allergic contact dermatitis and to have perhaps little things in life trigger eczema off in areas where it does not make sense for them to be re-exposed.

Q. By the same token, doctor, if a person suffers from—I can't remember the proper—

A. Asteatopic.

Q. Asteatopic eczema, is that an eczema form that can be brought on without any exposure to chemicals?

A. Certainly.

Q. And if a person such as Mr. Lacy [sic] had that type of eczema, I take it, at least to a layman, he would see a rash while he has the eczema, is that correct?

A. (No response).

Q. In other words, he would have areas of redness or tenderness during the period that the eczema is active?

A. Yes. And he could also itch at times without any perceptible rash. Maybe his skin would be a little dry, or what he would interpret as dryness.

Based on his one examination, Dr. Godwin did not think claimant's rash was work related but indicated he could not rule out the possibility.

Roger I. Cielley, M.D., who testified by way of deposition, stated he specializes in dermatology and previously was on the faculty of the University of Iowa. Dr. Ceilley indicated he first saw claimant on March 2, 1978. Claimant gave Dr. Cielley a history of being exposed to herbicides and a resulting rash and blisters. Dr. Cielley stated:

Q. Okay. Now, what did your examination on March 2nd of 1978 consist of?

A. Complete examination of his skin showed no active dermatitis at that time. It was diffusely dry at that time.

Q. Did you prescribe anything for Mr. Lacy's [sic] condition on that visit?

A. No.

On March 20, 1978 a patch test was conducted. On March 23, 1979 claimant was again seen and the results of the test showed claimant reacted with both Lasso and Ramrod. Dr. Cielley revealed that he informed claimant to avoid contact with both products as well as informed defendant of his recommendation.

Dr. Ceilley opined that there was a causal connection of claimant's allergic condition with his employment. Dr. Cielley stated:

A. Well, given the fact that he did not have active dermatitis at the time I first saw him, I could not say with certainty that the mentioned materials were the cause of his dermatitis. However, in view of the history available and the extensive patch testing done, the likelihood is rather great that one of these two products may have been the cause of the rash that he reported.

Dr. Cielley indicated that claimant had informed him there were periods where the rash was not in an active state of agitation. Dr. Cielley stated:

Q. ...when you use the term "allergic in nature", what does that mean? In other words, what is an allergy?

A. An allergy usually is a condition where the body produces an antibody, or another form of immune response to a foreign protein or chemical.

Q. From that standpoint, it is an allergy typically a response of the body in the sense that if the irritant is not present, the allergy does not manifest itself?

A. That's ordinarily true. However, sometimes the immune response can persist for some time beyond the point of contact with the allergin.

Q. In other words, there could be some carryover or residual?

A. That is correct.

Q. And that residual, depending on the nature of the contact, can be of varying duration of length, is that correct?

A. Yes.

Q. But, customarily, if a person has an allergy, it usually requires some exposure to the chemical or the foreign substance to produce the allergic reaction initially, is that correct?

A. That's correct.

Q. Okay. Let's go back to talking about Mr. Lacy's [sic] case in particular. When you examined Mr. Lacy [sic] at the beginning of March, do I understand that his rash was not detectable in the sense of there not being an active rash?

A. That is correct.

. . .

Q. Doctor, as you testified today—And, incidentally, the Commissioner has that letter in his records—do you still hold the opinion that Mr. Lacy's [sic] history of allergic contact dermatitis to herbicides should in no way limit further employment involving contact with chemicals unless those chemicals are those specific herbicides?

A. That's correct.

Q. And that's still an opinion you hold today, Doctor?

A. That's correct, unless they are related chemicals, perhaps.

In a letter dated March 24, 1978, Dr. Cielley and James C. Plamondon, M.D. stated:

> Mr. Willie L. Lacy [sic] was evaluated in the University of Iowa Department of Dermatology in March, 1978 for a recurrent widespread dermatitic eruption. As it was suspected that products from the herbicide plant where he was employed were responsible for this eruption, multiple patch tests were applied. These patch tests included 28 chemicals and mixtures which are common allergic contact sensitizers and two chemical mixtures which he had contact with during his employment. The only patch tests which were positive were to the two chemical mixtures that he contacted during his employment. The other 28 more common allergic contact sensitizers were negative.
>
> The implication of this evaluation is that Mr. Lacy [sic] will not be able to work in the future in areas where he might contact even small amounts of herbicides. However this does not imply any increased propensity towards sensitization with other chemicals. This history of allergic contact dermatitis to herbicides should in no way limit future employment involving contact with chemicals unless these chemicals are those specific herbicides.

In a report dated December 27, 1979, R.L. Zuehlke, M.D. stated:

> . . .he has been followed here at the Dermatology Clinic at the University of Iowa since June 1977, and found by patch testing to be allergic to the herbicides Lasso and Ramrod, which are apparently manufactured at the company at which he used to work. . . Mr. Lacy [sic] states that he has not worked at Monsanto for at least a year and since then has only had small areas of dermatitis on his body that usually is responsive to topical creams given to him by his local physician. He does not think that he is exposed to herbicides to any significant extent except for possible visits to a feed store. His main problem seems to be almost daily headaches that he claims interferes with his thought processes.
>
> It is impossible for us to state whether his headaches are a residual affect [sic] of his exposure to herbicides, and we recommend that he see a neurologist for evaluation of this problem. As for his current dermatitits, we feel that his present impairment is negligible, but that he still has the latent ability to react to the materials to which he is allergic.

In his report of March 7, 1978, John Weider, M.D. opined claimant did not have an allergic problem at that time.

Claimant's exhibit 12 is a report of Hugh Baker, D.O. dated March 22, 1979 which states:

> W. Leroy Lacy [sic] has not shown any improvement since last year from herbicide poisoning. Upon any exertion, he warms up and starts perspiring, which causes a fine red rash in the creases of his body which burns and itches until treatment is given. Treatment for this rash is Rhilihist Lotion and Aristocort Cream applied several times a day.
>
> He is apparently permanently disabled from engaging in his regular employment as Maintenance Technician due to the rash upon exertion.

Applicable Law

Section 85A.8, Code of Iowa, states:

> Occupational disease defined. Occupation diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such disease shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the

> employee was employed, and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

Claimant need only prove that (1) the disease is causally related to the exposure to harmful conditions of the field of employment, (2) the harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupation. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).

It is also clear that a defendant-employer's refusal to give a claimant any sort of work or his inability to find other suitable work after bona fide efforts may justify an award of disability. *McSpadden v. Big Ben Coal Co, supra.*

Analysis

Prior to a discussion on the main issues of claimant's case, it should be stated that little weight is given to claimant's exhibit 12 in that it does not follow the guidelines of section 500—4.18 of the Rules of the Iowa Industrial Commissioner.

Based on the evidence presented, it is clear that claimant has had an allergic reaction in the form of a rash to chemicals which the defendant-employer produces. Such a determination is supported by the testimony of claimant, Grace Askam and Dr. Cielley. Claimant has also met his burden in proving he came into contact with those chemicals while working for defendant-employer but would rarely come into contact with such chemicals outside of his employment with defendant-employer.

Claimant had an allergic reaction caused by defendant-employer's chemicals but the testimony of Dr. Klein and Dr. Godwin also indicates that claimant had other rashes which were not related to his work. As disclosed by the testimony of Dr. Klein, claimant had a rash prior to his employment with defendant-employer. Furthermore, no doctor causally connected claimant's headaches to his employment. Although Dr. Baker opines that claimant is permanently disabled due to rash upon exertion, the greater weight of medical evidence does not reveal that his rash caused by defendant-employer's chemicals resulted in any permanent impairment.

Claimant testified that he has been unable to get any employment since terminating with defendant-employer on April 18, 1978. Claimant's testimony stands unrebutted. It is clear however, that it has not been claimant's condition which has kept him from re-mployment as much as the employment situation at that time. At the same time, *McSpadden* indicates that claimant may be entitled to some benefits as a result of his plight because he has had an actual reduction in earnings. Claimant is 37 years old and has a high school education. Claimant has had several difficult jobs which involved setting type and running a printing press, mill operator, office manager and running a silk screen press. With the exception of claimant's testimony and the report of Dr. Baker, the greater weight of evidence reveals that claimant could return to any of his former jobs or perform any job which would not require contact with defendant-employer's chemicals. Based on the evidence presented, claimant has suffered a permanent partial disability of 5 percent of the body as a whole.

Claimant testified he could not remember what days he missed work as a result of his allergies. Defendants' exhibit A reveals that claimant missed 6 days of work because of skin reactions or doctor appointments for his skin problem. Claimant testified he was paid for all the days he missed work because of his injury. Claimant failed to show he was entitled to other healing period benefits.

The parties were unable to stipulate to claimant's rate of compensation. It is determined that claimant's rate of weekly compensation should be decided as of the date of his last exposure to defendant-employer's chemicals. As shown by claimant's exhibit 13, claimant was paid every other week. It is determined that claimant's gross weekly wage for the 13 weeks preceding his injury was approximately $286.00. Claimant testified he was married and had 4 children under the age of 18 at the time of his injury. It is determined the claimant's rate of compensation should be $185.04 per week.

Claimant originally went to Iowa City on his own. Contrary to claimant's testimony, the greater weight of testimony does not reveal that claimant's situation at the time was one of an emergency and defendants had been providing claimant with care. The fact that defendants later authorized claimant to get tested in Iowa City does not make them liable for claimant's previous unauthorized medical expenses. As disclosed by claimant, it was not until March of 1978 that defendants sent claimant to Iowa City. Therefore, all prior bills cannot be recovered by claimant.

Claimant also admitted that he went to see Dr. Baker on his own without obtaining prior authorization. Without authorization, claimant is not entitled to reimbursement for the same.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented, the following findings of fact and conclusions of law are made:

Finding 1. When claimant was hired by defendant-employer on June 2, 1976, he had a preexisting rash.

Finding 2. After claimant started working for defendant-employer, claimant had an allergic reaction with chemicals produced by the defendant-employer.

Finding 3. After claimant started working for defendant, he had rashes due to heat and humidity.

Finding 4. Claimant was paid for all the time he missed work as a result of a rash.

Finding 5. Claimant was terminated by defendants because doctors said he should not work around chemicals produced by defendant.

Finding 6. Claimant should not work around chemicals produced by defendant but is not hindered from working for any employer not producing like chemicals.

Finding 7. Claimant has no permanent functional impairment as a result of his allergy to defendant-employer's chemicals.

Finding 8. Claimant's headaches are not related to his allergy.

Finding 9. Since his termination, claimant has been unable to obtain employment.

Finding 10. Claimant's inability to find work is related to the job market at this time and not his allergies.

Finding 11. Claimant is 37 years old, has a high school education and has a varied employment history.

Finding 12. Claimant's allergies to defendant-employer's chemicals does not keep him from doing any of the jobs he performed prior to his employment.

Finding 13. Claimant missed six (6) days of work as a result of his allergies but has been paid for the same.

Finding 14. Claimant's gross weekly wage for the thirteen (13) weeks prior to his termination was approximately two hundred eight-six and 00/100 dollars ($286.00) per week.

Finding 15. At the time of his termination, claimant was married and had four (4) children under the age of eighteen (18) years of age.

Finding 16. Claimant's rate of compensation is one hundred eighty-five and 04/100 dollars ($185.04) per week.

Finding 17. Claimant originally went to Iowa City without authorization by defendants.

Finding 18. Claimant saw Drs. Baker and Gentry without prior authorization from defendants.

Conclusion A. Claimant suffered an occupational disease which arose out of and in the course of his employment with defendant in the form of an allergy to chemicals produced by defendant.

Conclusion B. As a result of claimant's occupational disease claimant has a permanent partial disability of 5% of the body as a whole.

Conclusion C. Claimant met his burden in proving he missed 6 days of work as a result of his injury.

THEREFORE, defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits of one hundred eighty-five and 04/100 dollars ($185.04) per week. Claimant is not to be paid any healing period benefits since he was paid for all days missed.

Defendant is to pay Dr. Godwin's bill in the amount of sixteen and 00/10 dollars ($16.00).

Defendant is to reimburse claimant for mileage expenses in the amount of two hundred twenty-eight and 40/100 dollars ($228.40).

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to section 85.30, Code of Iowa.

Cost of the proceeding are taxed to defendants.

A final report shall be filed upon payment of this award.

* * *

Signed and filed this 19th day of June, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

RAYMOND D. LANG,

Claimant,

vs.

DUBUQUE PACKING COMPANY

Employer,
Self-insured,
Defendants.

Appeal Decision

Employer has appealed from a review-reopening decision on remand filed October 29, 1979, which reinstated the prior decison of March 23, 1978 which had previously been adopted with modification on appeal on June 13, 1978. Insofar as the prior final agency decision was the appeal decision of June 13, 1978, the review-reopening decision on remand is summarily modified in accordance with that decision. The modification merely changes the date from which benefits are to commence from March 24, 1977 to March 14, 1977.

The original record consisted of the transcript of the review-reopening proceeding with claimant's exhibits 1 and 2 and a deposition of John F. Frost, M.D. On judicial review of the prior final decision the district court remanded the case to the industrial commissioner with instructions to consider the evidence to be presented of Dr. R.H. Ferguson, M.D. of the Mayo Clinic. The industrial commissioner remanded to the original hearing deputy industrial commissioner for that purpose. No authorization was given by the district court of evidence other than the written report and deposition of Dr. Ferguson.

In addition, the deposition of Dr. Charles H. Dicken, M.D. was also taken and submitted over the objection of claimant. Employer contends that the examination of Dr. Dicken was "at the direction of the Deputy Industrial Commissioner" (Dicken deposition, page 2, line 22) that the specialty of the physicians was not known at the time the application was made (Dicken deposition, page 3, lines 1-2), and that the comprehensive history and examination performed by Dr. Dicken was at the "suggestion and direction of the Industrial Commissioner" (Dicken deposition, page 3, lines 7-9).

The record does not disclose support for these contentions and even if so it is questionable whether the deputy or commissioner might not have exceeded the directions of the remand order from the district court. That employer had only recently discovered the specialties of the physicians is somewhat questionable in view of the letter in defendant's possession from Dr. Ferguson dated February 6, 1978.

As both the deposition of Dr. Ferguson and Dr. Dicken were submitted they will be considered separately, and the court can decide if they should both have been considered.

I

The letter from Dr. Ferguson to Dr. L.C. Faber dated February 6, 1978 merely indicates that from the general physical examination and tests which were made at his direction that he was "not able to identify any systemic process which would account for his (claimant's) chronic skin problem." Apart from the skin problems, the general examination was normal. The remainder of the letter reports the conclusions of Dr. Dicken who "felt the current lesions were of a nummular eczema type", suggested a treatment program and indicated that "if his (claimant's) job involved wet work, this could make his dermatitis worse because of irritation."

The deposition of Dr. Ferguson discloses that he is a specialist in internal medicine with a subspecialty in rheumatology. The results of Dr. Ferguson's examination of claimant were unremarkable except for the following findings:

> On the skin, circular patches of eczema, with scaling and fissuring over the dorsum of the knuckles and fingers were noted.
>
> An active lesion was present at the right anterior ankle. One or two red and slightly elevated plaques were noted over his arms, which he predicts will vesiculate, ulcerate, and then scale.
>
> Multiple other vesicular scaling patches in various stages of evolution were seen over the buttocks, thighs, and arms.
>
> Coalescent circular patches of deep pigmentation at sites of previously healed lesions were present.
>
> No scars or active lesions were apparent in the interscapular are, [sic] extending down to the buttocks.
>
> Examination of the head, neck, lungs, and heart, were negative aside from occasional rhonchi and some expiratory prolongation on examination of the lungs.

Dr. Ferguson's examination was for the purpose of determining whether or not claimant "could have a systemic disease of the connective tissue that might be giving to rash as a manifestation". (Deposition page 9, lines 18-21). This was ruled out.

Dr. Ferguson's impression was that claimant had a chronic neurodermatitis. Dr. Ferguson had no opinion as to whether or not claimant's condition was permanent or temporary. It seemed to him to be disabling at the time he saw claimant but had no estimate as to any extent of disability.

As to his ability to carry on gainful employment, the doctor stated:

> I don't think I gave him any thought in terms of his disability to go back to any gainful employment. It seems to me there might well be some non-stressful sedentary activities, or some form of activities that might be found that would not be a detriment to his skin or health, but it did seem, based on the limited knowledge I had of the job he had been on previously, that he was not at that time qualified to go back to that type of work.

Over the hearsay objections of claimant Dr. Ferguson referred to a report of Dr. Dicken and stated:

> I have a report here from Dr. Dicken, who in essence, made certain suggestions in terms of his management, and made some recommendations in terms of changes in his oral medication, and some of the topical applications to be used to his skin, and made the comment that if the job involves wet work, this could make his dermatitis worse, because of irritation.

In response to the adviseability of claimant to return to work Dr. Ferguson stated:

> Well, if one is physically active, with skin that is actively inflamed and irritated with blisters, and itching and excoriation, which results from your scratching in an area which was itching and raw, if one is physically active and irritating such an area, it will set up an itch, and the cycle will go on.
>
> If the part can be rested, and if your attention is diverted from it, and if it's not irritated by motion, or pressure, or activity, or heat, or moisture or oily solutions, or irritants to the skin—now I'm talking in general terms now—the dermatitis is less likely to be irritated, and more apt to remain quiescent, and tolerable.
>
> . . .
>
> Nervous stress or mental stress might heighten itching, and lead to scratching and irritation. I think it's a common observation, that any time one is tense or under nervous pressure, that an area that might tend to be itchy, will in fact itch, and just an area that's painful might in fact give more pain, when a person's nervous tension is heightened.
>
> . . .
>
> That type of environment might not be conducive to keeping the dermatitis quiescent either.
>
> . . .

Well, I'm not sure it would be therapeutic for his dermatitis. It would be therapeutic for the whole person if it did not affect the dermatitis—adversely affect his health. But, I think from the standpoint of his total health or physical-mental well-being, I think he would be much better off, if he could find some occupation that didn't adversely affect his health.

This remainder of Dr. Ferguson's testimony dealt with the adviseability of continued use of oral steroids.

If the testimony of Dr. Ferguson is the only testimony which is to be considered by this tribunal it is evident that it does nothing to enhance the employer's case. In fact it is supportive of claimant's case. Dr. Ferguson ruled out a systemic disease in relation to claimant's dermatitis; did not feel qualified to testify as to causal relationship; had no opinion as to his duration; thought it was disabiling at the time of examination; and limited the field of gainful employment in which claimant could endeavor.

Based upon this additional testimony alone, the prior ruling of this tribunal filed June 13, 1978 is not only supported but reinforced.

II

Dr. Dicken's deposition discloses that he is a specialist in dermatology. He examined claimant on one occasion. He noted that claimant's skin lesions were of a nummular eczema type; that there was no atopic history; that the etiology of nummular eczema is unknown; that trauma is indicated in a lot of conditions but would not indicate that this is the cause for sure.

Dr. Dicken further testified that he was not aware of any accepted or standardized tests or tables for indicating percentage of disability for dermatological problems; that on the basis of one visit he did not feel it fair to determine degree of disability; and that he was "hopeful" claimant's condition would improve.

As to claimant's ability to return to work, Dr. Dicken stated:

> Well, the things that tend to irritate dermatitis most are conditions where you're going to be hot and sweaty, and where you get wet and stay wet, these sort of things tend to irritiate dermatitis, so I think how much work you could do, would depend to a certain extent on how much these conditions might be encountered, and this would vary within the plant.
>
> * * *
>
> I think any sort of job that involved less of the excessive sweating or heat conditions, anything that would have less involvement with direct wet-type work, would be more favorable.

He further testified that it was possible that claimant could work in a dry storage warehouse.

As to the entire skin surface of claimant that was affected by the lesions Dr. Dicken stated:

> Well, I don't think there would be an accurate way to assess previous lesions. I would say, at the time I saw him, I would estimate ten to twenty percent.

Dr. Dicken indicated that if he were treating claimant he would try to avoid systemic coricosteroid treatment, but that was a matter of choice. He generally approved of the management of claimant's condition by Dr. Frost except that he personally would try to avoid the use of systemic steroids. With regard to the use of steroids in this case the following exchange is noteworthy.

> Q. (Mr. Bitter) Yes, but in the case of Mr. Lang, from the report and testimony of Dr. Frost, that appears, doesn't it, to be precisely what has happened? As soon as the steroids were reduced or tapered off, his dermatological condition flared up and became worse, and this seems to be somewhat directly related?
>
> A. (Dr. Dicken) I think this is one problem that you encounter with systemic steroids, and perhaps a good reason not to get a patient started on them. If you give enough systemic steroids the patient does well, but when you lower the dose they do poorly. You are bouncing it up and down, so it is not always a good situation to be in.
>
> Q. Very fairly characterized though, the condition of Mr. Lang, though, as far as flaring up when steroids medication is reduced, and then his dermatological condition appears to become better as the steroids use is increased?
>
> A. I would say so.

In response to a question as to the causal relationship between the original injury and claimant's current condition Dr. Dicken stated:

> I think one could theorize that his problem with the dermatitis and sensitization and stasis dermatitis, could be a predisposing factor. I don't think one could say with absolute certainty that that's true.
>
> * * *
>
> I think that one could certainly think that the sequence of events that took place after his injury, certainly altered his skin, and could have produced this.
>
> * * *
>
> Well, I think the difficulty here is as I mentioned earlier, we see lots of patients with this nummular eczema type pattern, and of course each individual history is different, and some have not had this sort of sequence of events, so that looking at the end results and going backwards on a number of patients, you can't necessarily say that all these events lead up to this entity. On the other hand, he certainly has had a lot of difficulty with his skin, and how much a part this had to play in the picture when I saw him, it's hard to say, but it would seem to be a big factor.

Dr. Dicken could not give an opinion based upon only one observation whether claimant would get better or worse.

Whether or not Dr. Dicken's testimony is considered a part of the record is relatively immaterial as it also is of little value to support employer's contentions. Dr. Dicken diagnosed claimant's condition as nummular eczema; was of no assistance regarding causation; could not access a disability; indicated that at the time of his examination claimant had exposure to ten to twenty percent of his body; and limited the field of endeavor in which claimant should engage in gainful employment.

Based upon the testimony of Dr. Dicken alone or in conjunction with that of Dr. Ferguson the employer has not prevailed in establishing that claimant does not have continued disability as a result of his injury.

Employer contends that the depositions taken at Mayo Clinic do not indicate the condition of the claimant is permanent. That is true. Neither, however, do they indicate it is not permanent.

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 Fireman & Engineers*, 230 Iowa 1127, 300 N.W.322 (1941); *Garden v. New England Mutual Life Insurance Co.*, 218 Iowa 1094, 254 N.W.287 (1934).

Claimant's original injury from which his present condition flows was November 13, 1973. As of his examination in February 1978 he still had it and it was disabling. No one gave a prognosis as to when it would be cured if in fact it would. This would appear to fulfill the requirements of indefinite and undeterminable.

Employer further contends that as claimant had returned to work on May 5, 1974 and remained employed until September 25, 1975 and again was off work but returned December 26, 1975 until September 7, 1976 that the requirement for termination of healing period had been met. While that is so with regard to claimant's original injury, it is not so with regard to his change of condition. To say that once a person returns to work after an injury which results in a permanent disability that such person would not be entitled to a further healing period for a new and different permanent disability relating to the same causative injury would be an absurdity. The healing period which claimant was originally paid was for the scheduled disability to his right foot. The healing period which is now being awarded is for healing period connected with his resultant injury to the body as a whole which is related to his original injury to his right foot. For support to this concept see *Meyers v. Holiday Inn of Cedar Falls, Iowa*, Iowa App., 272 N.W.2d 24 (1978).

Although the original injury was to the foot, it is the results of the injury and not the situs that determines the disability. While the trauma was limited to the right foot, the claimant was affected with an ailment that extended beyond the schedule. See *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980); *Second Injury Fund v. Mich Coal Co.*, 274 N.W.2d 300 (Iowa 1979); *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

When the injury suffered is a general body injury such as in this case, the claimant's disability is evaluated from an industrial and not an exclusively functional standpoint. *Martin v. Skelly Oil Co.*, 252 Iowa 128, 106 N.W.2d 95 (1960).

As claimant's present disability is to the body as a whole since the change in condition caused by the spread of the dermatitis and as the claimant has not returned to work nor recuperated from the injury, then healing period shall apply.

WHEREFORE, the appeal decision heretofore filed on June 13, 1978 and is reinstated.

THEREFORE, it is ordered:

That employer pay claimant a running award at the weekly rate of ninety-one dollars ($91) commencing on March 14, 1977 and continuing until the conditions as contemplated in §85.34(1), Code of Iowa, have been met. Accrued payments are payable in a lump sum together with statutory interest computed from the date due as contemplated in §85.30, Code of Iowa.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LAVERN H. LANGBEIN,

Claimant,

vs.

BOYER VALLEY FERTILIZER COMPANY, INC.,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Lavern H. Langbein, the claimant, against his employer, Boyer Valley Fertilizer Company, Inc., and the insurance carrier, Aid Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on January 18, 1980.

* * *

The issues for determination are whether the claimant sustained an injury which arose out of and in the course of his employment; the existence of a causal relationship between that injury and the claimed resulting disability as well as the extent of disability. There is no claim for permanent partial disability in this case. There is also a claim for medical expense under section 85.27 of the Code.

There is sufficient credible evidence in this record to support the following statements of fact, to wit:

The claimant, Lavern H. Langbein, testified that he is 42 years old and a resident of Lake View, Iowa. On January 18, 1980 he was unloading a semitrailer which had been packed with 50 pound bags and was stacking these bags in a warehouse for the defendant-employer. While in the process of stacking, the claimant felt a pain in the back as well as in the abdomen. He indicated that in 1976 he had a prior hernia injury for which he was paid workers' compensation benefits. The claimant indicates that the symptoms he felt on January 18, 1980 were similar to those and in the same area as the 1976 hernia incident.

Claimant reported the slipping incident to his employer and spent the weekend at home in pain. He was examined by his family physician on the Monday following the incident and worked the balance of that week. On February 5, 1980, while driving a load for the defendant-employer to Alta, Iowa, claimant was involved in a truck accident and states that immediately after the accident he felt pain in his side and abdomen. He reported the incident to his employer and went to his family physician for examination and treatment.

On February 5, 1980 the claimant underwent surgery for a bilateral inguinal hernia. He remained out of work eight weeks after surgery pursuant to his physician's orders and has now returned to work for the defendant-employer and appears to be performing satisfactorily.

Bruce Paysen testified on behalf of the claimant. He is the warehouse manager for the defendant-employer and is involved in scheduling truck deliveries and assists in loading trucks. he is also the claimant's immediate supervisor. This witness confirms claimant's testimony that on January 18, 1980 he dispatched the claimant to Tennant, Iowa with a load of fertilizer contained in 50 pound bags. He further confirmed the fact that an individual would have to unload his truck by hand at Tennant because they did not have a forklift at that location. The witness indicates that the claimant told him upon return from Tennant, Iowa that he hurt his stomach while unloading. He described claimant as being doubled over at this time. This witness further indicates that claimant told him that while stacking the bags of fertilizer in Tennant, Iowa, he hurt his side in the same manner as he did in 1976. This witness states that he told the claimant to go home and that he should see a physician in reference to this matter. Mr. Paysen is aware of claimant's 1976 hernia surgery but stated claimant has been able to perform his work duties since 1976 without difficulty.

This witness states that he told Colleen Nutzman about the incident and that Colleen is the office manager for the defendant-employer. He confirms that claimant was off eight weeks after the truck wreck incident and is now back to work for the defendant-employer and performing a normal job function.

Colleen Nutzman testified on behalf of the claimant. She has been employed for the defendant-employer for five years and has held the position of office manager for one and one-half years. She states that on January 18, 1980 she was told by Bruce Paysen that claimant had come back from Tennant, Iowa in bad shape. He had been lifting bags and was doubled over. She was not aware that claimant has had any previous problems in performing his job. She completed the workers' compensation papers and sent them to the insurance carrier. This witness expresses the opinion that she thought that the injury claimant sustained on January 18 was work related. She also states that at about this time workers' compensation carriers were changed and that Aid Insurance Company is no longer the carrier for this defendant.

W. J. Nichols, D.O., the claimant's family physician, reports in a letter dated May 17, 1980:

> Mr. Langbein was injured on January 18, 1980, while unloading bags from a truck at Tenat [sic], Iowa. On January 21, 1980, I examined him in the office and advised him to rest and use ice on his right abdomen, and, if not improved, return in two weeks. He showed improvement and did not return until being injured in a truck accident on February 5, 1980. At that time he was suffering multiple abrasions and contusions and complained of severe pain in the lower abdomen. X-rays were negative for fracture at that time. Conservative care was again instituted. On February 8, 1980, he returned to my office with pain in the lower abdomen and examination revealed bilateral weakness, which I diagnosed as bilateral hernias. He was hospitalized on February 10, 1980, and consultation with Dr. Dierwechter who felt possible direct weakness was present and surgery was indicated. I assisted Dr. Dierwechter in Mr. Langbein's surgery. At that time it was found that the patient did indeed suffer direct hernias bilaterally. His recovery has been satisfactory, and he has now been dismissed from care. I would respectfully request that his claim for job related injury and care be considered.

In an attachment to the aforementioned May 17, 1980 letter, Dr. Nichols indicates a final diagnosis after surgery of "bilateral inguinal hernia."

In a follow-up report dated July 12, 1980, Dr. Nichols states:

> His first diagnosis was Bilateral Inguinal Hernia, which was repaired surgicaly, [sic] and Lavern had a good prognosis. As to the best of my knowledge he is back to work. He was disabled following his surgery for his hernia, for about two months.

In another reported dated October 14, 1980, Dr. Nichols observes, "...Mr. Langbein was totally disabled for eight weeks from February 8, 1980 until April 4, 1980. As to the determination of permanent disability, I feel that at this time he should completely recover with no permanent disability."

Ronald A. Dierwechter, M.D., the surgeon involved in this case, indicates on his report of consultation:

> 41 year old white male with bilateral hernia repair several years ago. He is apparently doing heavy work with forklift, truck unloading and similar heavy procedures. In addition, he has had a recent truck

accident and since has had intermittent difficulties with pain in the groin extending into the back. Examination shows some loose external inguinal rings although I cannot definitely detect a hernia per se.

In his operative report Dr. Dierwechter states:

> There was no evidence of indirect hernia in either side although there was some weakness of the post inguinal wall though not sufficient I think to definitely call it a hernia. Both posterior inguinal wall [sic] were tightened with O-tictron so as to carefully guard against any recurrent problems of this area.

In a report dated April 23, 1980, Dr. Dierwechter states:

> I think that you will agree that there are a considerable number of hernia weaknesses and symptomotology present, in the absence of an actual sac, of which I think this patient is an example. His pain began immediately on some heavy lifting at work, and continued whenever the patient exerted himself to any extent. The fact that he has improved considerably after his surgery would, I think, underscore the fact that this area apparently was weak, thus causing his symptomotology.

This physician, in a follow-up report dated July 18, 1980, states:

> The above patient has had previous inguinal hernia surgery. On 18 January, 1980, the patient was apparently unloading 50 pound bags from a truck, and he suffered pain in the left groin, radiating to the back. This was severe enough so that he saw his private physician on 21 January with these complaints. On 5 February, the patient was in a truck accident, at which time he was also seen at his private physician's office, complaining of low back pain and elbow pain, [sic] He was asked to have x-rays taken at the hospital the next morning.

On November 5, 1980 this physician, in an additional report, states that there should be no permanent disability resulting from the hernia or the hernia repair.

William P. Wellington, M.D., in defendants' exhibit B, states that he has reviewed the chart of Mr. Langbein as submitted by the defense which makes a variety of comments which culminate in the following:

> In retrospect (which is a very easy way to diagnose) Mr. Langbein could very well have had low back strain and/or lower abdominal muscular and ligament strain, causing his symptoms, but after surgery intervention, followed by bedrest and being off work for six weeks, it would be impossible to make a different diagnosis.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 18, 1980 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.)

A review of Dr. Wellington's letter of January 26, 1981 leaves the undersigned with the impression that he has only reviewed the chart of Mr. Langbein and has never had the opportunity to directly examine the claimant. Hence, his opinion with respect to this matter will be given little weight.

Particular emphasis will be placed on the opinions of Dr. Dierwechter and Dr. Nichols who are both the treating physicians and the treating surgeons in this case. Dr. Dierwechter had the opportunity to not only examine the claimant, but to perform a surgical procedure on him and his opinion as to causation as well as to other matters is given particular emphasis.

He is, in substance, of the opinion that the lifting incident is causally related to the hernia injury. He is also of the opinion that there is no permanent disability as a result of this incident.

Based upon the testimony of the claimant as well as the other witnesses testifying herein, it becomes clear that the claimant sustained this injury and that it arose out of and in the course of his employment with this defendant-employer.

WHEREFORE, it is found:

That the claimant sustained his burden of proof and established that on January 18, 1980 he sustained an injury which arose out of and in the course of his employment with the defendant-employer.

That there is a causal relationship between that injury and claimant's resulting temporary total disability.

That the claimant was temporarily totally disabled for a period of eight (8) weeks.

That no permanent disability resulted from this incident.

That the medical expenses in the stipulated amount of two thousand one hundred eleven and 15/100 ($2,111.15) are reasonable and were incurred to treat the work related injury pursuant to section 85.27 of the Code.

* * *

Signed and filed this 26th day of March, 1981.

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.

This proceeding for a total commutation of all benefits is being brought by Magdalen Larsen, claimant, against Haag Drug Company, employer, and U.S. Fire Insurance Company, insurance carrier, defendants. A hearing was held on August 28, 1980, and the case was considered fully submitted at that time.

The record consists of the file and decision of the prior decision in arbitration and the testimony of the claimant.

Issues and Applicable Law

As indicated by section 85.45 of the Code, conditions must be met before claimant is entitled to have benefits commuted; the period during which compensation is payable must be definitely determined, and the commutation must be in the best interest of the claimant. (See *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964).

Facts

On March 20, 1980 an Arbitration Decision was filed in the above-entitled action wherein the deputy found:

> That claimant sustained her burden of proof and established that she was employed by defendant on September 1, 1977 and that she suffered a trauma induced heart block on that date which arose out of and in the course of her employment with defendant.
>
> That claimant has established the causal connection between the injury and resulting disability and that her disability is permanent and total in nature as defined in §85.34(3), Code of Iowa, 1977.

As a result of the findings, defendants were ordered to pay claimant at the rate of $61.02 from September 1, 1977 during the period of her disability pursuant to §85.34 and $9,733.10 of medical benefits.

Claimant testified that she was born on June 9,1901 and is no longer employed. Claimant stated that she lives by herself in her own home which is paid for. Claimant indicated she wanted a full commutation which claimant and her attorney caculated to be a little over $22,000. Claimant testified she needs to pay a bill of Dr. Gibson's which is approximately $1,000 which was disallowed in the arbitration proceeding and needs to repair the windows in her fifty-year old home for which she has been given an estimate of $1,700, because they are rotten. Claimant also indicated that she wanted to pay the lawyers's fee of $6,200 which she has incurred as a result of her workers' compensation claim.

On cross-examination claimant revealed that she receives $400 per month from social security besides the permanent total benefits she receives from defendants. Even then claimant indicates that she occasionally comes short of her monthly expenses.

Analysis

As disclosed by the case of *Diamond v. The Parsons Co., supra*, the period for which compensation is payable can be definitely determined in a case of permanent total disability. The claimant still has the burden of showing that a total commutation would be in her best interest.

Even though claimant did not introduce any bills or estimates which would have been of great benefit to the undersigned in making a determination, claimant did testify that she had a doctor bill of approximately $1,000, an attorney bill of $6,200, and a future repair bill of $1,700 for a total $8,900. Claimant has not indicated what she would do with the balance of a total commutation. There was no evidence as to what she would do with the money or how she might invest it so that her best interests would be protected. Claimant herself admitted that she has a hard time living on her social security and workers' compensation benefits. although the claimant has met her burden in showing a legitimate concern that her itemized bills be paid, she has not met her burden in showing that a total commutation would be in her best interest.

If claimant's attorney wants to be paid at this time, claimant should not be penalized because of early payment of the attorney's fee. Therefore, claimant's attorney fees are subject to the same discount as claimant would be for the same amount of money.

Claimant's injury took place on September 1, 1977, at which time claimant was 76 years old and had a life expectancy of 473 weeks (see Industrial Commissioner rule 500—6.3(1). By the date of the hearing on this commutation claimant should have received 156 weeks of compensation.

473 weeks - life expectancy
156 weeks - paid to date of hearing

317 weeks - left to be paid

The amount of discount on claimant's attorney's fees is figured in the following manner.

317 weeks	274.0745 - discount factor
188 weeks	172.2714 - discount factor
129 weeks	101.8031 - resulting discount factor

101.8031 divided by 129 = 0.789173% of discount

$6,200 x 0.789173 = $4,892.86 - amount of attorney's fee at discount rate

The total amount that claimant needs to have commuted is as follows:

Attorney's fee	$4892.86
Doctor bill	1000.00
Repair of windows	1700.00
	$7,592.86

317 weeks 274.6745 - discount factor
161 weeks 149.3593 - discount factor
156 weeks 124.7152 - resulting discount factor

$61.02 weekly rate x 124.7152 discount factor = $7610.12

Findings of Fact

WHEREFORE, it is found:

That the period of claimant's disability can be definitely determined.

That it is in claimant's best interest to pay her attorney's fees as well as her doctor bills and the estimated repair of her windows.

THEREFORE, a partial commutation of claimant's benefits are ordered and defendants are to pay claimant $7,610.12 which represents 156 weeks of compensation. When claimant has accrued 317 weeks of compensation from the date of injury her compensation shall cease to be paid for a period of 156 weeks and then defendants shall again pay claimant benefits for the period of her disability. Claimant's attorney fees of $6,200 are hereby reduced to their present value of $4,892.96.

Defendants are to pay the costs of this action.

Defendants are to file a Final Report after final payment of this decision.

* * *

Signed and filed this 19th day of September, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

LEANNE K. LAUDEN,

Claimant,

vs.

WALKER MANUFACTURING CO., DELUXE PRODUCTS CORP.,

Employer,

Self-Insured
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by LeAnne K. Lauden, the claimant, against her employer, Walker Manufacturing Company, Deluxe Products Corp., to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury she sustained on July 11, 1978. This matter came on for hearing before the undersigned at the Cerro Cordo County Courthouse in Mason City, Iowa on January 6, 1981. The record was considered fully submitted on that date.

* * *

The issue to be determined is the extent of permanent partial disability.

Thirty year old claimant testified that on July 11, 1978 she was working in the spindle conveyor assembly unit on the night shift. The oil filters were coming through the line only partially painted. She was assigned to turn the spindle as the line was moved and take off the filters that were not painted correctly. She was using both hands and wearing thermogloves. Her left hand became trapped up to her elbow around the spindle and against the guide bar. While others worked to release her, her hand was pinched and burned. She passed out when she took off her glove and viewed how her skin had been pushed backwards. The first aid office was closed so claimant was taken to the Albert Lea Hospital emergency room. X-rays were taken and the burns dressed by a Dr. Demo.

Claimant testified that she next saw Darrell E. Fisher, M.D., who eventually referred her to R. D. Beckenbaugh, M.D., at the Mayo Clinic for surgery and subsequent therapy. Claimant recalled that her hand began to draw closed and she could not straighten her fingers prior to the operation. She now has discoloration of the ring finger into the palm where scar tissue is present. Claimant testified that some of the quarter-sized area is numb. A hard dimple is present between the ring and little finger. Claimant noted that different items get caught in the dimple hindering her use of the hand and her safety. She added that her left arm is now smaller and weaker than her right arm. Her present difficulties include being fearful of dropping heavy or hot items when cooking, being unable to cut hair safely because the scissors go into the dimple and she stabs herself, and being conscious of the graft when using her hand in public. [Claimant listed a number of other problems in a letter to Dr. Fisher. (See defendant's exhibit A, pages 3 and 4)].

Claimant thinks her hand will not improve further. John R. Walker, M.D., discussed additional surgery that could be performed but was not necessary. The claimant has declined.

Claimant testified that the surgery at the Mayo Clinic required a skin graft from her right hip which left a red patch that becomes irritated from the seams in her clothing.

Upon cross-examination claimant explained that Dr. Walker's suggestion of surgery was only with regard to the dimpled area. Claimant further testified that she is right-handed but needed both hands to carry out factory work. After her return to work, she remained so employed until her husband transferred jobs. She maintained her

foreman put her on jobs where she used her left hand less than prior to the injury. She is not working at present.

In a letter dated October 2, 1978 and addressed to defendant Darrell E. Fisher, M.D., states in part:

> On examination her left hand and forearm show no atrophy. There are very mild healing changes in the proximal volar left forearm suggesting a previous superficial burn which has left no cosmetic impairment. She has a small healed burn over the dorsum of the hand in two areas at the metacarpophalangeal joint level. She has full flexion of the left hand bringing the digits well into the palm covering up a contracted irregular keloid scar involving the distal end proximal palmar crease in an area 2.5 cm. long and 1.5 cm. wide with the palmar contracture adhering to the palmar fascia and limiting the extension of the long finger and therefore producing pain. She is able to fully extend her index, ring, and little fingers but had considerable pain on palpation of her moderately inflamed keloid scar which is still very young as to its maturity. This is markedly tender, and she is very sensitive to touch in this area though in other areas appears to demonstrate no pain reaction. The neurovascular examination of the hand is considered normal. There is no unusual dryness or sweating in the hand or fingers. No x-ray was taken. Two colored photographs were taken in the office today.
>
> In my opinion, this woman suffered an obvious 3rd degree burn to this critical area to palm of the left hand which has subsequently undergone expected hypertrophic changes with current young keloid formation and will take 3-6 months for this to mature to the point that elective excision could be carried out. Excision would correct the problem of contracture of her palmar fascia, though it may well require a skin graft procedure to this area of her palm.
>
> In my opinion, she is not capable of working on her former job as it is described to me if it does, in fact, require the use of both hands for its regular function. She is able to use her left thumb and index finger in a normal manner so that light activities such as pinching or picking up objects weighing no more than 5 lbs., in my opinion, could be carried out with the left hand with no great restriction.
>
> . . .
>
> I do not think she can return to any form of work involving the use of the left hand except for thumb and index finger pinching, and she is to do no grasping or gripping whatsoever with the palm of her hand. [Claimant's exhibit 1.]

R. D. Beckenbaugh, M.D., writes to Dr. Fisher on January 15, 1979 advising that claimant was treated for her chronic scar contracture that was "causing limited extension of the thumb and index finger and was quite tender and hypertrophic in a stellate fashion." Dr. Beckenbaugh reported that "an excision of the scar and a primary split thickness skin graft" was carried out on January 8, 1979. He anticipated four to six weeks for recovery. (Claimant's exhibit 2.)

In office notes for April 3, 1980, Dr. Fisher reports:

> Her left hand is nondominant, her graft was done January 8, 1979, now 15 months post-op. Has full range of motion of the left upper extremity including the hand, wrist, digits and thumb. Her skin graft is well taken. Measures 2.5 by 3.8 cm. and there is a very tiny dimple which produces no problem nor contracture and her contracture of the web spaces is now completely gone. Has some tenderness over her doner site above the right greater trochanter which measures 2.5 times 2.5 cm. and has very minimal scar formation in my opinion. She has very slight obvious decreased sensation in the left palm where the graft is involved and is reminded that no cutaneous nerve fibers will be present on this portion of the skin though her tactile sensation in all of her digits is normal. She may return to work at any form of work tolerated though I recommended to her that she avoid occupations involving forceful gripping, squeezing using the entire palm and that she look for more fingertip use of the hand. In my opinion, she has a permanent partial physical impairment of 2% of the left upper extremity which is permanent. [Defendant's exhibit A, page 2.]

In office notes for October 16, 1980, Dr. Fisher found no change in claimant's physical impairment. (Defendant's exhibit A, page 2.) In a letter dated October 30, 1980 and addressed to defendant's counsel, Dr. Fisher translates two percent impairment of the upper extremity as being one percent of the body as a whole. (Defendant's exhibit A, page 1.)

John R. Walker, M.D., writes to claimant's counsel on August 6, 1980 stating that he evaluated the claimant for complaints referrable to the work injury and subsequent surgery. Dr. Walker's examination revealed:

> * * * a well-healed palmar graft, split thickness type, measuring approximately 2 x 4 cm. It is bronzed and there is a contracture of the ulnar side of the scar at the prosculature of the hypothenar eminance on this hand, as compared to the right and there is also some loss of the thenar musculature, due to atrophy. This is on the left hand, of course and also compared with the right hand. There is 3/8 atrophy of the left forearm as compared with that to the right. The grip is reduced in comparison to the right. On the right she is able to register 140 kiloponts on the Vigorometer, where on the left it is only 72 kiloponts. She has an itchy, reddish scar measuring 3 x 5 cm. at the donor site of the skin graft.
>
> AP & lateral views of both hands reveal a mild bone atrophy of dis-use of the left hand as compared to the right hand. [Claimant's exhibit 3, pages 2 and 3.]

Dr. Walker's opinion and recommendations were:

This patient has a cosmetic problem and a pain problem due to the hand, with of course loss of strength and grip and with loss of actual musculature of the forearm and the tumb and the fifth finger as well.

It would appear that this patient has, considering her loss of co-ordination and strength and the discomfort, a permanent, partial disability of 18% of the left upper extremity.

At the present time, the only treatment that I would recommend is a possible excision of the small scar contracture, but this is certainly not mandatory. [Claimant's exhibit 3, page 3.]

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 11, 1978 is the cause of the 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 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.*

The medical and lay testimony support finding that claimant's impairment extends to the arm. Claimant testified that her upper extremity became caught up to the elbow and that her present loss of use includes weakness of the arm itself. The medical reports note burns to the forearm as well as to the hand and atrophy of the forearm muscles. The impairment is rated in terms of the upper extremity.

Parenthically, it is noted that Dr. Fisher's last letter translates the impairment to the body as a whole and claimant does mention in answer to interrogatory number 22 (claimant's exhibit 5) as a claim for industrial disability as a result of the skin graft from the hip (contrast with paragraph 19 of the original notice and petition which claims the nature and extent of permanent disability as entailing "[l]oss of ability to use left hand"). There is no loss of earning capacity in this case as a result of the skin graft from the hip, and claimant's otherwise limited scheduled injury may not be so transformed into an injury that resulted in disability to the body as a whole. Contrast *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

In light of claimant's credible testimony regarding the difficulty she has using the extremity, Dr. Fisher's permanent impairment rating seems extremely low. Although he was not a treating physician, Dr. Walker's opinion appears to be more corroborative of claimant's loss of use as she describes it and as it is otherwise supported by the record viewed as a whole.

WHEREFORE, it is hereby found that claimant has sustained her burden of proving that as a result of the July 11, 1978 injury her left upper extremity is eighteen (18) percent permanently partially disabled.

It is further found that claimant is entitled to be reimbursed for Dr. Walker's examination pursuant to a claimant's previously approved application for a Code section 85.39 examination.

It is further found that claimant is entitled to reimbursement for remaining mileage expenses incurred in traveling to see Drs. Fisher and Walker. Counsel indicated this equalled eight hundred ninety-eight (898) miles after July 1, 1980.

* * *

Signed and filed this 23rd day of February, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JEFFERY G. LEMON,

Claimant,

vs.

GEORGIA PACIFIC CORP.,

Employer,

Self-Insured,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendant apeals from an adverse arbitration decision.

* * *

The arbitration decision of the hearing deputy will be affirmed, with the following amplification.

Claimant lost vision in his left eye, he says, because about 2:00 a.m. on October 15, 1979, he was hit in that eye by the round side of a large hook. He did not seek medical attention until 9:00 a.m. that day. That such a blow could cause the loss of vision in an eye and that claimant would wait seven hours before seeking medical attention seems strange. However, both circumstances are explained by Theodore Torsch, M.D., a qualfied ophthalmologist, the treating doctor.

Q. And what type of perforation was it?

A. Well, it was a type of perforation we see either with a large blunt instrument or with a great force with a smaller, less blunt instrument such as a knife could produce an injury like this or a fist or a foot.

Normally the amount of kinetic energy that has to be transferred to the eye with a blunt instrument has to be higher in order to produce a perforation like this than the amount of kinetic energy that has to be transferred with a sharp instrument. A sharper instrument with less kinetic energy could produce this injury versus a blunt instrument which would have to have more kinetic energy to produce this injury.

Q. How does the striking of the eye with a blunt instrument cause the perforation?

A. There are areas of the eye which are weaker than other areas of the eye. And when the kinetic energy is transferred to the eye, the areas that are weakest tend to bulge somewhat and can rupture sort of like a tire that's been overinflated. Some spots have to be weaker than the others.

The areas that are usually the weakest are the areas associated with extraocular muscles, the muscles that cause the movement of the eye. And those areas are usually where the perforations take place because it's the thinnest area of the eye, and therefore the most subject to pressure and rupturing from blunt injury.

Q. So what I'm trying to make absolutely clear for the record here is that you're saying that the perforation of the eye could have been accomplished without, for example, a knife or something actually getting into the eye?

A. Yes (Torsch deposition, pp. 10-11).

* * *

Q. And with the type of loss of vision that you noted upon your examination at nine o' clock, how much time before that, even given the benefit of the doubt on the various theories, would you have anticipated the vision to have been lost significantly enough for him to notice it?

A. Well, to be very honest, I was surprised that he was not aware of the visual loss at the time I saw him. He seemed—When he came in to see me, he was very unimpressed in his own mind with the severity of this injury. To me it looked to be extremely severe. To him, he was very nonchalant about it. That is to say, he did not appreciate in my mind how severely his eye had been injured. He didn't perceive that he had visual reduction. His chief complaint didn't even notice that he had any reduction in that vision in that eye, but this is not the first person.

The good Lord gave us two eyes. And if you have visual information coming from one eye, a lot of people don't appreciate the fact they can't see out of the other eye.

Q. He didn't appreciate the fact that he lost vision in one eye?

A. He was not aware of it at the time I saw him.

Q. He didn't voice it at least?

A. Shall I say his general characteristics in the office were very nonchalant to the seriousness of this injury. He seemed to be very unimpressed with how severely he had been injured, and I was surprised at this (Torsch deposition, pp. 29-30).

* * *

A. Again as we discussed earlier, this may have been a progressive loss of vision. This may have been another reason why the patient didn't appreciate the injury. He may have appreciated the shock and the pain and maybe he was knocked to the floor. He may not have appreciated how severely the eye was injured. And particularly if a person underwent a gradual vision loss, he may not have appreciated it during that period of time (Torsch, deposition, p. 31).

The foregoing evidence, inter alia, quite adequately shows how claimant was injured and why he delayed seeking treatment.

To the contrary, of course, is the testimony of Robert Stickler Brown, M.D., also a qualified opthalmologist, who examined claimant on behalf of defendant. Because Dr. Torsch was the treating doctor and Dr. Brown examining doctor, the former has more opportunity to form his expert opinion, and his (Dr. Torsch's) evidence is given greater weight.

Finally, claimant's credibility in such a case must be said to be an issue. No evidence appears in the record which would diminish his believability.

WHEREFORE, it is found and held as a finding of fact, to wit:

(1) That claimant sustained an injury which arose out of and in the course of his employment on October 15, 1979, while at work, when he was struck by the rounded side of a large hook.

(2) That said injury was the cause of claimant's loss of vision in the left eye.

(3) That claimant is entitled to a healing period from October 15, 1979 until he returned to work on December 17, 1979.

(4) That the proper rate of weekly compensation is two hundred thirty-one and 82/100 dollars ($231.82).

* * *

Signed and filed at Des Moines, Iowa this 29th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

CONNIE LEWIS,

Claimant,

vs.

AALF'S MANUFACTURING CO.,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 9, 1980, the undersigned deputy industrial commissioner has been appointed under the provisions of section 86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from a proposed arbitration decision which awarded claimant certain compensation benefits.

On reviewing the record, it is found that the hearing deputy's findings of fact and conclusions of law are proper, except for the finding on weekly compensation rate, which must be modified.

First, certain procedural matters must be taken care of. After defendants' appeal, claimant cross-appealed; whereupon defendants moved to dismiss the cross-appeal, which brought forth by claimant a motion to dismiss defendants' appeal. The arbitration decision is only the proposed final agency decision in this matter. Since the record is considered de novo, the motions are moot and are hereby overruled.

The case has several issues: whether claimant sustained an injury which arose out of and in the course of employment; if so, whether there is a causal relation between that injury and her disability; if so, the extent of such disability; whether the notice provisions of section 85.23 were satisified; and finally there is an issue of the rate of weekly compensation.

The issues of injury, causal relationship and notice were thoroughly and correctly explored in the hearing deputy's decision. Briefly, claimant worked for the employer starting in 1971, always in some phase of manufacture of bluejeans. Sometime in August or early September 1978, she noticed a catch in the area of her left shoulder, left collar bone, and breastbone. The medical evidence showed the condition was a scolenus anticus syndrome or thoracic outlet syndrome, caused by the repetitive motions necessary to operate the sewing machine. There was also evidence (Dr. Blume report, July 6, 1979) that claimant has some synovitis and arthritis in the left sternoclavicular joint. Claimant's employer knew about the relatedness of the condition at or about the same time as claimant.

The question of the existence of permanent partial disability is more difficult. The pre-hearing order clearly shows "temporary" not healing period and permanent partial as the disability issue. The hearing deputy determined that sufficient evidence was present to determine permanent partial disability, stating that the record as a whole shows claimant's condition is permanent. The situation at the time of the hearing is that claimant wanted surgery (Tr, 43) and that Dr. Blume recommended an operation (claimant's exhibit G); however, Dr. Blenderman stated that the degree of claimant's discomfort was insufficient to make claimant want surgery and that an operation might not totally relieve the problem (deposition, 24). There is no clear medical indication of claimant's future, whether she does or does not have the surgery.

Even though one cannot predict claimant's medical future with any certitude, it is not difficult to appreciate that she has had a change in her earning capacity and that change is permanent in nature. Of course, it is not necessary that claimant have a permanent functional impairment in order to be entitled to permanent partial disability payments; she is precluded from returning to her employment because of the injury. *Blacksmith v. All American, Inc.*, 290 N.W.2d 348 (Iowa 1980). As the hearing deputy stated, claimant was in the process of becoming certified to teach special education being unable to continue working at the employer's business. This fundamental change in occupation was necessitated by claimant's work injury. It is clear, of course, that teaching may well pay claimant a better living. Her only real loss is foreclosure from work requiring movements like or similar to those at the employer's sewing machine. Hence, her loss of earning capacity is a rather minimal or moderate 5 percent.

The healing period determined by the hearing deputy appears basically to be correct. Claimant's last day of work at the employer's premises was April 27, 1979 (Tr, 36); She reached her maximum recuperation and her healing period ended on June 14, 1979, a period of 7 weeks. Since the payroll resume (defendants' exhibits 1 and 1A) shows continuous work from the date of the injury through the last week of April 1979, the dates of April 27 through June 14, 1979 seem clearly to be the healing period.

Last is the issue of weekly compensation rate. Section 85.36(6) states:

> 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 am 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.

Since that code section fits claimant's circumstances, it will be used to determine her weekly earnings. Defendants' exhibits 1 and 1A give her earnings from the week ending May 6, 1978 to April 28, 1979. Claimant did not work 13 consecutive weeks between May 6, 1978 and the date of the injury in September 1978. However, it is clear that the requirement of 13 consecutive weeks must be interpreted in light of the first unnumbered paragraph of section 85.36 which mandates that one determine the weekly earnings "at the time of the injury," and that said earnings are those to which the employee "would have been entitled had he worked the customary hours for the full pay period in which he was injured,. . . ." Here, as in many other cases, claimant had vacations and layoffs which broke the string of weeks.

The requisite action, then, is to determine what claimant was earning when she was hurt; subsection 6 qualifies this requirement by stating a method of computation. Reading the first unnumbered paragraph and subsection 6 together, the best method of calculation would be to determine the last 13 completed consecutive weeks. Although this method may not be possible in some cases where insufficient information is available, here there is just enough data.

Using September 2, 1978 as the injury date, it is possible to use exhibits 1 and 1A, ignoring layoffs and vacation weeks. The 13 weeks are those ending May 6, 13, 20, 27, June 3, 10, 17, 24, July 1, 8, 22, August 26 and September 2, 1978. The computation shows the actual weekly wage to be $116.35, entitling claimant to a weekly compensation rate of $74.44.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on September 2, 1978 claimant sustained an injury arising out of and in the course of the employment in the nature of a thoracic outlet syndrome.

2. That the employer in the person of Bill Edward Thompson knew of the work-relatedness of the injury sometime during the month of September, 1978.

3. That as a result of said injury, claimant was unable to work for a period of seven (7) weeks, from April 27, 1979 to June 14, 1979.

4. That an estimate of the permanent functional impairment is not of record.

5. That, nevertheless, claimant's earning capacity was changed because she will probably never again be able to work at a sewing machine.

6. That claimant's loss of earning capacity was minimal or moderate and resulted in permanent partial disability to the body as a whole for industrial purposes in the amount of five (5%) percent.

7. That her average weekly wage was one hundred sixteen and 35/100 dollars ($116.35) and the proper weekly compensation rate is seventy-seven and 44/100 dollars ($77.44).

* * *

Signed and filed this 30th day of December, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending

LOUIS E. LIMOGES,

Claimant,

vs.

MEIER AUTO SALVAGE,

Employer,

and

CONTINENTAL INSURANCE CO,

Insurance Carrier,
Defendants.

Arbitrtation Decison

This is a proceeding in arbitration brought by Louis E. Limoges, the claimant, against his employer, Meier Auto Salvage, and its insurance carrier, Continental Insurance Companies, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on June 19, 1976. This matter came on for hearing before the undersigned at the Woodbury Courthouse in Sioux City, Iowa, on December 4, 1980. The record was considered fully submitted on January 4, 1981.

* * *

According to the pre-hearing order, the issues to be determined are whether the claimant sustained an injury in the course of and arising out of employment; whether there is a causal relationship between the alleged injury and the disability; and whether claimant is entitled to benefits for healing period and permanent partial disability.

At the time of the hearing, the parties agreed that "in the course of" and "arising out of employment" were still in issue. Claimant's counsel indicated he would stipulate the date of injury was June 12, 1976. However, in his arbitration decision filed January 4, 1980, Deputy Commissioner Mueller stated the issue as being whether the claimant established a need for medical services contemplated by Code section 85.27 and ordered the defendants provide the claimant with an examination by A. J. Callaghan, M.D. "of the claimant's chest and upper lumbar area as it relates to possible traumatic injury sustained on June 19, 1976." A finding that the injury occurred in the course of and arising out of employment was implicit in such order regarding medical care. In any event, the record viewed as a whole indicates that the injury did occur on June 19, 1976 in the course of and arising out of claimant's employment.

Claimant, 55 years old, who began working for defendant-employer on October 28, 1975, was picking up

debris on the date of injury while Francis Brown, defendant's manager, and Shawn Skatges were stacking cars with the help of a crane. Claimant testified that he missed in reaching for the hook of the crane's boom as it swung towards him, and subsequently the hook grabbed him from the left and wrapped around to his mid back while the attached ball hit him in the chest and knocked him to the ground. Aside from feeling winded, claimant did not notice any chest or back pain until he drove home at the completion of the work day.

Claimant worked continually and at his same job after the date of injury until the last two weeks of December 1976 when he was sick with the flu. Defendant-employer interpreted claimant's two-week absence as a voluntary quit. Claimant's subsequent claim for unemployment benefits was denied. Claimant later returned to work for defendant for a couple weeks. According to the claimant, he left work because his back bothered him and he could not tolerate taking orders from someone younger.

From January 1977 to May 1978 claimant drove and maintained a truck for Harold Schulte, an antique dealer, and assisted in loading and unloading the truck in return for his and his wife's all-expenses paid travels around the United States. Claimant has not worked since May 1978.

At the time of the June 1979 hearing, claimant testified that since the date of injury his back and stomach had bothered him. He described the stomach pain as extended into his chest making breathing difficult. Claimant agreed that he had been able to work everyday after the injury without his condition becoming so bothersome that he needed medical care; however, at the time of the June 1979 hearing, claimant did think he needed treatment.

At the time of the present hearing claimant testified that he saw Dr. Callaghan pursuant to the prior ruling but also went to James L. Hartje, M.D. for his stomach problems. He explained that he first noticed an effect of the stomach problem when lifting for the antique dealer. He denied any serious physical problems prior to the date of injury although he did concede suffering an earlier arm injury in Arizona for which he unsuccessfully brought a claim for compensation. Claimant indicated he was unable to tear down a house without hiring assistance because of the back and leg pain he experienced in attempting such task. He also found walking a bean field too taxing. He added a painful right arm and difficulty sleeping at night to his list of complaints. He presently cleans copper and brass to supplement the income his wife earns for the family.

Claimant's wife, Dorothy, who testified only at the recent hearing, verified claimant's complaints. She acknowledged that claimant was not well educated and had difficulty keeping a job but disputed that claimant had a high degree of absenteeism. She conceded that claimant helped with some heavy lifting for the antique dealer but voiced no complaints of pain at that time.

Lena Meier, bookkeeper for defendant-employer, testified at the prior hearing. She noted that claimant's work record revealed erratic attendance before, but not after, the date of injury—until claimant failed to come to work after December 23, 1976. Claimant was terminated January 20, 1977. She recalled that claimant returned to work for two weeks in December of 1977 but thereafter again failed to come to work. She explained that the date of injury had to be Saturday, December 19, 1976 and not December 12, 1976 because claimant only worked one Saturday in December of that year. She verified that claimant earned $2.30 per hour at that time of the injury. (Claimant's exhibit 9, Claimant's work record reveals that claimant did sporadically miss work prior to the date of injury. Such exhibit does not include data for more than 2 weeks after the date of injury.)

Francis Eugene Brown, manager for defendant-employer since 1969 and a witness at both hearings, testified that the claimant, who is his wife's uncle, was a slovenly worker, refused overtime and missed several days of work. Brown did not recall the specific date of injury but did remember the incident. He explained that as he was returning the crane to pickup position, the cable and 20 pound weight (30 to 50 pounds according to his testimony at the second hearing) swung in an arc. He noted that claimant was leaning inside a car when the crane or weight struck the upper part of claimant's back. Brown did not witness claimant fall or suffer any blow to the stomach but admitted he was standing 30 feet away from the scene. Brown asked the claimant if claimant was hurt. According to Brown, the claimant did not complain of pain except on one occasion a week after the episode and did not request medical care. Brown pointed out that claimant likewise did not mention any problem or need for medical care when claimant returned to work for defendant-employer in December of 1977. He explained that claimant's employment was terminated on that occasion because claimant had been responsible for damage done to an overhead door. (Claimant, upon rebuttal, insisted that someone else hit the door with a crane.)

In a letter report dated February 4, 1980, A. J. Callaghan, M.D. states that he examined the claimant on January 12, 1980. He was aware of the work injury (as described by the claimant at the hearings) and of claimant's contention that since the date of injury he has had pain above the right hip area upon walking and recently experienced hip and chest pain upon lifting. Dr. Callaghan's examination was "not remarkable" and showed "no evidence of any fractures or limitation of motion... in the back or the spine." Chest examination revealed no tenderness, heart sounds and blood pressure were normal and the lungs appeared clear. (Claimant's exhibit 1.)

An x-ray report prepared by C. M. Marriett, M.D. for Dr. Callaghan, contained essentially normal findings for the chest and evidence of early degenerative changes but of no fractures in both the dorsal and lumbosacral spine. (Claimant's exhibit 2.)

In a follow-up letter dated December 12, 1980, Dr. Callaghan notes that although claimant related all his subjective complaints to the date of injury, the examination failed to yield objective findings explaining such pain. Dr. Callaghan states: "I have no way of knowing if this is related to his accident." He did opine that claimant's degenerative arthritis was compatible with claimant's age.

In a letter dated February 8, 1980, James L. Hartje, M.D. states that he saw the claimant upon request by Dr. Callaghan for determination whether claimant had a gastric polyp high in the fundus of the stomach. Dr. Hartje

recommended "esophagogastroduodenoscopy and biopsy and removal of the polyp." Dr. Hartje did "not think that there is any way that this polyp could be related to any external trauma. At the present time, his pain sounds musculo-skeletal in nature to me and not of abdominal origin." He thought the polyp was an "incidental finding and unrelated to the trauma..." (Claimant's exhibit 4.)

In a follow-up letter dated July 7, 1980, Dr. Hartje clarified that Dr. Callaghan asked him to evaluate claimant's abdominal pain. The esophagogastroduodenoscopy was part of such evaluation. He states that although "[i]t is very difficult to say whether the ulcer is due to the accident or not certainly the endoscopy was needed to evalute the pain which started after the accident." (Claimant's exhibit 3.)

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 N.W.2d 63 (1955).

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 19, 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.)

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 the 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.*.

Preponderance of the evidence means the greater weight of evidence, the evidence of superior influence or efficacy. *Bauer v. Reavell*, 219 Iowa 1212, 260 N.W.2d 39 (1935).

A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. *Burt, supra.*

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 and Co.*, 217 N.W.2d 531, 536 (Iowa 1974).

As indicated earlier the record clearly supports the finding that claimant did receive a blow to his back and possibily to his chest while in the course of performing his duties for defendant-employer. Defendant's manager was a witness to the incident. However, claimant's version of what occurred (a blow to the back and chest and a fall to the ground) is given greater weight than Mr. Brown's account (a blow between the shoulders) in light of the fact that Mr. Brown's vantage point was 30 feet from the scene and he was involved in operating the crane.

Despite what might appear to be a severe injury, claimant was able to continue working steadily at the same job until his termination following two weeks absenteeism in December 1976 which claimant blamed on the flu. Neither Dr. Callaghan nor Dr. Hartje even state that it is "possible" (let alone "probable") that claimant's present difficulties are related to the June 1976 work injury. Reading the record as a whole does not remedy the lack of supportive medical evidence. Claimant did in fact find work after being terminated by defendant-employer in January 1977 and such work entailed some degree of lifting. Although claimant tried to convey the idea that his pain only became a noticeable hinderance when he was doing some lifting for the antique dealer and such lifting itself did not initiate such pain, the analysis is suspect. If claimant's doctors were aware of such matter, neither addressed the contribution such activity may have had to claimant's present disability. Accordingly, the record does not support finding that claimant's present complaints are causally related to the July 1976 injury. Nor is claimant entitled to weekly compensation under the rationale set forth in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980) and *Blacksmith v. All American Inc.*, 290 N.W.2d 348 (Iowa 1980) because his termination was not for purposes related to his work injury but rather resulted from what the employer found to be absenteeism (which the claimant essentially related to the flu) on one occasion and responsibility for damage to defendant-employer's property in the second instance.

With regard to claimant's request for payment of offered medical expenses, the record indicates that Dr. Callaghan referred the claimant to Dr. Hartje for evaluation of the abdominal complaints. Although Deputy Commissioner Mueller's decision specifically directed the defendants to provide Dr. Callaghan's services for examination of the chest and upper lumbar region, the decision by Dr. Callaghan to explore the possibility of abdominal involvement is deemed reasonable and necessary. Dr. Hartje verified that the procedures he employed were for determination of the problem and whether it was related to the injury. Hence the bills related to such investigation by Drs. Callaghan and Hartje will be allowed. Claimant's prescription bill was not sufficiently identified as being part of the diagnostic process or for subsequent treatment of conditions which neither doctor linked to the injury. Such expense will not be allowed.

THEREFORE, for all the reasons set forth above, it is hereby found that claimant sustained an injury in the

course of and arising out of the employment but that such injury is not responsible for the alleged disability on which claimant bases his claim.

It is further found that diagnostic treatment offered by Dr. Callaghan and Dr. Hartje was necessary and reasonable as contemplated by the prior arbitration decision of Deputy Commissioner Mueller based on Code section 85.27. (Note the medical report mentioned in exhibit 7 is a cost expense and not part of the treatment. Fifteen and 00/100 dollars [$15.00]—the apparent difference between the office visits that included a report and the one that did not—will be subtracted from the total shown on such exhibit.) Reimbursement for the drug prescription will not be allowed insofar as it is not clear whether such medication was for the diagnostic procedure or was for treatment of conditions which claimant's doctors did not find to be work-related.

* * *

Signed and filed this 16th day of April, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

GEORGE LOTER,

Claimant,

vs.

JIMMY DEAN MEAT, INC.,

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from an order filed July 18, 1980 overruling their motion to set aside a default order entered June 13, 1980.

A review of the record discloses that good cause has not been shown to set aside the default.

It is noted, however, that the default order itself is unduly limiting. The default order indicates that defendants "shall be permitted only to cross-examine such witnesses as are introduced by claimant." Such limitation is without proper support.

"Where a defaulting defendant appears prior to trial of the question of damages, he has a right to be heard and participate therein." *Williamson v. Casey*, 220 N.W.2d 638, 640 (Iowa 1974). "He (defendant) may cross-examine witnesses and may offer proof in mitigation of damages. Defendant may in effect even defeat the action by showing that no damanges were caused to plaintiff (claimant) by the matters alleged. *Hallett Construction Co. v. Iowa State Highway Com'n*, 154 N.W.2d 71, 74 (Iowa 1967).

The damages in this workers' compensation case would appear to be the amount of weekly compensation and medical benefits related to claimant's injury. Defendants may thus "be heard and participate", "cross-examine witnesses", "offer proof in mitigation of damages" and show that "no damages were caused to" claimant by the instant injury.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RUDY LUCIA,

Claimant,

vs.

VITALIS TRUCK LINES,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurance Carrier,
Defendants.

Ruling

On March 3, 1981 claimant filed an application for an order that claimant not be required to submit to examination by David Sampel, psychologist, which had been requested informally by the defendants. In support of his application, claimant argued that defendants previously had adequate opportunity to avail themselves of such an examination, that in response to the undersigned's June 30, 1980 decision which, in part, ordered the defendants to offer the services of three experts in psychotherapy from which the claimant was to choose one, defendants designated Todd F. Hines as their psychotherapist, that according to the June 30, 1980 decision such treatment was to continue at defendants' expense in accordance with Dr. Hines' recommendations, that Dr. Hines has not recommended a psychological examination by another psychologist, and that any additional psychological evaluation or examination or treatment at this time is contrary to the June 20, 1980 decision and could disrupt and prolong current treatment.

On March 4, 1981 defendants filed a Resistance to Application for Order stating that at the time of the hearing the psychological evidence indicated that claimant would need only a few months of treatment, that there has been no apparent improvement, that claimant has been uncooperative (reference was made to a letter

from Dr. Hines, not presently before the undersigned), that an evaluation is necessary to determine whether he still is improving or is at a point where permanent partial disability benefits should begin, and that the defendants have not previously pursued a psychological examination in this case and have a statutory right to do so.

On March 6, 1981 defendants filed an Application for Examination Pursuant to Code Section 85.39 asking that the claimant submit himself for examination by Dr. David Sampel, psychologist, at a time convenient to the parties.

On March 9, 1981 claimant filed a Motion to Set Application for Hearing so that Dr. Hines could testify as to the matters raised in defendants' Resistance and as to the effect the evaluation would have on claimant's progress.

The June 30, 1980 decision provided in relevant part:

> The undersigned is not prepared to render a high permanent partial disability or permanent total disability rating which is otherwise suggested by the record. The ultimate goal of the workers' compensation law is to rehabilitate the injured worker. The claimant has indicated a desire to return to work but has demonstrated an inability to succeed in such attempts for reasons expert evidence attributes to the physical and psychological results of the work injury. At this point a running award is proper. Dr. Hines is optimistic that claimant will completely recover from the psychological problem with psychotherapeutic treatment and vocational rehabilitation. However, the physiological problem related to the injury is permanent in nature and for that reason the benefits will be labeled healing period rather than temporary total disability benefits. Compare *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).
>
> * * *
>
> ...Dr. Hines' recommendations regarding therapy, to be administered before and concurrently with vocational rehabilitation is deemed necessary and reasonable. The defendants shall tender the service of three (3) experts in psychotherapy from which the claimant may choose one. The tender shall remain open for sixty (60) days. Upon acceptance, the treatment will continue at the defendants' expense in accordance with Dr. Hines' recommendations.
>
> * * *
>
> It is further ordered that when defendants have evidence that termination of healing period benefits has occurred, they are to submit the evidence to claimants' counsel and this office. If the parties are unable to reach an agreement as to the cessation of healing period and amount of permanent disability, a hearing shall be requested by defendants on those issues. Giving due consideration to the prompt obtaining of rebuttal evidence by claimant, a hearing shall be set at the earliest possible time. Defendants shall pay healing period benefits until either an agreement between the parties is reached and this office is given written notice or until defendants, with a prima facie showing that healing period benefits shall cease, shall file a request for immediate hearing for a determination of the cessation of the healing period.

Code Section 85.39 provides in relevant part:

> 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; * * * * (Emphasis added.)

David Sampel is a psychologist. Code Section 85.39 contemplates that a psychiatrist and psychiatrist-referred experts authorized to practice under the laws of this state conduct such examinations. Accordingly, defendants' present request for examination must be denied.

Parenthetically, it should be noted that defendants are not prevented from obtaining an 85.39 examination. The decision intended that the treatment offered would continue in accordance with the offered psychotherapist's recommendations. It did not envision hindering the defendants from obtaining an evaluation to support their position on termination of healing period. Presumably, defendants will take into consideration the possibility that such evaluation may interrupt and prolong Dr. Hines' care which is being provided through the mechanics of the June 30, 1980 decision. Any argument by the parties regarding the progress of the present care as it relates to claimant's recuperating would be immaterial to a determination of the defendants' right to conduct an 85.39 examination.

WHEREFORE, it is hereby found that defendants' request for an 85.39 examination does not satisfy that statute's prerequisites in that Dr. Sampel is a psychologist.

THEREFORE, defendants' request for an 85.39 examination is denied. In light of such ruling, claimant's application for order and hearing are denied.

* * *

Signed and filed this 16th day of March, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

PHYLLIS LUKEHART,

Claimant,

vs.

GLENWOOD STATE HOSPITAL SCHOOL,

Employer,

and

THE STATE OF IOWA,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Phillis Lukehart, the claimant, against Glenwood State Hospital School, her employer, and the State of Iowa, as insurer, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury following a fall at work on March 12, 1978 for which claimant received a healing period of 16 weeks and four days at the agreed weekly rate of entitlement of $96.57. Following the termination of the healing period of July 6, 1978, claimant received an additional healing period of 27 weeks and one day ending on September 12, 1979 together with payment of an additional 33 weeks for a 15 percent functional impairment of claimant's right lower extremity.

The issue requiring a ruling is the nature and extent of claimant's functional impairment of her right leg as contemplated in Code section 85.34(2)(o).

* * *

Based upon the undersigned's notes, there is sufficient credible evidence contained in this record to support the following findings of facts:

Claimant, age 25 and married, sustained an admitted right knee injury as a result of a fall on her employee's premises on March 12, 1978.

In 1969, at age 14, claimant sustained an "internal derangement of the RT knee." Dr. F. Eberle Thornton removed the medial meniscus at that time. (Exhibit H).

Immediately following the industrial fall, Ronald K. Miller, M.D., found an "extremely severe chondromalacia down to the bone and acute dislocation of the patella, right knee." Claimant's kneecap was removed surgically. (Deposition, p. 4, l.6)

In February 1979 Claimant sought medical care from Dr. Aldi, with complaints of leg weakness, "knee giving out," painful and swollen.

Dr. Aldi's diagnosis was as follows (Exhibit B):

> Mrs. Lukehart indeed had a patellectomy of the right knee by Dr. R.K. Miller, Orthopedic surgeon on April 5, 1978. Apparently this was due to severe chrondromalacia and acute dislocation. This patient never got better following the operation. Since the time of the operation her knee was giving out on her. She was falling down and she was in constant pain; she could hardly bend her knee. She also had some catching in her knee from time to time. She had not been able to work.
>
> Assessing the case, I went ahead in order to alleviate her symptoms; I put a prosthesis behind the patella tendon which at that time was without a patella. It has been six weeks since the operation.
>
> The patient was seen in my office twice; she seems to be getting along pretty well. At that same time when I put in a metal surface behind the patellar tendon, I also elevated the attachment of the tendon to the tibia and relaxed it slightly by moving the bone block proximally approximately ¼ inch. If the operation works out she should do pretty well.
>
> The second operation was merely done to correct a patellectomy rather than her first injury which was still puzzling to me. Therefore, I should consider the second operation was necessitated by the original injury.

Dr. Aldi's surgical notes covering the claimant's March 7, 1979 operation were in part as follows (Deposition exhibit 2):

> The tibial tubercle was outlined and then drill holes were made about a block measuring ½ inch by 1 inch including the attachment of the patella tendon. This was removed. The medial incision was carried down protecting the quadriceps extension and patellar tendon. This was retracted laterally exposing the anterior aspect of the right knee completely. There was some osteophyte formation at the junction of the cartilage and periosteum of the medial condyle but there was minimum amount if any cartilaginous degeneration. The medial meniscus had been removed in the past but the lateral meniscus was quite normal. So were the cruciate ligaments. By using proper Jig and trial prostheses the patella groove was shaved down to the bone and a metal prostheses to resurface was carried out. The metal was anchored to the bone by using Methylmethacrylate. Then the tibial tubercle was transferred approximately ½ inch medially and 1/8 inch proximally in order to get better aligning of the quadriceps extension over the prostheses.

Dr. Aldi expressed his opinion (Deposition, p. 10, l.14) that the claimant has a functional impairment of 35 percent of the right leg with 20 percent of this total charged to the prior 1969 surgery.

John Grant, M.D., an orthopedic surgeon associated with the McFarland Clinic, concluded that the claimant has a functional impairment of 30 percent of the right leg. (Joint Exhibit H)

John L. Hoyt, M.D., of Creston, Iowa, based upon his examination of the claimant on May 30, 1980, reported in part as follows (Joint Exhibit C):

> Impression—Instability of the right knee after patella removal and subsequent metal patella prosthesis insertion with transplantation of the

patellar tendon. Since the patient is finding it increasingly difficult to be up and about without falls and without effusion and pain. It would seem that her ultimate prognosis is not good with a chronic instability of the right knee joint.

Dr. Hoyt concluded that in his opinion, claimant has a 50 percent functional impairment.

Dr. Miller, the orthopedic surgeon who performed the 1978 surgery, does not appear to have seen the claimant since June 1978, as is also true of Jack Fickel, M.D. (Joint Exhibits E and D)

It is concluded that the claimant has sustained a functional impairment of 33 1/3 percent of her right leg by reason of the resultant disability of the matter under review.

Claimant appears to be disputing the concept of functional impairment as enumerated in Code section 85.34(2) when she provides us with the findings of B. L. Cogley, Ph.D., a clinical psychologist. (Joint Exhibit F)

In the absence of medical evidence which extends the bodily impairment beyond the injury scheduled member, claimant's recovery is limited to the functional impairment to the effected member. *Barton v. Nevada Produce*, 235 Iowa 285, 110 N.W.2d 660 (1961).

Claimant testified that her right leg instability causes her to fall unexpectedly without warning at least once per day and that her ability to walk is impaired.

In light of Dr. Aldi's opinion concerning claimant's maximum recovery benefits following surgery, claimant's healing period is found to have expired on September 12, 1979, especially when compared with the Iowa Industrial Commissioner Rule 500—8.3(85) which reads as follows:

> 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.

WHEREFORE, after having heard and seen the witnesses in open hearing and after taking all of the credible evidence contained in the undersigned's notes of these proceedings, the following findings of fact are made:

1. That the claimant sustained an admitted industrial injury on March 12, 1978 for which she received a healing period of forty-three (43) weeks and five (5) days at the stipulated weekly rate of ninety-six and 57/100 dollars ($96.57).

2. That claimant's healing period ended on September 12, 1979 and that she has been paid fifteen (15) percent permanent partial disability of her right leg.

3. That since claimant's second surgery, she has not performed any acts of gainful employment due to the injury.

4. That the claimant has sustained a permanent functional impairment of thirty-three and one-third (33 1/3) percent of her right leg.

* * *

Signed and filed 5th day of June, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

JAMES MCAFEE,

Claimant,

vs.

M & S SPECIALIZED SERVICES, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

UPON THE APPLICATION OF CHRISTOPHER MCAFEE, MICHAEL MCAFEE, SHAWN MCAFEE, and **PATRICK MCAFEE,**

Children of the Claimant by Their Next of Friend and Mother, **JEANETTE L. MCAFEE,**

Applicants.

and

CHERLY MCAFEE, window, and **CHERLY MCAFEE,** as Next Friend of **COREY MCAFEE,** a minor,

Respondents.

Order of Apportionment

This is a proceeding on an application for equitable apportionment of death benefits under the Iowa Workers' Compensation Act brought by Jeanette L. McAfee, next of friend and mother of Christopher, Michael, Shawn and Patrick McAfee. The matter came on for hearing on March 23, 1981 before the undersigned at the Juvenile Court Facility in Cedar Rapids, Iowa, and was considered fully submitted at that time.

The record consists of the testimony of Jeanette and of Cheryl McAfee; defendants' [applicant's] exhibit 1, a declaratory judgment entered February 10, 1981; defendants' exhibit 2, beneficiary provision of a Prudential insurance policy; defendants' exhibit 4, a

portion of a stock retirement agreement; defendants' exhibit 5, articles of agreement for ownership and administration of M & S Specialized Services, Inc.; plantiff's [respondent's] exhibit 1, 1979 W-2 for decedent; plaintiff's exhibit 4, a dissolution decree and stipulation in the marriage of decedent and Jeanette L. McAfee; and plaintiff's exhibit 5, a financial statement for Cheryl McAfee. Jeanette McAfee requested her financial statement be made a part of the record in an application filed April 2, 1981. As it was used for purposes of direct and cross-examination and as it contains information relevant to the decision in the case, it has been included on the record and marked defendants' exhibit 6. An application to correct record was filed April 14, 1981. That material was marked defendants' exhibit 7 and was considered as well. Briefs were provided by Jeanette and by Cheryl McAfee and defendant-insurance carrier provided an accounting.

A first report of injury was received by the industrial commissioner's office on August 28, 1980 which relates an injury to James McAfee on August 19, 1980 at which time he was painting inside a large tank. An explosion occurred. McAfee was propelled from the tank in flames and suffered burns over 90 percent of his body. He died on September 17, 1980. The records of the insurance carrier show Cheryl McAfee has been paid $6,920.50 and Jeanette McAfee has received $4,243.00.

The issue to be decided here is how benefits should be apportioned between decedent's five surviving children and his surviving spouse.

Jeanette McAfee, who is a 36 year old high school graduate, testified she married decedent James McAfee on January 7, 1967. Issue of that marriage are Christopher, 13, born February 8, 1968; Michael, 12, born March 29, 1969; Shawn, 8, born September 27, 1972; and Patrick, 5, born July 14, 1975. The marriage ended in a dissolution sought by decedent and granted August 24, 1979. Under the terms of the dissolution decree, decedent was to pay $37.50 per week per child for support until January 1, 1980 at which time the amount was to increase to $41.25 per week per child, to be paid "until each of the said minor children shall attain the age of eighteen (18) years of age, or shall graduate from high school, whichever date shall last occur, or shall become self-supporting." Decedent was also required to:

> maintain hospitalization and medical insurance on the minor children during the time that he is required to pay child support as hereinabove provided, and he shall also maintain a minimum of Fifty Thousand Dollars ($50,000.00) life insurance on his life, with the minor children as beneficiaries during the time that he is required to pay child support as hereinabove provided.

On cross-examination Jeanette acknowledged that the policy was to cover child support in the event of death and that she had not sought adjustment in child support.

With a loan from the Small Business Administration decedent and Patrick Sloan purchased a portion of a business involving painting of water towers and structural steel from decedent's former employer. Decedent's home and Sloan's land were used as security in obtaining the loan. At first the office of the company was in the McAfee basement. Decedent was the salesperson and Sloan supervised the crews. Jeanette was the company secretary working without salary by answering phones and typing in the afternoons. Later the office was moved to Center Point.

After the relocation Jeanette stated that she worked two days a week and was paid $30. She reported that about four years ago she took a bookkeeping course at Kirkwood College. For approximately the past two years she has been employed in an accounting department where she does reconciling of bank statements, a job for which she received on the job training and at which she works from 8:00 to 4:30. Six monthly reviews are conducted by the company and as a result of those reviews, the witness has gotten raises. She denied any opportunity for advancement with her employer.

She claimed she received neither workers' compensation payments nor Social Security from the time decedent was injured until December or 1980. At the time of hearing her children were receiving $175 per month per child in Social Security and $688 total per month in workers' compensation benefits. According to the witness, her take-home salary is $250 every two weeks. Her financial statement indicates set monthly earning of $592.67. Her brief corrects that amount to $502.67.

That financial statement also shows a house valued at $22,000 with a $16,239.93 mortgage, a 1975 automobile on which she owes $640 and $4,000 worth of furniture and appliances. She listed monthly expenses of $1,053.50 not including installment payments of $60. Additionally, she did not include $30 per month for medical insurance. Because her mother was available for babysitting, she had no expenses for child care. She stated that she had placed $2,000 in savings and that her checking account balance was $300.

Jeanette characterized her living arrangments as modest. She claimed 80,000 miles on her automobile. She said she would like a better home, car and clothes, and a vacation.

Cheryl McAfee, 25 year old widow of decedent, has a high school education and is a licensed cosmetologist. During her high school years she worked as a waitress. After obtaining her cosmetologist's license she worked for about four and one-half years at which time she was taking home $150 to $175 per week. She stated that she recently talked to her former boss about returning to work; however, her present intent is to remain at home with her child.

She testified that in July of 1979 she quit working and went on the road with decedent. The two were married September 8, 1979. Corey McAfee, born June 14, 1980, is the child of that union. After her marriage the witness stayed at home in a house which the couple rented. During this time she relied on decedent for support and had no other income source.

Placed in evidence were the couple's tax returns and W-2s of 1979 which show Cheryl's earnings to be $5,266.48 and decedent's from defendant-employer to be $23,400 for a total of $28,666.48.

A financial statement filed by Cheryl shows a homestead worth $40,000 with a $33,805 mortgage, a 1977 Camaro valued at $4,700, a 1978 MG Midget estimated at $3,600 with an encumbrance of $2,817.20, furniture worth $3,000 with payments of $300 remaining and appliances worth $880. Cheryl testified that she and decedent were obligated to buy her present three bedroom home prior to his death, that she bought the house in October of 1980 and that she paid $5,000 down. Also purchased after decedent's death was the Camaro which the witness stated she bought with proceeds from a $5,000 life insurance policy because her Midget was too small for baby paraphernalia. Monthly household expenses of $1,063.05 and monthly installment payments of $206.86 are listed. She claimed her checking account showed a balance of $112.57.

Further clarification of Cheryl's financial situation is provided in her testimony. She said that following decedent's death a hog roast was held to provide funds for her son and her. She testified to loans from friends and from her sister.

Testimony was also presented regarding decedent's estate for which Cheryl is the executrix. She stated that she was making a claim for one-third against a will that named Jeanette as surviving spouse and that she intended to honor a $50,000 claim being made by Jeanette McAfee on behalf of her children.

Documents placed in evidence relating to the estate include the beneficiary portions of Aetna and Prudential insurance policies, a portion of a stock retirement agreement, and articles of agreement for ownership and administration of defendant-employer. Each life insurance policy was for $100,000 (double indemnity). A declaratory judgment currently under appeal was filed February 10, 1981 in Linn County District Court which gave decedent's estate all the proceeds of the Prudential policy and $121,328.66 remaining from the Aetna policy.

Applicable code sections are as follows:

Iowa Code 85.43:

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

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

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

The following shall be conclusively presumed to be wholly dependent upon the deceased employee:

1. The surviving spouse...

2. A child or children under eighteen years of age, and over said age if physically or mentally incapacitated from earning, whether actually dependent for support or not upon the parent at the time of his or her death.

Iowa Code 85.31:

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.

Applicant Jeanette McAfee argues that "the only fair way to apportion the compensation payments is to award each 'wholly dependent' dependent an equal share." Respondent Cheryl McAfee urges "that the facts in this case are not sufficiently strong to warrant triggering the Commissioner's discretion; but if they are, the facts certainly show it is most equitable that Cheryl receive the entire compensation benefit and the other [sic] distribution would deprive Cheryl of her rightful compensation for the loss of her husband and his income and would put Jeanette in a position better than she would have been absent the death thereby frustrating the purpose behind the statutes...".

The undersigned appreciates the attempts by the parties to highlight considerations, the promptness with which respondent's brief was filed and the thoroughness and citations provided by applicant's brief; however, she is not persuaded by either argument and finds that each child of James McAfee should be awarded fourteen percent and that the surviving spouse should receive thirty percent of the compensation benefits.

Applicant asserts that "[t]he dissolution statutes and the McAfee stipulation and dissolution decree do not control nor are even relevant to an equitable

apportionment under section 85.43 of the Iowa Code. Respondent argues:

> In this case, James and Jeanette McAfee decided in 1979 they should go their separate ways and severe their relationship as husband and wife. They entered into a binding agreement which was incorporated into their Decree of Dissolution and given the weight of Court Order which provided that Jim, as of the time of his death, was obligated to support his four children in Jeanette's custody by payment of $41.25 per child per week or $8,580.00 per year. Both parties agreed to this amount on advice of counsel and prior to Jim's death, neither had requested the amount be modified. The support payments were current as of the time of Jim's death. The Decree by way of Incorporation of the Stipulation, also made provision for the children in the event of Jim's premature death, by calling for him to maintain a $50,000 life insurance policy for their benefit. No evidence was presented on the hearing of this matter that either Jim or Jeanette desired any other provision be made as to support of the children or that either was in any way dissatisfied with the arrangment [sic]. If Jim had survived, no evidence was presented which would indicate that Jeanette would receive any more than as provided in the Decree for support. If Jim had not died in an industrial accident, the evidence shows Jeanette would receive no more than the Social Security benefit and the proceeds of the $50,000.00 life insurance policy for support. This is all that Jim and Jeanette could have ever reasonably anticipated.

While a dissolution of marriage severs the relationship between the parties, it hopefully does not sever the relationship of either party with the children of the marriage. That decedent maintained a concern for his children is evidenced by the fact that at the time of his death he was current on his child support payments. No evidence indicates that had decedent's business improved he would not have wanted the children of his first marriage to benefit from that good fortune. Nor is there evidence that Jeanette would not have sought a modification of the original decree had a substantial material change in the permanent financial circumstance made it appropriate. *See, e.g., Spaulding v. Spaulding*, 204 N.W.2d 634 (Iowa 1973). *See also Schantz v. Schantz*, 163 N.W.2d 398 (Iowa 1968). Testimony, however, was that decedent's business was struggling.

Respondent also makes reference to the fact that the dissolution decree terminated child support to age 18 or upon graduation from high school. Social security payments and workers' compensation payments might continue beyond that point. The Sixty-fourth General Assembly of the Iowa legislature amended Iowa Code section 598.1(2) to read as follows:

> "Support" or "support payments" means any amount which the court may require either of the parties to pay under a temporary order or a final judgment or decree, and may include alimony, child support, maintenance, and any other term used to describe such obligations. Such obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in college, university, or area school; or has been accepted for admission to a college, university, or area school and the next regular term has not yet begun; or a child of any age who is dependent on the parties to the dissolution proceedings because of physical or mental disability.

This section was enacted by the same legislature which lowered the age of majority from 21 to 19. (A further lowering of eighteen occurred in the following session.) Support is extended to those engaged in educational pursuits. *See, In Re Marriage of Briggs*, 225 N.W.2d 911 (Iowa 1975). This position seems the better view and is the one adopted in Iowa Code section 85.31(1)(b).

Applicant compares Jeanette's and Cheryl's financial circumstances. Monthly expenses for the five people in Jeanette's household are less than those of Cheryl's household. It is obvious to this deputy industrial commissioner that Jeanette McAfee has lived frugally and has managed her finances with prudence. Cheryl's management is less impressive and it is to be hoped that she will obtain some assistance in evaluating her current financial situation and in budgeting the funds she has. This appears to be a situation in which both the surviving spouse and the children from each of decedent's marriages can be provided with adequate support from the monies available.

That all survivors here may inherit from decedent's estate has been given consideration.

Respondent attacks Jeanette's desires expressed at hearing for a new house, car, clothes for her children, and a vacation. This deputy industrial commissioner agrees that Jeanette would derive some benefit from these things, but that is not reason to deny her application on behalf of her children. Those items would benefit her children as well and she appears to be a mother with the best interests of her children at heart. However, the undersigned does feel some concern that Jeanette did not indicate financial planning for her children's futures in terms of meeting their educational or vocation needs. This lack of planning may be attributable to her never having had funds in excess of those needed for day to day living.

Cheryl as surviving spouse has lost her source of income. While she is a licensed cosmetologist who could work and who may have to work until decedent's estate is settled, the undersigned believes she is entitled to a larger share of benefits to maintain her household and to care for her very young child. Her percentage of benefits is not to increase until such time as no children are receiving benefits.

WHEREFORE, after considering all the testimony and documentary evidence of record, it is found:

That James McAfee suffered an injury arising out of and in the course of his employment on August 19, 1980.

That James McAfee died on September 17, 1980.

That the proper rate of compensation is three hundred twenty-one and 15/100 dollars ($321.15).

That James McAfee was survived by a spouse Cheryl McAfee who is entitled to a thirty (30) percent share of death benefits.

That Corey McAfee is the child of James and Cheryl McAfee and is entitled to a fourteen (14) percent share of death benefits.

That Christopher, Michael, Shawn and Patrick McAfee, the children of James and Jeanette McAfee, are each entitled to a fourteen (14) percent share of death benefits.

That should Cheryl McAfee remarry, her share of benefits will be divided equally among the children receiving benefits at that time.

That should any child become ineligible for benefits, his share will be divided among the children receiving benefits at that time.

* * *

Signed and filed at this 22nd day of April, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

J. C. McDONALD,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed December 22, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from an award of permanent partial disability, stating that the award should be higher than in the review-reopening decision.

On December 2, 1980, defendants moved to dismiss claimant's appeal, stating that the transcript was late being filed. On December 3, 1980, claimant responded thereto, giving adequate explanation as to why the transcript was late and moving for more time. Defendants' motion is hereby overruled and claimant is granted the time retroactively to file the transcript.

* * *

The hearing deputy adequately summarized the law and facts; however, his decision will be modified.

The undersigned deputy industrial commissioner takes a more serious view of claimant's industrial disability, although the hearing deputy's award of 25% is certainly substantial. The award will be increased, therefore, because (1) the hearing deputy may have been mistaken about claimant's age; (2) the undersigned give more emphasis to certain facts; and (3) the undersigned's general review of the evidence shows claimant's employment opportunities are less than one might hope.

1. The hearing deputy recited claimant's age as 45, whereas the correct age is 40. The difference is not great, yet claimant has five years longer to live with his disability than was stated in the review-reopening decision. This point is minor, however, when considering another portion of the evidence.

2. Mr. Vander Vegt, the rehabilitation specialist, testified as follows:

> Q. Okay. How many other jobs, then, would this eliminate if he would not be able to perform work in heavy construction work?
>
> A. Well,—
>
> Q. Heavy work that he has testified to.
>
> A. Okay. According to the Dictionary of Occupational Titles, all work is divided into five categories, in terms of its physical demands. Those five categories are: sendentary, light, medium, heavy and very heavy.
>
> If we eliminate heavy and very heavy, and give him access to sendentary, light and medium jobs we eliminate approximately 20 percent of the jobs in the national economy.
>
> Q. So you're saying, then, work that would be available for him would be approximately what percent, sir?
>
> A. Well, in the three remaining categories, 80 percent of the job titles in the national economy fall within those three categories (Tr. pp. 110-111).

(The hearing deputy, although he summarized this evidence, did not mention it in his rationale.) If one eliminates those jobs mentioned in the testimony, one may do away with only 20 percent of the work on a national basis, but to claimant, one does away with virtually the only kind of work he has ever done. In fact, one hopes that claimant will be able to tolerate heavy work; indeed his most recent work at Bogan Auto Wrecking shows that he can perform those duties for a period of two days before needing relief.

3. Whatever, claimant's age, education, job experience, and functional impairment work against him to a greater extent than 25% permanent partial disability for industrial purposes. In his favor, he has good motivation and the fact that his age, education, job

experience, and impairment could be much worse. There are other elements of industrial disability, of course, but the foregoing are believed to be the crucial ones here.

WHEREFORE, it is found and held as a finding of fact, to wit:

That on December 14, 1977, claimant sustained an injury which arose out of and in the course of his employment when he struck his right shoulder and right side of his head against a panel.

That said injury was in the nature of an injury to the right shoulder and neck causing an intervertebral disc herniation at C5, C6.

That said injury caused claimant to be disabled from work for a period of seventy-two (72) weeks.

That as a result of said injury, claimant sustained a disability to the body as a whole in the amount of forty percent (40%) for industrial purposes.

That the claimant's proper rate of weekly compensation for healing period is two hundred forty-seven and 00/100 dollars ($247.00) and for permanent partial disability is two hundred twenty-eight and 00/100 dollars ($228.00).

* * *

Signed and filed this 30th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

STEVEN McDONALD,

Claimant,

vs.

ANDREWS & SON ROOFING & SHEET METAL, INC.,

Employer,

and

BITUMINOUS CASUALTY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal a proposed decision in review-reopening awarding claimant healing period benefits and two and one-half percent permanent partial disability to the right arm.

* * *

The issues on appeal are the length of healing period and amount of permanent partial disability, if any.

Twenty-two year old, single claimant has a twelfth grade education. His past employment consisted of concrete work and application of steel siding.

He began working as a laborer for defendant employer in December 1975. On April 8, 1976 while working on a roof, he slipped and while trying to break his fall, immersed his right hand and arm in a bucket of hot tar. He was first seen by R. Mason, M.D. in Audubon for second degree burns to the right hand. He was later hospitalized in the Cass County Hospital under the care of Keith R. Swanson, M.D.

In an August 11, 1976 report, Dr. Swanson writes that claimant had complete movement of the hand and had no permanent disability. In a January 24, 1979 letter Dr. Swanson further elaborates that claimant had a healed scar on the volar aspect of the right arm and the dorsum of the right hand. He writes that claimant complained of the fingers getting cold. Physical examination revealed a full extension of the fingers and the elbow. There was also full rotation of the arm. It was Dr. Swanson's impression that the only deformity that existed was a healed scar and that the location or extent of the scars caused no permanent disability.

N. K. Pandeya, D.O. notes in a September 27, 1978 letter that extension and flexion at the wrist joint area of the right hand is painful and is definitely restricted compared to claimant's left wrist joint area movement. He also notes that claimant has diminished sensation of his hand. Using the McBride disability evaluation as a guide he stated that claimant suffers probably one percent loss due to decreased endurance, one-half percent loss due to decreased safety as a workman, one percent because of the prestige of physique, decreased chance of acceptance and another one-half percent for cold intolerance which gives a three percent disability to the hand or two and one-half percent impairment to the arm.

The form 5 indicates claimant was paid temporary total disability from April 9, 1976 through June 10, 1976. Claimant testified that Dr. Swanson released him to return to work in June, but claimant didn't think he was able to work because the skin was soft and the palm of his hand would become irritated. The sun also irritated it. He did some corn detasseling the last two weeks of July, 1976 and then began working on a construction crew on August 15, 1976 making the same or more money than before he was injured.

Claimant's present complaints are sensitivity to heat and cold and decreased sensation, as well as decreased mobility of his fingers, hand, and wrist. He states he can cut his fingers or hand without realizing it.

Defendants contend the deputy erred in extending temporary total healing period to August 15 instead of when the doctor released claimant to work in June or when he began corn detasseling in July. Defendants further contend the deputy was in error for awarding two and one-half percent disability.

Claimant's testimony indicates that he returned to work toward the end of July, 1976 at a detasseling job. This would terminate the healing period as the "substantially similar" test applies only in the situation where "recuperation" from the injury is being determined. Rule 500—8.3, IAC. Furthermore, there is no support for the assumption that the detasseling work was not "substantially similar." The detasseling work paid $3.00 an hour. The first report of injury indicates claimant was paid $3.00 an hour for his work at defendant employer.

Apparently the work was irregular, however, as the memorandum of agreement quoted, his average weekly wage at $124.03 resulting in a rate of compensation of $79.53. This apparently was not contested and was the rate awarded in the review-reopening decision. It is possible that "recuperation" from the injury had occurred at a prior time although there is no medical evidence to indicate when that would be.

It is not difficult to tell why the deputy chose the date of August 14, 1976 for termination of the healing period as that is the only specific date disclosed by the evidence. The rest of the record leaves it to the commissioner to speculate as to the date the healing period should terminate. Since no medical evidence of "recuperation" is present the date claimant returned to work detasseling will be used as the termination of the healing period. The only evidence as to when this occurred is claimant's testimony that it was for two weeks at "the end of July" (transcript page 19, line 1) and affirmative response to the question "you went to work in the middle of July" (transcript page 26, line 10-11).

Taking official notice of the calendar for 1976, it is noted that the last two weeks of July began with Monday, July 19, 1976. This then is determined to be the termination of claimant's healing period.

The medical testimony together with claimant's testimony regarding sensitivity and mobility of his fingers and hand and wrist very adequately support the finding of two and one-half percent (2½%) permanent partial functional impairment of the arm.

WHEREFORE, it is found that as a result of claimant's injury of April 8, 1976 he sustained a permanent partial disability of two and one-half percent (2½%) of the right arm and a healing period through July 18, 1976.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

PAT McGLADE,

Claimant,

vs.

COAKLEY INDUSTRIAL SERVICE INC.,

Employer,

and

COMMERCIAL UNION INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

INTRODUCTION

This is a proceeding in arbitration brought by Pat McGlade, the claimant, against his employer, Coakley Industrial Services, Inc., and the insurance carrier, commercial Union Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on March 5, 1980.

* * *

Issue

The issues to be determined are whether the claimant sustained an injury arising out of and in the course of his employment, and, if so, the existence of a causal relationship between that injury and the resulting disability as well as the nature and extent of disability. There is also an issue as to the appropriate rate.

Findings of Fact

There is sufficient credible evidence in this record to support the following findings of fact, to wit:

Claimant, age 21, is a high school graduate and has no particular training in any other field.

On March 5, 1980 claimant was an employee of the defendant, Coakley Industrial Services, Inc. On that date claimant sustained an injury which arose out of and in the course of his employment with the defendant-employer when he attempted to push a delivery truck he was operating out of the mud. As a result of this pushing incident, his left knee buckled and immediate pain was experienced.

The claimant continued to work for the defendant-employer until March 11, 1980 when he came under the care of Ronald K. Miller, M.D., an orthopedic surgeon.

While under the care of Dr. Miller, a left knee arthrogram was performed and a diagnosis of Bakers's cyst and unusual prominence, medial posterior recesses was made. Dr. Miller prescribed a course of conservative treatment and an exercise program was prescribed with apparent good success. There was no surgery performed on this date. The claimant was released to return to work by Dr. Miller on April 14, 1980 and presented himself for employment purposes to the defendant-employer on April 17, 1980. Dr. Miller expresses the opinion that claimant has sustained a ten percent permanent partial impairment of the left knee and that injury noted is consistent with the history as reported to Dr. Miller. Dr. Miller is the treating physician and his opinion as to the medical aspects of this case, including the extent of this functional impairment, is uncontroverted.

The claimant now has continuing difficulties with his left knee and has difficulties squatting and notices pain. There is no evidence of subsequent injuries to the member in question. The record reveals that there was no prior injury to claimant's left knee. At the time of hearing the claimant was employed by the Council Bluffs Water Works.

As reflected in claimant's exhibit 6, the average weekly wage for the 13 weeks prior the the injury under Code section 85.36(6) is $164.34 per week and on the date of

injury the claimant was single and entitled to one exemption. The correct rate for workers' compensation benefits is one hundred one and 14/100 dollars ($101.14).

Applicable Law

An injury to a scheduled member entitles claimant to weekly compensation for permanent disability as limited by the schedule; claimant is not entitled to industrial disability. *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660; *Daily v. Pooley Lumber Co.*, 233 Iowa 758, 10 N.W.2d 569; *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W.2d 598.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 5, 1980 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). *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.)

Analysis

There is testimony in this record as to how the injury to claimant's left knee may affect his earning capacity. Under the present status of the Iowa law, an award in a scheduled injury case is limited to the amount of the schedule and the concept of industrial disability does not apply.

The uncontroverted medical evidence in this file as submitted by Dr. Ronald Miller, a highly qualified orthopedic surgeon, reflects that claimant has sustained a ten percent permanent partial impairment to the left knee. It appears from a review of Dr. Miller's deposition that he causally relates this to the incident in question. It is also noted that his opinion is uncontroverted by any other evidence in the record.

Conclusions of Law

WHEREFORE, it is found:

That the claimant was an employee of the defendant-employer on March 5, 1980 and on that date sustained an injury which arose out of and in the course of his employment with this defendant-employer.

That the claimant's injury is to his left knee and does not extend beyond that scheduled member.

That the uncontroverted medical evidence reflects that claimant has sustained a ten percent permanent partial disability to the left leg.

That the applicable rate for healing period in this case is one hundred one and 14/100 dollars ($101.14) and the applicable rate for permanent partial disability is this case is one hundred one and 14/100 dollars ($101.14).

. . .

Signed and filed this 24th day of June, 1981.

E.J. KELLY
Deputy Industrial Commissioner

No Appeal.

MARION M. MCKINLEY,

Claimant,

vs.

ROWLEY INTERSTATE TRANSPORTATION COMPANY, INC.,

Employer,

and

U.S. FIDELITY & GUARANTY,

Insurance Carrier,
Defendants.

ROWLEY INTERSTATE TRANSPORTATION COMPANY, INC.,

Employer,

and

U.S. FIDELITY & GUARANTY,

Insurance Carrier,
Third-Party Claimants,

vs.

MIDWEST EMERY FREIGHT SYSTEM, INC., d/b/a AR-GLEN CORPORATION, a/k/a AR-GLEN DIVISION
MIDWEST EMERY FREIGHT SYSTEM, INC.,

Employer,

and

CARRIERS INSURANCE COMPANY,

Insurance Carrier,
Third-Party Defendants.

Order

By order of the Industrial Commissioner filed June 30, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of Section 86.3 to issue the final agency decision on appeal in this matter. Midwest Emery Freight Systems, Inc., and Carriers Insurance Company filed their appeal on December 3, 1979, and claimant filed her appeal on December 11, 1979.

On March 9, 1979 a pre-hearing order was issued. It stated, *inter alia:*

> The issues to be heard are whether decedent was employed by either of the named defendant employers at the time of the alleged injury and whether he was in the course of his employment at that time.

The parties agree that the foregoing shall be the only issues heard in the March 27, 1979 hearing and that the balance of the case, if further hearing is necessary, can be heard at a later date and can be heard by a deputy industrial commissioner different from the deputy at the initial hearing, if necessary.

As a result of that order, a hearing was held on March 29, 1979. The decision concluded:

Therefore, after having heard and seen 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 on January 10, 1977 Stewart McKinley, decedent, entered into a "trip lease" in Wilmington, Delaware with Midwest Emergy Freight System, hauling a load of bananas to be delivered in Northlake, Illinois.

2. That by the terms and conditions of said lease and by the actions of the defendant-Midwest Emery Freight Systems exercised that degree of control over the actions of Stewart McKinley, decedent, as to create an employee-employer relationship.

THEREFORE, it is so found, and the costs of these proceedings are charged to the defendant-Midwest Emery Freight Systems.

Thus, upon the issue of which, if any, of the two trucking companies was the decedent's employer, the hearing deputy held Midwest Emery (and its insurance carrier) liable as the employer. No evidence was introduced to show that decedent sustained an injury which arose out of and in the course of his employment, that there was a causal relationship between that injury and his death, claimant's standing to receive benefits, or the fairness and reasonableness of medical and funeral expenses. The case at this point is incomplete.

In *Elsberry v. Boone County*, filed January 14, 1980, the Industrial Commissioner stated:

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 402 N.W.2d 63 (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.

Further, Section 17A.19(1), Code of Iowa, states in part:

Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action. However, nothing in this chapter shall bridge or deny to any person or party who is aggrieved or adversely affected by any agency action the right to seek relief from such action in the courts.

1. A person or party *who has exhausted all adequate administrative remedies* and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter (Emphasis supplied).

Applying the above principles to the case at hand, it is clear that the parties have not finished their case before the Iowa Industrial Commissioner. The balance of the case should be heard before any action on appeal is taken. Of course, the issues on which the appeals were attempted in this case will be preserved for any future appeals.

And, finally, the agreement of the parties as recited in the pre-hearing order, cited above, indicates a commitment to complete a hearing on all the issues before any party should file an appeal. The parties should be held to their pre-hearing agreements.

WHEREFORE, it is found:

That the appeal by Midwest Emery Freight Systems, Inc., and Carriers Insurance Company and the appeal by claimant is interlocutory in nature.

THEREFORE, it is ordered:

That the appeal by Midwest Emery Freight Systems, Inc., and Carriers Insurance Company and by claimant is hereby dismissed. The case will be returned to the ready-to-sign category for further handling.

* * *

Signed and filed this 29th day of August, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Reversed;
Appealed to Supreme Court, Pending

SHARON R. MC MURRIN,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

IDEAL MUTUAL INSURANCE

Insurance Carrier,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Appeal Decision

Claimant has appealed from a proposed second injury fund decision wherein claimant was denied compensation for failure to sustain her burden of proof that she was entitled to a recovery against the second injury fund.

* * *

Claimant's notice of appeal filed January 7, 1981 fails to allege any error in the deputy's findings of fact and conclusions of law filed December 22, 1980. Pursuant to Rule 500—4.28 of the Industrial Commissioner's Rules, appeals must state issues on appeal.

Pursuant to an order filed March 2, 1981, claimant was directed to submit briefs and exceptions as provided by the rule by March 23, 1981. No such briefs and exceptions were filed.

Based upon the evidence, the deputy found the claimant's injury to be de Quervian's disease or tendonitis of both wrists. To qualify for second injury fund benefits an employee must have "previously lost, or lost the use of one hand ... and then become disabled by a compensable injury to another such member or organ." Under these facts, the manifestation of one injury on two occasions does not qualify the claimant for second injury fund benefits. Claimant did not have the prior loss of a member as contemplated by Iowa Code section 85.64.

It is therefore found that the deputy's findings of facts and conclusions of law in the second injury fund decision filed December 22, 1980 are proper.

WHEREFORE, the holding of findings of fact and conclusions of law of the second injury fund decision filed December 22, 1980 are adopted as the final decision of this agency.

It is found and held:

That claimant failed to sustain her burden of proof that she is entitled to a recovery against the second injury fund.

THEREFORE, it is ordered:

That the claimant's petition for benefits against the second injury fund be dismissed.

Signed and filed this 28th day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROSMARY MAI,

Claimant,

vs.

OLAN MILLS, INC.,

Employer,

and

GREAT AMERICAN INS. CO.,

Insurance Carrier,
Defendants.

By order of the industrial commission filed June 4, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants have appealed from a proposed arbitration decision wherein it was found that claimant received an injury which arose out of and in the course of her employment.

The industrial commissioner's file contained no filings prior to the arbitration petition. At this time, it is necessary to review the events following the signing of the original arbitration decision August 9, 1979.

August 24, 1979, appeal by defendants; also a request for presentation of additional evidence.

August 30, 1979, claimant's resistance.

August 31, 1979, order of remand by the industrial commissioner to the arbitration deputy, who was given the remand to determined "whether or not the additional evidence defendants desire to produce should be considered" and to hold a re-hearing if applicable.

September 6, 1979, decision by the hearing deputy on remand: (1) disallows more evidence on healing period; (2) defendants ordered to file earnings statement of claimant.

October 2, 1979, defendants submission of claimant's weekly wage data (marked defendants' exhibit E).

October 18, 1979, arbitration decision on remand: changes rate to $143.65.

January 15, 1980, letter by the industrial commissioner advising the parties of their right to file briefs and exceptions.

January 28, 1980, defendants' brief filed.

The overall decision being appealed, therefore, is an arbitration award of a healing period of 21 weeks, a permanent partial disability award of 25 weeks (both payable at the rate of $143.65 per week) plus medical and hospital expenses and costs.

The facts may be reviewed briefly. Claimant, a 55-year old woman who had worked for the defendant-employer some four years, was employed as a "proof consultant," one who attempted to sell additional photographic prints.

On Tuesday, December 21, 1976 claimant and three other people (Thomas L. Hawkins, Mary Starr, and Etta Schwartzengruber) were ensconsed at the Town House Motel in Cedar Rapids. During the day, claimant and Ms. Schwartzengruber bickered as to who must be docked for a no-sales situation which had arisen. Around 7:00 that evening, claimant, Mary Starr and Hawkins spent some time together in at least two bars. During this time, claimant and Ms. Starr, a trainee, argued about the situation between claimant and Ms. Schwartzengruber. About 11:00, Hawkins left.

Around 1:00 in the morning, claimant returned to the motel, she occupying a room adjacent to Hawkins' room. The two rooms had connecting doors. The record is very much in dispute as to exactly what happened next. Claimant and Hawkins talked about claimant's disputes with her fellow employees. The claimant insists that she stayed in her own room with the door partly closed, that she talked to Hawkins through the door and that she did not see Hawkins until he came in and struck her repeatedly.

Hawkins, on the other hand, claims that the employee not only insisted on his resolving the dispute between claimant and Ms. Starr but kept entering his room. He testified further that he repeatedly asked her to leave and that she kept returning. After warning her, he hit her.

Upon this basic set of facts, the hearing deputy awarded the benefits mentioned above. Defendants alleges some 16 points of error, although some of the allegations are duplicates.

The main question is whether claimant's injury arose out of and in the course of her employment. To be compensable, claimant must be injured "at a place where it was his duty to be, at a time when he was properly doing his work and while in the performance thereof." *Reddick v. Grand Union Tea Co.*, 230 Iowa 108, 116 297 N.W. 800 (1941). See also *Musselman v. Central Telephone Co.*, 261 Iowa 352,355 (1967) and *Cady v. Cedar Rapids Community School*, 278 N.W.2d 298 (Iowa 1979).

Professor Larson states:

> Similarity, it is universally agreed that if the assault grew out of an argument over the performance of the work, the possession of the tools or equipment used in the work, delivery of a paycheck, quitting work, getting fired, trying to act as a peacemaker between quarreling employees, and the like, the assault is compensable. Larson, *The Law of Workmen's Compensation*, Volume 1, §11.12, pp. 3-154 to 3-158.

Larson cites a 1972 Florida case in which claimant and his son were in a project superintendent's office prior to the start of the work day. This office was located several miles from where claimant was to work. An argument developed, and claimant and son were fired. As he was leaving the premises, claimant was assaulted and injured by the superintendent. The court held the case compensable, stating that once claimant was fired, he was in the context of an employment situation, even though it was not during his working hours nor at his work place. *Hill v. Gregg, Gibson and Gregg, Inc.*, 260 S.2d 193 (Florida 1972). Simiarly, in the instant case, it may be said that the argument was in the context of the employment situation.

Considering these precedents, claimant's assault had its origins in the work. These people were away from home in a situation wherein their work put them together much of the time. Claimant states and Hawkins does not deny that she threatened to quit over the difficulties she encountered with Ms. Starr. The assault, and it was savage in that claimant had her jaw and some ribs broken, thus had its origin in the work *milieu*.

Defendants claim the employee should be denied compensation because of the privisions of §85.16, which states in part:

> No compensation under this chapter shall be allowed for an injury caused:
>
> * * *
>
> 2. When intoxication of the employee was proximate cause of the injury.
>
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee.

The evidence showed that the claimant was somewhat loud, even abusive, in her remarks. Such conduct suggests she was intoxicated, although there was no chemical proof to show the fact. The defense of intoxication, however, would not apply to cases of injury caused by a third party. The defense would require that claimant's intoxication be the proximate cause of the injury as in a negligence case. That claimant perhaps was "asking for it" is no defense.

Nor can it be said that Hawkins' act was for a reason personal to the employee. That is, the reason for the assault grew out of the employment as discussed above. See also *Cedar Rapids Community School v. Cady, supra.*

Defendants also assert that the hearing deputy found that claimant had resigned and was therefore not an employee at the time of the attack. However, the first finding of fact on page four of the original arbitration decision states that "the claimant was an employee of the defendant-employer on December 21, 1976." Whatever inference may be drawn from the decision, the finding is not as defendants assert. In any event, defendants cite no law contrary to the rather elementary proposition that an injury shortly after quitting or being fired is compensable. See Larson, *The Law of Workmen's Compensation*, Volume 1A, §26.00, pp. 5-228 to 5-250.

Defendants also state that the hearing deputy erred because he ignored the romantic involvement between Hawkins and claimant and that said involvement could be "inferred" to be the matter under discussion. The hearing

deputy did *not* ignore this evidence; however, a comment is indicated. Simply because two had been romatically involved prior to the incident does not lead to the inference that the romantic involvement was the cause of the assault. All the evidence in the case points to the argument between claimant and Ms. Starr being the focal point of the discussion. This being the case means the romantic involvement is irrelevant to the decision of whether or not compensation is due.

Issue five on page ten of defendants' brief states:

> The Deputy Industrial Commissioner erred in asserting that the Defendants failed to establish the burden of proof of their affirmative defense merely on the basis that in his belief the violent manner of the Claimant was needed to support the contention of such affirmative defense.
>
> We would submit that under Section 85.16 that violent behavior need not be required to support the contention of the affirmative defenses under 85.16(3).

This issue is not clearly enough stated to comment upon.

Defendants contend that the hearing deputy erred by holding that payment of claimant's wages by the defendant-employer after the injury constituted notice of knowledge under §85.23. That section states, in part:

> 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.

The hearing deputy's conclusion was that superiors knew of the incident because they continued the payment of wages. That seems logical enough. Further, Hawkins was claimant's immediate supervisor and had knowledge of his own actions. Such knowledge satisfies the requirements of §85.23.

Defendants further state that they should have been given a credit for wages paid in the sum of $1,050.00 during the time claimant was off work. At the hearing, the question of a credit against compensation came up and defendants' attorney said: "I can't say whether they [the wages] were voluntary or involuntary, or whether she should or should not be credited" (p. 82). On the following page, the deputy industrial commissioner closed the record by stating that he would resolve the matter. Section 85.38(2) states:

> Credit for benefits paid under group plans. In the event the disabled employee shall receive any benefits, including medical, surgical or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter or chapter 85A, then such amounts so paid to said employee from any such group plan shall be credited to or against any compensation payments including medical, surgical or hospital, made or to be made under this chapter or chapter 85A. Such amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received such payments only to the extent of such credit.

Since defendants were not sure at the time of the hearing whether or not to claim a credit the deputy industrial commissioner had no "plan" in evidence. Therefore, there has been no real showing of any right to a credit by defendants. And finally there is no showing that the "benefits should not have been paid or payable" if the injury was compensable.

Defendants also claim that the permanent disability should have been paid under §85.34(t) for permanent disfigurement of the face instead of industrial disability under §85.34(u). The hearing deputy's decision clearly states that the disability was based on claimant's difficulty in speaking. The nature of the injury has nothing to do with scarring.

The doctrine of industrial disability is 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, qualfications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

The deputy also correctly cited *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 258 N.W.2d 899 with respect to industrial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 5, 1980 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). *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 evidence of G. L. Quast, M.D., an oral maxillofacial surgeon, is the only really substantive medical evidence in the file. The report contained the history of the assault and states further:

> Examination on 3/6/78 revealed a centric opening of 33mm. with deviation to the right. There was restriction of movement in the right and left lateral excursions. Teeth were in good repair, although there was slight mobility throughout the entire mandibular and maxillary dentition. Tenderness was expressed with palpation over the right temporomandibular joint with a stethoscope. There was residual scaring of the mucosa on the mandibular lip with some enlargement of glandular areas in the lip, seen in this same area.
>
> X-ray examination at this date revealed a previously fractured right mandibular condyle with gross displacement to the medial. It was impossible to determine whether this displaced fragment had fused to the skull, the mandible, or whether there were beginning indications of an osteoma represented.
>
> I again saw Rose Mary on 11/20/78 for re-evaluation of her continued complaints of pain the right temporomandibular joint area and a complaint of "teeth feeling mushy on the right." She refused any further x-rays at this time.
>
> Centric opening at this date was 25 mm. there was lateral excursion of the mandible within normal limits, however, it was considerably restricted to the right side. In centric occlusion, the patient contacts prematurely on the right side, then takes a marked left shift before a final centric occlusion is achieved.
>
> Pain continued to be elicited on palpation over the right temporomandibular joint. Crepitation continues to be evident when listening with a stethoscope. There is a residual scar on the mucosa of the mandibular lip, however this is a very small proportion and certainly well within the limits of what could be expected. There is some glandular enlargement along this area also, which in all probability, is not related to the previous injury.
>
> While it is very difficult to pin point the etiology of Rose Mary's complaints, she definately [sic] has had an increased restriction. Thus a loss of opening of the jaw or mouth in the past eight months, progressingly deteriorated from an opening of 33 mm. to one of 25 mm. There has been an increase in restriction to a right lateral movement of the mandible.
>
> While the subjective symptoms associated with the right temporomandibular joint area tends to be compatible with those eight months ago, it certainly is possible that the area is continuing to deteriorate with some form of osteoma or ankylosis starting to develope [sic]. It would be impossible to determine this entirely without laminagrams or tomograms of the area and in addition, time will tell also, if the restriction continues to get worse.
>
> If this restriction increases to a point where it is impossible to open her mouth or move her lower jaw in such a manner to chew or talk in a normal manner, surgical treatment will be indicated, which would consist of removing the osteoma or restrictions whatever they may be, and replacement with an artificial joint of some fabrication.
>
> It would be my opinion, based upon the change from March to November, that future problems stand a good probability of necessitating surgical intervention at some in the future. Also, the continued premature contact on the right with the left shift in the centric occlusion, will ultimately have it's effect on the periodontal structures and this should be treated with periodontal therapy, occlusal equlibration, etc., otherwise, over the years, periodontal deterioration will occur and it is possible that this could result in the loss of some teeth, secondary to periodontal destruction.

Thus, the evidence shows a permanent condition and the possibility of necessity for further treatment. The deputy's determination of disability seems adequate, considering the medical evidence and the components of industrial disability.

Defendants alleged that the hearing deputy erred in allowing 21 weeks healing period. There is no medical evidence of when claimant was released to work. She herself testified that she had the mouth braces removed after about two months and that it was about four months until she was "not restricted" (Transcript, pp. 18-19). Later she testified that she was able to go back to work and found employment on May 18, 1977 (Transcript, p. 21). Considering the nature of her injuries, it is not unreasonable to assume that she would be off 21 weeks, and her testimony is sufficient to uphold such a finding. Section 85.34(1) and Rule 500—8.3, I.A.C. define the nature of the healing period. Here it is found that claimant recuperated from her injury at that time, as shown by her testimony, that she returned to work, namely, May 18, 1977.

Defendants also claim that the rate of $143.65 is wrong. The hearing deputy's computations were checked and found to be correct. The gross wage of $2,947.94 which, with credit for two exemptions, entitles claimant to a weekly compensation rate of $143.65. Defendants present no theory for a reversal of the rate.

Finally, defendants argue that the bill of Dr. Dingle should have not been ordered paid because there was no showing that the charges of $250.00 were fair and reasonable and that they were causally related to the injury. Defendants are, of course, correct in this allegation.

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 was an employee of the defendant-employer on December 21, 1976.

2. That the claimant was sent by the defendant-employer to the Town House Motel in Cedar Rapids, Iowa, to conduct the defendant-employer's business of selling photographs.

3. That on December 21, 1976 a business dispute arose between the claimant and Etta Schwartzengruber, a co-employee.

4. That Thomas Hawkins, claimant's supervisor was asked to arbitrate the business issue and refused to do so.

5. That claimant again requested Thomas Hawkins to resolve the dispute in question and that said Thomas Hawkins struck the claimant.

6. That the reason for the assault by Thomas Hawkins on the claimant was work related.

7. That as a result of the injury the claimant was unable to perform acts of gainful employment for a period of twenty-one weeks.

8. That claimant's rate of weekly entitlement is found to be one hundred forty-three and 65/100 dollars ($143.65).

9. That the claimant has sustained a permanent partial disability of five (5%) percent of the body as a whole.

* * *

Signed and filed this 12th day of August, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

MARY MARINO,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant appeals from a proposed arbitration decision and ruling on a special appearance in which this agency took jurisdiction over this contested case proceeding and awarded disability benefits and medical expenses over and above those previously paid under the Nebraska law.

* * *

Although defendant has noticed that its appeal is to cover all matters contrary to its position, the letter "brief" filed January 27, 1981 indicates that the issue is the propriety of this agency accepting jurisdication based solely upon the domicile of the claimant. This tribunal has consistently so held until such time as the statute is amended or the court rules either the statute unconstitutional or the interpretation erroneous we shall continue to interpret section 85.71(1) as conferring jurisdiction to this agency of a claim based solely upon the domicile of the claimant being in Iowa.

As the defendant has made reference to the briefs which were filed in Miller v. Iowa Beef we shall refer to the holding in that case as precedence along with the numerous other cases on the same issue in which this defendant was a party.

Review of the findings of fact and conclusions of law of the deputies in the order filed March 31, 1980 and arbitration decision filed October 17, 1980 are proper.

WHEREFORE, the holdings of findings of fact and conclusions of law of the order filed March 31, 1980 and the arbitration decision filed October 17, 1980 are adopted as the final decision of the agency.

It is found and held as a finding of fact, to wit:

That on September 12, 1979 claimant sustained an injury which arose out of and in the course of her employment when she worked on the 8200 bagging machine at the defendant-employer's premises in Dakota City, Nebraska.

That the injury was in the nature of a cervical myositis with a cervical-dorsal-lumbar sprain.

That the injury caused claimant to be disabled from work from September 21, 1979 through October 7, 1979 recommencing November 13, 1979 through December 16, 1979, a period of seven and two-sevenths (7 2/7) weeks.

That as a result of said injury claimant has not sustained permanent partial disability.

That the claimant's proper rate for weekly compensation for temporary total disability is one hundred sixty-nine and 74/100 dollars ($169.74) per week.

That defendant is entitled to credit for benefits and medical expenses previously paid under the Nebraska Workmen's Compensation Law for this injury.

* * *

Signed and filed at Des Moines, Iowa this 24th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

RICHARD W. MARION,

Claimant,

vs.

LEO MARION CONCRETE CONSTRUCTION COMPANY,

Employer,

and

AID INSURANCE SERVICES,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed arbitration decision wherein claimant was denied compensation for failure to establish by a preponderance of the evidence that his disability was causally related to an alleged industrial injury on June 27, 1979.

• • •

The issue presented by claimant on appeal is whether or not claimant has established by a preponderance of the evidence that his spinal injury occurred in the course of his employment.

Claimant contends that his back injury was caused while stripping forms on June 27, 1979, a Wednesday. Claimant continued working through Friday at allegedly lighter work. On Saturday, June 30, claimant and his wife flew to Las Vegas returning on July 3. Claimant contends he was in pain throughout the long weekend. The plane on the return trip encountered turbulence which caused the pain to intensify. Claimant's testimony was coorborated by his wife and a co-employee.

Defendants contend that claimant received no injury while at work and for support rely upon the histories given to the various physicians who treated the claimant upon his return from Las Vegas. None of these histories relate an incident occurring at work but only the incident being jounced around during the plane trip.

Although either theory of causation is plausible, the deputy industrial commissioner who was the initial finder of fact chose to doubt the claimant's credibility as to a job related injury due to his lack of reporting any incident at work to his treating physicians. On appeal no reason is found to disturb this finding.

The findings of fact and conclusions of law in the arbitration decision are hereby adopted with the following expansion:

Finding of Facts

1. That claimant was an employee of defendant-employer on June 27, 1979 [transcript, page 8].

2. That claimant did not report any employment related incident to his treating physicians [defendants' exhibit E, plaintiff's exhibit 1 and 3].

3. That claimant suffered a herniated nucleus pulposus at the L5-S1 level as the result of a preexising degenerative disc disease [plaintiff's exhibit 1].

4. That claimant's disc herniation became symptomatic while returning from a pleasure trip to Las Vagas, Nevada on a commercial aircraft [plaintiff's exhibit 2 and 3].

5. That claimant underwent a lumbar laminectomy on August 3, 1979 resulting in a seven percent disability to his back [Hawkins deposition, page 8].

6. That claimant was unable to work from July 3, 1979 until September 11, 1979 as the result of the forementioned spinal injury.

7. That claimant is presently able to engage in acts of gainful employment to which he was suited prior to July 3, 1979 [transcript, page 7].

Conclusions of Law

That claimant has not proven by a preponderance of the evidence that an industrial injury occurred on June 27, 1979 which is the cause of claimant's disability.

That the claimant did not sustain any industrial injury which arose out of and in the course of his employment.

WHEREFORE, it is found:

That the findings of fact and conclusions of law of the review-reopening decision filed January 29, 1981 are proper, they are adopted as the final decision of this agency.

THEREFORE, it is ordered:

That the claimant is to receive nothing further from these proceedings. That the costs of this appeal are charged to the claimant.

• • •

Signed and filed this 23rd day of June, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

KEITH MASON,

Claimant,

vs.

ARMOUR-DIAL, INC.,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Keith Mason, the claimant, against Armour-Dial, Inc., 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 2, 1978. This matter was heard in Burlington, Iowa, on October 29, 1980.

• • •

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

Claimant, age 56, married with 3 dependent children is a forklift driver for the defendant. On March 2, 1978, while attempting to move a railroad car bulkhead manually, "something popped in my back" (transcript page 7, line 22). Claimant reported to the Valley Clinic the following day and was sent to physical therapy by Dr. H. Schire. Claimant was put on "light duty" until mid August

(defendant's exhibit 10) and was able to continue employment being in a position to handle the duty assigned (transcript page 16, line 16). In October 1978 claimant made complaints of continuing back pain to B.C. Kappmeyer, M.D., his family physician who referred claimant to James A. Gwaltney, Jr., M.D., an orthopedic surgeon. Dr. Gwaltney reported in part, as follows (claimant's exhibits 4 and 5):

> I first saw Mr. Keith O. Mason the 30th of November, 1978. You have my clinical record on him. It was sent to you on the 4th of December, 1979.
>
> Mr. Mason had the following diagnosis, and the most important is degenerative disc disease at the 4th and 5th lumbar interspace long standing. 2) Mild scoliosis. 3) Rather marked obesity.
>
> The patient states he was injured in March, 1978 when he was shaking a bulkhead on a railroad car trying to lock it. He felt something pop in his back and felt a burning sensation. He had no leg pain and no pain or coughing or sneezing. The patient has never shown any localizing signs on physical examination. The injury that the patient describes in March, 1978 certainly could have aggravated the preexisting disc disease causing the type of pain he described.
>
> In my opinion, he has an aggravation of a preexisting disc disease at the 4th and 5th lumbar vertebra causing symptoms. Also from this injury, I would estimate his permanent partial physical impairment to be five percent of the whole body.
>
> The mild scoliosis present is of no clinical significance. The rather marked obesity which is also present, assuredly has prolonged his recovery. Whether this is the only factor prolonging his recovery, I do not know.
>
> 11/30/78
> **History:**
>
> This 54 year old white male, born 9/16/24, 6' 1/2", 319 lbs. was seen in my office referred by Dr. Kappmeyer for evaluation of his back. Patient states he was injured in March, 1978 when he was shaking a bulkhead on a railroad car trying to lock it. He felt something pop in his back and felt a burning sensation. No leg pain. No pain or coughing or sneezing. Patient states for 3 mos. he had a lot of pain and sharp catches in his back. In August they had a shutdown and his back got better. His back aches and is stiff and feels like it is crooked. It feels like something is shifting in his back. No back trouble before March 1978. He had therapy. Patient is on his feet a lot at work. Pt. saw Dr. Shire, company Dr. at Valley Clinic then went to Dr. Kappmeyer.
>
> **Physical**
>
> examination revealed: 2 plus knee reflexes and 1 plus at the ankles. Straight leg raising test is negative. Patient has some 1 plus pitting edema. Both lower extremities have some superficial varicose veins. Pulses are alright though. No pain in legs when walking. Mild scoliosis of the spine with a right thoracic hump and some right flank fullness. Some asymmetry of his flank creases and a little bit of difference in arm space. Right shoulder is a little bit down about 1/4".
>
> **X-rays:**
>
> from the University of Iowa in Iowa City at the lumbosacral spine show fairly marked degenerative disc disease at L-5 — S-1 and L-4 — L-5. There is a marked decrease in disc space. These changes are quite old. (X-rays given to patient to return.)
>
> 1. Degenerative disc disease L-4 — L-5
> 2. Long standing mild scoliosis.
>
> **Rec:**
>
> Patient was told for every 1 lb. overweight he is it puts 2½ lbs. of extra pressure on his back. There is no surgery that would be recommended in his case and a back brace would not hold him. Patient needs to reduce and that is about it. Any muscle relaxers would only be temporary relief. There is a possibility that one of these discs will come out badly. Most probably the injury in March, 1978 caused aggravation of these two conditions. At the present time patient does not have any signs of nerve root compression. Surgery or myelogram is definitely not indicated now and I hope it never will be. A brace would be of no benefit. Pt. encouraged to reduce. Patient should go to Dr. Kappmeyer about Tues., 12/5/78 and let him give him a diet. Patient should weigh twice a week. On the basis of x-ray I don't think he would qualify for disability. It certainly would be beneficial for him to be doing light work and I don't think he should be doing heavy work. A job where patient is on his feet is better than one sitting down. Given prescription for Clinoril 150 mgm #200 TT bid, refill prn. Return 3 mos....
>
> 12/4/78
>
> SIS, Inc. Administrators sent to Armour-Dial Co., P.O. Box 1427, Ft. Madison, Ia 52627.
>
> 3/22/79
>
> Pt. weighs 306 lbs. today. He has lost 13 lbs. from when I saw him before and I consider this a mark of motivation of trying to get well. His back is better. He has worked 3 wks. in the latter part of Dec. 1978 and then he was layed off. States he could work in another dept., but he would have to carry a heavy ring. Reflexes equal. Straight leg raising test is negative. No significant spasm in the back. Continue anti-inflammatory medication. Continue reduction. Patient has done very nicely. I have no other recommendations. If he has any trouble with Clinoril or wt. reduction I would be happy to see him before 3 mos. Return 3 mos....

Claimant continued his duties, which he described as "light duty" (transcript page 24, line 22) until December

29, 1978 when the claimant was subjected to a layoff. Based upon his seniority, the only position available was in the manufacturing department which claimant felt he was unable to perform (transcript page 25, line 1). This record fails to contain medical evidence concerning claimant's physical condition during the 9 month interval and the claimant, in failing to provide such supportive medical evidence, did not sustain his burden of proof in support of his claim for healing period benefits.

In November 1979 claimant became a patient of Don K. Gilchrist, M.D., who reported his findings in part, as follows (claimant's exhibit 9):

11/30/79

OPINION: In the first place, one cannot argue with the x-ray findings correlating with the patient's symptomatology. Secondly, the patient adamantly denies any previous trouble with this back prior to the injury incurred in March of 1978. Thirdly, the patient is not disabled with his symptomatology but should definitely be in a position that does not require prolonged standing or any stooping or lifting of weights over 50 pounds. Lastly, this man's obesity is definitely a contributory factor to his symptomatology and it can be reasonably assumed that some of his symptomatolgy would improve with strick [sic] weight reduction and appropriate exercise program to strengthen his lower abdominal and spinal musculature.

3/9/80

My diagnosis remains the same, that of degenerative osteoarthritis, mild to moderate, lumbar spine with degenerative disc disease at L-4, 5 and L-5, S-1 level.

OPINION: This man is not a surgical candidate but I do believe his obesity is exacerbating his back symptoms. I think he will have continued pain and difficulty doing heavy occupations on a permanent basis. However, lighter type jobs I think could easily be handled by the patient and he, in fact, expresses motivation toward continued working within his physical capability.

9/29/80

In regards to the above-mentioned examination, it is my medical judgment that this patient has a 33% permanent partial disability because of the described back problem.

As I stated in my previous exam, I felt that he was permanently disabled from doing heavy occupation but I thought that lighter types of jobs could be handled by the patient.

Marc J. Williams, D.C., following an extensive examination conducted May 19, 1980, reported in part, as follows (claimant's exhibit 8):

Due to the nature of this condition and because of our findings upon examination and evaluation, the prognosis in this case must be considered poor. It should be noted that the patient's response to conservative therapy and treatment appears to have been consistant [sic] and encouraging in view of the severity and chronicity of this condition. The following impairment rating has been given to Mr. Mason after complete orthopedic and neurological examination on May 28, 1980. It is my opinion that Mr. Mason has reached a point of maximum medical improvement.

Range of Motion	7%
Motor Impairment Rating	26%
Sensory Impairment Rating	5%
Permanent Impairment of the Whole Man	34%

The above figures are based on the AMA's committee on "Rating of Mental and Physical Impairment: and can be found in the *Guides to the Evaluation of Permanent Impairment*, Copyright, 1977, American Medical Association.

On January 9, 1981, during his deposition following a vigorous cross-examination, Dr. Gilchrist remained steadfast to his opinions that claimant has a 33 percent functional impairment of the body as a whole.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 2, 1978 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). *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 apparent that the claimant has sustained his burden of proof in establishing through competent medical testimony that he sustained an industrial injury on March 2, 1978 which has resulted in a permanent functional impairment of the body as a whole and that such impairment is causally connected to the incident in question.

In light of the medical evidence and the undersigned's personal observation of the claimant, it is concluded that this claimant has a 25 percent functional impairment of the body as a whole and is thereby entitled to benefits as outlined in section 85.34(2)(u).

In light of claimant's continuing employment activities, retention of seniority and lack of diminution of weekly wages, it is concluded that this claimant has not suffered an industrial disability.

WHEREFORE, after having heard and seen the witnesses in open hearing and after taking all of the credible evidence contained in this record into account, the following findings of fact are made:

1. That the claimant sustained an industrial injury on March 2, 1978.

2. That the claimant did not suffer compensable lost time from his employment.

3. That the claimant has a functional impairment of twenty-five (25%) percent which is causally connected to his employment activities.

4. That the claimant received wage payment of eight and 46/100 dollars ($8.46) per hour (defendant's exhibit 9).

5. That the claimant worked a normal forty (40) hours per week resulting in a gross weekly wage of three hundred thirty-eight and 40/100 dollars ($338.40) or a statutory weekly entitlement of two hundred thirteen and 15/100 dollars ($213.15) per week based on five (5) exemptions.

. . .

Signed and filed this 27th day of May, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

THOMAS A. MEEK,

Claimant,

vs.

PEPSI COLA,

Employer,

and

NORTHWESTERN NATIONAL INSURANCE,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed October 3, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse arbitration decision under which claimant was awarded certain compensation benefits.

. . .

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

The issue on appeal is claimant's credibility. The hearing deputy awarded healing period and permanent partial disability benefits as a result of an alleged back injury caused by a slip and fall. Because of evidence introduced by defendants which questioned claimant's character and questioned whether his testimony was consistent with prior statements, defendants, through their attorney, term the arbitration award an "outrage" and a "most extreme miscarriage of justice" (defendants' brief, p. 1). The record contains evidence that claimant staged accidents, withheld information, gave inconsistent medical history, and that he asked a fellow employee to cut a vein in his (claimaint's) hand (tr. 134-135). The evidence is well summarized in the hearing deputy's decision. The question for determination, that of credibility, involves a re-evaluation of the record as it was presented to the hearing deputy.

Such a re-evaluation entails an examination of a particularly cold record and one is reluctant to supplant the hearing officer's judgment. Defendants recognized this difficulty when they say:

> Notwithstanding all of the above, this appeal is of the most difficult variety for an appellate officer to handle, for it involves the substitution of the appellate officer's judgment and fact determinations for the judgment and fact determinations of the Deputy. But when the determinations of the Deputy are as extreme as in the present case, there is no alternative to correcting them. (Brief, p. 2)

Those determinations, however, were based upon claimant's testimony of the injury (tr. 13), some corroboration by his fellow-worker, Jeff Nelson (tr. 111), and Dr. Haag's report of June 13, 1979, which shows a history consistent with claimant's description (claimant's exhibit 1), as well as the evidence defendants believe is paramount. Further, as claimant points out in his brief, claimant's bizarre conduct (attempting to manufacture a worker' compensation claim) began in October 1979, well after the alleged injury and after his claim had been refused suggesting a more complex motive for his behavior.

Considering the record as a whole and considering that the hearing officer accorded claimant's testimony sufficient credibility as a partial basis for an award, that award is affirmed.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on March 28, 1979, claimant sustained an injury which arose out of and in the course of his employment when he slipped and fell at work.

2. That as a result of said injury, claimant was disabled from work for a period of twenty-six (26) weeks, from March 28, 1979 through September 26, 1979.

3. That as a result, claimant sustained permanent partial disability to the body as a whole in the amount of ten percent (10%) for industrial purposes.

4. That the correct rate of weekly compensation for both healing period and permanent partial disability is one hundred thirty and 71/100 dollars ($130.71) per week.

5. That the following medical expenses were proved to be causally related to the injury and were fair and reasonable:

Des Moines Anestheosiologists	$266.00
Orthopaedists Limited, P.C.	1,130.00
Iowa Lutheran Hospital April 9, 1979—April 14, 1979	1,124.15
Iowa Lutheran Hospital April 24, 1979—May 3, 1979	1,831.94
Hilltop Medical Center	371.25

* * *

Signed and filed at Des Moines, Iowa this 31th day of December, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

JAMES E. MERICAL,

Claimant,

vs.

FEILEN MEAT COMPANY,

Employer,

and

CRUM & FORSTER INSURANCE CO.,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed June 30, 1980 the undersigned deputy industrial commissioner has been appointed under the provisons of §86.3 to issue the final agency decision on appeal in this matter. This is an appeal by claimant from an adverse arbitration decision by a deputy industrial commissioner.

The hearing deputy's decision is affirmed. It is necessary, nevertheless, to discuss several matters.

Subsequent to the arbitration decision, claimant filed a motion for leave to amend the petition to show an injury date of September 8, 1977 and to include the issue of estoppel against the defendants. Claimant's obvious reason for wanting to change the injury date is because the deputy held that the statute of limitations had run on the first injury date (March 31, 1977). The present proceeding being de novo, leave to amend might be granted; also, R.C.P. 88 certainly leaves room for such an amendment. However, to do so would change the case from that which the hearing deputy decided and gives claimant a second chance to prove the case he failed to prove the first time. Claimant had his chance to prove an injury of March 31, 1977. Also, at the time of his choice within the limitation period, he could have filed for an injury of September 1977.

Likewise, claimant could have included the issue of estoppel in the original proceeding. His choice was not to do so and he will be bound by that choice. Claimant's motion for leave to amend is overruled.

A second motion, one for remand and consolidation of proceedings, was filed after the hearing. In that motion, claimant asked that the instant case be remanded to a hearing deputy and consolidated with another action which has been brought for an alleged injury of January 1979. Again, claimant had his chance to prove the instant case and for that reason, the appeal will be decided on the merits of the hearing before the other deputy commissioner. Claimant's motion for remand and consolidation of proceedings is hereby overruled.

The facts may be briefly stated. Claimant developed a condition over the years, a bilateral carpal tunnel syndrome. His trouble began in 1973 or 1974, and he saw a physician as early as 1973. By March 1977, he could no longer carry on his employment as a meat cutter.

With respect to the statute of limitation, the critical facts occurred on July 8-9, 1976. On the former date, J. M. Bruner, M.D., a hand surgeon, examined claimant. The next day, that doctor wrote to the employer and stated that claimant's problem was overuse of his hand as a boner and cutter. Claimant denied that Dr. Bruner gave him the same information. Since he did not file his action until June 4, 1979, more than two years expired from July 8, 1976, and the statute of limitations would have expired if that date is used as the starting point.

Although claimant denied that Dr. Bruner informed him of the origin of his problem, the record states to the contrary (pp. 42-43). The evidence brought out on cross-examination that claimant did know of the cause of his problem in July 1976 is of considerable weight and is taken to be the fact.

Prior to July 1, 1977, the applicable statute of limitations, §85.26 stated that an original action must be commenced "within two years from the date of the injury causing such death or disability..." The Iowa Supreme Court held that the "causing" injury fixes the time when the limitations begin to run. *Otis v. Parrott*, 233 Iowa 1039, 8 N.W.2d 708 (1943). The amended statute adopts the discovery rule which would allow claimant to file within two years of the time he discovers that his problem is work-connected. See also *Orr v. Lewis Central School District*, Iowa, filed November 12, 1980.

Even if the discovery rule were adopted and the statute of limitation extended, under the above construction of facts the period of limitation expired anyway. That is, claimant knew on July 8, 1976 that the origin of his problem lay with his work. If *that* date is taken as the starting date for the statute of limitation, claimant still did not file in time. In other words, if claimant is given the benefit of the discovery rule, he still did not file within the period of limitation.

WHEREFORE, it is found and held as a finding of fact, to wit:

That claimant's carpal tunnel syndrome began to develop in 1973.

That claimant was examined by Dr. Bruner on July 8, 1976.

That on July 8, 1976, claimant knew that the problem with his hands was connected to the employment.

That claimant ceased being a meat cutter in March 1977.

That the hearing deputy's finding that the employer received notice of the injury on July 9, 1976 is hereby adopted.

That the two-year statute of limitation began to run on July 8, 1976.

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

* * *

Signed and filed at Des Moines, Iowa this 17th day of December, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

HOWARD G. MERRILL,

Claimant,

vs.

NATIONAL STEEL SERVICE CENTER,

Employer,

and

CNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decison

This is a proceeding in review-reopening brought by Howard A. Merrill, claimant, against National Steel Service, employer, and CNA Insurance Company, insurance carrier, for the recovery of further benefits as a result of an injury on June 30, 1976. Claimant's rate of compensation as indicated in the Memorandum of Agreement previously filed and stipulated to by the parties in this proceeding is $123.05. A hearing was held before the undersigned on May 29, 1980. The case was considered fully submitted upon receipt of claimant's letter on June 11, 1980.

Issues

The issue presented by the parties at the time of the pre-hearing and the hearing is whether claimant's request for further medical treatment is causally connected to his injury and reasonable.

Facts

Claimant, who has been a truck driver most of his life injured his back in December of 1974 when he was unloading 100 pound coils from a truck. Claimant stated he missed 5 to 6 months of work as a result of his 1974 injury. On June 30, 1976 claimant received an injury arising out of and in the course of his employment with defendant-employer when while lifting steel sheets to drag into a warehouse he experienced pain and was unable to straighten up.

Claimant testified that at the direction of the defendant he went to see his family physician who referred claimant to William R. Whitmore, M.D. Claimant indicated that Dr. Whitmore examined him and instructed him not to return to work. Claimant stated that Dr. Whitmore asked him if he wanted surgery with a disclosure that it could make his back worse. Claimant revealed that he was also seen for one week at the Industrial Injury Clinic in Neenah, Wisconsin. Claimant stated he was given therapy and exercises at the Injury Clinic. Claimant revealed that he did not do the exercises which caused him any pain and does not recall being instructed to continue the exercises after leaving the Clinic. Claimant was seen by F. Dale Wilson, M.D. and J.E. Ives, M.D., in Clinton, Iowa. Claimant stated that he was seen at the Franciscan Hospital Rehabilitation Center in Rock Island, Illinois, at his attorney's request. Claimant testified that the doctors at the Franciscan Hospital recommended therapy and exercise.

Claimant testified that he presently has pain in his back all the time and has not been released by any doctor to work without restriction. Claimant also has rheumatoid arthritis in his right elbow.

Claimant revealed that up until 5 or 6 weeks prior to the hearing he had only worked on old engines in his garage and made light deliveries with his son. Five or six weeks prior to the hearing claimant started working part-time driving a truck for a sod company and admitted that his back might be a little better since starting work.

In his report of May 6, 1975 William C. McCabe, M.D., revealed that claimant started having problems with his arm in October of 1974. Dr. McCabe also indicated he started seeing claimant for back pain on December 5, 1974.

The report of February 16, 1978 from the Industrial Injury Clinic in Neehan, Wisconsin, contains the following:

The patient is a 57 year old man who comes in at this time for evaluation of pain in the back and sometimes traveling down the front and back of the right leg, more in the front, and pain in the right elbow which sometimes goes down the right arm.

Historically, he states his back problem began in 1974 December, when he was working as a pedal driver as he calls it, delivering for a steel service center and at this particular time, he wrenched his back lifting about 100 pounds when he was throwing a coil off the truck. He was off under a doctors care for about five months. His problem was diagnosed as a muscle strain and he recovered and returned to work and did have some residual back pain problems. Also, at one point, developed pain in his neck and was treated for a while for that and didn't know exactly what the details were of the cause of his neck problem or related particularly to the industrial injury in question. On the 30th of June, 1976,

however, he was lifting and pulling on the job and re-injured his back and this time the pain began to radiate into the right leg. He went to his regular physician who referred him to an orthopedic surgeon who states "didn't tell me anything". Later, he said this surgeon put him in the hospital and ran a myelogram on him, told him he had a ruptured disc and recommended surgery. The patient, however, became a bit reticent and demurred and states "the surgeon lost interest in me at that point". He went back to his regular physician who continued to treat his back pain problems. He was never released to go to work in the meantime, his right elbow flared up on him for reasons he is not quite sure and he began to lose motion and have a lot of discomfort in it primarily on the radial side along the radial head with some associated pains going to the hands and numbness. Because of his disability and unclear diagnosis, he states he was ultimately advised to come here for further evaluation. States he is otherwise basically been in good health. He was told that he might have rheumatoid arthritis in his right elbow. The only other thing that has bothered him has been a little hayfever in the spring and fall. He has never had any surgery. Current medication is Aspirin. Prior to this, he was also on some muscle relaxant and states that didn't help and had quit taking it.

* * *

On Clinical Examination: * * * Musculoskeletal System—No weakness or atrophy to measurement or testing in the upper or lower extremities, although reflexes are brisk, equal and symmetric. Plantar responses are plantar and the patient reports normal sensory appreciation throughout his body, both with regard to crude touch and vibratory sense. Toe and heel gaits are performed well. Straight leg raising does not reveal a nerve tension on either side. He can do a Class I situp and butterfly hyperextension maneuver with ease demonstrating full motion of the torso. With regard to the right elbow, he is somewhat tender over the radial head. There is crepitance there and the elbow lacks about the last 25 to 30 degrees of full extension. Some discomfort on the extremes of motion.

* * *

Lumbar Spine films show the 12th ribs to be rudimentary. There are five vertebral bodies with lumbar characteristics. There is a slight scoliosis to the left at L4. L5 is transitional and partially sacralized on the left side. There is some joint space narrowing at L5-S1. A few droplets of pantopaque contrasts medial are noted in the spinal canal. There is no evidence for fracture or bone destruction.

X-rays of the right elbow show degenerative nd hypertrophic changes in and about the elbow joint with some joint space narrowing and some anterior spurring present. There is also some calcification along the lateral condyle of the distal right humerus.

A Bone Scan was performed showing the scoliosis of the low lumbar spine convexity to the left. No abnormal areas of uptake are seen. Dorsal spine appears unremarkable. It is Dr. G. R. Anderson's opinion that the bone scan shows a slight increased uptake generally in the lumbar area as well as the sacroiliac joints. In addition, he offers the information that the x-rays of the elbow are consistent with rheumatoid arthritic changes.

* * *

An Electromyography was performed screening the lumbar roots by Dr. H. A. Majid, Neurologist. The findings are consistent with a distal sensory neuropathy. There is no evidence of radiculopathy or nerve root compression.

* * * It was the opinion of the therapist who supervised the testing that the *patient appeared more concerned over the right elbow than the low back regarding weighted activities.* Gait is within normal limits with no gross deviations noted.

* * *

* * * Psychologically, he was quite open indicating that he has responded to the situation by becoming somewhat depressed. The depression is situational and predominantly manifests itself in the rather fearful avoidance of any situation that is going to cause him pain. * * * *

* * *

His back injury first occurred on December 5, 1974. On that date, he was unloading 100 pound coils of wire from his truck onto a forklift. He slipped on two pallets landing on the floor of the truck. He reported the accident as soon as he got back to the warehouse. He was off of work for five months and indicated even when he returned to work, his back still bothered him but the main reason he continued to work with it was because others seemed to hint to him that "nothing was wrong with me." Finally, on June 30, 1976 he was pulling off galvanized steel flat sheets from the truck and injured his back. He describes the feeling like something was on fire with pain radiating down his right leg to the ankle. He indicates the pain is not always problematic but seems to get worse if he twists just a certain way.

* * * He does not feel there is a job within the company that he could perform. He has not looked for work since his injury and has not looked into a training program. When asked what he would do if he could return to work, he indicated he might consider forming his own wrecker business, indicating he feels the need to protect both his employment and himself in the event his back "goes out again". It was this interviewer's opinion that he viewed himself as being disabled and saw little chance of changing this perception. He applied for Social Security Disability on two occasions and was refused both times. He

continues to receive $123 a week in Compensation Benefits. He is currently interested about trying for VA Benefits with regard to his disability status.

* * *

IT IS THE DIAGNOSTIC IMPRESSION OF THE STAFF THAT THIS INDIVIDUAL HAS:

1. RHEUMATOID DIATHESIS, NONINDUSTRIAL.

2. BACK STRAIN WITHOUT EVIDENCE OF NERVE ROOT COMPRESSION.

It is the recommendation of the staff that:

1. There is no evidence of a cervical functional problem at this time with full range of motion of the neck and no cervical radiculopathy. In addition, it is felt that the source of the majority of the patient's current symptoms is the underlying nonindustrial rheumatoid problem. Therefore, no permanent residuals are felt to exist relative to the industrial incident in question.

2. The patient was advised to continue with physical reconditioning program as outlined and demonstrated to him while in the Industrial Injury Clinic.

3. He may resume gainful employment as of 13 March, 1978. Because of the preexisting factors such as scoliosis, hypertrophic changes of the lumbar spine, rheumatoid arthritis, the patient's age and his size, it is felt that he limit his lifting activities to a maximum of 80 pounds with no high frequency bending or twisting of the spine.

4. Anti-inflammatory medications are indicated and he was begun on Naprosin 250 mg. b.i.d., p.c. If this proves to be ineffective, a trial use of Indocin may be considered.

5. It is recommended that he follow through with the vocation suggestions as outlined in the body of this report.

Dr. Ives in his report of July 29, 1977 made the following recommendations:

> ...This man should be in a job that requires no lifting over 25 pounds and does not require him to do excessive stooping and bending. Prolonged standing or prolonged walking would also be prohibited in his case. The disability will be of an undetermined length of time.

In his report of May 4, 1978, Dr. Wilson made the following comments:

> ...Recommendations for further medical care include management by his local physician with the anti-inflammatory drugs.

* * *

Concerning the back: This has reached an essentially permanent state and will not improve without a surgical intervention. The best advice at the moment seems to be that a surgical intervention is not now indicated.

The prognosis is grave; some improvement can be expected in the elbow. Some rehabilitation is in order. The man himself is seriously considering self-employment with the limits of his ability and this is recommended.

In his report of February 12, 1979 for the Franciscan Rehabilitation Center, Robert J. Chesser, M.D. stated, in part:

IMPRESSION: Based on the week's evaluation, my feeling is that Mr. Merrill's back symptoms are due to poorly conditioned back and soft tissue contracture due to the prolonged periods of bedrest. In addition to his poorly conditioned back, he does have a rheumatoid arthritis as evidenced by his elevated Sed. rate and rheumatoid factor. This appears to be involving his right elbow.

RECOMMENDATIONS: 1) That Mr. Merrill be enrolled in a very aggressive therapy program to consist of ultrasound up to 2.0 watts per centimeters squared over the paraspinal area from L1 to S1. This would need to be followed by active stretching exercises in order to try to lengthen the soft tissue structures. We explained to Mr. Merrill that this would involve discomfort since the stretching of the structures would naturally produce pain, however, within several weeks this should subside. We also made it clear to him that this exercise program, although we felt it would decrease his pain, would not do anything to straighten out the scoliosis that he had in his spine since this is most likely due to his sacralization of his lumbar spine which was a congenital change. I feel that he would need daily physical therapy for three fo [sic] four weeks. This then could be tappered [sic] to three times a week for an additional two to three weeks with him doing the exercise program on the alternate days. 2) That he be able to return to work after a six to eight week program. His job would consist of local runs which would not involve repetitive lifting and twisting as he had done in the past. Because of the rheumatoid arthritis, I feel that a weight restriction of sixty reasonable. In addition, he would not be required to do repetitive lifting and twisting. 3) We felt that since he had been off work for such a long period of time and most likely had insecurities regarding returning to work and feeling uncomfortable meeting new employers that sessions with a vocational counselor to work through some of these feelings would be in order in order to make him feel more comfortable when he would go out and be actively seeking a job. 4) He should be seen by his family physician to monitor his hypertension as indicated in the initial history and physical, his blood pressure was quite elevated at the time of admission. He was started on a diuretic, however, his blood pressure returned to normal within one to two days. Although this might have been anxiety related, I felt that diastolic of 120 is much too high to just chalk up to anxiety so I did encourage him to seek his family physician for continued follow-up for his blood pressure. 5) It was the consensus

of the panel that Mr. Merrill's depression would resolve as he became more active, got out of the house more and began doing things he enjoyed again. 6) We explained to Mr. Merrill that we would be willing to see him here for the vocational counseling and also for follow-up for the physical therapy if this was ok with him and his sponser [sic].

SUMMARY: Overall the evaluation here corresponds very closely to the evaluation suggestions from Neenah, Wisconsin. We would like to see him approached more actively and receive more physical therapy and exercise and feel that he can return to work within six to eight weeks; however, he will require restricted duties as outlined above because of the rheumatoid arthritis. There is no evidence of any permanent disability in his low back that can be related to an injury.

Applicable Law

Section 86.70, Code of Iowa, states, in part:

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 of vocational education.

Section 85.27, Code of Iowa, states, in part:

The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonable necessary transportation expenses incurred for such services * * * *

* * *

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 therefore, allow and order other care.

The claimant has the burden of proving by a preponderance of the evidence that his injury is causally connected to the medical care and treatment upon which he is now basing 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). *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.)

Findings of Fact

On February 18, 1980 claimant filed an application for further medical care in which he requests rehabilitation pursuant to Section 85.70, Code of Iowa. It is noted that 5 to 6 weeks prior to hearing claimant became employed driving a truck for a sod company. Any determination on the issue at this time would therefore be moot. It is also noted that no evidence was received which would indicate that the Franciscan Hospital program is recognized by the state board of vocational rehabilitation education. Furthermore, a close reading of claimant's application as well as the evidence presented discloses that claimant's application is really a request for medical care pursuant to Section 85.27, Code of Iowa.

Section 85.27 of the Code states an employer shall furnish reasonable surgical, medical, physical rehabilitation and hospital services but also has the right to choose the care provided. If the parties are unable to agree to alternate care the undersigned may order other care.

It would appear that the medical care that claimant is seeking is different than that previously offered by the defendants in that the physical exercises would be under the control of the hospital rather than unsupervised. Claimant has met his burden in proving that said medical treatment, of therapy and exercises is causally connected to his injury in that Dr. Chesser makes a distinction between claimant's pain and congenital problems.

Although this medical care is reasonable and causally connected to his injury it is noted that claimant is proceeding on a misconception of the facts. At the time of the hearing claimant indicated that when he completes this treatment he will no longer have any restrictions. The report of Dr. Chesser discloses that claimant will always have restrictions because of his rheumatoid arthritis which is not work-related. Furthermore, claimant has in the past not done the exercises which cause him pain. The Franciscan Hospital indicates that the exercises to be given will cause pain. Claimant's lack of motivation and apparent lack of cooperation may render this treatment useless. Claimant failed to prove the vocational counseling was causally connected to any back injury.

Analysis

WHEREFORE, it is found that the medical treatment requested by the claimant is reasonable and causally connected to his injury.

It would be in the claimant's best interest to have the requested treatment.

THEREFORE, defendants are to furnish claimant with the treatment and care which shall include physical therapy and exercises, of the Franciscan Rehabilitation Center.

* * *

Signed and filed this 19th day of December, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

SANDRA E. MILES,

Claimant,

vs.

ASSOCIATED MILK PRODUCERS INC., (A.M.P.I.),

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision in which claimant was awarded temporary total disability compensation for employment-related lifting activities which aggravated a preexisting condition.

* * *

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

Claimant specifically testified that she told Pat Coolican that lifting the 50-pound bags had "about killed her" whereas Mr. Coolican simply did not recall any complaints from claimant concerning lifting the 50-pound bags. In addition, claimant testified that at various times she reported to Don Kruckenberg that her back was hurting. Claimant noted that she made some complaints to Kruckenberg when she was actually carrying boxes. Claimant stated that she felt she made it clear to her supervisors that her back complaints were work-related.

With regard to the incident involving the 50-pound bags, claimant stated that she entered Kruckenberg's office within one month after the incident and told him she had hurt her back. Kruckenberg on the other hand has no recollection of conversation in his office with claimant. He does not deny that the conversation occurred, rather he testified that claimant complained frequently of shoulder and backaches. He testified that he was aware of these complaints, but that unless the complaints were severe enough to require hospitalization or a doctor, not much attention was paid to them. It is understandable why claimant complained in general terms about her back to her supervisors. The lifting activities required by her job aggravated claimant's back condition. There was no specific incident which required hospitalization or the immediate attention of a doctor. Indeed, Kruckenberg himself testified that scant attention was paid to complaints not relating to a specific injury. The evidence supports the deputy's finding that claimant reported her back problems to both Coolican and Kruckenberg, thus, giving actual notice to the employer.

Claimant testified that the termination form was described to her by Coolican as being required for the company's own benefit and that it really didn't matter what was put on the slip. Claimant testified, therefore, that she told her supervisor that she had many reasons for quitting and that she really did't care what reason he put down. However, according to claimant she quit because her back was hurting.

Coolican testified that he had talked with claimant at different times during her employment and that at one time she had told him that "basically the reason she was quitting was—she said that she did not want to work full time anymore." Mr. Coolican, however, could not relate the specific conversation on the day the slip was signed. He noted that he had simply asked claimant if not wishing to work full-time was a fair statement and that claimant said "yes" by her signature. The evidence with regard to the termination slip supports claimant's contention that she quit for reasons other than that listed on the slip.

The report of John R. Walker, M.D., dated May 16, 1979, extensively related claimant's work history, and specifically described the job involving the 50-pound bags. His opinion that claimant sustained a permanent partial disability was based upon a history given by claimant and upon claimant's medical reports. Both S. J. Laveg, M.D., who referred claimant to Dr. Walker, and Dr. Walker stated in reports that claimant's back problem was causally related to her employment. Both physicians noted that it was not unusual for a person to have back complaints of this type without one specific incident being the cause. Claimant testified that the lifting at work caused her back problems. Her testimony that she hurt her back lifting 50-pound bags was confirmed by her co-worker, Geraldine Klunder, who stated that claimant had complained of back pain on the particular day when she was actually lifting the 50-pound bags. Claimant's husband also testified that he found his wife in bed and in extreme pain a few days following the 50-pound bag incident and that she causally related the pain to the lifting.

Between January and May of 1978 claimant complained, according to her testimony, to Kruckenberg that her back hurt. That claimant complained of back pain is confirmed by Kruckenberg's own testimony that he frequently heard claimant complain of back and shoulder pain. The evidence in the record supports the deputy's determination that claimant's employment-related lifting activities aggravated her preexisting back condition.

The letter of G.I. Tice, M.D., dated May 1978 which indicated claimant suffered "back strain," confirmed

claimant's complaints to her supervisors that she was suffering from back problems.

An Original Notice of Petition was filed December 7, 1978; therefore, the employer did have notice of claimant's claimed injury within ninety days of the valuations of both Dr. Tice and Dr. Laaveg.

In his report of May 16, 1979 Dr. Walker states that claimant "has never really recovered" from the condition which resulted from the heavy lifting, bending, and twisting type of job which she did for one day at her place of employment. Dr. Laaveg, in a report dated April 30, 1979, stated that the majority of patients do improve over a period of time, but that he was unable at that point to evaluate claimant's permanent impairment. Therefore, the deputy's determination that temporary total disability benefits should be continued until the requirements of Iowa Code §85.33 are met was proper.

WHEREFORE, for the reasons stated above, the proposed arbitration decision is hereby adopted as the final decision of the agency. It is found:

The conditions preexisted May/June 1978.

That claimant's employment-related lifting activities caused claimant's back strain.

That claimant has been unable to perform acts of gainful employment since September 14, 1978 as a direct result of the injury.

That claimant remains temporarily disabled.

. . .

Signed and filed this 6th day of November, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RUSSELL I. MILLER,

Claimant,

vs.

ARMSTRONG RUBBER COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

. . .

Defendants appeal from an adverse arbitration decision.

For reasons stated below, this decision, which differs in result from the proposed agency decision, will consitute the final agency decision under §17A.15(4).

Claimant has had many injuries, both on and off the job. Here he seeks to recover benefits because of a condition in his left wrist.

He first had a problem with this wrist May 9, 1978 when he hurt it at work (Tr. 19), although the employer's record shows only a shoulder injury (defendants' exhibit A, p. 19). Then in September 1978, he "hit the wrist on the drum while [he] was sterating the tire" (Tr. 21), although the employer's record shows a finger injury, not a wrist injury (defendants' exhibit A, p. 14).

Claimant again hurt his left wrist in October 1978 when he rolled over in bed (Tr. 25). A January 1979 injury was described as follows:

> Yes. The same process, where I was sterating the loose fabric, I caught my left hand in the loose fabric as I was sterating the outside turnup, and it threw my hand over backwards, and pulled the sterate—piece of sterate out of my hand (Tr. 26).

The employer's records are equivocal as to this alleged injury. A report of March 14, 1979 (claimant's exhibit 1) states that a wrist injury occurred in January 1979, but that it happened at home. However, a first report of injury was filed May 9, 1979 and shows a left wrist injury of "? Jan. 1979?" of which the employer had knowledge on March 14, 1979 (industrial commissioner's file and claimant's exhibit 1).

Although claimant had some difficulty, he continued to work until April 26, 1979. On January 26, 1980 he sustained a Colles fracture to his left forearm, just barely above the wrist; this accident was nonoccupational.

The medical evidence showed claimant saw three doctors at the Des Moines Orthopaedic Surgeons, P.C. First, Ronald K. Bunten, M.D., a qualified orthopaedic surgeon, saw claimant April 13, 1979 and diagnosed a "probable sprain, distal radial ulnar joint, left wrist" (defendants' exhibit A, p. 1). Dr. Bunten also states that "[o]nset may have been related to some of his work activities as a tire builder." It is noted that this statement is made as a part of claimant's history, not in explanation of the cause. Then, Dr. Bunten's report of May 9, 1979 states:

> He believes it was October, 1978, when he injured the wrist while working, although this was not documented at the time (defendants' exhibit A, p. 1).

After Dr. Bunten again saw claimant on May 25, and June 15, 1979, Arnis Grundberg, M.D., a qualified orthopaedic surgeon, saw claimant on June 28, July 3, and August 22, 1979. On June 29, 1979, Dr. Grundberg states:

> Russell Miller, age 38, is here because of pain over the distal ulna of the wrist. The pain is present with vigorous use of the forearm, especially in rotation of the forearm and wrist. The patient builds small truck tires at Armstrong. The injury occurred in October

1978, when he had a hold of a rotating drum that spinned faster than he expected and twisted his forearm and wrist. He has intermittently worked. At the present time he is not working since the 26th of April when they put him to building tractor tires. After he works for 20 minutes, the pain comes on, and because of this he has not been able to work.

On examination, there is no swelling over the left wrist. On palpation no tender area is found over the distal ulna but there is some tenderness over the lunate and scaphoid at the left wrist. There is no limitation of motion.

I reviewed the old x-rays and took some new ones with stress views, and I can see no abnormality.

Impression: Left wrist pain, etiology unknown.

Discussion: I excused him from work for two more weeks. I told him to work vigorously at home so that it starts hurting so I could examine him again to see if I could find the seat of his problems. He will return to see me after he does the hard work so I can examine him again.

It seems to me that if we cannot find the cause of his problem, we could temporize by putting him on some easier duty. He seemed to be able to build car tires but cannot build truck tires and we will see if we can get him back to building car tires (defendants' exhibit A, p. 2).

On July 3, 1979, Dr. Grundberg states:

He has been using his wrist over the weekend and it hurts with supination. There is a tender area over the distal ulna that is not over the extensor carpi radialis and is not over the styloid process of the ulna, and isn't close to the radiolunar joint. Dr. Bunten injected it twice and that did not help very much. He is especially having trouble since he was switched to heavy truck tires. I will write a note recommending that he not go back to that.

Discussion: The patient's injury did not happen on the job as I have indicated in the previous note, and it is reasonable that that particular injury has caused his present difficulty. It is, I think, reasonable that since he was able to do his job even with a sore wrist while building passenger tires, and is not able to do his work by building the heavier truck tires, that he be put back on working and building passenger car tires. I think that since the Cortisone injections have not helped that the only thing that we can do at this point is give it time and often these will heal by themselves. This may take several months, however (defendants' exhibit A, p. 3).

Starting November 7, 1979, claimant was treated by Douglas S. Reagan, M.D., a qualfied orthopaedic surgeon. (It is noted that all three orthopaedic surgeons who saw claimant are members of the same group.) The history stated:

From our records, Mr. Miller is a thirty year old right-handed tirebuilder who in October of 1978 while working on tires grasped a rotating drum, pressed the wrong button, and his hand went in to a position of flexion and ulnar deviation. He had immediate pain and subsequent pain which lasted for several weeks. At that time x-rays demonstrated nothing. In January he again was working on tires and with this activity again had a dorsi-flexion and radial deviation injury at this time and again had pain in his wrist associated with work. At a separate incident, a time of which was undetermined, he was getting up from bed and injured his wrist for a third time and has subsequently had difficulty with his wrist since that time (Reagan deposition, 5-6).

Later, the doctor was asked a hypothetical question.

Q. Doctor, we had a hearing and we had the benefit of some of the records that better abled us to understand the dates of the history a little better, so I am going to ask you to assume your knowledge of this history and the care and treatment of Mr. Miller, but also ask you to assume hypothetically the facts that I mention to you prepatory to asking you a question. Doctor, he indicates that in August, or sometime in 1975, that he had a skiing accident and he injured the bicep tendons and was off work some fourteen months until about 1976 and then he returned to his usual job, that he does not have any real complaints to his shoulder, and that he had no complaints at all in his wrist through that period of time, and then the first time he had any complaints with his wrist followed a period of May 9th of 1978 where he was making a splice on a Shafer and he hit the wrong button causing the drum to spin away and jerk in his left arm. He reported this incident to the nurse and he was bothered by that considerably for a few weeks and then it kind of subsided. Then in September of 1978 later that year he again hit his left arm or wrist on the spinning machine and he had considerable trouble with that at that time and in October of 1978 while he was having the trouble with his wrist he kind of rolled over in bed and further hurt it and then he went back to work in January of 1979 and continued having trouble as he built the tires. Based upon that history, Doctor, would you have an opinion as to what caused the condition you found in his left wrist? (Reagan deposition, pp. 9-10).

After defendants objected to the hypothetical question, Dr. Reagan was asked as follows:

Q. Doctor, he, as a matter of form, makes those objections. Could you go ahead and give us your opinion on my question as to the causation, if you know, of his conditions to the left wrist?

A. Based on the information that has been given, I would think that it would be likely that the injury was associated with one of the noted times of injury, probably that of the May injury as the time of injury.

Q. The May, 1978 injury where he hit the button?

A. Yes (Reagan deposition, pp. 11-12).

From such evidence, the hearing deputy concluded that the 1979 incident was an aggravation of a pre-existing injury, a questionable result at best. The main problem for claimant, is that his *pro se* petition listed a 1-3-79 injury, then later his hypothetical question all but *ruled out* a January 1979 injury (after very specific descriptions of May and September 1978 work incidents, the words "went back to work in January of 1979 and continued having trouble as he built the tires" are not very convincing of a January 1979 injury).

Defendants recognize claimant's dilemma in their statement of the issues on appeal.

> 1. Was there evidence in the record from which the Deputy Commissioner could reasonably conclude that claimant's alleged injury of Janury 3, 1979 was the proximate cause of claimant's disability?
>
> 2. Could the Deputy Commissioner, based on the evidence before him, reasonably conclude that claimant's disability, if any, was a result of the alleged injury of January 3, 1979 as distinguished from each and all of the preceding and subsequent injuries to claimant's left arm, hand and wrist.
>
> 3. Did claimant's evidence of notice to the employer and insurance carrier reasonably support notice under the provisions of section 85.23, The Code (defendants' appeal brief, pp 2-3).

The first two issues refer to causation. The third issue will not be discussed at least with respect to a January 1979 injury, because, as stated above, claimant's exhibit 1 shows the employer had knowledge. The question becomes, then, whether claimant could recover under any theory or whether his disproving of a January 1979 injury precludes him from any recovering.

Fundamentally, Drs. Grundberg and Reagan each take a history and see a causal connection between that injury and some length of disability. Dr. Bunten's notes do not reveal his opinion on causal connection one way or another. On the information available, claimant could have been injured in May, September, and October of 1978 and January of 1979, but the only evidence of causal relationship is to an October 1978 injury (Dr. Grundberg's notes) or to a May 1978 injury (Regan desposition, p. 12). The petition, of course, lists a 1979 injury, an injury for which there is no proof of causal relationship to any disability.

A variance between pleading (1979 injury) and proof (1978 injury) may be immaterial, and claimant could be allowed to recover. *Cross v. Hermanson Bros.*, 235 Iowa 739, 743, 16 N.W.2d 616 (1945). See also *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 343, 112 N.W.2d 299 (1961). However, there is nothing in the record to show claimant meant the evidence of the 1978 injuries to be anything more than a foundation to prove a 1979 aggravation. Of course, a claimant may amend although the statute of limitations may have run, so long as the theory of liability does not wholly differ. *Swartz v. Bly*, 183 N.W.2d 733 (Iowa 1971). See also *Johnson v. Percy Construction, Inc.*, 258 N.W.2d 366 (Iowa 1977). As the record stands, one cannot tell whether or not claimant was trying to prove injuries in the year 1978, nor is claimant's brief of any help because it argues only the issue of the 1979 injury and of notice.

WHEREFORE, it is hereby found and held as a finding of fact, to wit:

1. That on or about January 3, 1979, claimant sustained an injury which arose out of and in the course of his employment.

2. That the injury was a strain to the left wrist when claimant caught his left hand in loose fabric while sterating a tire while at the employer's premises.

3. That the evidence does not disclose claimant sustained any disability or medical or allied expenses because of said injury.

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

* * *

Signed and filed at Des Moines, Iowa this 30th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Rehearing.

RUSSELL I. MILLER,

Claimant,

vs.

ARMSTRONG RUBBER COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Decision on Rehearing

Pursuant to order, the oral argument on claimant's application for rehearing was heard on February 27, 1981.

Briefly, claimant was awarded compensation benefits in an arbitration decision on August 15, 1980. The award was based on what the hearing deputy thought was evidence of a compensable aggravation of a preexisting condition on January 3, 1979.

Upon appeal, the undersigned deputy industrial commission reviewed the matter de novo and found insufficient evidence to support an award for compensable aggravation on January 3, 1979.

As the appeal decision shows, there were several possible dates of injury. The hearing deputy's decision, as

stated above, was founded upon the theory of aggravation. The first indication of a different theory of recovery comes in claimant's application for rehearing. That theory, basically that claimant did not understand the probable compensable character of the injuries until January or April 1979 will not be discussed in any detail here. (There was no evidence introduced which supported the theory.)

Claimant should be allowed to amend his petition to show the alleged injuries of 1978 and 1979, even though he has failed to do so at this time. The medical evidence should be evaluated in the light of a different theory of liability as well as the theory of aggravation. Allowing claimant to amend at this late date is perhaps lenient; however, it needs no citation to state the law is to be interpreted liberally in favor of the claimant. Further, this is an administrative agency and should be given to less formal pleading practices. *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961); *Cross v. Hermanson Bros.*, 235 Iowa 729, 16 N.W.2d 616 (1945).

WHEREFORE, claimant is given until March 31, 1981 in which to amend his petition within the guidelines discussed below. If such an amendment is filed, the case is automatically remanded for a further hearing in arbitration. If claimant chooses not to amend his petition within the confines of this decision on rehearing, then the appeal decision of January 30, 1981 applies as of March 31, 1981.

* * *

Signed and filed at Des Moines, Iowa this 16th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

MANUEL MONTELONGO,

Claimant,

vs.

DUBUQUE PACKING COMPANY OMAHA, NEBRASKA, a Nebraska Corporation

and

UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY (Its Insuror from 11/1/77—11/1/78),

and vs.

INSURANCE COMPANY OF NORTH AMERICA, 7101 Mercy Road, Omaha, Nebraska (Insuror of Flavorland Industries 1971-1975),

and

THE SECOND INJURY FUND,

State of Iowa,
Defendants.

Appeal Decision

INTRODUCTION

By order of the industrial commissioner filed February 6, 1981 the undersigned deputy industrial commissioner has been appointed under provisions of §86.3 to issue the final agency decision on appeal in this matter. The employer, Dubuque Packing Company, was held liable in an arbitration decision of October 15, 1980.

As the caption of this case shows, other parties were named as respondents but only the Dubuque Packing Company (hereinafter the employer) was held liable.

The record on appeal includes the transcript which contains the testimony of claimant (with Alberto Rodriguez as intrepreter), Joseph Lopez, and Melvin Kiebel; the deposition of Louis F. Tribulato, MD., was admitted into evidence; also admitted into evidence were claimant's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11; the employer's exhibits A, B, C, D, E, F, G, H, I, J, K, L, and M; the second injury fund exhibit 1; and the commissioner's exhibit 1 (in two parts).

The result reached by the deputy is modified, and this appeal decision will be the final decision in this matter.

Issues

The issue, aside from whether claimant was injured and disabled at all, concerns the state of claimant's domicile. The employer's operation in Iowa is self-insured; employer's operation in Nebraska is covered by an insurance carrier. Thus, if the employer can successfully defend an Iowa compensation claim it would not be obligated to pay benefits under the Iowa law. Technically, the issues are put forward in the employer's appeal brief as two propositions:

> The Deputy Industrial Commissioner's decision is erroneous as a matter of law in that it makes a finding that the "claimant has established by preponderance of the evidence that he was a *resident* of the state of Iowa on July 19, [sic] 1979 and is entitled to benefits, if any, as contained in section 85.71 Code, supra." [emphasis supplied]

The Deputy Industrial Commissioner's finding as to industrial disability is not supported by the facts and law in this particular case.

Summary of Evidence

Claimant sustained what at first appeared to be only an injury to the left knee on July 18, 1979. Later he had a knee operation and developed a low back problem as a result of the knee injury.

The first proposition by the employer points out a mistake in the hearing deputy's decision. That is, on page 3 of the decision, the deputy states that claimant had established by a preponderance of evidence that he is a "resident" (as opposed to "domiciliary") of the state of Iowa, and further he

makes a formal finding of fact to that effect on page 6. However in the deputy's defense, it should also be stated he used the term "domicile" in discussing the evidence on page 3 of his decision. There is, on the other hand, no need to make an excuse for the mistake because, regardless of what the deputy did, the evidence is sufficiently in claimant's favor to reach the same result as the hearing officer.

Four addresses are mentioned in the record:

1. 2221 U Street, Omaha, Nebraska.
2. 2514 F Street, Council Bluffs, Iowa.
3. 1328 Avenue B, Council Bluffs, Iowa.

The record is not clear at all as to any exact dates of claimant's residence; however, from the record one sees that claimant bought the house on U Street, Omaha, some 15 years prior to the hearing which would have been about 1965. Further, he bought the house on F Street in Omaha about 10½ years prior to the hearing which would have been about 1969 or 1970. He left the F Street address in Omaha because he and his wife were divorced. He lived for a time in Trailer City in the year 1978, and he lived at 1328 Avenue B in Council Bluffs as of December 21, 1978, several months before the injury. Supporting this evidence is claimant's own testimony, a mortgage for the Council Bluffs property of December 1978, and the note for the mortgage dated December 21, 1978 and specifically listing the Avenue B, Council Bluffs address. (The hearing deputy relied on an Iowa Driver's License and other attachments to claimant's compliance with the employer's motion to produce; however, those documents were *not* admitted into evidence and will not be considered as evidence of claimant's domicile.) Also, Joseph Lopez testified that Mr. Montelongo did *not* live on U Street in Omaha (as defendant contends) and that the house at the address is leased to another person (Tr., p. 63). According to claimant, the house is rented to one Mr. Jose Flores (Tr., p. 55). (The hearing deputy using only his notes, mistakenly stated that Mr. Flores actually testified, whereas he in fact did not.)

The only real evidence against claimant's domicile being in Council Bluffs is a Federal W-4 Form of March 27, 1978 and several payroll checks all showing an address of 2221 U Street in Omaha. In explanation of why he continued to use that address, claimant stated that he had problems with the post office and it was easier to have his mail sent to that address. Such an explanation is suspect, obviously. On the other hand, looking at all of the evidence, claimant's is of sufficient weight to carry the day. He was divorced in 1978 and obviously left the F Street, Omaha, address. After his stay in Trailer City, he bought the property in Council Bluffs, and it does not seem unreasonable to assume he began to reside at the property when he bought it (although that need not necessarily be the case). Defendant presents only exhibits, no testimony, and although the exhibits bear some weight, they are not sufficient to offset the basic value of claimant's case.

Applicable Law

Section 85.71 states in part:

> In an employee, while working outside the territorial limits of the 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...

Anderson v. Blakesly, 155 Iowa 430, 438; 136 N.W. 210 (1912) gives a classic definition of domicile:

> "The 'domicile' of a person has been defined as the place where 'he has his true, fixed, permanent home and principal establishment to which whenever he is absent he has the intention of returning'."

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 18, 1979 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).

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

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

Analysis

There is conflicting evidence on many points; however, claimant preponderates sufficiently to gain an award. He has shown that he probably is domiciled in Iowa, which is sufficient to give the Iowa Industrial Commissioner jurisdiction in this matter.

As to the matter of disability, defendant-employer complains about the fact that certain papers in the industrial commissioner's file show claimant had a prior back condition. It is conceivable that these papers in the file would have some weight both as to substantive matters and impeachment; however, they are not a part of the record. Not being such, they will not be considered.

Finally, the employer complains that the interpreter was not accurate. The transcript shows that the interpreter, a Mr. Rodriguez, worked as a janitor with the D. H. Food Company, had a tenth grade education, and was associated with the Omaha Lutheran Metropolitan Ministries, "an organization supported by various local lutheran churches, and I am the hispanic resource consultant." (Tr., p. 31) It would appear from the foregoing that Mr. Rodriguez was well enough qualified.

Finding of Fact

1. Claimant was an employee of Dubuque Packing Company, Omaha, Nebraska, a Nebraska Corporation, on July 18, 1979. (Tr., p. 16)

2. Claimant was injured at work on July 18, 1979. (Tr., p. 20)

3. The injury was an internal derangement of the left knee (Tribulato depo., exhibit 1) and a lumbo-sacral strain. (Tribulato depo., p. 29).

4. The injury necessitated a left knee replacement. (Tribulato depo., p. 25)

5. The work injury caused permanent impairment to the knee and to the back. (Tribulato depo., pp. 40 and 34)

6. The total permanent impairment to claimant's knee is fifty percent (50%), twenty percent (20%) of which is from the compensable 1979 injury (Tribulato depo., p. 40) and the back impairment, all attributable to the 1979 injury, is fifteen percent (15%). (Tribulato depo., p. 31)

7. That claimant cannot work as a beef lugger. (Tribulato depo., p. 33)

8. That claimant is still under the care of Louis F. Tribulato, M.D. (Tribulato depo., p. 16)

9. Dr. Tribulato performed an arthroscopy on claimant's left knee on January 18, 1980. (Tribulato depo., p. 24)

10. Claimant was almost healed from the operation as of July 2, 1980 and the expected time of recuperation from such an injury is six months. (Tribulato depo., p. 25)

11. Claimant had prior impairment to the left knee. (Tribulato depo., p. 40)

12. Claimant had no prior impairment to the back. (Tribulato depo., p. 35)

13. Claimant's prior employment experience was in heavy labor; he was 57 years of age at the time of the hearing. (Tr., p. 14)

14. Claimant purchased and moved to 2221 U Street, Omaha, Nebraska about 1965. (Tr., p. 38)

15. Claimant purchased and moved to 2514 F Street, Omaha, Nebraska in 1969 or 1970. (Tr., p. 39)

16. Claimant was divorced and moved to Trailer City, Council Bluffs, Iowa in 1978. (Tr., p. 39)

17. Claimant purchased and moved to 1328 Avenue B, Council Bluffs, Iowa as of December 21, 1978 and lived there at the time of the injury. (Tr., p. 36)

18. The purchase of and living at 1328 Avenue B, Council Bluffs, Iowa shows that claimant intended the address to be his domicile.

Conclusions of Law

1. Claimant is the employee of defendant-employer, Dubuque Packing Company, Omaha, Nebraska, a Nebraska corporation.

2. Claimant sustained an injury which arose out of and in the course of his employment on July 18, 1979.

3. The injury caused disability to his left knee and low back and caused forty-five percent (45%) permanent partial disability to the body as a whole for industrial purposes.

4. Claimant was domiciled in Iowa on July 18, 1979.

5. The correct rate of weekly compensation is $173.16.

* * *

Signed and filed at Des Moines, Iowa this 30th day of April, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

VIRGINIA MOORE,

Claimant,

vs.

FOAM MOLDING CORPORATION,

Employer,

and

AETNA CASUALTY & SURETY CO.,

Insurance Carrier,
Defendants.

Declaratory Ruling

On May 13, 1981, claimant filed her request for declaratory ruling. That request is set forth in full:

COMES NOW the Claimant, through counsel, and pursuant to Rule 500—5.1, *IAC*, makes formal request for a declaratory ruling as set forth below:

(1) As was set forth at length on the rear of Petitioner's Form 100, and in Respondent's Answer, there is considerable doubt as to what remedy, if any, Claimant has for the grievances she has set forth. Even worse, there is considerable doubt about what is the proper forum for such a complaint.

(2) This was originally started as a Small Claims Court action in Polk County, because Claimant believed that the claim for less than four days of lost work times evidently fell outside the jurisdiction of Iowa Code §85.20. Since §85.32 states that workmen's compensation benefits would not commence until the fourth day of lost time, it was believed that this was not a claim "for which benefits under this chapter, Chapter 85A, or Chapter 85B are recoverable", §85.20. In fact, the Small Claims Court dismissed this action without prejudice on its own motion, supposedly for lack of subject matter jurisdiction. Judge Thomas Renda suggested that, if Claimant could obtain a declaratory ruling such as the one now requested, to the effect that there was no lack of jurisdiction in the Small Claims Court, he would reinstate the action.

(3) Should this Commissioner find that he does have authority to hear the case and to award the damages prayed for, Claimant would not object to the exercise of jurisdiction. However, it would make things a lot easier for everybody if the Commissioner would either accept or decline jurisdiction clearly.

WHEREFORE, it is requested that a declaratory ruling as to jurisdiction be issued, with either dismissal, or assignment for hearing as soon as may be, as the case may be.

The request to for a declaratory ruling apparently confuses the question of the industrial commissioner's jurisdiction and claimant's rights. Under chapter 86, the industrial commissioner can determine disputes which concern injuries that arise out of and in the course of the employment; the industrial commissioner therefore has subject matter jurisdiction. However, just because the industrial commissioner has jurisdiction does not mean that the claimant can recover under the workers' compensation law. (Of course, claimant clearly would have a right to medical and allied benefits under §85.27.)

Under §85.32, excepting cases of permanent partial disability, "compensation shall begin on the fourth day of disability after the injury." It is clear, therefore, that for less than four days of disability, claimant cannot recover. See also §85.20.

WHEREFORE, it is held that the industrial commissioner has jurisdiction over a dispute that occurs because of an injury which arises out of and in the course of the employer but that claimant would have no right to compensation for a time loss of less than four days, except as to injuries resulting in permanent partial disability.

* * *

Signed and filed at Des Moines, Iowa this 3rd day of June, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

KENNETH E. MORRIS,

Claimant,

vs.

OSCAR MAYER & COMPANY,

Employer,
Self-Insured,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Appeal Decision

Claimant and defendant-employer have appealed from a proposed review-reopening, arbitration, second injury fund and section 85.27 benefits decision in which it was determined that claimant had sustained an industrial disability for forty-five percent of the body as a whole. In addition the deputy determined that claimant was not entitled to second injury fund benefits or medical benefits.

* * *

The issues on appeal are whether the award should be based upon industrial disability, whether defendant-

employer should be given credit for healing period benefits paid in excess of the statutory limit in effect at the time of the injury, whether the second injury fund is responsible for payment of all or any portion of the award, and whether claimant's industrial disability is greater than forty-five percent.

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

Claimant's injury occurred in 1972. The law with regard to healing period in 1972 differs from the present law. Prior to July 1, 1973, healing period benefits were limited to thirty percent of the permanent partial disability entitlement.

Upon application of the claimant, the commissioner could extend the healing period benefits to sixty percent of the permanent partial disability entitlement if it appeared that the actual healing period would substantially exceed the thirty percent maximum. In no event, regardless of how long the incapacity from earning extended, was the claimant entitled to more than the sixty percent statutory maximum. In the present case, it is deemed that claimant's filing of this action was an application to extend the healing period benefits past the thirty percent figure. Therefore, the maximum amount of healing period compensation the claimant can receive is sixty percent.

Prior to July 1, 1973, healing period disability extended only for the duration of incapacity to earn. In order to receive benefits, the claimant was required to prove incapacity.

Claimant has not returned to work since April 1978. He investigated rehabilitation programs and additional education at the request of defendant-employer, but never attempted to pursue these activities. John H. Kelley, M.D., stated in a report dated September 18, 1978, that claimant could perform some type of sedentary work, although he could not stand or work on slippery surfaces all day. There is no indication that claimant attempted to secure any type of sedentary job. Claimant's incapacity to earn, therefore, terminated on September 18, 1978, when Dr. Kelly stated that claimant could perform some type of work.

Although, claimant's healing period terminated on September 18, 1978 and not on March 21, 1979, this office does not find defendant-employer's argument of a $2,000 overpayment of healing period benefits persuasive. An award of forty-five percent industrial disability results in two hundred twenty-five weeks of permanent partial disability compensation. Under 1972 law, claimant is entitled to maximum healing period benefits of $7,965.00. Defendant only paid total healing period compensation of $7,738.28. Defendant is not entitled to a credit for healing period benefits; there was no overpayment.

Defendant-employer is entitled, however, to a credit of five dollars per week for the period of the healing period payments extending from September 18, 1978 through March 21, 1979. The five dollars represents the difference between the amount paid for healing period and the amount to be paid as permanent partial disability compensation. Defendant-employer is entitled to credit fifty-nine dollars of the healing period payment for that period of time against the permanent partial disability payments to be paid.

The findings of fact and conclusions of law in the proposed decision as herein modified are adopted in this decision.

WHEREFORE, it is found:

That claimant sustained his burden of proof and established on January 14, 1972, he sustained an injury to his left knee and a resulting injury to his right knee which arose out of and in the course of his employment with defendant-employer.

That these work-related injuries are causally related to claimant's resulting disability.

That claimant's healing period terminated on September 18, 1978.

That sections 85.34(2)(s) and (u) and 85.34(3) of the 1971 Iowa Code are applicable to this case and as such, claimant's disability will be evaluated industrially.

That claimant has sustained an industrial disability to the extent of forty-five percent (45%) of the body as a whole.

That claimant failed to sustain his burden of proof and did not establish his entitlement to second injury fund benefits.

That no evidence as to section 85.27 medical benefits was introduced and as such, no award will be made.

* * *

Signed and filed this 20th day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RONALD MORRISON,

Claimant,

vs.

WILSON FOODS,

Employer,
Self-Insured,
Defendant.

Defendants have appealed from a proposed review-reopening decision in which it was determined claimant suffered a forty-four percent (44%) permanent partial disability to his right hand.

* * *

The issue on appeal is the causal connection between claimant's injury and his resulting disability, and the nature and extent of the disability.

Claimant, age 30, is a high school graduate, is married, and has two dependent children. Claimant testified that all of his jobs have involved manual labor.

Claimant has been employed by defendant as a hog snout trimmer for approximately five years prior to his injury on May 3, 1978. On that date, while he was working, he noticed two men shuffling about behind him; however, he continued to do his job. He saw a flash out of the corner of his eye and felt pain. When he looked down he saw the blade had cut across his right index finger and embedded itself into the big knuckle. Claimant immediately went to the nurses's office and was taken to the hospital. Surgery was performed that day by A. Ivan Pakiam, M.D., a reconstructive and plastic surgery specialist.

Upon admission to the hospital claimant was unable to flex his right finger and experienced complete numbness of the radial side due to severed tendons and a severed nerve. Dr. Pakiam noted the slash extended across the entire finger and entered the volar plate. The joint injury involved the proximal interphalangeal joint, the second knuckle. In order to expose all the injured structures, it was surgically necessary to extend the wound toward the palm of the hand proximally and into the finger distally. After the surgery claimant continued to see Dr. Pakiam for approximately ten months. Dr. Pakiam testified that claimant was cooperative in udergoing the recommended psysiotherapy. As a result, claimant's range of movement in each joint was increased to such an extent that a frequently required second surgery was unnecessary. Claimant continued to exercise his finger until a few months prior to the hearing.

Dr. Pakiam released claimant to return to his regular job on March 26, 1979. Dr. Pakiam felt that claimant's repetitive work required the finger to remain in a clenched position. This apparently resulted in some loss of movement of the finger.

Claimant testified that he has pain in his finger and decreased mobility of his right hand as a result of the surgical incision. It is painful to perform his job and the pain in his finger and hand increases during the day. Claimant takes no medication for the pain and has not complained of pain to his foreman or the company nurse. The cold area he works in contributes to the pain; however, Amos Freeman, general foreman in claimant's area, disagrees that the area is cold.

Mr. Freeman stated that in his opinion claimant was a good worker and performed his job just as well after he returned as the day he left.

Dr. Pakiam stated that it was necessary to make an incision in claimant's right palm to repair the finger injury and that the problems with the right finger have given claimant problems in the use of his right hand. He noted that because the tip of the claimant's finger misses the palm of his hand by about six cm., approximately two inches, claimant cannot grip anything smaller than six cm.

Dr. Pakiam rated claimant's proximal interphalangeal joint disability as 36%, the distal interphalangeal joint as 35%, and loss of function due to sensory deficit as 37%. Based upon AMA guidelines, these figures result in a 74% disability to the finger which, in turn translates into a 19% impairment of the hand attributable to the index finger. In addition, Dr. Pakiam attributes a 25% disability to the hand as a result of loss of grip strength.

The deputy combined these two figures to determine that claimant suffered a 44% partial disability to his right hand.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 3, 1978 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).

A worker's right to receive compensation for injuries which arose out of and in the course of employment is purely statutory. The statute conferring this right upon the worker can also fix the amount of compensation to be paid for different specific injuries. The employee is not entitled to compensation except as provided by the statute. *Soukup v. Shores Co.*, 222 Iowa 272, 278, 268 N.W. 598, 601 (1936).

Where the result of an injury causes the loss of a foot, or eye, etc., the loss, together with its ensuing natural results upon the body, is a permanent partial disability and is entitled only to the prescribed compensation. *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 290 110 N.W.2d 660 (1961). The schedule fixed by the legislature includes compensation for resulting reduced capacity to labor, and earning power. *Schell v. Central Engineering Co.*, 232 Iowa 424, 425 4 N.W.2d 339, (1942).

The claimant has the burden of showing that while the trauma, the injury, was limited to his right index finger, there resulted an ailment extending beyond the scheduled loss of the finger or the use of the finger. *Kellogg v. Shute and Lewis Coal Co.*, 256 Iowa 1257, 130 N.W.2d 667 (1964).

The court in *Schell* cited *Lente v. Luci*, 275 Pa 217 222, 119 A. 132, 134 for the proposition that "there must be a destruction, derangement or deficiency in the organs of the other parts of the body" where the claim is made that some other part of the body is affected by the injury to a member.

There is no evidence that claimant's hand was injured in the accident. The only member injured was his finger. Dr. Pakiam did testify that an incision into the palm was required to expose and repair all injured portions of the finger. This incision resulted in a scar on claimant's right palm; however, there is no evidence of any disability to the hand as a result of this incision. The evidence fails to support any destruction, derangement, or deficiency of the hand as a result of either the accident or the surgical incision.

Claimant's loss of grip strength resulted only from a loss of function of his index finger. No evidence has been produced relating to a disability to the hand which occurred as a result of the injury or the incision, which would result in a further loss of grip strength not attributable to the natural consequence of the loss or loss of use of the index finger and is contemplated by the schedule. *Schell v. Central Engineering Co., supra.*

Thus, the matters to be dealt with at this time would appear to be the motions of the parties in regard to the two Original Notices and Petitions already on file.

* * *

It would therefore appear that the workers' compensation carrier's Original Notice and Petition against claimant and third party carrier should be dismissed since the proper forum for that particular action lies elsewhere.

II

Claimant's action against employer and the workers' compensation carrier is a different matter. The employer and the workers' compensation carrier moved to dismiss this action (which prayed for approval of the settlement) on the grounds that the approval or disapproval would be moot and have no force and effect.

Section 85.22(3), Code of Iowa, provides "a simple method" by which to make such a settlement effective. See *American Mutual, supra*, at page 1303 of 246 Iowa.

The jurisdiction as to whether the settlement should be approved lies with the commissioner. Therefore, workers' compensation carrier's and employer's Motion to Dismiss is overruled and that portion of the case will be assigned to the "ready to assign" calendar for proceedings as to whether the settlement should be approved.

IT IS THEREFORE ORDERED that the Motion to Dismiss filed by Defendant-Western World Insurance Company on October 24, 1980 is sustained.

IT IS FURTHER ORDERED that defendant-Glynn Construction Company's and Aid Insurance Company's Motion to Dismiss filed on November 20, 1980 is overruled....

"Subrogation" is equitable remedy borrowed from civil law. *Ierardi v. Farmers' Trust Co. of Newark*, 4 W.W. Harr. Del., 246, 151 A. 822, 825. And as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisified the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another. The doctrine of "subrogation" is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own. *Harford Bank of Bel Air v. Hopper's Estate*, 169 Md. 314, 181 A. 751, 755.

It is also said that its elements are: (1) That party claiming it shall have paid debt; (2) that he was not a volunteer, but had a direct interest in discharge of debt or lien; (3) that he was secondarily liable for debt or discharge of lien; (4) that no injustice would be done to the other party by allowance of the equity. *Hampton Loan & Exchange Bank v. Lightsey*, 155 S.C. 222, 152 S.E. 425, 427.

It is apparent that the insurer relied upon claimant's attorney for investigative assistance. Such investigation now reveals that claimant's common law action has little, if any, value and it is apparent that the insurer slept on its rights during the five years following this September 24, 1975 industrial episode.

In light of the foregoing, the proposed settlement must be approved.

THEREFORE, it is ordered that the previously negotiated settlement in the sum of three thousand five hundred dollars ($3,500.00) between the claimant and Western World Insurance Co. on behalf of Edwards & Browne Company d/b/a Safeway Steel Scaffold Company be and the same is hereby approved.

* * *

Signed and filed this 16th day of March, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

CYNTHIA S. NORDEN,

Claimant,

vs.

UNIVERSAL ENGINEERING,

Employer,

and

SENTRY INSURANCE,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Cynthia S. Norden, the claimant, against her employer, Universal Engineering, and the insurance carrier, Sentry Insurance, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on April 26, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Juvenile Court Facility in Cedar Rapids, Iowa on April 21, 1980. The record was considered fully submitted on June 23, 1980 with the receipt of claimant's counsel's letter argument.

* * *

The issues involved in this litigation are whether or not the claimant suffered an injury on April 26, 1979, which arose out of and in the course of her employment with the defendant; the existence of a causal relationship between that injury and her claimed resulting disability, and the length of healing period and the extent of permanent partial disability, as well as certain mileage expenses.

• • •

There is sufficient credible evidence in this record to support the following findings of fact:

Claimant, Cynthia S. Norden, is 25 years old, single, and a resident of Cedar Rapids, Iowa. She began working for the defendant, Universal Engineering, on January 2, 1979. She places the approximate date of injury at April 26, 1979. Claimant ran an engine lathe for the defendant at the time of injury. On April 26, 1979 she was changing the RPMs on the lathe when her right wrist was snapped back by the machinery.

Claimant indicates she immediately felt numbness but continued to work. The wrist did not bother her the remainder of that day. A week later she developed shooting pain, aching, and cramping in the right wrist area, and her arm would fall asleep.

On or about May 16, 1979 claimant states she notified her foreman, Gary Peters, about the injury to her wrist and requested medical treatment. She was dispatched to the personnel office and spoke with Annette Eberhart. She also spoke with Phil Riffey who indicated to claimant that he considered the matter nonwork-related. Claimant then went to the emergency room at Mercy Hospital in Cedar Rapids.

Claimant indicates that she received treatment in the emergency room and was referred to her family physician who then referred her to Dr. David C. Naden, an orthopedic surgeon in Cedar Rapids. Dr. Naden is the treating physician and first examined the claimant on May 18, 1979. Claimant continued to work from the date of the alleged injury up to May 18, 1979.

She testified that she gave a history of her condition to Dr. Naden. Her right wrist was put in a splint, two weeks later she was given Cortisone shots, and the right arm was casted. Surgery was performed on June 15, 1979 to remove a ganglion cyst from the right wrist, and claimant remained in the hospital two and a half days. Claimant testified that thirty days post-operatively she could not bend her wrist and had lost flexibility. She also had pain and numbness in her arm. She was then referred to the University Hospitals by Dr. Naden, where she was examined and directed to continue therapy at St. Luke's Hospital in Cedar Rapids.

Today she complains of a marked limitation in the range of motion of the right wrist, and her condition has remained this way for ten months. She does not experience any pain now.

Claimant's medical bills were paid, as well as $1,267.86 in lost wages, by the group insurance carrier for the defendant. Claimant testified to driving 90 miles for treatment by Dr. Naden and also driving 42 miles round trip to Iowa City for examination.

Claimant testified that she had no problems with her right wrist, right hand, or the fingers of her right hand prior to April 26, 1979.

On cross-examination claimant testified that Gary Peters was her foreman on the date of injury and that she reported the injury on May 16, 1979. Mr. Peters completed defendants' exhibit E, the supervisor's report of accident investigation. Defendants' exhibit E is dated June 1979, but claimant states the injury was actually reported May 16. Claimant further testified that she is guessing at the April 26, 1979 date of injury and does not recall that as being a specific date of injury. The claimant is not aware of any witnesses to the injury and testified that she worked every day after April 26 until May 18. Claimant indicates that she is not making any claim for a reduction in earnings in regards to this injury.

The claimant stated on cross-examination that she had been hospitalized in her youth for a blood poisoning incident and was again hospitalized in 1977 for treatment of a nonwork-related infection. (See defendants' exhibit K). She failed to indicate these previous hospitalizations in her answers to defendants' interrogatories.

Claimant testified that her last visit with Dr. Naden was April 14, 1980, and the last date of treatment prior to that was July 23, 1979.

Annette Eberhard testified on behalf of the defendant that she is an employee of Universal Engineering and has been so for the last ten years. She is the assistant personnel manager and has custody of the personnel records and has knowledge of the workers' compensation area of her company. She testified that claimant's starting hourly rate was $7.73 an hour and that her hourly rate on January 8, 1980 was $8.28 per hour.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 26, 1979 is the cause of the 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).

Claimant has sustained her burden of proof and established that she sustained an injury on April 26, 1979 which arose out of and in the course of her employment with the defendant. This burden has been sustained through the claimant's testimony that the event occurred and the lack of witnesses to challenge this position.

Claimant, however, has failed to establish a causal relationship between the incident of April 26, 1979 and the alleged resulting disability. Dr. Norden is equivocal in his testimony on both direct and cross-examination and expresses an opinion of causation without knowledge of all of the facts of claimant's work-related incident or the physical requirements of her job.

Dr. Naden, in his report dated November 13, 1979 (claimant's exhibit 1) states, "It is impossible to establish the fact that this was definitely work incurred, however, it was work aggravated." This statement is made in a brief report and there is no evidence that Dr. Naden knows what claimant's job is or the physical requirements thereof. He admits he never was advised by the claimant that her complaints arose from a work related incident. Dr.

Naden's statement that her work could aggravate her condition is therefore given very little weight.

Dr. Naden testified in his deposition in response to a hypothetical question posed by claimant's counsel as follows:

Q. Now, doctor, again, in your opinion,—She gave a history of an incident at work that she describes as—Let me read it. She was making a change on an engine lathe, and while the machine was running the arm of the lathe snapped back, forcing her hand back. That would be her right hand.

A. Yes.

Q. Assuming that history to be true, doctor, in your opinion would there be any causal connection between the condition you found her and for which you treated her and that incident?

A. Yes, I think it's probable, if that's true.

Q. And would that incident have also—would there be any connection between that incident and the disability that you determined was either five or six percent of the arm or five and a half to seven percent of the hand?

A. Yes, I think it's causal.

On cross-examination he indicates that at no time during his course of treatment, which included surgery, did claimant ever indicate to him that she had sustained an injury on the job and relate the facts of that incident as she had testified to in this proceeding. He simply states she implied that a work injury occurred.

Dr. Naden then testifies on cross-examination:

Q. Now, what is a ganglion, exactly?

A. A ganglion is just a little cystic structure that is—has a fibrous tissue lining and has some fluid in it.

Q. Is there anything peculiar to an occupational condition there, or does it come on from wear and tear? Does it come on with disease?

A. It can.

Q. Sports?

A. It can come on from many different things, that's right.

Q. And so, if you looked and you saw a ganglion, there wouldn't be anything about that that would lead you to think that, from looking at it, that it was caused from her work, right?

A. Not necessarily.

Q. Now, from what you observed at your surgery, when you were inside and looking around in her body, would it be just as likely, in the absence of any history, that the ganglion was caused by normal metabolism and wear and tear as by any type of trauma?

A. This is possible.

On redirect examination Dr. Naden testifies as follows:

Q. I guess what I was trying to get is the rationale behind why a traumatic experience, such as you described, may cause the problem she had or aggravate it.

A. Well, basically, whenever—anybody would be susceptible to this type of thing with any type of activity. So any motion, any movement, whether it be forceful or not, could produce this type of affliction.

The clinical notes of Dr. Buckwalter of Iowa City have been reviewed and considered and do not attempt to establish any causal relationship between the work related incident and the claimant disability.

The greater weight will be placed on Dr. Naden's testimony on cross-examination as it reveals a lack of factual detail on which he has relied to express his opinion. It is also the opinion of this deputy that Dr. Naden's statement that many different things and any movement could produce the noted affliction in claimant nulifies his opinion of possible causal relationship.

It should be noted parenthetically that claimant has placed herself in a posture whereby she is considered something less than fully credible as to her physical history. This has occurred because of her delay in reporting the incident to her employer and further her failure to indicate to her treating physician and surgeon the facts and circumstances surrounding her alleged on-the-job injury. It is further noted that she failed to fully answer certain interrogatories inquiring into her past medical history. While some of these incidents may be small in character taken as a whole, they are not helpful in the claimant's endeavors to appear credible.

THEREFORE, it is found:

That the claimant sustained her burden of proof and established by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment with the defendant.

That claimant did not, however, sustain her burden of proof as to causal relationship and has not established by competent testimony that the disability she now claims was causally related to her work injury.

That the mileage expenses incurred by claimant for trips to Dr. Naden's office as well as to Iowa City for examination by Dr. Buckwalter were not incurred pursuant to Section 85.27, Code of Iowa, and an award will not be made for them.

WHEREFORE, it is ordered:

That the claimant shall take nothing from these proceedings.

Costs of this action are taxed to the defendant pursuant to rule 500—4.33.

* * *

Signed and filed this 22nd day of August, 1980.

E.J. KELLY
Deputy Industrial Commissioner

No Appeal.

JOHN R. O'BRYANT,

Claimant,

vs.

W. G. BLOCK COMPANY,

Employer,

and

EMPLOYERS INS. OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed July 28, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter.

On reviewing the record, it is found that the deputy's findings of facts and conclusions of law are proper with the following amplifications:

The hearing deputy awarded claimant weekly benefits for healing period and for 20% permanent partial disability to the body as a whole. Defendants' appeal states (1) claimant failed to prove a specific incident; (2) claimant's inconsistent versions of his injury constitute impeachment to the extent that he should be denied compensation; and (3) that the award of permanent partial disability is too large.

Respondent's exhibit 3 gives a good version of what happened early in January 1978:

> In the first week in January, 1978, I don't remember what day of the week, I was sitting in the endloader at the W. G. Block yard located at Comanche, Iowa and I felt a pain in my right leg in the back of the leg and this pain was kind of a tingling pain and it was not sharp and it was from the mid portion of the thigh and ran down the back of the leg to the heel of the right foot. . .
>
> After I got down from the cab and straightened my right leg I would get a very sharp pain which would be concentrated in the right leg behind the right knee and I started walking and the pain went away. . .

In *Almquist v. Shenandoah Nurseries*, 218 Iowa 724 at 732, 254 N.W.2d 35 (1934), the Iowa Supreme Court defines a personal injury:

> 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.

Further, at page 736, the court states that a claimant need not show "a special incident or unusual occurrence" in order to prove a personal injury. Defendants' proposition that claimant must prove a special incident is therefore incorrect.

However, claimant must prove he sustained an injury which arose out of and in the course of his employment. (No citations necessary.) With respect to that issue, the record contains the above quoted version plus the medical evidence. As to history and causation, only Charlton Henry Barnes, M.D., gave evidence:

> Q. Now, other than the history that you've previously related of stepping off the end loader [sic] and having the pain in the back of the right leg, is that what you indicated, doctor?
>
> A. Yes.
>
> Q. Other than that, did he give you any other history of accidents or any other history of trauma:
>
> A. No.
>
> Q. Doctor, based upon the history that he gave you and your treatment and examination of Mr. O'Bryant, and based upon your own experience as an orthopedic surgeon, do you have an opinion, that you can state with a reasonable degree of medical certainty, whether there was any causal connection between the herniated disk, for which you operated, and the history that he related to you as you previously related.
>
> A. Well, he runs heavy equipment, and my feeling is it's a chronic straining situation, and over a number of years the disk becomes more and more susceptible to rupture, and the stepping off the end loader [sic] was just the final blow that finally ruptured it. (Barnes deposition, p. 10)

Matters of such causal relationship are within the domain of expert medical testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960). Except for the allegation that the lay version of the facts is doubtful, if one assumes a sequence of events such as claimant described, one accepts Dr. Barnes' opinion because there is *no other evidence* which refutes causal relationship. In other words: claimant describes the facts; the doctor testifies that such facts establish a causal connection to claimant's state of ill being: a *prima facie* case is established.

Turning to the alleged impeachment of claimant, one first should look at the chronology:

(1) Early January, 1978. The alleged incident.

(2) February 7, 1978. Claimant first sees Dr. Barnes.

(3) March 20, 1978. Claimant gives handwritten statement to representative of defendants.

(4) May 16, 1978. Dr. Barnes sends copy of office notes to insurance carrier.

(5) After May 16, 1978. Dr. Barnes amends his office notes.

Dr. Barnes notes show claimant did not keep an appointment of January 26, 1978. Beside the entry indicating that fact, the following is typed: "1st. A/D 1-3-78, pt. runns [sic] heavy equipment at work, started to bother him on 1-3-78, but become [sic] worse on 2-6-78."

Beside the February 7, 1978 date, the following was entered by hand: "Off work since 2-7-78 (worked ½ day)." Beside a second 2-7-78 date, the following was typed:

> The patient has had a two month history of pain in the right leg when he sits down or coughs. He says it gets markedly worse. If he rides in a car, it increases. Clinically, straight leg raising, positive contralateral straight leg raising on the left, positive on the right. He has no ankle jerk on the right. Decreased sensation in the lateral aspect of the right foot. He is to have x-rays of the spine and pelvis.

Later, sometime after May 16, 1978, when Dr. Barnes sent the insurance company his notes, the doctor amended his notes to indicate claimant stepped off the endloader and developed pain. One is meant to infer that claimant added this history to make his story sound better. It is true, of course, that the doctor's notes show a conflicting history: back pain for two months versus back pain for one month. Since one believes claimant's version, one concludes that claimant and the doctor were not specific in their discussion of history. And, finally, claimant's version, overall, is artless enough for one to believe the essentials of his story: he felt a pain while occupying the endloader and felt further pain when he got down from the cab.

Claimant may be guilty of asking the doctor to amend the history, but enough is known of what happened to support an award independently. The impeachment, therefore, fails.

Defendants also appeal the finding of 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 his fitted. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

It is 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 intends the term "disability" to mean "industriat 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 [cited *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. * * * *

The record (transcript, pp. 17-22) clearly shows claimant can no longer operate an endloader and has trouble climbing, bending, and lifting. On the other hand, he is still working for the W. G. Block Company and can still perform many tasks. Although he retains a good income from his work, at age 42 he has many years to come in which he will have continuing problems with his disability. A permanent partial disability of 20% is not unreasonable.

* * *

Signed and filed at Des Moines, Iowa this 19th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RIEDAR OESTENSTAD,

Claimant,

vs.

QUAIL CONSTRUCTION CO.,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed February 6, 1981 the undersigned deputy industrial commissioner has been appointed under the provisons of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from an adverse review-reopening decision.

* * *

A review of the facts and law reveals that the hearing deputy's decision was correct, and it is therefore affirmed.

The issues are stated in claimant's appeal brief. The first issue is whether the stroke arose out of and in the course of the employment, or in the alternative, whether there was a causal relationship between an admitted compensable injury and the stroke. The second issue is stated as follows:

> When the record at the hearing consists of testimony by the four medical persons involved in the examination of claimant all testifying that the cut on the thumb is a possible cause of the stroke, and where the supporting evidence is consistent with the cut on the thumb being a cause of the stroke and where there is no evidence or theory to the contrary, in that set of facts a recovery should be allowed (Brief, p. 1).

The wording of the second issue appears to be a statement of law; however, later claimant concedes the issue is one of fact:

> This is clearly a situation where the trier of fact must determine what is the most likely version of the evidence and of what happened. That decision must be based on the four corners of this record and the only evidence in this record indicates that the likelihood is the cut on the thumb led to the disabiling stroke (Brief, p. 5).

The facts and law are well stated by the hearing deputy as was the rationale. Both issues were covered in detail.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on February 6, 1978, claimant cut his thumb in an accident which arose out of and in the course of his employment and on the same day suffered a stroke while in the doctor's office and under treatment for the thumb injury.

2. That there's no causal relationship between the compensable injury and the stroke, and that the stroke did not arise out of the employment.

3. That because the stroke did not arise out of the employment and was not causally related to the injury, the bills for the medical and allied expenses were not reasonable and necessary.

THEREFORE, claimant is herby denied recovery of further compensation benefits.

• • •

Signed and filed at Des Moines, Iowa this 27th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

TERRY O'TOOLE,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,

Self-Insured,
Defendant.

Review-Reopening Decision

This is a proceeding captioned in review-reopening brought by Terry O'Toole, the claimant, against Wilson Foods, his self-insured employer, the defendant, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on May 10, 1973. This matter was submitted on a stipulated record.

The record consists of a stipluation signed by the attorneys for the parties with a yellow highlighted section marked exhibit A; an unsigned stipulation labeled exhibit B and a letter to claimant's attorney from Mary M. Weibel, legal analyst marked exhibit C. Claimant's attorney has also supplied a brief.

In his brief claimant states the issue thusly:

> Whether an employer should be allowed to limit benefit amounts to an injured employee under the Worker's [sic] Compensation Act by using the State average weekly wage in existence at the time of the injury when compensation is not paid until substantially after the injury and there is no apparent reason for the delay.

The parties have stipulated that claimant was paid temporary total or healing period benefits for 11 6/7 weeks at a rate of $68 per week; that claimant was paid permanent partial disability for 46 weeks at a rate of $63 per week; that Dr. Naden provided a disability rating of 20 percent on September 26, 1973; that the claimant's injury occurred on May 10, 1973; and that the payment of permanent partial disability was made on April 9, 1974. Defendant's attorney added to the stipulation that the report of Dr. Naden was received by the defendant on January 25, 1974. Claimant has not stipulated to the latter assertion.

The thrust of claimant's argument appears to be that "the state wide average weekly wage used in limiting benefits should be that which applied at the time that the payment was made." Additionally, claimant urges that:

> [i]f employers are allowed to limit compensation to injured employees by the statewide average weekly wage in existence at the time of injury, even when benefits are not paid until long after the injury, this would frustrate the central purpose of the workman's [sic] compensation act of prompt payment. This would encourage employers and carriers to put off payment for as long a period of time as possible. Employers and carriers, under such a system, are providing no incentive to make prompt payment.

The claimant here received payments for permanent partial disability at the rate of $63, the rate at the time of his injury as opposed to $84, the rate at the time payment was made.

The records of the industrial commissioner establish that the claimant received payment of healing period benefits on August 8, 1973. The payment of permanent partial disability was not accomplished until April 9, 1974.

Section 85.34(2) provides in part:

> 2. Permanent partial disabilities. Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1 hereof. Such compensation shall be in addition to the benefits provided by sections 85.27 and 85.28. Such compensation shall be based upon the extent of such disability and 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*, provides 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; and for all cases of permanent partial disability such compensation shall be paid as follows . . . [emphasis added]

The decisions of the industrial commissioner are consistent in finding the claimant's rate of compensation established at the time of injury. *Grebner v. Farmland Insurance Co.*, Appeal Decision filed by the Iowa Industrial Commissioner on October 24, 1979, affirmed by Polk County District Court on January 22, 1981; *William M. Ridgely v. Hawkeye Security Insurance Co.*, Appeal Decision filed May 28, 1979, dismissed in District Court on June 5, 1980.

The claimant is correct in his contention that a major function of the workers' compensation act is to provide prompt payment to a covered employee in the event of an injury arising out of and in the course of his employment. *Blizek v. Eagle Signal Co.*, 164 N.W.2d 84, 85 (Iowa 1969). The Iowa Supreme Court repeatedly has asserted that the workers' compensation statute is to be interpreted broadly and liberally for the benefit of the worker and the workers' dependents. "Its beneficient 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 Schools v. Cady*, 278 N.W.2d 298, 299 (Iowa 1979). The requirements of the statute are binding. *Halstead v. Johnson's Texaco*, 264 N.W.2d 757, 759 (Iowa 1978). The act "is a creature of statute and, subject to constitutional limitations, may contain such provisions and limitations as the legislature may prescribe." *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 289, 110 N.W.2d 660 (1961). In interpreting the law, this administrative agency cannot go beyond the law but must implement the law. *Burlington Community School v. Public Employment Relations Board*, 268 N.W.2d 517, 521 (Iowa 1978). "Interpretations by an agency charged with implementation of statute, particularly over a long period of time, and without legislative intervention, is [sic] evidence of compatibility of that agency's interpretation with legislative intent." *Churchill Trucklines, Inc., v. Transportation Regulation Board*, 274 N.W.2d 295, 297-8 (Iowa 1979).

A number of jurisdictions have addressed the issue of when the rate of compensation is established. The opinion of the Maryland Supreme Court in *Cooper v. Wilomilo County*, 278 Maryland 596, _____, 366 Atlantic 2d 55, 58 (1976) stated:

> 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 impermissively alter a substantial term of an existing contract between the employer and employee (and derivitively as to an insurer).

The Delaware Supreme Court likewise found that its statute did not provide for periodic adjustments but contemplated a fixed benefit determined as of the date of injury. *Graffagnino v. Amoco's Chemical Co.*, _____ Del. _____, 389 Atlantic 2d 1302, 1304 (1978). See also *Thomas v. Burroughs Corporation*, 269 N.W.2d 658 (Mich. 1978); *Drayon v. Orleans Parrish School Board*, 347 So.2d 306 (La. Ct. of App. 1977); *Sanders v. General Motors Corp.*, 80 Mich. App. 190, 263 N.W.2d 329 (1977); *Ellis v. Department of Labor and 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); *Ribidouxv v. Uniroyal, Inc.*, 359 A.2d 45 (R.I. 1976); *Riverside v. Russell*, 324 So.2d 759 (Miss. 1975).

An opinion of the Iowa Supreme Court in dealing with death benefits rather than 85.34(2) benefits has applicability here. In *Kramer v. Tone Brothers*, 198 Iowa 1140, 199 N.W.2d 985 (1924) at 1145, _____, that opinion stated 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 ruling seems to be in line with more recent decisions from other jurisdictions.

It is interesting to note that there is presently before the Iowa legislature a bill which might have provided some relief to the claimant. The proposed legislation states that: "If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those payable under this chapter, or chapters 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied."

While this deputy industrial commissioner agrees that the delay in prompt payment of benefits frustrates the purpose of the workers' compensation act and does not

condone the actions of the self-insured employer, no relief can be ordered in this matter.

WHEREFORE, it is found:

That claimant take nothing further from these proceedings.

That each party pay its own cost.

* * *

Signed and filed at this 22nd day of April, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

MURRAY OVERTON,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendants.

Appeal Decision

INTRODUCTION

By order of the industrial commissioner filed April 27, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appeals from an adverse review-reopening decision.

* * *

Summary of Evidence

Claimant was injured on June 7, 1979 because of repetitive arm movements at work. A memorandum of agreement was filed by the employer stating the nature of the injury as a left wrist strain. The record shows that he also had trouble with his right wrist. He worked off and on during the summer of 1979 and saw several physicians. He visited Sidney H. Robinow, M.D., a qualified orthopedic surgeon, Thomas R. Kline, D.O., and Dale M. Grunewald, D.O. An EMG test of August 24, 1979 by Dr. Grunewald was essentially normal.

Claimant did not return to work at the employer's plant after August 28, 1979. The record shows that the claimant worked on his parents' farm after that time.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 7, 1979 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).

Issue

The issue is the extent of claimant's disability. Claimant's brief states it clearly: "The issue then boils down to whether or not on August 28, 1979 temporary-total disability payments should have commenced and how long they should run." (Claimant's brief, p. 3)

Analysis

Claimant has proved no disability beyond that already paid. Dr. Robinow clearly states in exhibit 6 that claimant could return to work on July 16, 1979. Dr. Robinow's opinion is accepted over the opinions of Doctors Kline and Grunewald because he is an orthopedic specialist. However, it should be pointed out that Dr. Grunewald's deposition and reports do not support further temporary-total disability, and the reports of Dr. Kline do not clearly show claimant was unable to work.

Findings of Fact

1. Claimant injured his left wrist because of repetitive arm movements on or about June 7, 1979. (Memorandum of agreement 6-22-79; tr., 23; exhibit 6)

2. Claimant's injury was a suspected carpal tunnel syndrome on the left. (Grunewald, 9)

3. Claimant's condition was not permanent. (Grunewald, 16-17; exhibit 6; exhibit 15)

4. Claimant was able to return to work July 16, 1979.

5. Claimant was paid weekly benefits for periods June 19-24, 1979; July 5-15, 1979; and August 14-15, 1979. (Undisputed)

Conclusions of Law

1. Claimant sustained an injury which arose out of and in the course of his employment on June 7, 1979.

2. That said injury caused temporary-total disability for a total elapsed time of two and five-sevenths (2 5/7) weeks.

3. That claimant has no permanent partial disability as a result of said injury.

4. That the proper rate of weekly compensation is one hundred ninety-six and 82/100 ($196.82).

WHEREFORE, claimant is denied recovery of further weekly compensation benefits.

* * *

Signed and filed at Des Moines, Iowa this 18th day of June, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

JOSEPH L. PARR,

Claimant,

vs.

NASH FINCH COMPANY,

Employer,

and

FARMERS INSURANCE GROUP,

Insurance Carrier,
Defendants.

Claimant appeals a proposed decision in review-reopening wherein claimant was awarded a 10 percent permanent partial disability.

* * *

Fifty-two year old married claimant is a high school graduate. He was a renter-farmer until 1969. He then worked at the Vinton County land fill for five years operating a front end loader. He quit the job because the wages were too low for the distance he had to travel to work. He was unemployed for a couple of months and then began working for Buck Abernathy, making duck decoys and archery targets. This job lasted for only a month or two because of the employer's inability to keep the business going. He then began working for Vinton Seed Corn bagging and palletizing seed corn and unloading trucks. During planting season he would work in the field for approximately three weeks and would then return to his regular job. In May 1976 he began working for defendant-employer, Nash Finch, a grocery warehouse.

Claimant testified that he first injured his back on June 8, 1977 when he slipped on a wet floor landing on his tailbone. He was seen initially by G. J. Fogarty, M.D., but went to a chiropractor, T. R. Sherman, D.C. for treatment. He was off work for three months with leg pain which resolved itself. He received compensation for this injury. He had no further problems until March 14, 1978 when his back popped while moving cases of ketchup. He was off work for three days. The following Monday claimant was again at work, and when he bent over to pick up a box of orange juice, he fell on his left side and was unable to get up. He was taken by ambulance to Mercy Hospital under the care of Dr. Fogarty and Warren Verdeck, M.D., orthopedic surgeons.

Claimant testified that he remained in the hospital for two weeks, and upon release he was still unable to walk. He returned to his chiropractor for treatment.

Claimant testified that his present complaints consist of "muscle tension" in his leg. If he has to apply the brake quickly while driving, he feels this muscle tension. He stated that he now has to stoop in a different fashion because the leg muscle "pulls." Claimant further testified that he hasn't tried to do any lifting because of the fear that he would favor his leg, possibly throwing his back out of shape again.

Although claimant testified he had no back or leg problems prior to June 1977, he testified on cross-examination that he had been treated by a chiropractor in the past for sore muscles sustained during the hay baling season when he was a farmer. Page 42 of plaintiff's exhibit 15 is a copy of an office note dated September 11, 1976 signed by Willard F. Triniter, D.C., which indicates that claimant was seen on September 8, 9, 10, and 11, 1976 for acute traumatic myofascitis of the left lumbosacral area with radiculitis into the left leg. Page 39 of the same exhibit is an employer's first report of injury showing an injury date of September 6, 1976 and indicating claimant strained his middle back while picking up a case of orange juice.

St. Luke's Methodist Hospital emergency room notes reveal that claimant was seen at the hospital on June 8, 1977 following a fall on a wet slippery surface at work. Claimant was complaining of left shoulder pain and lower back pain. X-rays revealed a slight irregularity at L2 with no definite fracture. The impression was a soft tissue injury of the left shoulder and lumbar strain. He was instructed to see Dr. Fogarty before returning to work. (Plaintiff's exhibit 8).

In a To Whom It May Concern letter dated August 2, 1977, Dr. Sherman writes that claimant suffered a severe sciatic neuritis caused by partial dislocation of the left hip. (Employer's exhibit E).

Dr. Fogarty refers to the June 1977 injury in notes dictated April 7, 1978 as follows:

> This man, a year ago, in June, 1977 says he slipped on some orange juice and landed on his back, and has had pain of the back and shoulder. His main complaint then was that of shoulder pain, rather than back pain. He had seen a chiropractor at that time and we had treated him with Naprosyn. Four days later he was complaining of R. elbow pain, left shoulder pain. We treated him then with Motrin. A week later he was seen again, and was back to work. At that time he had a good ROM and we sent him back to work and did not seen [sic] him again. However, he now states that he has had back problems since then, and had been seeing a chiropractor for about 3 months. He had finally felt his back was better. This differs from what our records show. (Plaintiff's exhibit 5).

Claimant was seen in the emergency room at Mercy Hospital on March 20, 1978 complaining of a sharp pain in the lumbosacral area of his back after a lifting incident at work. He was admitted under the care of Dr. Fogarty. (Plaintiff's exhibit 7). A surgeon's report dated April 24, 1978 and signed by Dr. Fogarty states that claimant again injured his back at work on March 14, 1978. Dr. Fogarty reports that claimant was hospitalized at Mercy Hospital from March 20, 1978 through April 3, 1978 with treatment consisting of traction and orthopedic referral.

Claimant was examined by Dr. Verdeck at the request of Dr. Fogarty. In the consultation record dated March 24, 1978, Dr. Verdeck notes that claimant was admitted at this time for problems with low back and right leg pain. He notes that claimant had only one episode of problems with his back and that was after falling at work approximately a year ago. He was treated by a chiropractor and had no further problems until about nine days prior to admission when he again sustained a twisting injury to his back at work. (Plaintiff's exhibit 9b). In the clinical resume dated April 3, 1978 Dr. Verdeck notes the following:

> PHYSICAL EXAMINATION: revealed a slender 51 year old man in no acute distress. There was a slight list to the left and considerable muscle spasm noted in the lower lumbar spine. There was also restriction of forward and lateral flexion. There was no localized tenderness, no weakness. There was a slightly positive straight leg raising, and crossed straight leg raising producing pain in the right sacroiliac area. Sensation was intact. No weakness was demonstrated.
>
> The patient was placed in traction and bed rest. Symptoms gradually improved. Re-examination on the 3rd of April revealed no further spasm in the back. He still had pain with attempted ambulation, however, otherwise was comfortable lying in bed. Also, on the 3rd of April examination of reflexes revealed a definitely decreased knee reflex on the right. Again the plantar responses were down. Ankle reflexes were intact. He had no numbness, and no significant weakness. Since he is improving, I think, that we can let him go home, however, we should get an EMG to evaluate this depressed knee jerk. Likewise we will repeat his CBC and sed rate before discharge, and we will follow him as an out patient.
>
> FINAL DIAGNOSIS: Low back and right leg pain, possible herniated nucleus pulposus L-3,4. (Plaintiff's exhibit 9c).

In an April 17, 1978 letter addressed to Dr. Fogarty, Dr. Verdeck writes:

> I most recently saw Mr. Parr on the 13th of April. He came into the office, stated that he had returned to his chiropractor for treatment shortly after discharge from the hospital and that he wished to continue follow up with his chiropractor. He did not wish to be seen further by me.
>
> He states that he did not keep his appointment to have the EMG performed. Also, he states that the chiropractor had noticed a decreased knee jerk and that he could take care of this.
>
> . . .
>
> When he was in the office this man appeared to be quite ill, was barely able to walk even with the aid of a walker and was quite shaky. I feel he should have further workup with an EMG and possible bone scan if no other focus of infection can be found. Also, very probably a myelogram should be performed. Mr. Parr was advised of this and was advised that he should have further medical follow up, either with you or someone else if he did not want to return to us. (Plaintiff's exhibit 9d).

Dr. Verdeck again saw claimant on August 14, 1978 and his office notes reveal the following:

> Mr. Parr returns at this time, apparently was scheduled to see me on the advice of his disability insurance company. He was apparently hospitalized since the last time I saw him in the office. I did talk briefly with Dr. Fogarty several weeks ago and apparently his elevated white count and sedrate [sic] have been evaluated and felt to be a normal variant or at least a long-standing problem with this patient. He has been seeing his chiropractor for treatment, currently is seeing him once a week. Apparently he is gradually improving. He has no further back pain, still has pain, however, over the anterior aspect of the right thigh. No numbness, paresthesias, weakness nor difficulty with bowel or bladder control.
>
> Examination again reveals a slender 51 year old man who again appears to be somewhat tremulous, although in much better general overall condition than when I last saw him. Examination of the spine reveals good motion with 4 inches of excursion on forward flexion, lateral flexion to 30 degrees bilaterally. His gait is within normal limits and heel and toe walking are performed well. Straight leg raising is negative bilaterally. Sensation is intact in the foot. Dorsalis pedis pulses are palpable bilaterally. He has no weakness in the lower extremity. Reflexes today reveal that the right knee jerk is again returned and it is now 2+ at the ankle and plantar responses are down bilaterally. There is no tenderness over the lumbosacroal spine. The right thigh appears to be slightly atrophic compared with the left and measurements 4 inches above the superior aspect of the patella reveals 15 inches on the right, 15 3/4 on the left. Straight leg raising is negative today. He never did have his EMG test done because he had heard some stories about EMG's.
>
> He seems to be gradually improving in his symptoms. His depressed knee reflex has returned to normal and he is satisified with the treatment he is getting from the chiropractor. At the present time I don't think he would be able to return to his regular occupation, which apparently involves a lot of heavy lifting above his shoulders. However, I think he could return to work on a limited activity basis, lifting no more than 30 lbs. (Plaintiff's exhibit 9a and employer's exhibit B).

In a September 5, 1978 letter addressed to Patricia A. Nehring of Mid Century Insurance Co., Dr. Verdeck writes concerning the August 14, 1978 examination:

> Regarding your letter on August 28, 1978, I last saw Mr. Parr on the 14th of August, 1978 and,

> apparently, he is considerably improved. He had no further back pain but still had pain over the anterior aspect of the right thigh.
>
> Examination was fairly unremarkable except there was some atrophy of the right thigh when measured. His knee reflex has returned to normal. I feel the date of maximum recovery could be estimated at the 14th of August, 1978. His permanent partial disability, I would estimate, at 5%... (Employer's exhibit A).

In his deposition Dr. Verdeck testified that claimant had, on occasion, a positive straight leg raising test, a decreased knee jerk, and leg pain which is consistent with the diagnosis of a herniated nucleus pulposus. He did suggest an EMG test be performed but claimant refused. Dr. Verdeck further testified that at the time of his last examination of claimant on March 1, 1979 (the day of the deposition), there were no longer any objective findings to support the occurrence of a herniation of the nucleus pulposus. He stated that there was a possibility that a herniation had occurred based on the decreased knee jerk which has now returned to normal. His final diagnosis was degenerative disc disease with spina bifida occulta and mild left lumbar scoliosis. He gave a five percent disability rating for the degenerative disc disease, using the *Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment*.

Regarding the 30 pound weight restriction, Dr. Verdeck testified that lifing heavier weights could bring about a recurrence or aggravation of claimant's symptoms.

Claimant was again admitted to the hospital on April 7, 1978 for bone marrow studies because of an elevated white count noted during the previous hospitalization. The count was determined to be within normal range for the claimant. Dr. Fogarty's final diagnosis was benign leukocytosis and chronic back pain and right leg pain with probable herniated disc.

In a November 1, 1978 letter addressed to Patricia Nehring, R. L. Schultz, D.C., writes that "at the present time 95 percent of Mr. Parr's symptoms have been alleviated. Total alleviation is questionable but a possibility." (Employer's exhibit D). In a January 31, 1979 letter Dr. Sherman confirms Dr. Schultz by writing that "at present, Mr. Parr is 95-100 percent symptom-free." (Employer's exhibit C).

This case was originally decided prior to the filing of the opinion of the Iowa Supreme Court in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). In that case the court stated, "the fact that the normal aging process may produce the ailment from which a claimant suffers as an actual result from his employment experience does not operate to bar a finding of disability." *Id*, at pages 191-192. Furthermore, after stating the recognized criteria for determining "industrial disability" the court amplified the considerations for determining "disablement" as that term is definied in the occupational disease act. Under the occupational disease law compensation is payable only for disablement "where an employee becomes actually incapacitated from performing his work or from earning equal wages in other suitable employment," section 85A.4, The Code. Reasons why the claimant may be unable to continue working may not always be related to functional impairment in an occupational disease case.

> For example, a defendant-employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability.
>
> * * *
>
> Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted. *McSpadden*, 288 N.W.2d at 192.

At first blush it would appear that *McSpadden* added additional criteria to be used in determining "industrial disability." Such, however is not the case.

Disability from injuries covered by chapter 85 has been defined by case law as "industrial disability" or a reduction in earning capacity." *Id.* at 192.

According to the footnote on page 192 of *McSpadden* "a primary consideration in determining disability under chapter 85A is loss of wages". Authority for that statement is attributed to an article in 24 *Drake Law Review* 336, 342-43 (1975), which states in relevant part: "In short, compensation is paid for loss of earnings under the occupational disease law, chapter 85A, and for loss of earning capacity under the workmen's compensation law, chapter 85." *Id.* at 343.

McSpadden was an occupational disease case. In that matter the court stated that the criteria used to determine "industrial disability" in an injury case could be used to determine "disablement" under the occupational disease act.

To these it added the observation that refusal to give any sort of work after suffering the affliction or inability to find other suitable work, even if not functionally impaired, would support an award of disability if the reasons for refusal or inability were "for reasons related to his disease." *McSpadden* at 192.

Thus, *McSpadden* did nothing to expand the criteria for determining "industrial disability" or "reduction in earning capacity" for an injury covered by chapter 85 that was not already in the case law.

To this has to be added the facts and holdings of *Blacksmith v. All American, Inc.*, 290 N.W.2d 348 (Iowa 1980) decided by the same court some two months after *McSpadden*.

In that case the court stated:

> ... the 1977 injury was a motivating reason for Blacksmith's job transfer... it disqualified him from driving a truck in the belief driving a truck could cause him to get phlebitis. * * *
>
> Blacksmith was transferred because of this perceived risk of subsequent health impairment, and the perception was indisuptably based in part on the 1977 experience.
>
> * * *
>
> * * * Blacksmith alleges an industrial disability, as the concept is explained in *McSpadden* * * * Blacksmith did incur an increased industrial disability and is not barred from recovery by failure

to prove an increased functional disability of his leg. * * * This is the case of an employee who has no apparent functional impairment and who wants to work at the job he had before but is precluded from doing so because his employer believes the past injury disqualified him, resulting in a palpable reduction in earning capacity. * * *

In an order denying rehearing, the court further elaborated:

> * * * Blacksmith's injury and resulting industrial disability were to his vascular system; it was only his functional disability which was temporary and limited to the left leg. As the opinion discloses, the court found from the record as a matter of law that the compensable injury was a propensity to traumatic phlebitis of which the 1977 work-connected truck-driving injury was a proximate cause, that the injury affected the body as a whole because it involved the vascular system, that it motivated the job transfer, and that it resulted in *some* reduction in earing capacity. * * * *

Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in actual reduction in earnings, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

The record contains the following evidence in the form of testimony of the claimant with regard to his return to work for the employer subsequent to his injury:

Q. All right. Did you go out to Nash Finch when he released you:?

A. No. No.

Q. You have not returned to Nash Finch for any reason—

A. Well, when I was released to go back to work, I had been, shall I say, terminated from Nash Finch before that.

Q. Well, that's what I want to know about. Did you go out to Nash Finch and have a conversation with someone?

A. Yes.

Q. Did you indicate to that person that you had an interest in trying to go back to some kind of job for them?

A. Yes. Yes.

Q. Who was that person you talked with? Gentleman by the name of Norm Allen?

A. Norm Allen.

Q. And what did Mr. Allen tell you when you went out to talk to him?

A. Well, he felt that I had been off of work too much, I was injured two or three times, and—

Q. Now, you say you were injured two or three times. Are those the times you told us about?

A. Yes. Yes. (Transcript page 34, line 7 thru page 35, line 3.

* * *

Q. Would you tell the Deputy what he told you now?

A. He told me that I was hurt, injured too many times on the work, and that he felt the work was too heavy for me.

Q. What else did he tell you?

A. And he felt that, beings I was off of work as much as I was, that he was going to have to terminate me.

Q. And then what did he do?

A. Well—

Q. Did he terminate you?

A. Yes.

Q. Did you agree that you should be terminated?

A. Well, I asked for—if I couldn't have a different job or a job that I could handle, an easier job.

Q. What did he say to that?

A. He said, well, we can't—we can't bump seniority. The seniority here, you can't—

Q. He didn't offer you any other job?

A. No.

Q. Did he—Did Nash Finch or Mr. Allen at any time offer you any assistance in getting any other job, at any other employment.

A. No. (Transcript page 37, line 12 thru page 38, line 9).

* * *

Q. Up until that point in time, up to the point in time when you went back and talked with Norm Allen, what were your plans as far as working were concerned.

A. Well, when I was able to get back to work, I was figuring on going back to work for Nash Finch.

Q. Now, if there had been a job offered to you—strike that.

Do you feel in your own mind that you would have been able to do the job that you had before the accident when you went back in October?

A. Let me re—re-phrase that.

Q. All right. Okay.

You have explained to us what the job was that you were doing—

A. Yes.

Q. —when you had your injuries.

A. Yes.

Q. You have told us about the lifting that was required and the weights that were required to be lifted.

A. Yes.

Q. After your injuries, do you think that you could do the same kind of work?

A. No. Huh-uh.

Q. And why do you believe that you could not do that work?

A. Well, I just—I'm afraid this would happen again now. (Transcript, page 42, line 13 thru page 43, line 12).

. . .

Q. Were there jobs at Nash Finch which you could do, in your opinion, that did not require heavy lifting?

A. I don't—I don't know if I would have been able to qualify for them if there were.

Q. This is because of seniority?

A. I suppose.

Q. Well, but setting that aside for a moment, do they have jobs out there that you—that you feel that you would be able to handle?

A. I would have to have training, I suppose, and then I would be able to, or it would take training.

Q. Mr. Allen or anyone else at Nash Finch offer to train you?

A. No. (Transcript page 43, line 21 thru page 44, line 8).

. . .

Q. And I believe you testified that when you went back to Nash Finch you felt there was some work available at Nash Finch that you could perform if it wasn't for seniority?

A. Well, seniority, and, if I understood, I would have to have training for it.

Q. Are you presently getting unemployment compensation?

A. Right now, yes. (Transcript page 63, line 20 thru page 64, line 1).

. . .

As to his attempts to secure other employment the testimony is:

Q. And could you tell me where you have gone and made application for work?

A. Well, I went out to Cromer's in Vinton.

Q. And what—what type of job were you seeking there?

A. Just more or less help the public, I mean, sell merchandise.

Q. What kind of—

A. Stocking shelves and this and that.

Q. What kind of a business is Cromer's?

A. Just a wholesale market or—I won't say wholesale either.

Q. Just a grocery store?

A. No, it's appliance, clothing, oil, farm products.

Q. Were you offered a job there?

A. No.

. . .

Q. Do you—Did you make a list of the places where you—

A. Yes.

Q. —went to?

A. Yes.

Q. Do you have a list with you? Would that help you to refresh you recollection.

A. A little bit.

Q. Okay.

A. Well, I was to Benton County for a job. I heard there was a maintainer job open. And that was in November.

Q. And did you get that job?

A. No, I didn't.

Q. All right.

A. And I was at Dubuque Pack. They weren't hiring at that time.

Q. When did you go see them?

A. That was in October, November.

. . .

Q. And have you been back this year to Dubuque Pack?

A. I was up there a couple of weeks ago.

Q. Now, is that located in Vinton?

A. Yes.

Q. What kind of job were you interested in taking with them?

A. Well, whatever job I could handle. I put down that I had a back injury, that I was restricted on—or I didn't—I just put down I had a back injury on the application. I don't know what type of work it is. I know it's canning hams, but I don't know what is involved.

Q. Then would you continue to tell the Deputy where you have sought to get a job?

A. And I was out to the Hawk Bilt. They was looking.

* * *

A. And they was looking for one man, and they was looking for a machinst [sic]. well, I couldn't fill that. I couldn't fill it, because I had no experience.

Q. When did you go there?

A. I was there in January.

Q. All right.

A. And then I was out to Altorfer's Machinery in Cedar Rapids, and then I was to—

Q. Now, wait a minute. Let's talk about Altorfer Machinery. When were you there?

A. I was there in January.

Q. And what type of job were you trying to get there?

A. I heard there was an opening for parts man.

Q. And did you get that job?

A. No, not at that time?

* * *

Q. What did the parts job at Altorfer Machinery require?

A. Well, I suppose a certain amount of lifting. I don't know just what position in this parts department was open.

Q. Did you tell Altorfer that you had an injury to your back?

A. Yes.

Q. Have you told each of the places where you have gone to seek employment that you had an injury?

A. Wherever I fill out an application, I put down that I had a back injury, when it asks. On the application it asks whether you had a back injury or this or that, and I put down I did.

Q. Where next did you go for a job.

A. I went to John Deere there in Vinton. They weren't hiring. Then I went up to braille school in February.

* * *

A. They weren't hiring.

Q. What kind of a job were you interested in trying to get at John Deere.

A. Well, I thought maybe I could help put machinery together.

Q. What about at the braille school, what kind of job were you interested in there?

A. Well, just a job. I don't know what—what jobs the braille school has. Just looking for work.

Q. Then where did you go next.

A. Then I went to—I heard Roger Schlarbaum, I heard he had an opening for a part-time cleaning job, but—

Q. Did you get that job?

A. No, I didn't get it.

Q. All right. Did you go to Family Foods?

A. Yes, I went to Family Foods.

Q. What's Family Foods, a grocery store?

A. That's a grocery store. They didn't—weren't hiring anybody.

Q. What kind of a job did you want at Family Foods?

A. I suppose stock shelves, carry out groceries, whatever I could do.

And I went to Cutlas, and they weren't hiring.

Q. What's Cutlas?

A. They make gears.

Q. What kind of a job did you want with Cutlas?

A. Well, if they had an opening, if I could qualify—of course, I couldn't qualify, because you have to have experience in making gears and cutting them, so,—so I didn't qualify there.

I was out to the Duane Arnold—

Q. Now, is that the energy—

A. Yes.

Q. —plant?

A. I went through Job Service for this job.

Q. Okay. What kind of job did you go to the Duane Arnold Energy Center for?

A. That was supposed to be a security job.

Q. Did you make an application for that one?

A. Yes. Yes.

Q. And did you get that job.

A. No.

Q. Do you know what that job paid, if you would have gotten it?

A. No. Around $4.00, I guess.

Q. All right.

A. Then, let's see here, City of Vinton, they had an opening for a—a job for a man to read the water meters. I was there just, when, last week or two weeks ago, and—Well, I was there again this week, and they had to hire somebody else that had seniority, because he worked for the City.

Q. Do you know what that job would pay.

A. That was paying—No. Around $4.00, I—No, it was five dollars and—$5.00. I seen it in the paper.

Q. All right.

A. The man that took the job was $5.00. I seen it in the paper.

Q. All right.

A. The man that took the job was $5.00 an hour.

Q. Where else have you been, or have you told us about all the places?

A. Well, I been back to Altorfer.

Q. Have you gotten a job, Mr. Parr, to this time?

A. To this time, I haven't.

Q. All right.

A. I—There's a possibility of getting a job with Altorfer. (Transcript page 45, line 13 thru page 51, line 25).

* * *

The testimony of the claimant as to the type of work he was looking for is:

Q. Are you continuing to look for a job?

A. Yes.

Q. Do you want to go back to work, Mr. Parr?

A. Yes. I got to do something. I want to work, if I can—if I can do it. I mean, I've got to go out and see if I can—

Q. Do you have any—Strike that. —feel that you would be able to do a job that would involve repetitive climbing and stooping at this time?

A. Well, I—I would rather, rather find a different kind of work than something that was going to be related to a lot of stooping.

Q. Why is that, Mr. Parr?

A. Well, I would like for my leg to get back in shape before I go to doing too much stooping. I mean—

Q. What about climbing?

A. Well, I would rather not at this time. I mean—

Q. What about a job that would require lifting weights of over 25 or 30 pounds.

A. No, I—I'm going to try to stay away from it, if I can, if I can find something else.

* * *

Q. I think you've testified that the security job was paying $4.00 an hour?

A. This is what they told me when I was there.

Q. And the City of Vinton, reading water meters, was paying $5.00 an hour?

A. That's true. That was in the paper.

Q. Do you know of any reason why you couldn't perform the security job.

A. No.

Q. Do you know any reason why you couldn't perform a job of reading water meters in the City of Vinton.

A. No. That's the reason I really was after that type of work.

Although it is not clear whether or not claimant's attempts at employment were unsuccessful was because of his injury, general economic conditions or lack of qualifications, attempts were in fact made. Whether all of the attempts were bona fide also cannot with clarity be discerned. Some because of their very nature might appear to have been only for the purpose of continuing to qualify for unemployment compensation.

Nevertheless, bona fide attempts were made, and the prospects for employment are promising. The areas in which employment is now available to claimant because of his injury has resulted in a reduction of earning capacity in excess of the proposed award.

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 Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

After considering the criteria for determining industrial disability and applying them to the facts of this case it is determined that claimant has an industrial disability of fifty (50) percent of the body as a whole.

No particular objection was made to the findings of the duration of healing period, and, therefore, the finding of the deputy will be adopted.

WHEREFORE, it is held that claimant as a result of his injury of March 1978 is entitled to healing period benefits from March 15, 1978 until August 14, 1978 and permanent partial disability benefits for a fifty percent (50%) industrial disability to the body as a whole.

* * *

Signed and filed this 31st day of October, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court; Pending.

CAROL PETERS,

Claimant,

vs.

PACESETTER CORPORATION,

Employer,

and

COMMERCIAL UNION,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 14, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter. Defendants appealed from an adverse arbitration decision. On Jaunary 14, 1981, the industrial commissioner outlined the requirements for the filing of briefs and exceptions; none were filed.

* * *

The findings of fact and conclusions of law of the deputy are correct and affirmed with the following amplifications.

Claimant was a telephone salesperson who described developing pain and numbness in the left hand and forearm caused by certain repetitive and cramped movements (transcript, 7-12). John Joseph Callaghan, M.D., an orthopedic surgeon from the University Hospitals in Iowa City, testified that there "definitely" was a causal connection between the work and the condition diagnosed, which was a left ulnar neuritis.

William R. Whitmore, M.D., a certified orthopedic surgeon, also clearly established the causal relationship. (See pp. 18, 19, and 23, Whitmore deposition.)

Also, as to the length of the disability, it was clear that as of the date of the hearing, claimant was temporarily disabled (Callaghan deposition, pp. 208-209).

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. * * * *

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 17, 1979 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 *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 375, 112 N.W.2d 299, the court quotes with approval from C.J.S.:

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

The evidence in toto more than adequately shows that claimant sustained a compensable health impairment, and the medical evidence clearly supports the causal connection between the work-related condition and the disability.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That on December 17, 1979 claimant sustained an injury which arose out of and in the course of her employment in the nature of a strained left hand and wrist, specifically left ulnar neuritis.

2. That said injury caused temporary total disability which had not ceased at the time of the hearing.

* * *

Signed and filed at Des Moines, Iowa this 26th day of February, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

DONALD A. PHILLIPS,

Claimant,

vs.

WAUGH OIL COMPANY, INC.,

Employer,

and

AMERICAN MUTUAL,

Insurance Carrier,
Defendants.

Amended Appeal Decision

On judicial review the court ordered "that this matter be remanded to the Iowa Industrial Commission, and particularly the deputy industrial commissioner, Allen [sic] A. [sic] Gardner, who rendered the arbitration decision of March 29 [sic], 1978, with instructions that said arbitration decision be redone in compliance with Section 17A.17 [sic] (Code of Iowa) and the court's findings and conclusions."

As Alan R. Gardner is no longer a deputy industrial commissioner and his arbitration decision of March 9, 1978 was adopted as the final decision of the agency by the industrial commissioner on August 15, 1978, the commissioner shall undertake to comply with the court's order by comporting with what is believed to be a mandate to comply with certain provisions of section 17A.16.

The appeal decision dated August 15, 1978 is amended as follows:

This is a proceeding brought by claimant, Donald A. Phillips, appealing a proposed arbitration decision wherein claimant was denied compensation.

Claimant, Donald A. Phillips, testified that while employed as a mechanic at Waugh Oil Company, Spirit Lake, Iowa, on March 17, 1975, he was breaking the bead on a truck tire when he had pain across his chest and down his elbows that lasted approximately one-half hour. He returned to work that day and continued working until he was hospitalized April 22. Prior to the hospitalization and after the incident on March 17, he saw Dr. Kirlin on March 20. Claimant had been taking Digitalis for approximately two years but took none on March 17.

The history given to the physicians indicate that claimant had an angina type pain for some two years preceding the instant episode. The history, and claimant's testimony, indicate that claimant would suffer the angina pectoris pain on occasion while sleeping. Claimant suffered a similar type pain across his chest while pounding the truck tire at his employment.

In September 1975, claimant underwent a coronary bypass surgery involving five coronary arteries. The surgeon performing the bypass indicated the graft of five coronary arteries was exceptional compared to the number of arteries grafted in the average operation. Scar tissue found on the anterior wall of the left ventricle at the time of the surgery indicated that a myocardial infarction had occurred at some point of time in the past.

Dr. Barnhorst, the surgeon at Mayo Clinic, diagnosed claimant's condition as "arteriosclerotic disease with angina pectoris" and indicated that claimant has a "low load" indication while undergoing a treadmill test. This meant the angina pain appeared at relatively low levels of stress.

Claimant has a severe underlying atherosclerotic condition. Dr. Barnhorst rendered the opinion that atherosclerosis is progressive with time. Activity incites the angina pain. One anginal episode will not precipitate another anginal episode. Although the incident described in March 1975 may have been the episode which precipitated a heart attack causing the scar tissue, considering the records and information available concerning the claimant's condition at the time of the episode, the myocardial infarction indicated by the scar tissue could well have occurred at a different time. The testimony of Dr. Barnhorst is insufficient to establish with the requisite probability that the incident of March 17, 1975 was a precipitation of any heart attack claimant may have suffered. Indications are that claimant's activity of exertion in changing the tire merely precipitated angina. The angina was a passing event which went away when the exertion stopped. The surgery was apparently performed to correct the underlying severe atherosclerotic condition.

Dr. Barnhorst described coronary atherosclerosis "hardening of the arteries" as a progressive narrowing of the coronary arteries due to deposition of fats in the walls of the arteries. He knew of no causal link between any kind of occupation in terms of physical exertion and atherosclerosis.

Dr. Kirlin, Spirit Lake, testified that he saw claimant March 20 and finally admitted him to the hospital. His discharge diagnosis was arteriosclerotic heart disease with pre-infarction angina, not in heart failure. He referred him to Mayo Clinic for suggested coronary bypass graft surgery. He further testified that his work on March 17th aggravated his arteriosclerotic heart disease and caused pain.

The record stands undisputed that the exertion of March 17, 1975 precipated angina pain. However, this statement standing alone establishes very little. In his deposition, Dr. Kirlin indicates that the exertion of breaking the bead on the tire precipitated "pain". Dr. Kirlin notes claimant had symptoms indicating sclerosis of the coronary vessels. He places claimant in a "functional class three" status. Dr. Barnhorst indicates this is a severe classification. Comments of Dr. Kirlin about temporary disability did not explain its cause. Dr. Kirlin indicated that in March and April 1975, claimant had "pre-infarction angina". No definite diagnosis on any myocardial infarction was made. His opinion parallels Dr. Barnhorst's in that he indicates angina pectoris is pain, the underlying atherosclerotic process is progressive, and activity can bring about angina pain. If the atherosclerosis is serious, minimal activity is all that is needed to precipitate angina pain. Such comments by this physician establish no more than this claimant did have angina pain precipitated by the exertion at work on March 17, 1975.

Findings of Fact

1. Claimant, while working for defendant, Waugh Oil Company, suffered an angina attack causing pain lasting approximately one-half hour.

2. He continued to work for a month thereafter.

3. He had angina attacks for approximately two years previous to this, some at home and while resting.

4. Subsequently he had coronary artery bypass surgery involving five arteries.

5. The medical diagnosis was arteriosclerotic heart disease with angina pectoris. There is no medically certain causal link between physical exertion and atherosclerosis.

Conclusions of Law

Claimant has the burden of establishing causal connection between the employment and injury. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965).

A mere possibility is not sufficient; a probability is necessary. There must be a causal connection, and the injury or disability must be a rational consequence of the hazard connected with the employment. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W.2d 732 (1956); *Sondag v. Ferris Hardware*, 220 N.W.2d 903.

To recover workers' compensation benefits, a claimant with a preexisting circulatory or heart condition must prove:

1. An employment exertion greater than that of nonemployment life, or

2. Unusually strenuous employment exertion resulting in heart injury.

Sondag v. Ferris Hardware, supra.

Causal connection between a heart condition and employment is essentially within the domain of expert testimony. However, the weight to be given such an opinion is for the finder of fact, and that may be affected by the completeness of the premises given the expert and other surrounding circumstances. *Sondag v. Ferris Hardware, supra; Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167; *Sondag v. Ferris Hardware*, 32nd Biennial Report, pg. 50-51.

In the present case, the only testimony as to causation was Dr. Kirlin who stated:

> It was my opinion that the man had a preexisting arteriosclerotic heart disease for an indeterminate length of time, and that he was working strenuously on March the 17th and that this aggravated his arteriosclerotic heart disease and caused pain.

Claimant has only proved that the angina attack on March 17, 1975, which caused pain for approximately half an hour, was precipitated by his exertion at work. Since he was able to return to work and was later treated for arteriosclerotic heart disease, which both doctors testified is a progressive disease not caused by exertion, claimant has failed to prove any disability resulting from this one episode.

In examining both physicians' opinions it appears at best, claimant established that on March 17, 1975 claimant's exertion at work superimposed upon a severe atherosclerotic condition precipitated a 25 to 30 minute bout of angina pain. Whether or not more occurred at this time is speculative at best. Claimant did have other episodes of angina pectoris before and after March 17, 1975 with little or no exertion.

THEREFORE, the relief sought by claimant in his application for arbitration is denied.

* * *

Signed and filed this 28th day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

GARRY L. PIERSON,

Claimant,

vs.

PIERSON BUILDING, INC.,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision in which claimant was awarded healing period from December 15, 1978 through August 14, 1980 in conjunction with an undisputed permanent partial disability. Also awarded were related medical and transportation expenses.

* * *

The sole issue on appeal is the propriety of the holding that claimant's healing period extended until August 14, 1980.

The recitation of facts and applicable law in the review-reopening decision are adopted and incorporated as a part of this decision. Defendants' position is essentially that once a rating of permanent physical impairment can be medically determined and further improvement of the condition is not anticipated or which, in retrospect, did not in fact occur.

The proposition that healing period terminates when a rating of permanent impairment can be made is untenable. It is fundamental that a prediction of expected residual permanency of a condition can be and is often made while the healing process is still in existence. This was, in fact, done by both doctors in this case as Dr. Grant, after his examination of August 30, 1979, described claimant's condition as chronic yet contemplates that his problem will become almost asymptomatic. Dr. Sebek, in his report of January 8, 1980, unequivocally states that claimant has not completed his recuperative period. Both doctors, however, rate his disability at that time as 15 percent of the upper extremity. Dr. Sebek, after an examination of August 14, 1980, stated that claimant had completed his recuperative period as of that date. Dr. Grant examined claimant on September 9, 1980. Although he noted that claimant's condition was essentially unchanged from his prior examination claimant's remarks

are recorded as "feeling he can do more than before" although the range of motion measurements show greater restriction than before.

That a rating of permanent physical impairment is medically made prior to the termination of the healing period can be no more than before" although the range of motion measurements show greater restriction than before.

That a rating of permanent physical impairment is medically made prior to the termination of the healing period can be no better illustrated than in the case of *Meyers v. Holiday Inn of Cedar Falls, Iowa*, 272 N.W.2d 24 (Iowa App. 1978) wherein an initial disability rating was altered because the claimant did not "improve to the extent anticipated."

Defendants' contention that further improvement was not anticipated or did not in fact occur is not borne out by the evidence. The initial medical reports of both doctors allude to medical reports along with the testimony of the claimant indicate that improvement was in fact accomplished and a stablization point reached on or about August 14, 1980.

WHEREFORE, it is found:

That the healing period in this case extends from the date of injury, December 15, 1978 until August 14, 1980, the date on which Dr. Roy Sebek, the treating orthopedic surgeon, indicates that in his opinion the claimant has completed his recuperative period.

• • •

Signed and filed this 26th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appeal to District Court; Pending.

WILLIAM POULSEN,

Claimant,

vs.

SHELLER-GLOBE CORPORATION,

Employer,
Self-Insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by William Poulsen, the claimant, against his self-insured employer, Sheller-Globe Corporation, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on July 13, 1977.

The issue to be determined is the extent of claimant's permanent partial disability.

There is sufficient credible evidence in the record to support the following findings of fact, to wit:

Claimant, William Poulsen, testified that he was run down by a forklift at work on July 13, 1977 while working for defendant-employer, Sheller-Globe Corporation. After his accident the claimant went to the personnel office and to the plant nurse who then took him to the hospital. He was treated in the emergency room by Dudley Noble, M.D. Claimant testified that x-rays were taken and he was admitted to the hospital where he remained for a period of 28 days.

The injury sustained was to the heel and arch of claimant's right foot. Claimant testified that he underwent skin grafts and surgery and the foot was casted for a period of time. Claimant was released from the hospital on August 10 and later returned to the hospital for a three day period for skin graft procedure.

Claimant testified that he returned to work on November 14, 1979.

Claimant testified that he has little lateral movement in his ankle and foot. He has no feeling from the arch of the right foot back to the heel of the right foot. He further testified that the heel portion of his right foot is detached from the bone, thus giving him a "spongy feeling" when he walks. He further testified that he cannot tell where the heel will come down as he has no feeling in this area. According to the claimant, the skin grafts run into his ankle and the graft and the scar tissue limit his ankle movement. He testified that the ankle is stiff at times.

Claimant testified that he cannot climb a ladder because of the numbness in the back portion of his foot. He also indicated that he has a problem with balance and at times has the sensation of falling over backwards when he steps backward with his right foot. He does not know which direction the toes on his right foot will point when walking because of the numbness in the right heel. Claimant also testified to swelling in the right foot on occasion.

Claimant indicated that he is in pain in the right foot region and, at times, has a tendency to "draw up short" or balk from the pain. Claimant indicated that he will occasionally get a shooting pain in his foot which will cause him to jump. Claimant testified that he has been able to perform his job upon return to work at defendant-employer's place of business but experiences pain when he is working.

After claimant's injury he was given Darvon which he has gradually stopped using.

Claimant consulted Drs. Howard and Steve Palmer who are general practitioners and testified to an examination by both of these physicians. These physicians are in the same office.

On cross-examination claimant testified that he began working for the defendant on September 11, 1967 and that he is still employed by the defendant. Claimant's position with the defendant was that of senior maintenance mechanic prior to injury and he holds that same position now. He is in charge of maintaining various sewing machines for defendant and is assigned to various jobs by his supervisor or foreman and does the jobs as assigned. Claimant is on his feet all day with the exception of his break periods. Claimant indicated that he tries to keep moving all of the time so that his leg does not stiffen up.

Claimant spends most of his time working inside

defendant's buildings. He is concerned if he ever steps on a rock or a pebble with his right foot that great discomfort could arise. He also indicated that he would not know if he stepped on a nail unless it penetrated far enough into his foot. He has a great concern about stepping on things because of the lack of sensation and feeling in his right sole.

Claimant continued to testify that in 1980 he has missed two days of work because of a cold or the flu. He does not know the amount of time he missed in 1979. Claimant thinks he has a good work record and has not missed additional work because of his foot. He indicated that he simply puts up with it.

Claimant indicated that he received regular salary increases along with other employees of the defendant when he was absent from work as a result of his injury. He also testified that he has received workers' compensation benefits and that all of his medical bills relating to this injury have been paid. Claimant testified that he saw Dr. Dudley Noble in 1978 for a determination of disability.

At the commencement of the hearing, the claimant walked around the courtroom to demonstrate his gait. It was evident to this deputy upon observing the claimant that he walks with a noticeable limp in the right leg which is alleged attributable to the foot injury.

On redirect-examination the claimant testified at some length concerning overtime work prior to the accident and the fact that he has not been able to work overtime since the accident. Claimant also testified that he was once disciplined for his failure to work overtime.

Claimant disagrees with Dr. Noble's findings that his ankle and foot motion are normal. He also was critical of the examination conducted by Dr. Noble in that claimant could not walk around to demonstrate to Dr. Noble the problems he is having. On recross-examination the claimant testified that he wears steel nosed shoes when working and that he has an insert in the right shoe. Claimant indicated that he is able to drive a car but at one time had a camper which he sold because he could not raise the top.

Claimant also indicated that prior to injury he used to go camping, play golf, canoeing and hiking, none of which he can do now.

At the time of the hearing defense counsel, in open court, offered the claimant fifteen percent permanent partial disability of the right leg in settlement of the case. There was no acceptance of this offer.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 13, 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).

Since the injury in this case is confined to a scheduled member the permanent disability is confined to the schedule set forth in the statute. See *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660.

Dudley Noble, M.D., in his report of September 8, 1978, assesses a fifteen percent permanent partial impairment of claimant's right leg. He again assesses the same degree of disability in his letter of October 12, 1979.

H.C. Palmer, M.D., in his letter of May 24, 1979 (claimant's exhibit 1) assesses a permanent partial disability to the extent of 75 percent of claimant's right leg.

In a subsequent report (claimant's exhibit 11) dated February 5, 1980 and signed by Steve Palmer, M.D., he attributes a fifty percent permanent partial disability to claimant's right leg.

Dr. H.C. Palmer and Dr. Steve Palmer are general practitioners and Dr. Noble is an orthopedic surgeon.

While Drs. Palmers' reports are more recent in time than Dr. Noble's and appear to be more extensive in terms of their examination, the undersigned deputy finds it significant that over a period of eight months Drs. Palmer have reduced their findings of permanent disability to the right leg from 75 percent to 50 percent.

The evidence in this case establishes that while the injured sight is to claimant's right foot there were skin grafts made to the right ankle and that claimant walks with a distinct limp of the right leg. All physicians testifying in this case assess claimant's disability in terms of his leg. It is therefore determined that this claimant's disability will be assessed in terms of disability to the right leg.

After due consideration of all evidence and all physicians' reports, it is determined that claimant has suffered a permanent partial disability to the extent of 30 percent of the right leg.

WHEREFORE, it is found that claimant has sustained his burden of proof and established an injury to his right leg which arose out of and in the course of his employment with the defendant on July 13, 1977.

That the claimant has sustained a disability to the extent of thirty percent (30%) of the right leg.

* * *

Signed and filed this 30th day of June, 1980.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

CHARLES L. RAINEY,

Claimant,

vs.

HOUDAILLE INDUSTRIES, INC., VIKING PUMP DIVISION,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed May 13, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant has appealed from a proposed arbitration [sic] decision wherein claimant was awarded certain benefits.

The hearing before the deputy industrial commissioner was held December 28, 1978 and the record was closed February 2, 1979. The Arbitration decision was filed August 17, 1979. (Claimant's "error six" states that the decision was mislabeled "arbitration" because benefits had been paid prior to the filing of the action. Claimant's first attorney filed in arbitration, and neither his second nor third attorney amended the petition. Although the decision is clearly one in the nature of a reopening, it is claimant who should have made the change of caption if he felt it was important.) Under the decision, claimant was awarded further benefits of temporary total disability in the amount of 33 weeks, 1 day at the rate of $133.37 per week (beyond the 18 weeks, 3 days that had already been paid) plus certain medical and hospital bills.

On September 6, 1979 claimant filed his notice of appeal. On February 27, 1980 the industrial commissioner by letter notified claimant to file briefs and exceptions by March 18, 1980 and gave defendants ten days to respond. Actually, claimant had already filed a brief in support of his appeal. Defendants made no response.

There is no doubt that claimant sustained a work injury. He testified:

> Well, I was getting ready to move the moldsdown [sic] and I pushing them and a pain shot down from the lower part of my back into the left side of my leg and, you know, I couldn't bend up at the time. And so I notified my foreman (p. 16).

On the injury date, October 21, 1977, claimant was sent to Earl C. Vorland, a chiropractor. He examined claimant, noting some "tension in the left hip and over the fifth lumbar area" (p. 4) and gave him a chiropractic adjustment; the next day he prescribed a lumbar belt. Claimant came in again on October 25; Dr. Vorland took x-rays and diagnosed the condition as a twisted pelvis" (p. 5). He continued to treat claimant for this condition. On October 31, 1977 Dr. Vorland noted claimant was still complaining about pain in his left buttock and treated him with "galvanic" over the gluteus maximus and minimus. On November 2, 1977 claimant returned, now complaining of pain in his right hip though the left hip felt better. On November 5, 1977 Dr. Vorland used galvanic on claimant's right side. Claimant returned on November 14, 1977 and stated he was better and had been working. Dr. Vorland continued seeing claimant a few more times, and on December 18, 1977 claimant told him he was much better and that by January 3, 1978 the pain had localized over the fifth lumbar. Dr. Vorland gave him a specific adjustment which, on January 10, 1978, had the claimant feeling better but still with some pain. The chiropractor x-rayed claimant again and found claimant's condition of the twisted pelvis to be normal. Dr. Vorland discharged claimant on January 10, 1978 as he felt he could do no more for the claimant.

Dr. Vorland also stated that claimant's complaints were not consistent with the physical findings. Claimant was subjected to a malingering test, which according to the orthopedic books and the orthopedic examination should have elicited very little, if any, pain. It was Dr. Vorland's conclusion that "the condition was such that as he complained he would not have been able to do these particular things that I instructed him to do. Plus the Lesegue and Soto-Hall Test would have been a positive finding" (p. 9). Dr. Vorland also stated he released claimant to work on several occasions, thinking claimant went to work, only to find out later that he had not worked. Dr. Vorland felt he was able to work, or he would not have released claimant.

The claimant appeared to have been off work from the date of the injury, October 14, 1977, until November 7, 1977. Also, from November 14, 1977 until November 20, 1977 were days of disability. Claimant was terminated on January 12, 1978. Apparently claimant worked normally during the times he was not off work.

A report of John R. Walker, M.D., an orthopedic surgeon, was dated February 1, 1978. In that report Dr. Walker states:

> Physical examination reveals a tall, well-developed, well-nourished, male walking apparently without a limp. The blood pressure is 130/82. Examination of the low back reveals that the patient is definitely somewhat tender over the left sacroiliac joint but he is acutely tender over the lumbosacral joint in the midline. The instability sign is definitely positive at L-5, S-1. Straight-leg-raising tests are positive when done by the patient actively or passively when done by the examining doctor. The patellar, ankle and plantar reflexes are 1+/1+ and physiological throughout. He has 5/8 inch shortening of the right lower extremity with no particular atrophy of thigh or calf. The patient has good spinal motion in flexion but complains of a pulling pain in the lumbrosacral joint when going down and also when he comes back up to the erect position.

Based on that examination plus a history, laboratory studies, and x-rays, Dr. Walker diagnosed "1.) sprain of the sacroiliac joint, left. 2.) Moderately severe sprain of the lumbosacral joint with a positive instability test at L-5, S-1." He recommended heat, massage, home exercises, and use of the back support already supplied by Dr. Vorland. He also prescribed some drugs.

On February 28, 1978 Dr. Walker writes:

> It would be my opinion after reading my examination report again, dated February 1, 1978, that this patient should not be back to work at this time. You will also note that I did prescribe some type of treatment for him and to my knowledge he is taking none at this time. In dealing with this matter, there is of course, always the question as to when he might possibly go back to a lighter job, that is, if Viking Pump could furnish this type of job for him. Certainly if he has a lot of heavy bending and lifting

and stooping he should not be doing it at this time.

Arnold Delbridge, M.D., an orthopedic surgeon, evaluated claimant on March 13, 1978, and wrote in a report of April 17, 1978 that "to all outward appearances [claimant's] current back problems are related to his injury in October." That letter said further.

> After my examination of Mr. Rainey, it was my feeling that he had a negative neurological of his lower extremities, but that he did have a positive straight leg raising at 70 degrees on the right and had a limited range of motion of his back.
>
> My feeling was that he had a low back sprain with minimal amount of sciatica.
>
> It is my feeling that at this time he may be able to do some light work, but it would have to be really light duty. I don't think that he should lift in excess of 20 to 25 pounds. He should not stoop repeatedly and any lifting he does should be done close to his body because he would certainly get into difficulty if he tried to lift at arm's length or have to place weights at a distance from his body.
>
> It is my feeling that the treatment that has been recommended for this gentleman, namely physical therapy, etc., is very appropriate and should be continued.
>
> It is my feeling that he will probably gradually get better and be able to resume his place in the work force. He may or may not need a lumbosacral support.

In his deposition, Dr. Delbridge testified that a myelogram of August 22, 1978 showed only a small defect at lumbar 2. Concerning this result, Dr. Delbridge testified:

> A negative myelogram would indicate that there is a good chance that there is no markedly protruding disk. I say a good chance, because in about twenty to twenty-five percent of the cases a myelogram may not pick up a disk, especially if it's a lateral disk. Therefore, while a myelogram does not rule out completely the possibility of a disk, it does certainly indicate that there is not a huge disk involved and also that there is at least a seventy-five percent chance that there is not a protruding disk (p. 7).

Dr. Delbridge further testified:

> My feeling was that Mr. Rainey had a back sprain—how old it was I couldn't say purely by examining him—and that he did, indeed, have some sciatica, probably on the basis of some nerve root irritation, which was very minimal and could have been caused by a disk that protruded so little that it did not show on the myelogram. (pp. 7-8).

An electromyogram study of October 23, 1978 suggested "a very minimal compromise of the nerve, if indeed there is a compromise at all" (p. 9). Dr. Delbridge last saw claimant January 3, 1979 and felt "that he could work with the possible exception of very heavy lifting" (p. 9) and "that no further treatment was indicated" (p. 16). As to the permanent partial disability, the doctor stated that "if there is any permanent partial disability of Mr. Rainey that it would be less than five percent"(p. 30).

Robert H. Kyle, a neurosurgeon, testified by evidentiary deposition that he examined claimant on November 24, 1978. The examination revealed a "slight atrophy" of the right calf and a "slightly positive" straight leg raising test (p. 6). Palpitation of the back was "essentially normal" (p. 8). Dr. Kyle's diagnosis was that of a slowly subsiding lumbar strain (p. 10). On the question of malingering, Dr. Kyle opined that claimant was not so doing; Dr. Kyle based this opinion upon the fact that the calf atrophy is evidence of pain (p. 17-18). Dr. Kyle assessed claimant's permanent partial disability at 15%, having reached the "opinion on the basis of my examination and the history that I have" (p. 21).

Barbara Jean Hershberger testified by evidentiary deposition that she was a nurse employed by Dr. Delbridge. In the fall of 1978, she said, claimant came to the office and requested medication; upon being told that he could not have it, he became very upset and left, slamming the door. Later that day, she had an occasion to go to St. Francis Hospital and observe claimant "walking along at quite a fast pace" (deposition, p. 5).

Heinie D. Wallbaum testified at the hearing. For some reason his testimony was transcribed separately and references to page numbers pertain to that separate testimony. He stated that he was a supervisor at the Viking Pump Iron Foundry and that claimant worked under him. Claimant's work involved using "a big snag grinder, a thirty inch snag grinder grinding out big castings" (p. 3). The witness testified that claimant "missed a lot of time" prior to the injury (p. 5). After the injury, claimant missed six more days in October, 11 days in November, one day in December. The record was not clear as to how much time claimant missed in January 1978. Contrary to claimant's testimony that he was given light work, this witness testified that claimant continued on the molding job until he was terminated and that claimant was able to keep up with his fellow workers.

As to why claimant was terminated, the following appears on page nine:

> Q. Was the basis of his termination an insubordination problem between you and he?
>
> A. That was it, yes.

Other than his testimony about the injury, claimant also testified that he and Irene Burnside lived together as man and wife and that three children lived with them, two of them being hers and one his, no children of the would-be marriage. He testified that he also had another child.

As to the events following the injury, he testified that he returned to work after a week or two and worked intermittently until January 12, 1978, when he was fired. As to the reason for his discharge and the work he performed just prior thereto, he testified:

> A. I didn't quit. I was discharged.

Q. Were you able to do that work satisfactorily, or were you fired for inability to work?

A. Well, the write-up they had on me, the reason they fired me, it wasn't nothing with my job.

Q. Were you able to perform that work of what did you say, molding and grinding? Were you able to perform that work when you went back the second and last time?

A. No, not as good as I was the first. I had to work and sit, you know, and let my back rest. And so I went and told my foreman and he sent me down in the mill room, cleaning room, grinding small parts that weigh around twenty-five pounds.

Q. Were you able to do that work now? You see that's what I was getting at.

A. No, I had to stand and I couldn't stand the standing. I mostly had to lean on the bench I was grinding on and sit on that (p. 22).

Later on cross-examination, he testified, "Well, they called me to the office and told me I was fired because of my conduct." (p. 55).

Claimant also testified that he would be unable to do the latter-described work (as of the time of the hearing); that he had trouble walking, sitting, lifting, and bending.

On cross-examination, claimant testified that he "didn't tell no one" that he and Irene Burnside were husband and wife (p. 49), that she was not listed as his wife on the health and accident insurance policy, that he supported Irene Burnside but that she drew aid to dependent children benefits. He also testified that he had not played basketball since about one year prior to the injury.

Irene Burnside testified that she lived with claimant for over five years, prior and subsequent to the injury; that she told people claimant was her husband and considered him to be her husband; and that she had observed claimant was less able to get about.

Willie F. Robinson testified that he was a friend of claimant; that claimant could not work on automobiles or play basketball as he could prior to the injury.

In his decision, the hearing deputy struck the deposition of Dr. Kyle from the record because of the irresponsiveness of the witness which in turn was actuated by the words of then-claimant's counsel.

Also not allowed into evidence was a written report of Dr. Walker dated January 19, 1979 covering an examination of that same date.

As stated above, the hearing was December 28, 1978.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 21, 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 *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299, the court quotes with approval from C.J.S.:

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

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.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "in the course of" relates to time, place and circumstances of the injury. *McClure v. Union, et al., Counties*, 188 N.W.2d 293 (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.

"The opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 907 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra*, p. 907. Further, "the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premises given the expert and other surrounding circumstances." *Bodish v. Fischer, Inc.*, 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965).

The overall issue, of course, is the nature and extent of claimant's disability. Other issues include the admissability of certain evidence, the rate of weekly compensation (which encompasses the issue of the common law marriage), and whether or not Mr. Gilliam is entitled to the amount of his attorney's lien. Also, the assignments of error made by claimant will be discussed as they relate to the issues.

Before the evidence of disability is discussed, the determination of admissability of evidence will be made (alleged errors two and 7). Dr. Walker's report of January 19, 1979 was filed *after* the hearing and concerned a physical examination wich took place *after* the hearing. Rule 500—4.31 states:

> Completion of contested case record. When notice of assignment of hearing is received by the parties or attorneys of record at least sixty days prior to the date of hearing, no evidence shall be taken after the thirtieth day following the hearing. Each party shall indicate by written statement filed at the hearing the dates of taking of any depositions or

other evidence to be taken within the thirty days following the hearing. In no event shall any examination or evaluation for evidential purposes in a contesting case proceeding be permitted following a hearing, except upon presentation of a sworn statement by counsel or party, if not represented, that due diligence was exercised to arrange for the examination or evaluation and that due to circumstances beyond the control of the party seeking to obtain the evaluation or examination, the evaluation or examination could not be obtained by the date of the hearing. Such a sworn statement shall include a full explanation of the facts on which the required grounds are based.

Claimant's attorney filed no sworn statement. It is one thing to allow a post-hearing deposition about evidence already in existence; it is altogether another thing to allow a party to obtain evidence which was created after the hearing. The rule quoted above will be followed and Dr. Walker's report of January 19, 1979 is *not* a part of the record in this case.

Second, there is a question about the admissability of Dr. Kyle's deposition. The hearing deputy struck the deposition from the record. The misconduct of then-claimant's attorney during the deposition is clear. For example, during the direct examination by defendants' attorney, the following occurs:

Q. Would there by any significance to the fact, Doctor, that for several weeks prior to the time he ended his employment at Viking Pump, Mr. Rainey was doing the heavy work and was able to do his job and people observed no problems with him doing his job, some months after the alleged injury.

MR. BEHNKE Claimant's attorney]: I would object to that because it's calling for an opinion based on the testimony of other people, rather than from his own observations. So I don't think you should even answer that question. That question is entirely wrong. And you should know better. If you don't, you should know that's an improper question. I will ask you not to answer the question.

Q. Well, Doctor—

MR. BEHNKE: I'm sick and tired of you coming in and quoting from other witnesses and then asking the doctor to give an opinion based on that other testimony. It's clearly wrong.

MR. ROBERTS [Defendant's attorney]: Well, then let the Commissioner decide it, John. You can't instruct the doctor not to answer.

MR. BEHNKE: I can.

MR. ROBERTS: I am taking the deposition.

MR. BEHNKE: He doesn't have to answer that if you don't want to. You can come back here. You do that repeatedly, and I'm sick and tired of it (pp. 11-12).

* * *

Q. He was injured on October 21st, Doctor. He worked for quite awhile. He was off for several weeks in November. And the records show he went back to the job he was doing during the month of December and the first week and a half of January doing the same work, heavy work at Viking, and on January 12th or thereabouts, or 10th, he was fired for insubordination, which we aren't concerned with here. And my question is, assuming those facts to be true, is that of some significance to you in this man's ability to function with whatever he complains is wrong with him?

MR. BEHNKE: You don't have to answer that if you don't have an opinion or care to, Doctor (p. 13).

* * *

Q. I guess what it comes down to, Doctor, is this man worked from December 1st at his job to January 10th or 12th, and according to employees and foremen he had no complaints and did his job without any hesitation or any evidence of a back injury. He never worked again after January 12th because of a non-work related dismissal. How do you explain his condition being what it is when you saw him in November versus what it was on the date he left Viking Pump when he was able to do his job?

MR. BEHNKE: You don't have to answer that question, Doctor. It's clearly improper (pp. 14-15).

* * *

Q. Well, if you're going to take his history and assume that to be true, Doctor, then you have got to try and explain to me how the man was able to do his work for almost six straight weeks with no complaints, that people observed him do heavy lifting, and then in the middle of January not work again until the day—through the time he saw you, and then appear as he did?

MR. BEHNKE: He doesn't have to explain any such thing at all to you (p. 16).

As the hearing deputy pointed out, Rule of Civil Procedure 148 is specific as to the conduct of such an oral examination. Subsection (a) of that rule provides that evidence objected to should be taken subject to the objection. The above examples show how claimant's then-counsel disrupted defendants' examination of Dr. Kyle; further, in some cases, claimant's then-counsel gave none too subtle hints suggesting how the witness should answer the question. For example referring to the excert from page 13, when claimant's then-counsel suggests that Dr. Kyle might not have an opinion, it turns out that the doctor indeed does not have an opinion. Overall, then, it appears the deposition was not taken in accord with Rule 148. The remedy, however, is not to disallow the deposition. Dr. Kyle saw claimant and formed certain opinions which should be a part of the record. Therefore, Dr. Kyle's deposition will be considered as a part of the evidence in this case. However, its weight is another matter.

Claimant, in his assignment of error number eight, cites as error the hearing deputy's failure to order payment of a bill by Schoitz Hospital for physical therapy. The bill, a copy of which was in claimant's brief, was not a part of the record in this case. Therefore, no order of payment will follow.

The hearing deputy based the weekly rate on a gross weekly wage of $223.60 (entitling claimant to a rate of $133.37), assuming claimant to be single. Claimant's assignment of error number three says claimant was married and "entitled to five (5) dependents" (brief p. 13). The evidence in this respect is not clear as one could wish. Claimant's testimony, as well as that of Irene Burnside serves to show that they thought of themselves as married to one another. Yet, there are other aspects to be shown. For example, the Supreme Court sets out the following elements of a common law marriage:

> 1. Intent and agreement in praesenti, as to marriage, on the part of both parties, together with continuous cohabitation and public declaration that they are husband and wife. 2. The burden of proof is on the one asserting the claim. 3. All elements of relationship as to marriage must be shown to exist. 4. A claim of such marriage is regarded with suspicion, and will be closely scrutinized. 5. When one party is dead, the essential elements must be shown by clear, consistent and convincing evidence. *In re Estate of Long*, 251 Iowa 1042, 102 N.W.2d 76 (1960).

Element number one may be considered satisfied and no comment is necessary with respect to number two. As to the third element, the evidence heretofore summarized shows that several of the parties' actions were inconsistent with the estate of marriage: Irene Burnside was not listed as claimant's wife on the health and accident policy and she drew ADC benefits at a time when, were she married and being supported by claimant, she would not have been eligible. There is insufficient proof of a common law marriage, such a marriage being the basis of claimant's claim to a higher weekly compensation rate.

On the other hand, claimant's testimony that he had two children of his own was not refuted. Since he was age 25 at the time of the injury, one may infer the children were of an age to entitle claimant to claim them as exemptions. Claimant's weekly compensation rate based on a wage of $223.60 and two children (a total of three exemptions) is $138.36.

Concerning the alleged error five, with respect to the attorney's lien, claimant claims that a fee was paid when claimant's first attorney deducted one-third "from each Temporary Total Disability benefit check when received." The only other evidence in the record is the lien itself and the attached itemized bill. Claimant's imprecise and unsubstantiated reference to a percentage being taken from an unspecified number of checks is not as convincing as the first attorney's detailed statement: Also claimant's assertion that the first attorney should not be reimbursed for expenses is not well founded. The lien will stand.

With respect to the permanent partial disability (alleged error one), only the opinions of Dr. Delbridge and Kyle remain in evidence, the report of Dr. Walker having been excluded. Dr. Delbridge's opinion of disability is stated in the subjunctive: If there is disability it is less than 5%. So, stated, this testimony by a treating doctor is not convincing that any permanent partial disability in fact exists. The testimony of Dr. Kyle is equivocal: although the doctor assigns a permanent partial disability of 15%, he thinks said disability may reduce and the clinical findings were not remarkable. The doctor offers no explanation of how a sprain could produce permanency. Considering all the evidence, including the lay evidence, and giving most weight to Dr. Delbridge's opinion over that of Dr. Kyle and Dr. Vorland, the record supports an award only for temporary total disability.

As for the extent of the temporary total disability, the hearing deputy relied upon the opinion of Dr. Delbridge releasing claimant for work on January 3, 1979. After the injury in 1977, claimant missed work October 22—November 20 (one week) and either worked or was able to work until February 1, 1978, when Dr. Walker said claimant could not work. The hearing deputy's determination that this period of temporary total disability ended January 3, 1979 (a period of 48 weeks, 1 day) was based upon the opinion of the only treating doctor who saw claimant at the time and is well founded.

WHEREFORE, it is found and held as a finding of fact, to wit:

That on October 21, 1977 claimant sustained an injury which arose out of and in the course of his employment when he was pushing a large mold at the employer's place of business.

That as a result of said injury, claimant was temporarily disabled from work for a total of fifty-one (51) weeks, four (4) days.

That claimant did not incur any permanent partial disability as a result of said injury.

That the proper rate of weekly compensation is one hundred thirty-eight and 36/100 dollars ($138.36).

* * *

Signed and filed at Des Moines, Iowa this 23rd day of July, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

MARY FRANCES RAMSEY,

Claimant,

vs.

AREA EDUCATION AGENCY XVI,

Employer,

and

EMPLOYERS MUTUAL COMPANIES,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed October 2, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. This is an appeal by claimant of an adverse abitration decision filed December 21, 1979.

The record on appeal consists of the transcripts of the hearing which included the testimony of claimant, Dennis Morgan, John Lowell Bryant, Jimrnie J. Smith, and Evelyn Johnson; the depositions of Arnold Schoolman, M.D., and Phillip Couchman, M.D.; claimant's exhibits 1-7 inclusive; defendants' exhibits 1-5 inclusive; and a letter from Dr. Schoolman dated October 5, 1979.

On reviewing the record, it is found that the hearing deputy's findings of fact and conclusion of law are proper with the following amplification.

The issue to be resolved here is clear cut: did the fall of December 20, 1977 cause or aggravate claimant's low back problems? The main conflict is between the testimony of Arnold Schoolman, M.D., and that of Phillip Couchman, M.D. Although Dr. Schoolman is the more highly qualified, the history given to him by claimant was incomplete: Claimant had low back complaints before and after the incident of December 20, 1977, and Dr. Schoolman does not include them in the history taken. On the other hand, the less experienced Dr. Couchman takes a history on January 15, 1978 (after claimant had returned to work on January 3, 1978) which intimates that a severe cough brought on the low back symptoms (defendants' exhibit 1). Then, in his deposition, Dr. Couchman says that, indeed, the cough did precipitate the low back disc problem (Couchman deposition, p. 15).

There is no showing that the coughing episode arose out of and in the course of the employment. It is clear that the hearing deputy, like the undersigned deputy, believed that the issue could be settled only by resolving the conflict between the testimony of these doctors.

It is true, as pointed out by claimant, that Dr. Couchman gave somewhat contradictory form reports as to the cause of claimant's back distress: In answer to a question on a form asking whether or not the injury was a sole cause of the condition, Dr. Couchman on April 8, 1978 answers "yes" and recites a previous history of arthritis; on a similar form dated June 7, 1978 he answers "no" and refers to the arthritis as a "contributing cause." However, his notes and deposition rather more clearly indicate that his opinion was that there was no causal relationship between the injury and claimant's severe back condition.

Thus, although the weight of Dr. Couchman's evidence may not be as high as wished, it has as much weight as Dr. Schoolman's evidence and is more persuasive because the history is more accurate.

WHEREFORE, it is found and held as a finding of fact, to wit:

That on December 20, 1977, claimant sustained an injury which arose out of and in the course of her employment.

That claimant had failed to prove that the said injury resulted in the severe back condition described in the hearing evidence.

That claimant is not entitled to benefits under the workers' compensation act.

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

* * *

Signed and filed at Des Moines, Iowa this 25th day of November, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

MARY FRANCES RAMSEY,

Claimant,

vs.

AREA EDUCATION AGENCY XVI,

Employer,

and

EMPLOYERS MUTUAL COMPANIES,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

The appeal decision filed November 25, 1980 is hereby amended to show that the record on appeal includes defendants' exhibit 6, the deposition of Herbert V. Fine, M.D.

* * *

Signed and filed at Des Moines, Iowa this 21st day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

JUANITA REBER,

Claimant,

vs.

WOOLCO-WOOLWORTH COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an arbitration decision, a nunc pro tunc order, and a rehearing decision, all filed by the hearing deputy.

* * *

The hearing decision, nunc pro tunc order, and a rehearing decision are affirmed with the following amplification.

There are several issues which must be reviewed. But first a recapitulation of part of the industrial commissioner's file would help clarify matters:

(1) On February 2, 1980, the pre-hearing order shows the issues for hearing to be (a) whether claimant sustained an injury arising out of and in the course of her employment; (b) if proved, the causal relationship between that injury and any disability; (c) the extent of that disability; and (d) the extent of entitlement to recovery under §85.27 (medical, hospital, and allied benefits).

(2) On May 14, 1980, the hearing deputy issued an arbitration decision on those issues as follows: (a) that claimant sustained an injury which arose out of and in the course of the employment (b) that there was a causal relationship between the injury and healing period disability, and (c) that since the extent of claimant's permanent partial disability was at that timed undeterminable, claimant should be paid a running healing period, and that (d) that claimant was entitled to certain benefits under §85.27.

(3) On May 20, 1980, the hearing deputy filed a *nunc pro tunc* order clarifying the basis of the rate of weekly compensation.

(4) Defendants appealed the substance of the award and requested a rehearing as to their entitlement to certain credits under §85.38.

(5) In a rehearing decision of September 19, 1980, the hearing deputy allowed a credit of $118.00 and disallowed a claimed credit of $860.00.

(6) On October 9, 1980, defendants also appealed the rehearing decision.

(7) On November 3, 1980, defendants filed a memorandum of agreement for an injury of April 24, 1979.

Of course, the filing of a memorandum of agreement established, inter alia, that claimant sustained an injury which arose out of and in the course of the employment, a paramount issue in the original hearing. *Freeman v. Luppes Transport Co., Inc.*, 227 N.W.2d 143 (Iowa, 1975). The memorandum shows a weekly rate of $139.51, the rate for an unmarried person with six exemptions; however, claimant is married with six exemptions (Tr. 78), thus making the weekly rate $143.35. Therefore, except for the question of benefits under §85.27 (which needs no discussion), the remaining issues are causal relationship, extent of disability, and extent of credit under §85.38.

The problems of causal connection and disability seem readily capable of solution: the unrebutted testimony of John H. Kelly, M.D., a qualfied orthopedic surgeon, sufficiently established the injury was the cause of claimant's problem.

> Well, I guess I would say that I have no reason to doubt that the incident she described started her pain and that if that is the case, then I suppose that I could say that this was the inciting incident that caused the condition (Kelly deposition, p. 16, claimant's exhibit 23).

> In the event the disabled employee shall receive any benefits, including medical, surgical or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter or chapter 85A. Such amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received such payments only to the extent of such credit.

The stipulations of facts showed as follows, for example:

Also, Dr. Kelly's unrebutted testimony established that claimant's injury was permanent and prevented claimant from working from the date of the injury through the date of his deposition on March 6, 1980, except for the period May 21 through June 6, 1979 (Kelly deposition, pp. 17-20). This evidence shows that the hearing deputy's analysis was correct as to causal connection and disability.

There remains the question of the amount of credit which may be claimed by defendants. Code section 85.38(2) states:

Mrs. Reber was paid sick pay benefits in the amount of $118 for thirty-three hours for the last part of April, 1979, for time which she did not work.

That this was handled as sick pay benefits because it was not reported to us at that time that Mrs. Reber was claiming this was work related, and the payment was denominated as such.

. . .

That my assistant, Mr. Sweet, was not aware of the status of this case and paid claimant for the entire month of May.

That there was an overpayment of wages in May of $860 for time which claimant did not work.

That I did not intend to pay Mrs. Reber any compensation in the form of sick pay or in the form of regular wages for May, 1979, other than the time she did work, and that this payment was a mistake by Mr. Sweet (statement of Lavern K. Fross, General Manager of the employer store, filed as a stipulation of facts, September 10, 1980).

Further, in another such statement by claimant, with respect to the $860.00, she stated that "no representation was made as to whether or not it was regular salary, sick leave, or any other form of payment" (filed September 10, 1980). One can only conclude that the $860.00 was an overpayment of wages.

The hearing deputy reasoned, correctly, that the workers' compensation law contains no provision for an employer to receive credit against compensation benefits for overpayment of wages. Secondly, §85.38(2) contemplates a credit only for sums expended in accord with a "plan"; an overpayment of wages is more in the nature of an accident than a plan. For the reasons stated, one concludes that the employer is entitled to a credit for $118.00 and not entitled to a credit under the provisions of §85.38 for $860.00.

WHEREFORE, it is hereby found as a finding of fact, to wit:

(1) That on April 24, 1979, claimant sustained an injury arising out of and in the course of her employment, per a memorandum of agreement filed November 3, 1980.

(2) That the nature of the injury was radiculitis, L-5 nerve root left, necessitating a laminectomy at the L4-L5 disc level (Kelly deposition, 6, 10).

(3) The compensation injury on April 24, 1979 was the cause of claimant's disability (Kelly, 23).

(4) That the causative injury resulted in claimant being unable to work from the date of the injury through the date of Dr. Kelly's deposition on March 6, 1980, except for the period May 21 through June 6, 1979 (Kelly, 17-20).

(5) That claimant's injury caused permanent disability (Kelly, 16) but that claimant's physical impairment could not be rated by the treating physician at the time his testimony was taken (Kelly, 20).

(6) That for the last part of April 1979, claimant was paid one hundred eighteen and 00/100 dollars ($118.00) in sick pay benefits under an employer financed plan that would not have been paid had workers' compensation benefits been paid (stipulations of facts filed September 10, 1980).

(7) That in May 1979, claimant received eight hundred sixty and 00/100 ($860.00) from her employer, said money not having been paid in accord with any plan, in fact being an overpayment of wages (stipulation of facts filed September 10, 1980).

. . .

Signed and filed at Des Moines, Iowa this 27th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

KAREN REDD,

Claimant,

vs.

BIL-MAR FOODS, INC.,

Employer,

and

KEMPER GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 14, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an arbitration decision which granted claimant a running award.

. . .

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

In their brief, defendants argue only one point, that of overlapping entitlement to workers' compensation and unemployment compensation benefits. First, however, the case should be reviewed briefly. The only issue stated in the pre-hearing order of June 24, 1980 was that of temporary total disability. (Although the case was filed in arbitration, defendants subsequently filed a memorandum of agreement.)

Claimant began work for the employer on October 25, 1979. On November 17, 1979, while deboning turkey breasts and stubbing wings, she lost the strength in her left hand. She was subsequently treated by three physicians, whose reports were admitted into evidence. Based upon the total record, the hearing deputy awarded healing period benefits from November 17, 1979 through November 26, 1979 and from December 5, 1979 to the date of the hearing. There is sufficient evidence in claimant's testimony and the medical reports to infer that the work incident caused claimant to be unable to work during this time.

Defendants state the issue on appeal as follows:

> Whether claimant is entitled to receive workers' compensation healing period benefits when she has applied for and received unemployment compensation benefits for the same period of time.

The record shows that she applied for unemployment compensation benefits in April 1980, a time at which the hearing deputy found she was disabled under the workers' compensation law.

Section 96.5(5)(b) provides that one may not draw unemployment compensation benefits for any week during which one is "receiving or has received payments in the form of" workers' compensation. In fact, there are valid questions as to whether claimant should have drawn the unemployment compensation. However, the industrial commissioner cannot pass upon such issues, the workers' compensation law being the only source of jurisdiction. An examination of sections 85.33 and 85.34(1) of that law provides that the employer is to pay for temporary total disability or healing period disability. There are sections of the workers' compensation law which allow the employer credit for certain other payments made: for example, under section 35.34(3), prior compensation paid for a disability may be credited against permanent total disability; and, under section 85.38(2), amounts paid under certain group plans may be credited against amounts owed under the workers' compensation law. A thorough examination of that law fails to reveal wherein an employer may have a credit for unemployment benefits paid. Without such a provision, a credit cannot be allowed. See also *Page v. General Electric Co.*, 391 A.2d 303 (Maine 1978), *McLead v. South Carolina Insurance Co.*, 251 S.E.2d 193 (South Carolina 1979).

The hearing deputy based the running award on claimant's continuing visits to the hand specialist, Bruce Butler, M.D., and one agrees that the disability continued. However, the treatment should have produced some results by now. If claimant has permanent partial disability because of the injury, she should receive her entitlement. In the meantime, she should make an effort to return to work as her disability permits.

WHEREFORE, it is found and held as a finding of fact, to wit:

That on November 17, 1979, claimant sustained an injury arising out of and in the course of the employment in the nature of a strain to the left wrist.

That as a result of said injury, claimant was disabled from working from the date of the injury to the date of the hearing on July 16, 1980 and that said disability continued thereafter.

That there is likelihood of permanent partial disability as a result of said injury.

That the claimant is entitled to healing period disability commencing November 17, 1979 and running through November 26, 1979 and recommencing December 5, 1979 and continuing until the condition as described in §85.34(1), Code has been met.

That it is too early to determine the extent of permanent partial disability.

* * *

Signed and filed at Des Moines, Iowa this 23rd day of February, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

THOMAS J. RILEY,

Claimant,

vs.

GEORGIA-PACIFIC COMPANY,

Employer,
Self-Insured,
Defendant.

Both parties have appealed a proposed arbitration decision which awarded claimant thirty percent permanent partial disability to the body as a whole for a heart condition found to have arisen out of and in the course of his employment.

Review of the record discloses that the findings of fact and conclusions of law of the deputy are proper.

Defendant had knowledge that claimant had complaints of chest pain while performing work for the employer. Although the myocardial infarction did not take place until two days later the continuation of recurrent chest pains was unbroken up to that point. This should indicate to the reasonably conscientious manager that it might involve a potential compensation claim.

The onset of symptoms was associated with the lifting of a shaft weighing from forty to sixty pounds. Although the pain would subside in the interim, it would reoccur with successive liftings of the shaft. This is sufficient to satisfy the finding of arising out of the employment even if it was only a slight aggravation of a preexisting condition.

As to claimant's degree of disability, little credence can be given to the opinion of Dr. McIllece because of his lack of knoweldge of claimant's work duties prior to the injury

and progress of his condition subsequent to the injury. Dr. Todd thought the claimant could return to his former employment. Claimant demonstrates little motivation to return to gainful employment as evidenced by his personal perception of his inability to work and because of disability payments he is receiving while not working.

WHEREFORE, the proposed arbitration decision is adopted as the final decision of the agency.

THEREFORE, defendant is ordered to pay unto claimant twenty-three and one-sevenths (23 1/7) weeks of healing period compensation at the rate of one hundred forty-eight and 59/100 dollars ($148.59) per week.

. . .

Signed and filed this 14th day of November, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DAVID RING,

Claimant,

vs.

DUBUQUE PACKING COMPANY,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

This matter came on for hearing at the Pottawattamie Courthouse in Council Bluffs on April 21, 1981 at which time the record was closed.

The record consists of the testimony of the claimant; claimants exhibits 1 and 2; and defendants exhibit 8.

The issue for determination is whether claimant sustained an injury arising out of and in the course of his employment which will entitle him to be paid permanent partial disability.

Findings of Fact

1. Claimant was employed by defendant in June, 1978. His gross weekly wage was $238.88. Claimant was married and entitled to six exemptions.

2. His duties at that time involved cutting meat from the heads of livestock in a nonrefrigerated area.

3. In late June, 1978, claimant exhibited symptoms of afternoon fever, joint aching and not feeling well with loss of appetite and resultant weight loss.

4. The claimant sought medical treatment and found that he had contracted brucellosis. He was paid three weeks of compensation pursuant to the Nebraska Statute ($150 wk).

5. The brucellosis was caused by exposure at work. All medical evidence submitted shows this.

6. Claimant returned to work in August, 1978 and worked at his former job through April, 1979.

7. At about this time, claimant moved to another job within defendants' operation through the union bargaining contract.

8. Claimant quit his job with defendant in June, 1979.

9. Claimant's reason for quitting is attributed to reasons other than the disease, although claimant exhibited symptoms of hip joint pain.

10. The greater weight of the medical evidence indicates that claimant had brucellosis and no longer has activity from the disease. Therefore, the condition is not permanent in a *medical* sense. (See Faber report)

11. At all times material hereto, claimant was domiciled in Council Bluffs, Pottawattamie County, Iowa and defendants' plant was in Omaha, Nebraska.

12. Since leaving the employment of defendant claimant has worked for lesser remuneration.

Conclusions of Law

1. Section 85.71, Code of Iowa provides this agency with jurisdiction when a domiciliary of this state sustains an injury arising out of and in the course of employment.

2. 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 Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

Based on the foregoing principles, it is found that claimant has established that the brucellosis was caused by employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 1978 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).

Based upon the foregoing principles it is found that the preponderance of the evidence indicates that the condition is not permanent in a medical sense. However, the claimant is entitled to the payment of medical expenses and temporary total disability.

3. An employer's refusl to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). In the instant case, claimant returned to work, later changed jobs and quit. The job change and quitting were unrelated to the disease process. It appears as if claimant's condition was not a major contributing cause of termination, nor was the termination directly traceable to the disease process. See *Langford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667 (Iowa 1971).

4. Section 85A.5 provides payment of compensation and medical expenses. Claimant's testimony indicates that he did not work in July 1978 and this entitles him to four and three-sevenths (4 3/7) weeks of compensation (31 days). The proper rate of compensation is one hundred fifty-seven and 06/100 dollars ($157.06). The medical expenses submitted will be ordered to be paid. Payments made pursuant to Nebraska law will be credited to defendant.

IT IS THEREFORE ORDERED that defendant pay unto claimant four and three-sevenths (4 3/7) weeks of temporary total disability compensation at the rate of one hundred fifty-seven and 06/100 dollars ($157.06) with defendant to receive credit for payments made pursuant to the Nebraska Workmens' Compensation Act.

IT IS FURTHER ORDERED that defendant pay the following medical expenses:

Drug Town	$ 27.79
Cogley Clinic	82.21

Costs of this action are taxed against defendants.

Defendants are to file a First Report of injury.

Defendants are to file a Final Report upon payment of this award.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Code section 85.30.

* * *

Signed and filed at this 12th day of June, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

BONNIE MAY RISDEN,

Surviving Spouse,
CHARLES FRANKLIN RISDEN,
Deceased,

Claimant,

vs.

MAQ, INC.,

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

On May 30, 1980 defendants filed an application for order of apportionment of death benefits.

By their marriage, Charles and Bonnie Risden had four children: Charles, Wendy, Charlene, and Bonnie. The children's father, Charles, and Bonnie were divorced in 1977.

The employee, Charles Risden, was killed in an accident which arose out of and in the course of employment on February 29, 1980. Besides the four children, there was a possibility that one Margie Currie might make a claim as a surviving spouse by virtue of an alleged common law marriage. Ms. Currie on September 25, 1980 filed her notice of no contest, leaving the four children as sole dependents under the workers' compensation law.

That law makes no provision for the apportionment of benefits where the only claimants are siblings. Section 85.49 provides that the clerk of the district court of the county of injury shall be the trustee for the amounts. Thus, the insurance company should pay the benefits to the proper compensation trustee. Without further application, the insurance company may make the payments to the clerk of court of the county in Iowa where the children now reside.

SO ORDERED.

* * *

Signed and filed at Des Moines, Iowa this 1st day of October, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

DAVID L. RITTGERS,

Claimant,

vs.

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Order

Now on this 3rd day of July, 1980, claimant's application for an interim order, defendants' resistance thereto, and claimant's reply to resistance comes on for determination.

Claimant contends defendants were paying compensation until December 12, 1979 at which time without notice payments ceased. Defendants contend that payments which they were making up to that point were voluntary. Claimant has apparently not returned to work nor received notice of termination of benefits as required by *Auxier v. Woodward State Hospital*, 266 N.W.2d 139 (Iowa 1978).

Defendants' contention that the payments being made were voluntary is without merit. This is a review-reopening proceeding in which a memorandum of agreement has been filed. Furthermore, no notice as contemplated by §86.20, Code of Iowa is on file.

Therefore, defendants are ordered to continue payments in the appropriate amount from December 12, 1979 with interest until the terms of *Auxier v. Woodward State Hospital, id*, are met.

. . .

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

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

DAVID L. RITTGERS,

Claimant,

vs.

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Both claimant and defendants have appealed from a proposed rehearing decision which incorporated the original proposed review-reopening and arbitration decision. Claimant was awarded healing period benefits beginning August 29, 1979 and medical expenses in the proposed rehearing decision. It was determined in the original proposed decision that claimant was 45% industrially disabled, and he was awarded healing period, permanent partial disability, and medical expenses.

The issues on appeal are whether claimant's affidavit could be introduced at the time of the rehearing in lieu of testimony (claimant now resides in Boise, Idaho), whether claimant's exhibits 18, 19, and 20 should be admitted as evidence, whether claimant is entitled to medical care from a physician he chose, and ultimately the nature and extent of claimant's disability.

Thirty-one year old claimant is married and has two children. He has a high school education. After graduation he attended a technical school for a twenty-week period, but he did not complete the two-year program in machinistry. He obtained a commercial pilot's license and a flight instructor's rating for single engine planes in 1972. However, the license has now expired except for pleasure flying. Claimant testified that at the time of the initial hearing he was seeking additional training under a vocational rehabilitation program to get his instrument and multi-engine rating. However, he was having trouble with the technical aspects of the training in addition to experiencing pain from sitting during the training.

Prior to beginning work as a package car driver for defendant-employer in October 1975, claimant worked as a welder, assembly line worker auto repairman, and carpenter. Claimant categorized all these jobs as heavy manual labor which required lifting, twisting, and turning. He also was self-employed in a partnership with another person making ornamental railing. However, according to claimant's testimony, this business was poorly managed and consequently went bankrupt.

Claimant's job with defendant-employer required driving, loading, bending, stooping, and lifting. He often lifted packages weighing more than fifty pounds.

In December 1973 claimant fell from a roof and injured his back. He testified he had only center back pain and totally recovered from this injury. Additionally, in a report dated March 1, 1979, Donald W. Blair, M.D., stated that the reported fracture in 1973 was at the L-3 level. He affirmed the statements of the doctors who treated the 1973 injury by indicating that there was no permanent functional impairment from that fall.

Claimant failed to note this injury on his employment application. Instead he answered questions concerning previous injuries and previous workers' compensation payments with "None." Defendants asserted this defense

in an "Amendment to Conform to the Proof" filed after the hearing. However, claimant experienced no back problems when working for defendant-employer until he was actually injured on the job.

In December 1976 when working for defendant-employer, a package fell from a shelf and hit claimant's neck. He lost no work time but later began to have double vision, headaches, and dizziness. On January 28, 1977 claimant slipped and fell on ice while working. He saw the company doctor, W. Reinwasser, D.O., who adminstered hot packs and treatments on claimant's back. He was off work three days. March 15, 1977, claimant sprained his neck while working, saw the company doctor, and was off work for a few days.

The injury at issue in the review-reopening occurred on May 31, 1977 when claimant injured himself while picking up a parcel. He twisted his back and experienced pain but finished working that day. He filed an accident report. Claimant experienced pain but continued working through June 15, 1977. At that time Dr. Reinwasser administered hot packs. Claimant then went on vacation; however, he testified that his wife did most of the driving. When he returned from vacation he remained off work and was treated with heat packs by Dr. Reinwasser for about thirty days. He was hospitalized with a diagnosis of acute lumbar strain and possible herniated disc in July and had x-rays, head scans, and skull scans.

Claimant returned to work for two and one half hours August 14; however, he was unable to drive due to prescribed medication he was taking for pain.

Claimant again returned to work August 24, 1977. He reinjured his back within a matter of hours. The arbitration action involves this injury. The report of Dr. Reinwasser dated September 9, 1977 indicated that claimant had sustained a recurrence of the May 31, 1977 injury. The diagnosis at the time of admission was recurrent lumbar strain and sprain. Claimant testifies that after the August injury he had pain in both legs whereas after the first injury he had pain in the low back and mainly his left leg.

Claimant underwent two laminectomies at the L-4, L-5 level performed by F.M. Hudson, M.D. The first was performed September 9, 1977 and when the symptoms recurred, the second was performed on March 24, 1978. Claimant was under the care of Dr. Blair after his release from the hospital.

Nine days following his release after the second surgery, claimant was hospitalized with a possible pulmonary embolus. Defendants refused to pay for this.

Dr. Blair stated in his February 14, 1979 report that the hospitalization in April 1978 for the possible pulmonary embolus was a probable complication of the back injury.

In a letter dated July 19, 1978 Dr. Blair released claimant to sedentary work as of July 6 and gave him a 15 percent permanent physical impairment to the whole man. Claimant has not returned to work since August 24, 1977. Gene Jackson, personnel manager for defendant-employer, testified that no light duty union jobs existed. Claimant cannot return to physical labor due to constant pain.

Claimant returned to Dr. Blair on February 19, 1979 with back strain due to shoveling snow. Dr. Blair noted that back pain flare-ups would occur periodically.

At the time of the original hearing on February 20, 1979 claimant complained of low back pain, sharp pain in his left hip, shooting pain down both legs, and general ache in both legs. Claimant testified that his double vision, blurred vision, and droopy eyelids were not related to the two injuries at issue. Gary L. Hedge, M.D. noted in a letter dated November 7, 1978 that claimant's eye condition would not interfere with professional flying.

In the review-reopening and arbitration decision the deputy determined that the August 24, 1977 injury was a mere aggravation of the condition which resulted from the May 1977 injury.

The deputy stated that claimant did not intend to deliberately deceive defendant-employer when he failed to advise them of his 1973 back injury. Claimant's double vision complaint's were rejected. A causal connection was found between the industrial injury and claimant's hospitalization for the pulmonary embolus. Claimant was awarded healing period, industrial disability, and medical expenses.

Claimant moved to Boise, Idaho shortly after the initial hearing. He consulted an orthopedic surgeon, Howard E. Johnson, M.D., who recommended further hospitalization and fusion surgery. A Williams back brace was prescribed.

Defendants contend that they did not authorize treatment by Dr. Johnson but rather, in a letter dated October 22, 1979 to claimant's attorney, authorized further care and treatment by Keith Taylor, M.D., in Boise, Idaho. They refused to pay for Dr. Johnson's care.

Claimant stated that he continued vocational rehabilitation in Des Moines until he moved to Boise where he started a pilot vocational rehabilitation program. However, he stated that because of pain he was having difficulty going through the program because it required a considerable amount of sitting.

In claimant's contested exhibits 18-20 Dr. Johnson states that claimant has a "mechanical instability due to collapse of the disc space and the resulting instability." In a letter dated November 6, 1979 (exhibit 19), Dr. Johnson states that "it is also my opinion that this man's present problem is a direct continuation of the problems which he had had previously in Iowa and it is the same condition for which he had received his treatment." He felt that if good relief were realized with immobilization with a brace or casting then permanent immobilization by fusion would give return of stability to the back and capability of claimant returning to his vocational retraining position.

Dr. Taylor stated in a report dated December 18, 1979 that he believed claimant has "some residual peripheral nerve entrapment most likely as a result of scarring secondary to his injury and subsequent surgery on two occasions. He thinks further surgery is unnecessary; however, he stated that claimant will not be free of pain but should learn to function with the condition of his back. He thought the 15 percent impairment rating was still applicable.

Dr. Johnson stated that claimant removed his back brace and returned to full activities after claimant's consultation with Dr. Taylor. As a result, claimant's pain intensified so that he was returned to bed with the brace,

and it took several days to improve. Dr. Johnson advised wearing the brace both day and night.

In his rehearing decision filed March 12, 1980, the deputy allowed claimant's affidavit stating that defendants did not take advantage of ample opportunity to cross-examine the claimant. He also allowed claimant's exhibits 18-20 stating that defendants failed to exercise their option concerning an evidentiary deposition of Dr. Johnson. It was noted by the deputy that defendants did not offer sustitute care by Dr. Taylor until October 22, 1979, thirty days after they were informed that Dr. Johnson was treating claimant.

The deputy allowed Dr. Johnson's treatment and ordered healing period and medical expenses.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 31, 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).

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 Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

The review-reopening and arbitration decision filed October 10, 1979, determined that claimant sustained an industrial injury on May 31, 1977 and as a result of this injury sustained an industrial disability of forty-five percent (45%) of the body as a whole. The evidence does not support claimant's allegation that his condition has changed since the original award was made.

At the hearing on February 20, 1979, claimant complained of low back pain, sharp pain in his left leg, shooting pain down both legs, and general ache in both legs. Dr. Blair noted in a report dated February 20, 1979 that claimant's back strain and resulting discomfort, which was associated with shoveling snow shortly before the hearing, was to be expected from time to time. Although Dr. Johnson was of the opinion that claimant's condition was worsening, his references in his reports to claimant's prior medical history were sketchy. His opinion apparently was not based upon a detailed examination of claimant's previous medical records.

Claimant's complaints at the time of his examination by Dr. Taylor were substantially equivalent to those at the time of the original hearing. Extensive medical history of claimant is noted in Dr. Taylor's report of December 18, 1979. Dr. Taylor's opinion that claimant's condition had not changed since a permanent physical impairment rating of 15 percent was given on July 6, 1978, appears to be premised upon his own examination as well as a detailed medical history of claimant's injuries.

Iowa Code §622.90 states "[t]he court or officer to whom any affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may require the witness to be brought before it or him and submit to a cross-examination by the opposite party." The court in *O'Callahan v. Dermedy*, 197 Iowa 632, 196 N.W.10 (1923), modified on other grounds, 197 Iowa 632, 197 N.W. 456, held that the industrial commission has a legal right to consider that the industrial commissioner has a legal right to consider affidavits in a proper case and under proper restrictions, but that the case should not be tried wholly on affidavits. The admission of affidavits is discretionary and the commissioner should require that an affiant be produced for cross-examination, where a demand is made by the party against whom the affidavit is offered.

The informal rehearing proceeding held on November 15, 1979 acquired the characteristics of a review-reopening since claimant was attempting to establish that a change had occurred in his condition since the original hearing. The record supports the fact that although the claimant's affidavit was taken prior to the rehearing, it was not filed until November 26, 1979. Defendants objected to the affidavit's admission both at the rehearing and in a resistance filed after the proceeding.

As noted in *O'Callahan v. Dermedy* a case should not be tried wholly on affidavits. Claimant's alleged change of condition is supported solely by his own affidavit since the medical reports of Dr. Johnson are inadequate to demonstrate knowledge of the claimant's condition prior to his examination. In contrast, Dr. Taylor's reports contain well-detailed references to claimant's past medical history. Based upon Dr. Taylor's detailed reports and his examination of claimant his opinion that claimant's condition has not changed since the 15 percent rating was given is more persuasive than claimant's self-serving allegations in his affidavit or Dr. Johnson's reports to determine that claimant's condition was the same as at the time of the original award.

Iowa Code §85.27 provides that the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employee is dissatisfied with the care offered he should communicate the basis of dissatisfaction to the employer so that alternate care may be agreed upon. An employee may choose his care at the employer's expense in an emergency.

The defendants have a continuing obligation to provide claimant with medical care; however, they have the right to choose the care. There was no showing of emergency when claimant was examined by Dr. Johnson. This is not to say that medical treatment was not reasonable and necessary at the time but rather, that the claimant made his selection without consulting the insurance carrier. Dr. Johnson's care was unauthorized, there was no need for emergency treatment, and claimant did not avail himself of the authorized care of Dr. Taylor, therefore, defendants are not responsible for payments relating to Dr. Johnson's treatment of claimant.

Dr. Reinwasser's report of September 9, 1977, which referred to claimant's August 24, 1977 injury, indicated that claimant had sustained a "recurrence of the injury of

May 31." The diagnosis after the time of admission was "recurrent lumbar strain and sprain." The incident of August 24, 1977 was not a new injury but rather, was merely irritation of claimant's condition as a result of the May 1977 injury.

Dr. Blair in his report of February 14, 1977 indicates that claimant's hospitalization for a possible pulmonary embolus shortly following his discharege after the second surgery was a probable complication of the surgery and did require the re-hospitalization in April of 1978. Therefore, claimant's hospitalization of April 1978 is causally connected to his May 1977 injury.

According to Iowa Code §85.34(1) healing period is paid until the employee returns to work or competent medical evidence indicates the recuperation from the injury which caused permanent partial disability has been accomplished. Rule 500—8.3 I.A.C. states in part that recuperation occurs when it is medically indicated that no further improvement is anticipated from the injury.

Dr. Blair indicated that claimant was able to resume work of a clerical nature as of July 6, 1978. It is determined that no further improvement was medically anticipated at that time; therefore, healing period terminated on July 6, 1978.

Although defendants asserted a defense concerning claimant's failure to note the back incident of 1973 on his employment application, claimant worked for defendant-employer for nearly a year and a half without back problems. In addition, Dr. Blair confirms the reports of the 1973 attending physicians by stating that the reported fracture of L-3 in 1973 should present no functional impairment. The 1973 injury and failure to report the incident are unrelated to claimant's current disability.

WHEREFORE, it is found.

That claimant sustained an admitted industrial injury on May 31, 1977.

That claimant reached his maximum medical recuperation on July 6, 1978.

That claimant made a complete recovery from his injury in 1973.

That as a result of the May 1977 injury claimant sustained an industrial disability of forty-five percent (45%) of the body as a whole.

That claimant's hospitalization of April 1978 is causally connected to the May 1977 injury.

That there has been no change in claimant's condition since the review-reopening and arbitration hearing.

That medical treatment of claimant by Dr. Johnson was unauthorized.

* * *

Signed and filed this 22nd day of August, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

RICHARD M. ROHRBERG,

Claimant,

vs.

GRIFFIN PIPE PRODUCTS COMPANY,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse review-reopening decision; also claimant filed a cross-appeal.

* * *

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

Defendants' brief indicates claimant has failed to prove "that the injury arose out of the employment" (p. 3). Obviously, in that context the term arising out of the employment refers to the question of causal relationship. Only one doctor testified to claimant's back impairment and the impairment caused by the fracture of both os calcis. (R. L. Hopp, M.D., initially treated claimant at Mercy Hospital; a consultation report was written by a Dr. Cousins; and Cemal M. Aldi, M.D., an orthopedist, examined and rated claimant's heels.) Robert J. Klein, M.D., states:

> He has 10 percent permanent disability of the body as a whole, as a result of his spine, *as a result of the compression fracture of D-11.* He has 5 percent permanent disability of the left lower limb, *as a result of a fracture of the left heel.* He has 10 percent permanent disability of the right *lower limb, as a result of that heel* (Claimant's exhibit 1, emphasis added).

Claimant's trauma was palpable, a fall which fractured both of his heels and one vertebra; Dr. Klein concludes (above) that these fractures caused the impairment, which seems entirely consistent with the facts.

Defendants' brief also indicates that "the physician who first examined claimant when he was admitted to Mercy Hospital after his injury stated in the hospital report that the back condition that claimant was suffering from at the time he was admitted dated back to an injury that he had suffered in 1973" (p. 4). Although claimant admits to prior back problems (lumbar, not dorsal, it should be noted), the hospital report of the physician's remarks makes no such connection at all. It states:

PAST HISTORY: Patient had an injury approximately 4 years ago and was treated for acute back injury which responded fairly well but states he still continues to have some discomfort in his back, however review of previous x-rays taken 4 years ago do not show any compression fractures and the one in the back now may be new. Otherwise has had no previous admissions, no major surgery.

To construe "the one in the back now may be new" to mean that the condition "dated back to an injury that he had suffered in 1973" is illogical. The evidence clearly indicates that the dorsal impairment resulted from the work injury.

A word should be said about claimant's industrial disability. Defendants argue that an examination of the various elements of that disability shows claimant's earning capacity has not been diminished. This is especially true, say defendants, because of claimant's job security at the employer. It is indeed gratifying and a high example of how the system should work that, despite his impairment, claimant can remain with employer.

Yet, a whole range of jobs requiring agility and strength are foreclosed to claimant because of his injury. His education is fair, as is his experience; yet, were claimant forced to compete in the open job market, with his physical impairment, he would find the extent of employment limited. Also, his present job security is no better than the employer's ability to compete in the economy. Plants have closed before.

The review of the evidence and authorities, therefore, shows a 20% permanent partial disability rating for industrial purposes is proper. Considering claimant's cross-appeal (wherein he asks for a disability of more than 20%), the same sort of reasoning applies, perhaps in reverse: the award against defendants is not too much, and the award for claimant is enough.

WHEREFORE, it is found and held as a finding of fact, to wit:

That on January 24, 1978 claimant sustained an injury in the nature of a compression fracture of the 11th dorsal vertebra and a fracture of each os calcis.

That said injury arose out of and in the course of his employment.

That as a result of said injury, claimant sustained a disability of twenty percent (20%) of the whole man for industrial purposes.

. . .

Signed and filed at Des Moines, Iowa this 15th day of January, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

FREDERICK ROMANI,

Claimant,

vs.

EBASCO SERVICES,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed February 6, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter. Defendant appeal from an adverse review-reopening decision under which claimant was given a running award for healing period benefits.

. . .

The decision of the hearing deputy is correct and is therefore affirmed.

Claimant, a native of New York, injured his back while working for the employer in Iowa. After the injury, he returned to New York. The hearing deputy's decision gives a good account of the facts in that case. Suffice it to say that the claimant has had continuing problems since the date of the injury, May 10, 1978, and, according to the hearing deputy, was still in the healing period phase. That ruling resulted from testimony by Albert Blenderman, M.D., of Sioux City, a qualfied orthopedic surgeon, who testified to a psychiatric dimension in the case, specifically an emotional overlay.

There are two basic issues in this case. The first concerns defendants' contention that although claimant may have certain permanent disability, the healing period has ended. Defendants cite much evidence in the record to support this proposition. Second, defendants object to the order by the hearing deputy that they supply out-of-state treatment.

Section 85.34(1), Code, states:

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 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, I.A.C., states:

> 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.

Section 85.27, Code, states in pertinent part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

Both sides have medical evidence in their favor. Considering all the evidence, it is not surprising that the hearing deputy chose to give most weight to that of Dr. Blenderman, a qualified surgeon who had recently examined claimant. Further, the hearing deputy went out of the way in favor of claimant's credibility. The quality of the evidence, in substance, and the added dimension of the psychiatric problem discussed by Dr. Blenderman, all lead one to believe that the claimant is indeed still in his healing period.

As for out-of-state treatment, it is clearly not forbidden by §85.27 which provides that the services and supplies furnished shall be "reasonable." Here, in order to accomplish the humanitarian purposes of the workers' compensation law, there appears to be no hardship at all on the employer and insurance carrier. The insurance carrier seemed able to follow the case while claimant resides in New York and should have no trouble doing so in the future. Therefore, where requiring the employer and insurance carrier to furnish out-of-state treatment under §85.27 does not impose a hardship, such treatment may be deemed reasonable.

This is a case wherein claimant and defendants should work together to end claimant's healing period status. Claimant especially should make every effort at attempting to return to work or to achieve rehabilitation. Defendants should be supportive of claimant in these efforts.

WHEREFORE, it is found that claimant has sustained his burden of proof and established that on May 10, 1978 he sustained a back injury which arose out of and in the course of his employment with the defendant.

That there is a causal relationship between that injury and the claimant's present condition.

That claimant has not returned to work and has not recuperated from his work-related injury as contemplated in §85.34(1).

* * *

Signed and filed at Des Moines, Iowa this 26th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

HERSCHEL E. ROUNDS,

Claimant,

vs.

GLEN BECK; WILLIAM BECK; GLEN BECK and WILLIAM BECK, Partners; GLEN BECK and WILLIAM BECK, Joint Venture,

Employer,

and

FARMLAND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

The employers appeal from a proposed supplemental arbitration decision in which it was determined that they were not insured for workers' compensation coverage by Farmland Insurance Company at the time of claimant's injury.

The issue on appeal is whether the workers' compensation coverage existed.

* * *

In February 1977, Herschel E. Rounds, claimant, filed a petition for arbitration alleging that a work-related injury occurred on November 5, 1976. In an arbitration decision filed February 28, 1978, the deputy found that claimant was an employee of both William and Glen Beck and that as a partnership or joint venture they had made cash payments in excess of $2,500 and were subject to the mandatory provisions of the Iowa Workers' Compensation Law. This decision was affirmed by the industrial commissioner on June 29, 1978. The district court affirmed the findings of the industrial commissioner on December 21, 1978. Notice of appeal to the Supreme Court of Iowa was filed on January 12, 1979. On April 16,

1979 the Supreme Court of Iowa remanded this case for the limited purpose of determining whether a contract of insurance which provided coverage for the workers' compensation claims asserted by claimant existed between the Becks and Farmland Insurance Company.

Glen Beck had two years of college education and was taking a three-year Veteran's Administration course in which workers' compensation was a short (about one hour) topic. This had alerted him to the necessity of obtaining coverage if he paid over $2500 in labor cost.

Glen's father, Bill Beck, previoulsy had workers' compensation coverage but had cancelled it on December 8, 1975 apparently because Glen was going to do the farming with his father's machinery and a minimum of hired help.

Glen testified that in 1976 he was in the field doing spring planting when he was approached by Baynard Willey concerning insurance for his farm operation. The discussion only lasted for 20-30 minutes.

The testimony is conflicting about whether workers' compensation insurance was discussed. Glen recalls discussing workers' compensation coverage with Willey. He knew that if he paid over $2,500 in labor costs he was liable for workers compensation, but he did not think he would be paying over $2,500 that year. According to Glen, it was his understanding from the discussion that if he became liable under the law then he would be covered by the insurance company. He wasn't sure how this would happen, but he did think he would be covered if the need arose.

Willey on the other hand does not recall discussing workers' compensation, but he would not say there was no conversation concerning that type of coverage. He simply did not remember.

According to Willey, he had first approached Bill that day concerning insurance needs. He stated that Bill told him they didn't hire enough help to require workers' compensation coverage and sent him out to speak to Glen concerning liability. Willey alleged that Glen told him they would be doing the farming themselves and hiring minimum help and that for this reason Willey felt the Farmer's Comprehensive Personal Insurance Coverage would be adequate for their needs. An endorsement was added to this policy covering Bill and Glen as part-time employees for medical benefits. Farm employees working less than two months per year were also covered if he needed it later.

A policy (claimant's and employer's exhibit 1) was issued to William A. and Glen R. Beck for the period of May 6, 1976 to May 6, 1977. Glen stated that he filed it without reading it. The policy issued covered general auto liability, personal liability, physical damage to property and personal medical payments and specifically for the farm operation, collapse hazards, operation hazards, elevator and explosion hazards, and medical coverage for Bill, Glen, and employees working less than two months. Nowhere is workers' compensation coverage mentioned in the policy. Testimony indicated that although some insurance companies add workers' compensation coverage by endorsements, a totally separate workers' compensation coverage was required by Farmland.

Glen notified Willey that claimant had "hurt himself while he was working for me." Glen testified that Willey told him not to worry, that he was covered. According to Glen, he discussed this with Willey two to three times and was never told he was not covered. Willey stated that after receiving notification of claimant's injury he requested the bills be sent to him and he assumed the medical bills would be paid. Glen was notified three to four days before the workers' compensation claim was filed that the insurance company was not liable.

The employer asked that notice be taken of the common meaning of the word "comprehensive" since the policy issued was a farmer's comprehensive policy.

The deputy noted that the employers had the burden of proving that the policy was enforceable against the insurance carrier and that reasonable expectations of the insured will be honored. Although the word "comprehensive" is all inclusive the deputy determined that the employers were not insured for workers' compensation. He noted that there was no provision in the policy for workers' compensation and that since Bill had previously had such a policy both Bill and Glen realized the necessity of such a policy.

The deputy placed greater weight on Willey's testimony and concluded Glen knew or should have known by the exercise of reasonable diligence that the insurance he negotiated excluded workers' compensation. He knew the previous policy had been cancelled, he had checked no, declining coverage for workers' compensation, and he expected to hire only minimal help. The argument of "reasonable expectations" was found to be without merit.

Review of the record and the decision of the deputy discloses that the findings of fact and conclusions of law are proper.

WHEREFORE, the supplemental arbitration decision is adopted as the final decision of the agency.

THEREFORE, Farmland Insurance Company, successor to Farmers Elevator Mutual Insurance Company, is not liable for this workers' compensation claim.

* * *

Signed and filed at this 28th day of August, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

LEO ST. CYR,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

UNITED STATES FIDELITY & GUARANTY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Leo St. Cyr, the claimant, against his employer, Ebasco Services, Inc., and the insurance carrier, United States Fidelity & Guaranty Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on January 14, 1977. This matter came on for hearing before the undersigned at the Woodbury County Courthouse in Sioux City, Iowa on December 3, 1980. The record was considered fully submitted on that date.

* * *

The issues to be determined are the nature and the extent of the disability. The parties disagree as to the date healing period terminated. Certain medical expenses are also in issue.

Claimant testified that on the date of injury he fell 60 feet from a beam where he had been standing and bolting beams. Claimant recalled falling against other beams on his way down and landing on one foot on the walkway at which point he passed out. When he regained consciousness he found himself in intensive care at St. Vincent Hospital. [Memorandum from defendant-employer documenting this incident corroborates claimant's testimony. (Claimant's exhibit 5.)]

Upon cross-examination claimant testified that he was in a car accident about one year before the 1977 work injury and in another car accident the summer after the work injury. He admitted not telling his doctors about either of these incidents.

A summary sheet signed by John J. Dougherty, M.D., and regarding claimant's January 14, 1977 to February 1, 1977 hospitalization describes claimant's injuries and the treatment administered.

> The above patient was admit-d [sic] to the hospital on 1-14-77 after having fallen at Ebasco. the [sic] patient had multiple fractured ribs on the left with a flail chest and a hemopneumothorax, also comminuted fracture midshaft right femur and a mild scoliosis to the left in the dorsal spine with contusion and sprain of the dorsolumbar spine and atelectasis left lung.
>
> He was seen in consultation by Dr. Atash. The patient was initially taken to surgery and a reduction was carried out of the fractured femur and pin in the proximal tibia. He was placed in balanced skeletal traction. Dr. Atash felt that he might very well have a ruptured diaphragm on the left and therefore he was taken to surgery and a traceostomy was carried out; however, no ruptured diaphragm was seen. He was also seen in consultation by Dr. Wassmuth necause [sic] of his difficulty with his lungs. He had bleeding and subsequently bronchoscopic aspiration of the chest.
>
> He was on crutches and dismissed on February 7, 1977 to be followed in the office.
>
> FINAL DIAGNOSIS:
>
> 1. Comminuted displaced fracture midshaft right femur with marked contusions and abrasions, multiple fractured ribs on the left with flail chest and hemopneumothorax.
>
> 2. Scoliosis to the right in the dorsal spine with contusions and abrasions of the back and atalectasis of the left lung. [Claimant's exhibit 8.]

Claimant was also seen by Dale R. Wassmuth, M.D., and D. O. Wright, M.D., for consultation. (Claimant's exhibit 8.)

Claimant testified that he lived at his mother's house for about two and one-half months after his release from the hospital so she could care for him while he recuperated. (Another employee told him nursing expenses ran between $10 to $15 per day.) Claimant recalled that he was on crutches or used a cane for four or five months. He related that his side, ribs, back and leg pain eased somewhat after two months but he was unable to walk two miles. He was depressed and frustrated over being unable to walk or work. Presently he thought his leg was still in poor condition but felt he was getting better mentally. However, he thought it might help him to see a psychiatrist.

As of March 7, 1977 Dr. Dougherty notes claimant is doing well and anticipates a year for recovery. (Claimant's exhibit 6, #2; defendants' exhibit A, #16.) When Dr. Dougherty saw the claimant on September 6, 1977 he reported:

> * * * The patient returns at this time saying he has some discomfort in his knee and his hip. The knee brace that I had previously ordered for him helped him. His back bothers him.
>
> The patient walks with somewhat of a limp on the right. He remains tender over the greater trochanter. Lying down his right leg seems a little shorter than that of the left but minimal. His knee has full extension. He is better with the brace. He flexes it about 80 degrees. There is a little laxity of the anterior posterior instability and his medial collateral ligaments is a little lax and he is a little tender medially and laterally.

Now the thing he does complain of is in his back and his knee bothers him. Also, as I mentioned above, his hip. Now I informed him that once his femur is solid, after probably about a year, we can consider taking the intermedullary nail out. He has some laxity of the ligaments of his right knee which gives him some discomfort. At the time I last saw him he was to return to see me in three weeks, after being placed on the exercises and range of motion to his right knee. I did discuss the possibility of reconstruction of his medial collateral ligament.

I think he did injure his ligaments in his knee when he fell but because of the comminuted fracture of the femur it is difficult to evaluate along with his other injury. He is better with a brace. I do feel that if he wishes to go ahead we should probably consider a reconstructive surgery on his knee in an effort to tighten up the ligament. I do not know if the patient does his exercises. The patient is a little angry individual. I think he wants to be as perfect as he was before he fell and with the the injuries that he had he will never be that way. [Claimant's exhibit 6, #4 (second entry); defendants' exhibit A, #14.]

In a letter dated December 12, 1977 Dr. Dougherty comments that the claimant probably will have more back problems if required to do much heavy lifting and excessive bending. He favored vocational rehabilitation for the claimant as long as such limitations were taken into consideration. (Claimant's exhibit 6, #5; defendants' exhibit A, #13.) When Dr. Dougherty saw the claimant on April 5, 1979 the claimant reported he had been, but was not presently, working. (Upon cross-examination claimant denied telling Dr. Dougherty he had been working.) Claimant complained of knee and leg weakness and discomfort above the great trochanter on the left. Dr. Dougherty's examination revealed:

After his last visit he walks pretty good. He tends to be a little bit bow legged. Squatting bothered his knee. He also had some scabs over his knee, when he reported he fell. His knee flexes 90 plus 20. He has full extension. He still has some laxity of the medical collateral ligament. He did not seem to have any particular anterior-posterior instability. I could not get any definite clicking. He was a little tender over the lateral aspect of the patella. Abduction of his hip was quite good but this gave him a little discomfort. He did not seem to have a flexion contracture. External rotation was a little decreased in the hip and internal rotation was decreased. He was a little tender over the greater trochanter. His back was a little tender in the mid-dorsal area in the left. He bends quite well with some discomfort and extension gives him some discomfort. He did not seem tender over the fracture site.

His x-rays of his dorsal spine showed a mild scoliosis in the lower dorsal spine and it appeared that he now had some calcification in the left at D-9-10, with some narrowing of the D-6-7 disc space.

Dr. Dougherty opined that the claimant:

....probably sustained some injury to the lower dorsal spine. Some of his kyphosis, however, is felt maybe to be on the basis of an epiphysitis. He does have some calcification lateral of his patella. His joint spaces looked okay. He does have some calcification around the upper end of the intermedullary nail.

He detailed his recommendations to the claimant:

The problem was discussed with Mr. St. Cyr, Jr. and I advised him I did not think I had anything to suggest with reference to his back except a good exercise program. I advised him that we could take the intermeduallary nail out of his femur and probably try to resect the calcification at the upper end of the nail at that time. We could also explore his knee with the idea of removing the calcification laterally of his patella and if he wished we could attempt to tighten up his medial collateral ligament but I could not guarantee him that this would be perfect, and I am sure it would not be. I would leave this up to the patient, as to what his desires were. [Claimant's exhibit 6, #8; defendants' exhibit A, #9.]

When Dr. Dougherty saw the claimant on October 18, 1979 the claimant was complaining of discomfort in the scar from prior surgery by Dr. Atash. Dr. Dougherty told the claimant to consult Dr. Atash regarding this matter. At that time Dr. Dougherty scheduled the claimant for surgery the following month. (Claimant's exhibit 6, #10; defendants' exhibit A, #7.) A summary sheet from the Marion Health Center, St. Vincent Unit, signed by Dr. Dougherty, concerns claimant's November 7 to November 12, 1979 hospitalization:

The aboved patient was admitted to the hospital 11-7-79. This patient had previously had a fracture of the right femur which is now healed with a marked amount of heterotopic bone. He also has some laxity of the medial collateral ligament, right knee.

The problem was discussed with the patient and advised that we could attempt to reconstruct the ligaments of his right knee, however we could not really guarantee him that we could get them an awful lot tighter than they are now. The patient therefore elected not to have this done.

The patient was taken to surgery, however, and had removal of the heterotopic bone around the upper end of the intermedullary nail and removal of the intermedullary nail.

Postoperatively, he is getting along satisfactorily. He was dismissed on 11-12-79 to be followed in the office.

FINAL DIAGNOSIS:

Previous fracture right femur. Previous intermedullary nailing. Healed with some restriction of motion of the right hip and marked amount of heterotopic bone of the right hip. Laxity medial collateral ligament, right knee. [Claimant's exhibit 8.]

In a letter dated December 6, 1979 Dr. Dougherty reports seeing the claimant in a followup office visit on November 17, 1979:

* * * He is getting along pretty well. He was using a cane but he was walking quite well. His sutures were removed and he was advised to return to see me in two weeks.

* * *

I think we should wait and see how he gets along before we dismiss him. He did mention that he may possibly have surgery at a later date on his knee but I really question if he is going to go for this. When he returns the next time, if I feel he has reached his maximum improvement and he does not want any surgery on the knee, then we will give you a disability rating. [Claimant's exhibit 6, #11; defendants' exhibit A, #6.]

Dr. Dougherty again saw the claimant on December 10, 1979 at which time the claimant reported a swelling that Dr. Dougherty assessed as a superficial skin infection. On January 8, 1980 claimant related that his knee was more bothersome and his hip was sore. Dr. Dougherty determined the hip was "doing okay" and scheduled an arthrogram of the knee. (Claimant's exhibit 6, #12; defendants exhibit A, #5.] (Throughout Dr. Dougherty's reports there are numerous references to claimant failing to keep appointments. He likewise failed to appear for the arthrogram. Claimant testified that he had difficulty communicating with Dr. Dougherty.)

In a letter dated March 26, 1980 Dr. Dougherty reports seeing the claimant on February 28, 1980 at which time his findings were essentially unchanged. He noted the claimant had not yet consulted Dr. Atash regarding his abnormal scar discomfort. (Claimant's exhibit 6, #13; defendants' exhibit A, #4.)

In a letter dated May 28, 1980 Dr. Dougherty addresses the difficulty he has had in accomplishing claimant's recovery:

As I have conveyed to you in previous letters, this patient comes and goes, sort of haphazardly. In other words you see him one time, you suggest something and then you do not hear from him again for four to six months.

It certainly would be my opinion this patient could get back to doing something. I think the arthrogram would be interesting but if he does not show up for it, then I would see no reason why we should not get the arthrogram and then sit down and discuss surgery, whether he wants to or not. I think if we could get him back to work without the surgery and see how he gets along, that would be an approach and if he did not, then consider the surgery. Or if he feels he can't get back to work, then I think we should pursue the surgery and see how he gets along. But as I have mentioned, he comes and goes so rarely that you never know what he is doing in the meantime. [Claimant's exhibit 6, #15; defendants exhibit A, #2.]

In a letter dated August 7, 1980 Dr. Dougherty notes the claimant did undergo an arthrogram which was determined to be normal. He saw the claimant on July 15, 1980 and again recommended reconstructive surgery to the claimant. (Claimant's exhibit 6, #18; defendants exhibit B, #2.) On August 21, 1980 claimant advised Dr. Dougherty that he did not wish to pursue surgery. Thereupon, Dr. Dougherty assessed the claimant's position:

Since the patient has elected not to go ahead with the surgery, then it would be my opinion he probably is entitled to approximately 30% permanent partial disability with reference to his leg. With regard to his back, he really has not mentioned anything about his back lately and I have not specifically asked him on his last visits. It would be my opinion he is probably entitled to some permanent partial disability there also, would feel it is probably in the neighborhood of 5% of his body. Thirty percent of his leg would extrapolate to approximately twelve percent of his body, making a total of around seventeen percent of his body. [Claimant's exhibit 6, #19; defendants' exhibit B, #3.]

In a letter dated December 3, 1980 Dr. Dougherty explains that when he last saw the claimant—the July 15, 1980 office visit—it was his opinion that there was nothing else to offer the claimant but surgical intervention and without that occurrence claimant had reached maximum recovery as of July 15, 1980. (Claimant's exhibit 6, #20.)

Manou C. Atash, M.D., reports on his involvement in this case in a letter dated May 5, 1980:

I saw Leo St. Cyr at St. Vincents' hospital in November 12, 1979, upon Dr. Dougherty [sic] request for evaluation of pain and bulging mass in the region of previous abdominal incision, through which the patient had an exploratory laperotomy on January 14, 1977 for his work related fall.

At the hospital since he was in traction it was quite difficult to evaluate his condition and he was again seen in the office 4-10-80 and it was noted that he has pain and some tenderness in his incision with a possible small defect (ventral incision hernia) specifically he complained of protusion of a bulging mass on and off in this region. I have asked him to

wear an abdominal support and I hope this will help him. He has been told if this does not help he may have to have exploration and repair of this defect. [Claimant's exhibit 6, #14; defendants' exhibit A, #3.)

Dr. Atash saw the claimant again on June 9, 1980 at which time the claimant reported that the abodominal support Dr. Atash had given him alleviated the pain in the incision. Dr. Atash could find no defect in the incision but noted that the claimant had done no lifting, pushing, or pulling because of his knee condition, and thus it was difficult to predict if claimant would have a recurrence abdominal scar pain upon heavy lifting or exertion. However, he concluded, "considering his past history of incisional pain, I doubt that this man will ever be able to do a [sic] very heavy work as he has done in the past." (Claimant's exhibit 6, #17; defendants' exhibit A, #1.) Finally, in a letter dated November 20, 1980 Dr. Atash opines that claimant has sustained "about 20% permanent disability" as a result of the 1977 work injury. (Claimant's exhibit 6, #20.)

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 Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

Thirty year old claimant has a high school education and work history including selling shoes (last two years of high school), meatcutting and construction work (including being a common laborer and then advancing to ironworker). Claimant explained that before he went into ironwork he took meatcutting courses at Western Tech but did not pursue that line of employment because he did not like the work and the pay was not high enough. He worked on an ironworker permit for three to four years and then began his apprenticeship. Claimant testified that he would have been a journeyman by now. He had been earning $9.31 an hour at the time of the injury. Claimant stated that he would have been earing $13.42 an hour today. He indicated that such jobs require both high and low work and heavy lifting.

Claimant testified that he has not worked since the date of injury. He explained that he has not attempted to locate employment because it was his understanding he should not do so while receiving workers' compensation benefits. Claimant was of the opinion that although he did not know what work to look into now, anyone can find a job and he would begin searching in the near future. He did not think he could return to ironwork because of the excessive weight lifting required. He has not tried to lift anything too heavy and did not think his knee would permit it. Claimant also noted that whereas being up high never bothered him before the date of injury, he did not think he could tolerate similar heights today.

Claimant testified that he wears the abdominal support at times but is more comfortable without it. He also wears the knee brace. He does not wish to pursue reconstructive surgery on his knee because Dr. Dougherty cannot guarantee the knee would be better after the operation. He has not taken any medication for pain or as a sleeping aid since September 1977.

Upon cross-examination claimant testified that he also did some farm work when he was a youth. He recalled working for Iowa Beef Processors for six months to a year at $3.86 an hour. Claimant also remembers that he received special training in ironwork at Iowa Western Tech three months every winter (two nights a week) for three years prior to the date of injury. The classes entailed learning how to read blue prints and mastering welding skills. He has no carpentry or electrical training.

Claimant testified upon further cross-examination that he has not attempted any lawnmowing or shoveling. He does some bicycling and plays softball. He presently does not have a chauffeur license but does know how to drive.

Cross-examination regarding the claimant's involvement in a February 1980 incident in which the gun he was handling went off and in a September 1980 episode in which he cut his nose when he ran into a glass window or door at a residence in South Sioux City was unclear at best. The claimant disputed any altercation in the prior matter and confused the latter occurrence with a car accident. He denied suffering any concussion. He was treated by Dr. Atash in the latter matter.

Defense witness, Donald E. Vander Vegt, C.R.C., director of rehabilitation at Crawford Rehabilitation Service, who has testified at a number of previous workers' compensation hearings, was present in the courtroom during claimants' testimony and testified he had examined the exhibits and pleadings. Vander Vegt did not recommend claimant return to ironwork. He opined that claimant could be employed in sales, meatcutting and light-medium welding. He testified that a boner salary was in the $6 to $8 per hour range and meatcutting in a food store chain would earn between $9 to $12 per hour. Vander Vegt noted that claimant's pre-injury access to the work force (using a base of 60,000) was 35.18 percent and his post-injury access was 25.41 percent.

Upon cross-examination Vander Vegt admitted that he first saw the claimant at the hearing and that talking to an individual is usually helpful in evaluating a particular case. He agreed that when he actually works on placing a particular person in the labor force he tries to avoid work they would not want to do. He further acknowledged that a good personality has an impact on employability but emphasized that such factor was not conclusive in and of itself. He had no opinion on claimant's potential for salesmanship success.

Upon redirect-examination Vander Vegt pointed out that talking to an individual is important in the context of an off-the-street client. However, all the information he would have obtained in an interview was disclosed during the course of the hearing. From the claimant's history and the record as he heard and reviewed them, he thought that the claimant appeared to be reluctant to return to work.

Upon further cross-examination he testified that it was more difficult to place a person with a serious injury and loss of income in the labor force. Upon further redirect examination Vander Vegt qualified that claimant could pursue various jobs.

Claimant's loss of earning capacity as a result of the

January 14, 1977 work injury is determined to be 40 percent. Claimant suffered severe injuries in his long fall on the date of injury. Although the ratings of permanent impairment are not excessive, the doctors agree that claimant's lifting and bending abilities have been affected and should be limited to avoid further injury. Even if claimant could perform the heavy labor entailed in ironwork, he understandably is fearful of heights and accordingly is unable to perform certain job assignments. The vocational rehabilitation expert did not recommend a return to such work. One area of concern in rating claimant's loss of earning capacity is his motivation. He has not attempted to return to work because he thought he was not supposed to do so while receiving workers' compensation benefits. Whereas the undersigned normally would be skeptical about such explanation, the claimant's further testimony that anyone can find a job and he would begin looking in the near future offset some of the negativism. In summary claimant's attitude is neither that of a malingerer nor that of a person eager to return to work. As the vocational expert testified, there are potential areas of employment for the claimant to pursue—whether he likes particular fields is not crucial in assessing his loss of earning capacity.

Parenthetically, it is noted that defense counsel argued that Dr. Atash's rating of 20 percent impairment should not be given much weight because he did not indicate what the 20 percent concerned nor whether the subsequent nonwork incident was taken into consideration. However, review of Dr. Atash's reports reveals that he specifically attributed the 20 percent to the work injury and he was treating the claimant for the body as a whole, not the extremity, problems.

Claimant has not returned to work. Termination of his healing period depends on when he recuperated. According to Industrial Commissioner Rule 500—8.3, recuperation is a medical determination that no further improvement is anticipated or that the claimant is capable of returning to work substantially similar to that in which he was engaged on the date of injury. Only the former determination of recuperation applies in the present case. Although Dr. Dougherty indicated claimant could get back to doing "something" in May 1980, he at no time suggested claimant could return to the same work he was doing on the date of injury. Defendants began paying claimant permanent partial disability benefits on May 5, 1980. Citing *Robert L. Frank v. Ebasco Services, Inc. and United Fidelity & Guaranty Company*, Review-Reopening Decision filed January 29, 1980 (see also Appeal Decision filed January 9, 1981). Defense counsel argued that claimant's delay in deciding whether to pursue surgery recommended by Dr. Dougherty delayed the termination of healing period. Although claimant's failure to keep his appointments is not condoned, his apprehension at pursuing further surgery is not unreasonable in light of what he suffered in the fall and subsequent course of treatment. Furthermore, whereas the undersigned otherwise would prefer to agree with the defendants' determination of a May 5, 1980 changeover date because of the claimant's seeming reluctance to see Dr. Dougherty, nevertheless the record clearly indicates that Dr. Dougherty did not make a medical determination regarding maximum recovery until July 15, 1980. Nor can it be overlooked that the claimant did undergo the arthrogram sometime between May and July 1980 (claimant's exhibit 6, #11; defendants exhibit A, #6).

WHEREFORE, it is hereby found for all the reasons stated above that claimant has sustained his burden of proving that as a result of the January 14, 1977 work injury, he is forty (40) percent industrially disabled. It is further found that claimant's healing period extended from the date of injury to July 15, 1980, the date Dr. Dougherty determined the claimant reached maximum recovery. In light of the determination that claimant's healing period extended to July 15, 1980, defense counsel's arguments with regard to credit for overpayment of such benefits need not be addressed. However, the agency policy on such matter has been set forth in *Ardith Caputo v. Unified Concern for Children*, Appeal Decision filed August 29, 1980.

With regard to the medical bill and mileage figures offered at the time of the hearing (claimant's exhibits 7 and 9), it is hereby found that such expenses are contemplated by Code section 85.27. Claimant's request for reimbursement for nursing services provided by his mother likewise comes within the purview of Code section 85.27. It is apparent that claimant either would have had to remain hospitalized or would have had to hire someone to care for him for the two and one-half (2½) month period he stayed with his mother. Sixty dollars ($60) a week will be allowed based on an informal review of some other cases entailing similar expense.

* * *

Signed and filed this 24th day of February, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

STEVEN W. SABASTA,

Claimant,

vs.

GEORGE H. WENTZ, INC., d/b/a WENTZ PLUMBING & HEATING CO.,

Employer,

and

THE ST. PAUL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed December 22, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse arbitration decision.

. . .

The decision of the hearing deputy is affirmed, with the following amplification.

Defendants' appeal brief gives a good statement of the case:

> The employee, Steven W. Sabasta, hereinafter referred to as employee, is a resident of Sioux City, Iowa. On April 26, 1979, he sustained an injury while working in the course of his employment in Sioux Falls, South Dakota. He had been hired on the job site.
>
> The defendant-employer, George H. Wentz, Inc., is a Nebraska corporation with its principal place of business in Lincoln, Nebraska. The employer has no registered agent for service of process in Iowa. The employer conducted no business in Iowa.

The hearing deputy determined that under §85.71, the industrial commissioner had "in rem" jurisdiction and under §17A.12 had personal jurisdiction. Based upon this interpretation and the facts of the case, he awarded certain compensation benefits.

Section 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.

Section 17A.12 provides that personal service can be accomplished by use of certified mail, which method was used by claimant in this case.

Defendants ask that the hearing deputy's decision be reversed for the following reasons:

> 1. Under Iowa Law, personal jurisdiction must be premised upon a statute which authorizes exercise of jurisdiction and such exercise of jurisdiction must be consistent with the due process principles embodied in the United States Constitution.
>
> 2. Personal jurisdiction over this employer cannot be justified under the due process requirements set out in *International Shoe* and its progency.
>
> 3. The defendant, employer, had no reason to anticipate being made subject to the laws of this state.
>
> 4. The fact that the court possesses subject matter jurisdiction upon the court.

The first three arguments are constitutional in nature, and the industrial commissioner has no power to interpret the constitutionally as it affects the workers' compensation statutes. To do so would be to question the *raison d' etre* of the workers' compensation law. "Agencies cannot decide issues of statutory validity." *Salisbury Laboratories v. Iowa, etc.*, 276 N.W.2d 830, 836 (Iowa, 1979). "An agency may not finally decide the limits of its statutory power." *Social Security Board v. Nierotko*, 326 U.S. 358, 369 (1964).

Therefore, no decision will be made on the constitutional arguments.

Under argument 4, defendants concede that §85.71(1) gives the industrial commissioner subject matter jurisdiction for an out-of-state injury but claim that the statute does not confer in personam jurisdiction. Defendants' brief is well-argued, and the authorities are persuasive, yet Iowa's statute appears to be unique. It flatly states that an employee who is injured out-of-state "shall be entitled to.... benefits... if he is domiciled in this state." There are no exceptions stated. The plain meaning, then, is that the statute applies outside Iowa's borders and that jurisdiction must therefore extend in personam as well as to subject matter.

The following finding of fact is based verbatim with minor modification on the pre-hearing stipulation filed July 16, 1980. Finding number 2 is different in that 44 5/7 weeks is one day longer than recited in the stipulation.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. Claimant, Steven W. Sabasta, sustained a personal injury arising out of and in the course of his employment by employer at Sioux Falls, South Dakota, on April 26, 1979.

2. By reason of the personal injury on April 26, 1979, claimant was temporarily totally disabled from April 27, 1979 through March 4, 1980 inclusive, a period of forty-four and five-sevenths (44 5/7) weeks. Claimant attained maximum medical recovery on March 5, 1980.

3. By reason of the personal injury sustained on April 27, 1979, claimant has no permanent partial disability or permanent impairment of his leg or any other portion of his body as of July, 1980.

4. The claimant's average gross weekly wage is the sum of four hundred fifty-six and 00/100 dollar ($456.00) per week. In the event claimant was entitled to temporary total disability benefits pursuant to the provisions of the Iowa Act, the rate would be the sum of two hundred sixty-five and 00/100 dollars ($265.00) per week.

5. Employer, George H. Wentz, Inc., is a Nebraska corporation with its principal place of business at 2949 Cornhusker Highway, Lincoln, Nebraska. Employer had no registered agent for service of process in Iowa as of April 26, 1979. Employer had not engaged in any construction projects within the boundaries of the state of Iowa during the five year period prior to April 26, 1979. No services were performed for employer by claimant within the state of Iowa.

6. On April 26, 1979, The St. Paul Insurance Company was the workers' compensation insurance carrier for employer. The claim of Steven W. Sabasta for workers' compensation benefits was submitted to the St. Paul Insurance Company. The claim was accepted under the provisions of the Nebraska Workmen's Compensation Act. No documents were filed with the Iowa Industrial Commissioner. No payments were made to Steven W. Sabasta under the provisions of the Iowa Workers' Compensation Act.

7. No memorandum of agreement has been filed with the Iowa Industrial Commissioner.

8. Pursuant to the provisions of the Nebraska Workmen's Compensation Act, employer and insurance carrier paid to claimant temporary total disability benefits at the rate of one hundred fifty-five and 00/100 dollars ($155.00) per week for a period of forty-five (45) weeks. All hospitals and medical expense incurred to date for treatment of the personal injury has been paid by employer and insurance carrier.

THEREFORE, defendants are hereby ordered to pay compensation benefits unto claimant for a period of forty-four and five-sevenths (44 5/7) weeks for temporary total disability, accrued payments to be made in a lump sum together with statutory interest, less a credit for those amounts paid for this claim under the Nebraska Workmen's Compensation law.

* * *

Signed and filed at Des Moines, Iowa this 17th day of February, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

CLARENCE SCHEPERS, (Dec.), JEAN SCHEPERS AND CHILDREN,

Claimants,

vs.

HRJ and KIMBALL INTERNATIONAL INC.,

Employer,
Defendant.

This is a proceeding in arbitration brought by Jean Schepers and children, against HRJ and Kimball International, Inc., employer, for death benefits as the result of the death of claimant's husband, Clarence Schepers, on March 17, 1978.

This case is being submitted on a stipulated record which is set out, in full, as follows:

In an effort to resolve this case in the most timely and efficient manner possible and due to the fact that most issues are not disputed, the parties hereby agree to the following:

1. This case may be decided by the Deputy Industrial Commissioner upon the facts and issues set forth in this stipulation.

2. On March 17, 1978, Clarence Schepers died in Council Bluffs, Pottawattamie County, Iowa, as a result of a severed spinal cord resulting from a tractor-trailer collision with another tractor-trailer on Interstate 29 near Council Bluffs, Iowa.

3. The death of Clarence Schepers occurred while he was in the process of delivering pianos for his employers and his death arose out of and in the course of employment.

4. If Mr. Clarence Schepers' family is entitled to workers' compensation death benefits, the rate of compensation is $247.00 per week.

5. Mr. Clarence Schepers was an over-the-road truck driver for HRJ and Kimball International, Inc., at the time of his death. During the course of his trip prior to the accident causing his death, he had delivered pianos to another destination in Iowa and was proceeding in Iowa towards Omaha, Nebraska, to make another delivery.

6. HRJ and Kimball International, Inc., do business in the State of Iowa including selling their products and making deliveries of their product in Iowa. Furthermore, they regularly travel through Iowa to make deliveries in other states.

7. It was a regular part of Clarence Schepers' duties while in the employment of HRJ and Kimball International Inc., to make deliveries in Iowa for his employers and to travel through Iowa to make deliveries in other states for his employers.

8. At the time of Mr. Schepers' death, the following children were dependents and those same children continue to be dependents of Mrs. Jean Schepers: Glen Schepers, born March 1, 1962; Donna Schepers, born January 22, 1963; Bruce Schepers, born November 15, 1965. Jean Schepers, wife of Clarence Schepers, has not remarried since the death of her husband.

9. At the time of his death, Clarence Schepers was married to Jean Schepers who currently has custody of the children listed above.

10. If the Deputy Industrial Commissioner determines that the claimants are entitled to benefits under the Iowa law, then the defendants are entitled to a credit against said award for all payments made for workers' compensation benefits under Indiana law excluding burial benefits which are not being claimed in this case for that reason.

11. Due to the fact that the above and foregoing facts have been stipulated to, it is further agreed that the only issue in this case is whether or not the Iowa Industrial Commissioner has subject matter jurisdiction of this case.

The above stipulation was filed on October 16, 1980.

Applicable Law

The first paragraph of section 85.3(2), Code of Iowa, states:

> 2. 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.

Analysis

As indicated in paragraphs number 11 of the stipulation, the only issue before the undersigned is the jurisdiction of the industrial commissioner. As disclosed by the law previously stated, the Iowa industrial commissioner has jurisdiction over injuries to employees of nonresident employers where the injury occurs in Iowa and arises out of and in the course of the employee's employment.

Findings of Fact

THEREFORE, defendant is to pay unto Mrs. Jean Schepers, death benefits at a rate of two hundred forty-seven dollars ($247.00) per week from the date of decedent's death for the period of her entitlement pursuant to section 85.31, Code of Iowa.

Defendant is to be given credit for the death benefits paid under the laws of the state of Indiana.

Costs are taxed to defendant.

Interest is to accrue pursuant to section 85.30, Code of Iowa.

Defendant is to file a final report upon completion of payments.

. . .

Signed and filed this 30th day of October, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

ALFRED W. SCHOENBORN,

Claimant,

vs.

EBASCO SERVICES, INC.,

Employer,

and

U.S.F. & G.,

Insurance Carrier,
Defendants.

Decision on Motion for Summary Judgment

On August 1, 1980 claimant filed a petition in review-reopening against Ebasco Services, employer, and U.S.F. & G., insurance carrier, defendants, for recovery of further benefits as a result of an injury on October 16, 1978. On January 19, 1981 defendants filed a motion for summary judgment which was resisted by claimant. On April 14,

1981 a hearing on defendants' motion for summary judgment was held before the undersigned and the issue was considered fully submitted at the conclusion of the hearing.

Issue

The only issue to be decided at this time is whether defendants are entitled to summary judgment.

Facts

For the purposes of this decision, the following are the only facts necessary to recite. On October 16, 1978 claimant received an injury arising out of and in the course of his employment with defendant. A memorandum of agreement was filed by defendants on November 27, 1978. On August 13, 1979 claimant had a second injury while working for Hydaker Wheatlake Company. On August 1, 1980 claimant filed his petition which commenced this action. On November 18, 1980 a hearing was held in the state of Michigan to determine if claimant was entitled to any benefits for his August 13, 1979 injury. On January 13, 1981 a decision in the Michigan case was mailed out. The Michigan decision has been appealed.

Applicable Law

A party is entitled to summary judgment only if he can show an absence of any genuine issue as to any material fact. IRCP 237, *Daboll v. Hoden*, 222 N.W.2d 727 (Iowa 1974). The burden of showing the absence of any genuine issue of any material fact is upon the person moving for summary judgment while the evidence is used in the light most favorable to the other party. *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976); *Davis v. Comito*, 204 N.W.2d 607 (Iowa 1973).

Analysis

Defendants' motion for summary judgment must fail because it is obvious that there are many issues that are unresolved. A reading of defendants' answer shows that they have denied most of the allegations as set out in claimant's petition. As disclosed by page 5 of claimant's exhibit 1, the Michigan Court knew of this action pending in Iowa and the Michigan decision did not determine the extent of disability from claimant's injury of October 16, 1978. Although the sworn testimony of claimant may be used as evidence to show he is not entitled to any further benefits under the October 16, 1978 injury, it does not stop him from making his allegations which he has the burden of proving.

Findings of Fact

WHEREFORE, defendants' motion for summary judgment is denied.

* * *

Signed and filed this 27th day of April, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DIANNE C. SCHOTANUS,

Claimant,

vs.

COMMAND HYDRAULICS, INC.,

Employer,

and

FIREMAN'S FUND INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Dianne C. Schotanus, the claimant, against her employer, Command Hydraulics, Inc., and the insurance carrier, Fireman's Fund Insurance Co., to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury she sustained on March 7, 1980. This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office, in Des Moines, Iowa, on February 12, 1981. The record was considered fully submitted at that time.

* * *

The parties stipulated that the claimant had been off work from March 12, 1980 until the time of hearing; that the medical bills submitted in claimant's exhibit 22 were fair and reasonable; and that the claimant was entitled to one exemption. No stipulation was entered as to the rate of compensation.

The issues to be considered here are whether or not there is a causal relationship between the claimant's injury and her resulting disability, the proper rate of compensation in the event benefits are awarded, whether or not the claimant is entitled to reimbursement for medical expenses and mileage, whether or not the defendants properly terminated benefits under the *Auxier* case, and whether or not defendants' direct letter contact with Dr. Laaveg was improper.

Thirty year old divorced claimant testified that she quit high school in the second semester of her senior year. She has subsequently attended technical school where she obtained training as a machinist, production worker and blueprint reader. She listed her work experience as that of a waitress, nurse's aide, motel maid, farm laborer, welder, drill press operator, and finisher-framer.

Command Hydraulics, defendant-employer where claimant was employed through job services, was a new company; and claimant's work, initially done alone, involved building and setting up tables and machinery in preparation for the time when the plant would begin operation. Later, Walter Cash was hired and supervision was provided by Doug Curtis. In regard to her work record, claimant admitted she had received a warning regarding tardiness which occurred after she had a discussion with a union representative. She asserted that tardiness was not a problem at the time she received the warning.

Claimant, who denied having back pain, having seen a doctor, being x-rayed, taking tablets to dissolve calcium deposits, or having a back problem or disease including arthritis prior to March 7, 1980, recounted the following medical history: a broken left arm at age nine, pulled ligaments in her ankle at age twelve, a Cesarean section in 1968, a broken nose in 1975, an injury to her chest in 1977 with a remaining scar, and thumb surgery in 1979. Claimant acknowledged that prior to commencing work for defendant-employer, she suffered a bruised arm at the hand of Patrick Wallace, the man with whom she resides, and that on February 20, 1980 she and Wallace had screamed to each other and she had been slapped on the left side of her face and had received a black eye. She rejected the suggestion that she had been pushed down or kicked by Wallace or by anyone else at any other time.

Claimant stated that on March 7, 1980 she picked up Dawn Janeka. When she arrived at work, the parking lot and walk were ice covered. The two walked to the employee's entrance. When they discovered it was locked, they proceeded toward the main door. On the way to that door, claimant fell. She asserted that she fell with feet and arms in the air, hit her lower back and right hip, and experienced extreme immediate pain in her lower back on the right. She was helped up by Janeka. She reported her fall to Bill Cory, punched in, "sort of" worked by leaning on the drill press and asked for aspirins. Claimant asserted that she complained of pain to others at work and that her condition remained the same. When she got home, she complained to Wallace, using a heating pad, took aspirin, and stayed off her feet for the weekend. She did not seek medical treatment.

On Monday she returned to work and also worked on Tuesday. On that day she discussed seeing a doctor with her foreman, Doug Curtis. She said that she called Dr. Berge the following day. Claimant got excuses from Dr. Berge which she said she took to her bosses. Eventually Dr. Berge arranged for her to see Dr. Laaveg who hospitalized her. She testified that her symptoms, in addition to back pain, included pressure with her menstrual periods, a fainting episode, and a feeling of faintness which passed.

Claimant claimed that her condition remained the same after hospitalization and that in June she discussed a release to return to work with Dr. Laaveg as she was concerned about the security of her job and also about the company which she described as a small company which needed help. She testified that she got a release on June 24, 1980 which she presented to Doug Curtis at her employer's on July 7, 1980. She said that she was told there was nothing for her to do and that she asked if that meant she was fired. She later talked to Rudolph Hermann who also said there was no work. Claimant, who had received unemployment benefits for a brief period prior to the March 7, 1980 incident, reported getting a total of $185 in unemployment benefits which were paid at a rate of $37 a week. Although claimant felt she was getting worse, she applied for work with various companies for jobs she considered light in nature such as secretary and checkout person with an intent that if a job were offered, she would take it; however, she did not know if in reality she could do the work.

In August claimant was hospitalized and treated conservatively. She was released from the hospital with a number of restrictions. She continued to see Dr. Laaveg whom she said would not release her to return to work. Claimant enumerated her present complaints as pressure in her lower back which had been worse on the right but was beginning to bother her on the left, increased pressure in the right leg which she described as "solidness" and "immobility," pressure in the right knee which causes an aching, menstrual problems, and muscle spasms in the back leading to headaches. She spoke of being bothered by cold weather, sitting, riding in cars, and walking distances. She said she presently is taking ten to twelve Ascriptin a day and Talwin on bad days and does twenty minutes of exercise each hour. She asserted that she has had no back injuries since March 7, 1980.

Patrick Wallace, who has resided with claimant for two years, testified he was unaware of her having any back problems prior to her fall on March 7, 1980. On the weekend following the incident, he observed pain in claimant's facial expression; he saw her stiff walk; he heard her complaints of pain; and he noted that she was unable to engage in normal activities. He reported that claimant's activity level has decreased; that she has difficulty either sitting or standing; and that he now assists her with household tasks such as cooking, cleaning, and moving furniture. In regard to claimant's fainting episode, he recalled the claimant calling his name, running to the kitchen, seeing the claimant fall, and catching her in midair. While he acknowledged slapping claimant in the face in February of 1980, he denied ever kicking or hitting her in the low back or knocking, pushing, or throwing her down. Neither was he aware of anyone else's having kicked or hit claimant in her back or having knocked, pushed, or thrown her down. He also denied the Thomas machine shop incident which was described by a subsequent witness as a time when claimant was working closely with a co-employee at the company's temporary quarters. The two were surprised by Wallace who was allegedly angry.

Dawn Janeka, a co-employee, who knew claimant socially and through riding to work with her and who voluntarily quit her job with defendant, testified that she was walking beside claimant when claimant fell and landed on her elbows and mid-back. As Janeka remembered, claimant whom she said she would not characterize as a complainer, complained of her elbows hurting on the day of her fall and only later complained of back problems. She did not recollect any complaints of back pain prior to the fall, but she thought claimant had a black eye in January of 1980. Although she had no first hand knowledge of the claimant's being kicked, she stated she had been told by claimant that Wallace hit her and she had seen bruises on claimant and a lump behind the ear. In addition to Janeka's testimony at the hearing, her statement to the insurance carrier was also placed in evidence. Janeka claimed at that time that claimant did not complain of pain until she went to the doctor a week to a week and a half after the incident. Janeka stated, "she [claimant] got a boyfriend that likes to hit her," but she was unable to be specific about incidents or injuries other than claimant's black eye.

Walter Bill Cash, a co-employee, observed claimant's fall from about 70 feet away and remembered claimant's feet flying from under her, her hands going down to catch herself, and her landing on her seat. He did not believe claimant had mentioned her back hurting prior to March of 1980 other than to comment on the routine stiffness and soreness typical of workers. The witness did not talk to claimant on a one to one basis after the incident and did not work directly with her; however, he overheard her remarks to others that she was stiff and sore. He testified in regard to the incident at the Thomas machine shop that claimant went outside with Wallace and returned with a welt behind the ear. He said he later was told by claimant that she had been kicked.

Rudolph Hermann, principal stockholder, president of defendant-employer, and custodian of defendant-employer's records, who had not been involved in personnel work prior to his work for defendant-employer, testified regarding claimant's pay records. He agreed with claimant that tardiness was not a problem at the time the written warning was formalized. He acknowledge the company had been lax in failing to give claimant a written warning regarding tardiness; however, it wanted to establish policies. He denied direct knowledge of claimant's discussion of unionization with her co-employees. He reported counseling claimant regarding problems with Wallace and suggesting a social worker.

Hermann stated that the last contact with claimant was March 25, 1980 at which time she said she would be seeing Dr. Laaveg on April 22, 1980. He said that claimant's case was the company's first experience with an employee being off work for an extended period of time, that he assumed office responsibility for the handling of the injury, and that he had been in contact on multiple occasions with the insurance carrier and John Engelke regarding handling of the claim. He claimed that he had not contacted claimant because he felt her situation was better handled by the insurance company. The witness disclosed his involvement in not rehiring claimant based on a clause in the employer's handbook relating to voluntary quits. He acknowledged knowing that claimant was going to the doctor in April and that prior to that time a determination was made that claimant voluntarily quit. He expressed the opinion that the company believed it had given claimant the benefit of the doubt and believed that a strict interpretation of the report in procedure described in the handbook was called for. Claimant's position subsequently was filled.

Dr. Berge, of General Medicine Associates, was the first physician from whom the claimant sought treatment following her fall. On March 12, 1980 he excused her from work from March 12 to March 16. On March 18, 1980 he extended the excuse for another week; and on March 25, 1980 he lengthened the allowed period "until after report from orthopedic surgeon." In a letter to the insurance carrier dated April 11, 1980, Dr. Berge wrote that the claimant with no previous history of low back problem had "considerable muscle spasms in her lower back paraspinal muscle mass"; localized, reproducible pain in her right sacroiliac joint; equal, symmetrical, normal deep tendon reflexes; a positive straight leg raising sign which cleared; a positive Fabere-Patrick sign; no neurological deficit; and normal lumbosacral spine x-rays. He reported that claimant was taking analgesics and muscle relaxants and that her range of motion had improved and her "overall amount of pain" had lessened.

The claimant was admitted to St. Joseph Mercy Hospital on April 28, 1980 by Dr. Laaveg, orthopedic surgeon. In addition to back symptoms, claimant described an incident in which she passed out and a similar episode which eased when she sat down. Prior to the hospital admission during an examination on April 22, 1980, Dr. Laaveg found tenderness at the right posterior superior iliac crest and at L4-5 and L5-S1. Straight leg was down. A lumbosacral spine series was interpreted by Paul W. Morgan, M.D., as revealing moderate disc space narrowing at the lumbosacral junction. Dr. Morgan's impression was localized degenerative disc disease. Dr. Laaveg's assessment was "[a]cute musculoskeletal low back pain of a sprain variety as an exacerbation of previously existing degenerative disc disease at L5-S1 unknown to the patient."

In the course of claimant's hospitalization, an electroencephalogram was done on April 30, 1980 and declared normal by Sant M. S. Hayreh, M.D. A Minnesota Multiphasic Personality Inventory Test was also undertaken which was interpreted as normal in later notes from Dr. Laaveg and in his report to the insurance carrier on June 6, 1980. A complete blood count, urinalysis, slide test for veneral disease and surgical panel were normal except for a "slightly low serum total protein of 6.0 grams percent." Claimant was given Williams' exercises, heat treatment and physical therapy. The claimant was discharged on May 2, 1980 with diagnoses of "[m]usculoskeletal back sprain chronic with mild mechanical pain" and "dizzy spells secondary to fainting." Claimant was given a prescription for Darvocet N and instructed not to work and to limit her activity.

Talwin was prescribed by Dr. Laaveg for claimant on May 23, 1980 and again on May 27, 1980. Dr. Laaveg's

notes of June 24, 1980 indicate the claimant's concern at that time.

> She is concerned about loosing [sic] her job stating that they have no light work for her. We have told her employer that as of 7-7-80 she can return to work lifting no greater than 15-20 lbs. with no prolonged standing, repeated bending or twisting. On 8-11-80 she can return to full labor.

The doctor assessed the claimant's condition as improving. Although she could flex 70° and had a negative straight leg raising test, she had a positive clinical instability test at L4-5.

Claimant called Dr. Laaveg on July 10, 1980 for a refill of her Talwin prescription. In a letter to claimant's attorney, dated July 16, 1980, the doctor wrote:

> Mrs. Schotanus has not recovered fully from her injury. It is not unusual to take up to a year to completely resolve such symptoms although a shorter time period may be required. It is too early to make a permanent partial impairment rating. I would say maximum improvement in her physical condition would be between 6 months and 12 months.

When claimant saw her physician on July 31, 1980, he found her pain improving, but she continued to have symptoms with activity and tenderness at L5-S1, to require Talwin, and to remain under work restrictions.

Dr. Laaveg's notes of August 13, 1980 record a history of increasing low back pain radiating down the right leg and into the ankle over the prior week and a half. The doctor observed the claimant stand forward flexed about 30° with a slight list to the left. Claimant flexed at approximately 45°; straight leg raising was positive on the right at 50°; and plantar responses were down. The doctor suspected a right L4-5 or L5-S1 disc herniation and admitted the claimant to North Iowa Medical Center where a myelogram, a complete blood count, a sedimentation rate, a urinalysis, a cerebral spinal fluid count, and a chest x-ray were all normal. Claimant was treated conservatively and sent home for total bed rest for a week to be followed by a walking program with utilization of a lumbrosacral corset and use of Ascriptin and Talwin. His diagnosis was mechanical low back pain with acute exacerbation.

A September 15, 1980 letter from Dr. Laaveg to claimant's attorney projected as uncertain the claimant's return to mechanical labor. His examination on September 23, 1980 revealed continuing low back pain with radiation into the thighs. He renewed claimant's Talwin prescription and continued her salicylates. A subsequent letter to claimant's attorney, dated October 2, 1980, reasserted claimant's inability to perform manual labor due to the instability of a disc and stated that "speculating on a final assessment at this time is inappropriate."

On November 25, 1980 claimant returned to Dr. Laaveg complaining of pain. The doctor reported forward flexion at 40°, inability to reverse the lumbar lordosis, tenderness to palpation at L4-5 and L5-S1, positive clinical instability at L5-S1, negative straight leg raising, and mild pain and discomfort on compression of the pelvis at the right sacroiliac joint. X-ray of her right hip was normal. The physician's impression remained degenerative disc disease at L5-S1 which precluded the claimant's performing "any type of labor." Claimant's medication was changed and a trial of a TENS unit, which she did not find helpful, was initiated.

Dr. Laaveg's letter of January 5, 1981 stated that the claimant was unable to return to any work, that surgery was not indicated, and that an assessment of permanency would not be appropriate until one year after the injury.

Dr. Walker saw claimant apparently at the request of her attorney and reported his findings in a letter dated November 10, 1980. The doctor writes of eliciting pain, a positive straight-leg raising test bilaterally, and positive Lasegue and Flip signs bilaterally. X-rays showed definite narrowing at the fifth lumbar disc. Dr. Walker stated that claimants' "present complaints and problems are directly caused by the fall of March 7, 1980," and that claimant is still in a healing phase requiring treatment and surgery. He believed that claimant had a herniated disc and a rather "rather markedly symptomatic sacroiliac sprain."

Dr. Andre, neurosurgeon, saw claimant at defendants' request. In a letter dated January 23, 1981, Dr. Andre recounted his review of information and stated that he has performed a "comprehensive examination." He expressed his opinion that the claimant's x-rays and myelogram and suggested electromyography and epidural venography.

The first issue to be addressed is whether or not there is a causal relationship between the claimant's injury and her resulting disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 7, 1980 is the cause of the 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 expert medical evidence must be considered with all other evidence introduced bearing on the causal relationship between the injury and the disability. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W.2d 732 (1956). 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).

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).

The claimant specifically denied back pain, having seen a doctor for her back, having been x-rayed, or having a back problem or disease including arthritis prior to March 7, 1980. Nothing in the medical history to which she testified indicated prior back trouble. Defendants attempted to establish that the claimant suffered injury at the hands of Wallace or some other person. The claimant acknowledged bruises on her arm and a black eye. She denied injury to her back by Wallace or any other person. Wallace's testimony supported hers. The testimony of Janeka and Cash was equivocal and does not establish an injury to claimant's back from a source other than her parking lot fall.

Dr. Laaveg's initial assessment was "[a]cute musculoskeletal low back pain of a spasm variety as an exacerbation or previously existing degenerative disc disease at L5-S1 unknown to the patient." More recently on October 2, 1980 Dr. Laaveg wrote that the claimant's back problem "is directly related to her fall while entering the building at work." The doctor's letter of January 5, 1981 indicates the claimant remains in a state of healing unable to return to any work. Dr. Walker, who recorded a history consistent with that in the medical evidence and who had reviewed the claimant's myelogram, stated that the claimant's "present complaints and problems are directly caused by the fall of March 7, 1980," and that claimant is still in a healing phase which requires treatment and surgery. Dr. Andre found the claimant's condition stable, but he proposed reviewing the claimant's x-rays and myelogram, and suggested electromyography and an epidural venography. While Dr. Andre's report was considered, it was deficient in failing to identify the information he reviewed in assessing the claimant's status and in failing to provide a history or physical findings. No evidence supports a conclusion that an aggravation or reinjury occurred subsequent to March 7, 1980. The claimant has established by a preponderance of the evidence that the injury of March 7, 1980 is the cause of the disability on which she now bases her claim.

Claimant has complained of menstrual difficulties. One history indicates edometritis and another records "cramping kidney problems low back." In appears claimant had a period during her August hospitalization; however, nothing in this evidence shows any gynecological investigation to determine whether or not genitourinary problems are contributing to claimant's disability.

Defendants argue that where an employee has returned to work or alleged an ability to return to work, that employee is not entitled to workers' compensation benefits. This deputy industrial commissioner agrees that a person who is receiving unemployment compensation certifies readiness, willingness and an ability to work; and the claimant did so attest at the time she received benefits. However, the undersigned is equally convinced that the claimant's medical condition in the period from July 7, 1970 to August 13, 1980 was not such that she would have been able to work. Her testimony was that she sought a release and about the fledgling company which she believed needed her help. She testified that during this time period her condition was worsening. The medical evidence shows that on July 10, 1980 she sought a refill of her Talwin prescription. On July 16, 1980, Dr. Laaveg wrote that the claimant had not fully recovered. When he saw her on July 31, 1980 he found her pain decreasing; however, she continued to have symptoms with activity to experience tenderness at L5-S1, and to require Talwin. The claimant's receipt of unemployment benefits does not preclude her receiving workers' compensation benefits in this case.

The second issue to be dealt with here is the rate of compensation to which the claimant is entitled. Briefs by the parties indicate their agreement that section 85.36(6) of the Iowa Code is the section to be applied. That section provides:

> 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 or in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Claimant testified her starting wage was was $4.10 an hour. It was increased after a 90 day probationary period to $4.35 per hour. The first unnumbered paragraph of section 85.36 mandates a determination of earnings to which an employee "would have been entitled had he worked the customary hours for the full pay period in which he was injured..." The claimant's earning record shows a number of weeks which cannot be included in a 13 week period in that they contain absences. The hourly rate was established through claimant's testimony, defendants' exhibits and the employee handbook. The following weeks and amounts have been used:

DATES	NUMBER OF HOURS	AMOUNT OF EARNINGS
March 3-7	40	$174.00
February 25-29	36.5	$158.78
February 18-22	44	$191.40
February 11-15	43	$187.05
February 4-8	40	$164.00
January 21-25	39.5	$161.95
January 7-11	36	$147.60
December 31-January 4	40	$164.00
December 17-21	40	$164.00
December 10-14	34.5	$141.45
December 3-7	36	$147.60
November 26-30	40	$164.00
November 19-23	37.5	$153.75

The claimant's total earnings for the 13 week period were $2,119.58. A gross weekly wage of $163.04461 is obtained, rounded to the nearest dollar is $163. The parties agree the unmarried claimant is entitled to a single exemption. Based on earnings of $163 per week the claiamnt's weekly rate of entitlement is found to be $100.59.

The third issue relates to medical expenses and mileage.Iowa Code section 85.27 provides, in part, that: "[t]he employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services." The parties stipulated to the fairness of the medicl expenses incurred by the claimant. The claimant is entitled to the mileage expenses to which she testified and to the medical expenses set out in claimant's exhibit 22 with the exception of $6, the total amount for two guest trays during her hospitalization.

The fourth issue to be considered is whether or not the claimant was deprived of due process of law by failure of her employer or its representative to provide her with notices required by *Auxier v. Woodward State Hospital*, 266 N.W.2d 139 (Iowa 1978). Defendants argue that the due process requirements applicable to state employees do not apply to employers in the private sector. This agency has applied *Auxier* to private employers. One of the holdings in *Auxier* at page 142 was that "on the basis of fundamental fairness, due process demands that, prior to termination of workers' compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice..." The evidence shows that the claimant reported for work on July 7, 1980. At that time she presented a release from Dr. Laaveg which stated she could return to light work on that day. She clearly intended to attempt a return to work. Although this deputy industrial commissioner has found with the advantage of hindsight that claimant was incapable of working through the next several weeks, the circumstances encountered by the parties on July 7, 1980 did not necessitate the defendant-employer and insurance carrier providing the claimant with an *Auxier* notice.

Finally, the parties seek guidance in the practical application of Iowa Code section 85.27 and Industrial Commissioner Rule 500—4.18 to their case. Claimant complains of defendants' counsel's seeking direct contact through correspondence with claimant's treating physician rather than through cross-examination and formal deposition. The undersigned finds no impropriety in the conduct of defendants' attorney. Section 85.27 and Rules 4.17 and 4.18 consistently have been interpreted to allow accessibility to medical evidence. Section 85.27 specifically addresses this problem and states:

> [a]ny employee, employer, or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they have access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of such information. Such information shall be made available to any party or their attorney upon request. Any institution or person releasing such information to a party or their attorney shall not be liable criminally or for civil damages by reason of the release of such information. If release of information is refused the party requesting such information may apply to the industrial commissioner for relief. The information requested shall be submitted to the industrial commissioner who shall determine the relevance and materiality of the information to the claim and enter an order accordingly.

By filing her action the claimant has agreed to the release of information concerning her physical condition. Prohibiting defendants from contacting Dr. Laaveg in this situation would be particularly inappropriate as defendant authorized the treatment by Dr. Laaveg. The importance of all parties being aware of the claimant's condition cannot be overemphasized. Such communications are the stuff of which settlements are made.

It is in the interest of us all as consumers to reduce the cost of litigation in workers' compensation cases. Rule 4.18 attempts to do that by allowing the use of signed narrative reports. Such reports in many cases overcome the necessity of depositions which are costly in terms of recording and transcription costs and in terms of time consumed by attorneys and by physicians. Depositions also take more time for a hearing officer to evaluate and can be more confusing than a concise, well-written physician's report. However, nothing herein should be interpreted as foreclosing the taking of doctors' deposition in the proper circumstances. It is noted that included among claimant's exhibits is the letter defendants' counsel received in response to his inquiry.

WHEREFORE, it is found:

That claimant has sustained her burden of proving that the injury of March 7, 1980 is the cause of the disability on which she now bases her claim.

That the injury of March 7, 1980 caused temporary total disability which had not ceased at the time of hearing.

That the claimant is entitled to temporary total disability payments at a rate of one hundred and 59/100 dollars ($100.59) per week.

That the claimant is entitled to the medical expenses set out below.

That the claimant is entitled to mileage expenses.

That no *Auxier* notice was required at the time of termination of the claimant's benefits.

THEREFORE, it is ordered:

That defendants pay to claimant temporary total disability at a rate of one hundred and 59/100 dollars ($100.59) per week from March 7, 1980 until such time as her disability is ceased. In the event the parties are unable to agree to a time of cessation of the claimant's disability, a request for review-reopening should be filed.

* * *

Signed and filed this 20th day of March, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

RAYMOND P. SCHOTT,

Claimant,

vs.

TERSTEP COMPANY, INC.

Employer,

and

AMERICAN MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Raymond Schott, against Terstep Company, Inc., his employer, and American Mutual Insurance Company, the insurance carrier, which was heard in Davenport, Iowa on July 18, 1980 pursuant to the directions contained in a previous decision filed on August 31, 1979 by Iowa deputy industrial commissioner Lee Jackwig, which found, in part, as follows:

> 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 injury 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 Insurance Company*, Appeal Decisions filed January 31, 1979.

WHEREFORE, it is hereby found that the claimant sustained at least a twenty (20) to twenty-five (25) percent industrial disability to the body as a whole. Final determination of the industrial disability depends on the outcome of future psychiatric evaluation and treatment.

It is further found that the present record supports a finding that healing period terminated in October of 1978. In the event psychiatric care accomplishes further recuperation, this finding may have to be adjusted to comply with the facts of the case.

It is further found that Dr. Frogley's treatment was not authorized in accordance with Code Section 85.27. The only prescription bill that is unidentified appears in exhibit 5 and is from Haag Drug Store. The number does not compare with that for Dalmane as shown in exhibit 3. Furthermore, the statement indicates only that the prescription is for Schott and the other bills state the precriptions were for Raymond Schott.

THEREFORE, the defendants are ordered to hold open a tender of three (3) psychiatrists or psychiatric clinics for a period of sixty (60) days from the date of this decision within which time the claimant is to accept such tender. Claimant is forewarned that failure to pursue such care may enable defendants to contend that failure of complaint to accept appropriate and necessary care is reason for a suspension or a lessening of benefits. The merits of such argument will be determined if and when it is raised.

Treatment is to run for as long as is necessary. Reference to the opinion of the chosen psychiatrist or psychiatric clinic may be one way of determining such period. In the meantime, the defendants shall pay the claimant weekly permanent partial disability benefits at the rate of two-hundred twenty-eight dollars ($228) per week in accordance with the findings set forth above. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of the date following the last day claimant worked for defendant-employer, which the parties indicated was October 20, 1978.

At this point in time, claimant is entitled to a determination of healing period from the date of injury until June 22, 1978, the date he returned to work.

Defendants are entitled to credit for the amount of compensation previously paid by them for this injury.

Compensation that has accrued to date shall be paid in a lump sum.

Defendants are further ordered to pay unto claimant the following medical expenses:

Exhibit 2, Mercy Hospital	$40.00
Exhibit 3, Haag Drug	5.49
Exhibit 4, Walgreen	19.38
Exhibit 5, Walgreen	6.46

When either party has evidence that either the claimant has achieved further maximum recovery from the psychiatric care, or that such care has not and will not be of further aid to the claimant, they are to submit the evidence to opposing counsel and to this office. If the parties are unable to reach an agreement as to the extent of any additional healing period and of the permanent partial disability, they shall request a hearing on those issues.

Following the above mandate, the parties submitted the uncontroverted medical evidentiary deposition of Patrick G. Campbell, M.D., claimant's treating psychiatrist.

Dr. Campbell saw the claimant on numerous occasions during the fall of 1979 and reported his findings. Concerning claimant's condition he testified as follows (deposition, page 9, line 11):

Q. After having seen him these several times, was Mr. Schott's condition any different on the last visit, November 8, than it had been when you saw him first on September 20?

A. Yes. I think his condition would vary from, you know, session to session. He would come in on one occasion, he would look pretty good. He wasn't very tense, he wasn't complaining of symptoms. He was going to try to make a job effort. There would be a lot of potential. It was almost like you were talking to a different person. He was going to do this, this looks like the best course, and he's feeling pretty good. But, then, he'd come in the next time, be altogether different. He would have a lot of pain, a lot of discomfort, a lot of complaining, a lot of hopelessness and frustration. So he would change from time to time.

The doctor further testified as follows (deposition, page 10, line 8):

Q. What was his condition, situation on the last date that you saw him in November.

A. This was what I felt had been reasonable effort with him, this number of sessions over this period of time to see if we couldn't deal with what appeared to be some of the unconscious lack of motivation or other feelings. No matter what we did in the brief times when he did seem to have some optimism or some determination, some motivation despite those little brief episodes, I just felt that he couldn't do it. And he felt the same way. He couldn't bring himself to do it. He couldn't—you know, things that we could do. We could consider using medications, we could consider going into the hospital. He couldn't bring himself to make that much of an effort in a direction that consciously—he really felt that he couldn't do it. No amount of clarification on my part or efforts toward clarification of one kind or another was not helpful to him. He really didn't feel that he could do it, that he could work, that he could understand the emotional nature of his problem, so forth.

Again, in the deposition at page 12, line 3, we find the following dialogue:

Q. For the purpose of the Industrial Commissioner did you at that time or do you now recommend any further treatment for Mr. Schott?

A. Well, he has a nervous problem. That is what we were dealing with. And, you know, I think any person with a nervous problem ought to have treatment available. I don't mean force him into it. He knew that when he was last here, that I'd be very glad to see him, to help him with his problem. So I feel at this time if he still has the nervous problem, he ought to have treatment available to him. I don't know that it is proper to force him into a treatment, you know. He is not going to hurt anybody, or, you know, he doesn't fit into that category in the law where we should force him. But he should have it available if he still—and I suspect he is, because he's had a nervous difficulty for many years.

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 applying the foregoing legal principles to the case at hand it is clear that claimant's fall on September 14, 1977 has aggravated his preexisting nervous condition.

Dr. Campbell concluded that the claimant is incapable of performing any type of gainful employment (deposition, page 14, line 13):

A. The main thing he was complaining about—he had two sets of symptoms. We talked about that before. Assume his back pain, he'd get this back pain, and it would spread to his hips and his arms and his shoulders, and he would become very exhausted. He was unable to sit, and his difficulty would occur

at different intervals under almost any kind of stress. I would suspect if you offered him a job where all you had to do was sit down in a chair, writing telephone numbers, he would have to go home, possibly, because of the development of pain and all the disability that goes with it. But, in addition to that, he has the problem with the anxiety and phobias. Now, these anxiety attacks that he has. And they would occur at different frequency under different circumstances, and with these two sets of symptoms, he just never followed through. This was apparent too when he was coming in. He went out to the Job Services, and he would go down to the union hall, and he would be feeling pretty good about the whole thing. But, then, 48 hours later, he would be very uneasy, with some anxiety symptoms, and without almost any provocation, a number of pain complaints, and the whole thing is off.

The doctor concluded that the claimant has made a "very good effort" to attempt reentry into the job market (deposition, page 17, line 7) and that the industrial injury under review aggravated his previous problem (deposition, page 19, line 5). It is apparent that the claimant is and will remain incapable of performing acts of gainful employment in the foreseeable future.

WHEREFORE, after having seen the witness and taking all of the credible evidence contained in this record into account, the following findings of fact are made:

1. That the claimant had a preexisting condition of anxiety and phobia.

2. That claimant sustained an admitted industrial injury on September 14, 1977 and that said injury has aggravated claimant's preexisting condition.

3. That said aggravation has rendered the claimant incapable of performing any acts of gainful employment.

* * *

Signed and filed this 4th day of November, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

GARY SCHRAGE,

Claimant,

vs.

JIMMY DEAN MEAT COMPANY

Employer,

and

FIREMAN'S FUND INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Gary Schrage, the claimant, against his employer, Jimmy Dean Meat Company, and the insurance carrier, Fireman's Fund Insurance Companies, defendants, to recover compensation under the Iowa Workers' Compensation Act by virtue of an alleged injury on August 19, 1980.

The issues to be resolved here are whether or not the claimant received an injury arising out of and in the course of his employment and whether or not there is a causal relationship between the alleged injury and the disability.

Claimant testified he commenced work for defendant-employer on August 12, 1980 at a boning table. On August 19, 1980 he started working at 7:00 a.m. on the high stand cutting meat off the backbone. This continuous process entailed standing on a platform five feet off the floor, leaning over a waist high railing to the area of his ankles depending on the length of the pig, using a knife in the right hand to slice down the backbone, and throwing the portion removed on a table. The claimant estimated the bone would weigh from 25 to 35 pounds. While he had someone working with him for a brief time, he asserted that at least nine hours of his day's work was done alone. He began experiencing pain in the anal area in the afternoon, but he continued to work until 5:00 p.m. He attempted to find the nurse and the foreman, but both had left. He was then taken by Rodney Basset to see Allen Williams whom he said told him to go to the hospital. Subsequent to surgery the claimant returned with defendant-employer.

Prior to working for defendant-employer claimant worked for another meat packer hanging hooks in a semi-trailer on which carcasses were hung. Claimant claimed he had done "everything in the plant" during his 20 years of employment for that packer. He asserted that none of his jobs had required lifting or straining while bending. In response to questioning regarding his work as a beef carrier, he said that he performed that job early in his employment and that no bending or stooping was necessary. Other jobs done included breaking up beef, beef ribbing and loading box beef. He said that he had done no job for his former employer like those he was

performing on August 19. He left that packing plant job on July 1, 1979. In the interim between July 1, 1979 and his beginning work for defendant-employer, he reported making hay, riding horses, and chasing cattle on his 80 acre farm, and taking a vacation. Claimant also had worked 25 years ago as a truck driver.

Claimant, who denied any previous problems with hemorrhoids, said that he had experienced itching in the anal area, but he had never sought medical treatment and he had not had itching while he was working for defendant-employer. He denied use of preparations or ointments. His remedy was to scratch. He said he had not observed any bumps, lumps or loose skin in the anal region. He denied problems with straining, urgency, constipation, use of laxatives, bleeding or prostate problems.

Craig Stephenson, supervisor of the boning table for defendant-employer, testified that claimant's description of the job he was doing was essentially correct; however, in preparation for hearing he had weighed backbones and found them weighing between 15 and 20 pounds. He acknowledged they could weigh up to 25 pounds depending on the size of the hog and who was doing the deboning. Stephenson said it was his practice to assign a partner to a new employee on the high stand. The two would alternate cuts on a line running at 85 hogs per hour pace.

Allen J. Williams, office manager for defendant-employer, testified that claimant started work on probation in the boning department on Wednesday, August 13, 1980. He recalled talking to claimant on August 19, 1980; however, he stated that he did not tell claimant to go to the hospital, but rather to get the care necessary and to report to his supervisor the next day. He recollected being told by claimant of itching and a lump which the claimant felt was a hemorrhoid.

Nursing notes show the claimant was admitted to the hospital at 6:20 p.m. with complaints of hemorrhoid trouble. A hemorrhoid was lanced in the emergency room. Less than 24 hours later the notes show the claimant denied a need for pain medication. The following day he was given an injection for pain. Later in the day he described his pain as tolerable.

Dr. McMillan's testimony was presented through his deposition and a letter. The doctor, who is a board certified family practitioner and who first saw claimant at the hospital, agreed with a history taken by a Dr. Sullivan that claimant had a preexisting hemorrhoid condition which quite possibly could have taken a number of years to develop. He acknowledged that itching is a symptom of hemorroids. His recollection of claimant's case was vivid as he thought it "about as bad a case of prolapsed hemorrhoids as you see in a routine general practice; severe prolapsed, thrombosed hemorrhoids." he said the combination of prolapse and thrombosis was responsible for claimant's severe pain. As to whether or not the prolapse or thrombosis came on during the six days claimant was employed by defendant-employer, he said:

> I do not know for certain that the prolapse didn't exist prior to the employment.
>
> Now, the thrombosed hemorrhoids certainly did not because they are excruciatingly painful, and it had to occur during the course of employment. There is a vague possibility that he attempted to work with the prolapse. I couldn't have done it, and most people couldn't; but maybe he did try. I could not really say the prolapse came on acutely during the course of that employment. I suspect that, but I don't really know that.

He further stated that "certainly the thrombosis occurred suddenly, and I feel that the prolapse well may have. I am frankly not positive on that point." When asked to render an opinion with a reasonable degree of medical certainty, he said, "I think it's reasonable to think that it did occur within a short period of time, because as serious as it was, I don't feel the man could have worked with his rectum in that condition. So somewhat from the assertion by saying, "[i]f he had a job that required little physical stress for the five days prior to the acute onset, he might have worked with a mild degree of prolapse." He did not feel that the prolapse and thrombosis had occurred simultaneously in claimant's case. In any event, Dr. McMillan believed that "certainly the majority of the condition had to occur during a very short span of time, perhaps even during the last day... I could not say he didn't have some degree of prolapse and work at a light job with it."

It was the doctor's understanding that claimant did "hard, manual labor... [which he] considered to mean lifting, bending, stooping, heavy work." Dr. McMillan acknowledged that over a long period such work could produce a hemorrhoid condition. Regarding the issue of causation the physician responded as follows:

> Q. Can you tell whether the prolapse portion of this problem was indeed caused by his six days of employment at Jimmy Dean, and his one day of nine and a half hours standing on a rack cutting back bones and bending over—leaning over a rail?
>
> A. No, sir, I couldn't honestly say that it was caused by that day's employment. It very well may have occurred during that day's employment.
>
> Q. Do you have an opinion as to whether the thrombosis portion of the problem was caused by that particular work, including that particular day?
>
> A. Well, again, the preexisting hemorrhoids were certainly present, and they can thrombose at any time. However, we have found that they most often do thrombose following aggravation, such as heavy lifting, riding in a truck all day long, this type of thing.

In a letter to claimant's counsel dated November 10, 1980, Dr. McMillan wrote: "It is my opinion that there is no question that his employment, which consists of heavy manual labor, caused the condition. Also, there is no question that the condition of hemorrhoids was aggravated by lifting and straining at work." The doctor asserted that surgery was a necessity for claimant, not an elective procedure. The doctor agreed that claimant would have recovered quickly if he had only the thrombosis and not the prolapse. However, he said:

> But in this case, with the preexisting—or with the prolapse, as I saw it, I didn't think that he could ever return to work with medical treatment, not surgical—
>
> I shouldn't say "to work." I should say to hard, manual labor.

Dr. McMillan's operation record reveals that a left lateral hemorrhoid and a right posterior hemorrhoid were removed. The right anterior hemorrhoid was not removed. The pathology report gives the opinion of D. W. Poweres, M.D., which was "[l]arge extensively thrombosed with degeneration and inflammation, hemorrhoidal veins.

On January 5, 1981 claimant was seen by Robert B. Stickler, M.D., board certified general surgeon, who wrote in a letter dated January 27, 1981 that claimant "had varicose veins or hemorrhoids about the anus for some time but until 8/19/80 he had never experienced a thrombosis which created much pain and swelling and took him to the hospital..."

He continued:

> it [the thrombosis] would be a complication of hemorrhoids, probably contributed to by his work and would be originally taken care of by the company although his employment there has been a very shor [sic] time. The rest of my conclusion would be that the responsibility for hemorrhoids would be no part of the companies [sic] obligation for it is not expected that pre-existing conditions would be cared for by a new company until a reasonable period of employment would be completed."

Dr. Stickler was deposed. He testified from his examination of claimant, his review of the hospital notes and a letter from Dr. McMillan. The doctor assumed claimant had hemorrhoids for a "long period of time." He said hemorrhoids are "not an acute rapidly developing disease at all" and "could possibly" result from the work activity. Dr. Stickler described claimant as "a pretty tough hombre" who would not complain. He also provided a description of the hemorrhoids:

> I look on hemorrhoids as the varicose veins of the anus, and there is a slipping in and out of this area, and that's why one of the symptoms is leakage and irritation, because the mucus isn't contained well within the anal canal, and that's why protrusion is a problem. After a BM, people then have to learn to tuck the veins back up, after the bowel movement, and why it's not unusual to have bleeding and bright red blood in the stool or on the toilet tissue. Those are disturbing symptoms. Blood is really scary.
>
> Then as one of these old veins hangs out there, it gets clotted, and that in itself is a bit discomforting, but by the time there is a bacteria getting into this area within just a few hours, it becomes exceedingly painful. It's like a young boil. The ultimate result of that would be more swelling, more pain and more infection, until this would be, as a boil, extruded from the body as a boil would rupture, but that might take many days.
>
> Some of them are able to control this infection by their own natural immunities towards bacteria, and they only become painful and swollen early on, and after about three or four days begins to subside, leaving a clot and a scar within that veining; and after the first three or four days, generally we don't even do anything for them. It will just subside on their own, leaving a little bump or a little tag there after.
>
> But that which presents acutely are, for the most part, treated by at least simple opening and release of the clot.

A considerable portion of the doctor's deposition was devoted to discussion of whether or not the hemorrhoidectomy was necessary. Dr. Strickler proposed that release of pressure in the thrombosed hemorrhoid would be accepted treatment. Subsequent to the release and through employment of medication and sitz baths, the pain would subside. Although the surgeon seemed to have some doubt as to the necessity of a hemorrhoidectomy after lancing of a thrombosed hemorrhoid in most cases, he acknowledged deference to the opinion of the treating physician. He responded thusly:

> Q. If Mr. Schrage and his attending physicians were under the assumption that he would continue to do the heavy labor and physical exertion that he had been doing, which he thought at the time caused or contributed to his condition, would it have been, in the exercise of your medical judgment, a wise medical decision to perform the hemorroidectomy?
>
> A. I think it's very logical. I would not hesitate, if a man had huge veins, he had a thrombosed hemorrhoid, to say, "I don't want any more of this," then to get the hemorrhoids out.

As to the complication suffered by claimant post-surgery, he said, "I think you'd consider that to be an expected complication on a certain number of people,...."

In order to receive compensation for an injury, an employee must establish that the injury arose of of and in the course of employment. Both conditions must exist. *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402 N.W.2d 63 (1955).

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.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "in the course of" relates to time, place, 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 may be performing his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *McClure v. Union, et al., Counties*, 188 N.W.2d 283 (Iowa 1971).

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

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

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, comtemplated by the Iowa Workers' 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, interrputs, or destroys some function of the body, or otherwise damages or injures a part or all of the body. * * * *

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

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

Claimant testified he was working on the high stand when he began to experience anal pain. He was clearly within the course of his employment.

The testimony from both Dr. Stickler and Dr. McMillan also supports a finding that claimant's thrombosed hemorrhoids arose out of his employment. It is less certain that the prolapsed portion of his problem arose out of his employment. An award of benefits cannot stand on a showing of a mere possibility of a causal connection between the injury and the claimant's employment. An award can be sustained if the causal connection is not only possible but fairly probable. *Nellis v. Quealy*, 237 Iowa 507, 21 N.W.2d 584 (1946). 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 evidence must be based on more than mere speculation, conjecture and surmise. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W. 732 (1956). The opinions of experts need not be couched in definite, positive, or unequivocal language. *Dickinson v. Mailliard*, 175 N.W.2d 588 (Iowa 1970). Greater difference is ordinarily given opinion involving medical expertise. *Merchants v. SMB Stage Lines*, 172 N.W.2d 804 (Iowa 1969). The claimant's burden of proving an injury arising out of his employment is not discharged by creating an equipoise. A preponderance is required. *Volk v. International Harvester*, 252 Iowa 298, 106 N.W.2d 649 (1960). Expert medical evidence must be considered with all other evidence introduced bearing on causal connection. *Burt v. John Deere Waterloo Tractors Works, supra*. The totality of the evidence and particularly of Dr. McMillan's testimony combining thrombosis and prolapse to produce pain leads the undersigned to conclude that the prolapse arose out of claimant's employment as well.

This hearing officer has considered the perception of the doctors in regard to the work claimant was performing. While it can be argued that those perceptions are not entirely accurate, they are not found to be so inaccurate as to render their opinions invalid.

One of defendants' contentions appears to be that the hemorrhoid surgery would not have been necessary once the pressure of the thrombosed hemorrhoid was released. In his discussion of whether or not surgery was necessary, Dr. Stickler made assumptions regarding the procedure performed on claimant in the emergency room. What procedure was in fact performed was never clarified. It is clear that while claimant's pain eased following his admission it did not cease. Dr. Stickler accorded some deference to the treating physician and this deputy industrial commissioner does likewise in giving greater weight to Dr. McMillan's testimony. Dr. Stickler characterized claimant as a "tough hombre," and

that classification comports with the undersigned's impression. Dr. McMillan testified claimant's case was "bad," and he leaves little doubt as to the necessity of surgery.

As the necessity of hemorroidectomy has been established, only brief mention need be made of claimant's subsequent hospitalization for a complication which was described by Dr. Stickler as a fairly common occurrence. Claimant will be awared the expense for that hospital admission as well.

WHEREFORE, it is found:

That claimant suffered an injury arising out of and in the course of his employment on August 19, 1980.

That claimant is entitled to temporary total disability from August 20, 1980 through September 7, 1980.

That the proper rate of compensation is one hundred ninety-four and 93/100 dollars ($194.93) per week.

That claimant is entitled to medical expenses as a result of that injury.

* * *

Signed and filed this 17th day of April, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

JAMES E. SHEHAN,

Claimant,

vs.

ACE LINES, INCORPORATED,

Employer,

and

THE HARTFORD INSURANCE COMPANY

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a ruling filed December 5, 1980 pertaining to a portion of claimant's contested case proceeding filed September 18, 1980. Rule 4.2 of the industrial commissioner provides, in part, that "[i]f the order on the separate issue does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal." 500 I.A.C. §4.2(86). See *Frost v. S.S. Kresge Co.*, 299 N.W.2d 646, 647 (Iowa 1980).

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). The court pointed out that an appeal is proper only after a final judgment has been granted and 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." *Id.* at 40. In a recent decision, *Citizens State Bank of Corydon v. Central Savings Association*, 267 N.W. 2d 33 (Iowa 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." *Id.* at 34. 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. *Id.* at 34.

The ruling of the deputy that claimant, through his then counsel, had received proper notice of his termination of benefits is not dispositive of his right to any further benefits.

WHEREFORE, it is found that claimant's appeal from the ruling filed December 5, 1980 is interlocutory and should be dismissed.

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

* * *

Signed and filed this 9th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

HAZEL L. SHIPLEY,

Claimant,

vs.

BARKER PRODUCTS CORPS.,

Employer,

and

ST. PAUL INSURANCE,

Insurance Carrier,
Defendants.

This matter came on for hearing at the Wapello County Courthouse in Ottumwa, Iowa on August 20, 1980 and the record was closed on January 5, 1981.

No filings were made prior to the filing of the Original Notice and Petition. The record consists of the testimony of the claimant, Samuel Edward Shipley, and Regina T. Fellows; claimant's exhibits 1, 2, 3, and 4; defendants' exhibits A, B, C, and D; the deposition of John R. Schiebe, M.D.; a report of Dr. Scheibe dated September 24, 1980; and a report of Richard D. Breckenridge, D.O., dated October 9, 1980. The parties stipulated that the proper rate of compensation is $100.44 per week and that certain sums were paid pursuant to a group plan envisioned in Section 85.38, Code of Iowa.

The issues for determination are:

1. Did claimant sustain an injury arising out of and in the course of her employment?

2. Was timely notice given?

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

Claimant, age 56, was employed by defendant-employer on January 19 or 20, 1979. Although claimant testified that she sustained an injury on Saturday, January 20, 1979, the greater weight of evidence indicates that the relevant events occurred on Friday, January 19, 1979. Claimant was employed as a spot welder and fell in the employer's parking lot after she had finished work. She was assisted by a John Arnold, a co-employee, who drove her home. On the following day she had back pain and on Monday, January 22, 1979 she called Regina Fellows, a secretary for defendant-employer, to tell her that she was "sick." Claimant did not relate the incident described above, apparently because of her embarrassment. Later in the week, claimant informed Mrs. Fellows that she fell in the parking lot and Mrs. Fellows relayed this information to supervisory personnel.

Claimant initially sought medical treatment from Matthew A. Manning, D.O. who treated claimant with manipulative and medical therapy. When this treatment proved unsuccessful, claimant was admitted to the hospital on January 31, 1979. At its onset, the pain was acute, and it had become more severe. Claimant had pain on straight leg raising on the right and questionable contralateral straight leg raising sign. She had some weakness of the extensor hallus on the right. The initial impression was that claimant had acute lumboscral strain and sprain with radicular pain and a possible herniated lumbar disc. Claimant was placed on a regimen of lumbosacral traction, physical therapy and medication. X-ray examination of the lumbar spine demonstrated the vertebral bodies to be intact. Claimant was discharged on February 16, 1979. Claimant was seen by Donald D. Berg, M.D., an Ottumwa orthopedist, on March 13, 1979. Claimant's previous complaints of back and right leg and hip pain had improved. Dr. Berg recommended that claimant return to work on March 19, 1979 if she continued to do well. Claimant did not return to work, however. Dr. Berg felt claimant had intertrochanteric bursitis and/or synovitis. Claimant was then treated by Richard Breckenridge, D.O., an associate of Dr. Manning. He stated that claimant continued to have hip and leg pain and that he treated her on a monthly basis with anti-inflammatory and arthritic medicines.

On March 19, 1980 claimant was seen by Stephen R. Jarrett, M.D., who is associated with the Franciscan Hospital Rehabilitation Center in Rock Island, Illinois. At that time, claimant related that she had had a normal myelogram. She had chronic right lower back pain which she stated radiated down the posterior aspect of the right leg into her calf. Palpation of the lumbar and lumbrosacral spine failed to reveal any tenderness and produced no pain. She complained of pain on palpation of the right sacroiliac joint. There was no spasm. She forward-flexed to 80 degrees with good rounding of the back. Muscle strength evaluation by manual muscle testing was normal. She could toe and heel walk without difficulty. Sensory examination revealed hyposthesia diffusely throughout the right lower extremity to pin-prick and light touch when compared to the left. There was no dermatome pattern involved. Vibratory sensation was intact bilaterally. Straight leg raising was negative on the left and produced complaints of back pain on the right at 70 degrees, although claimant could fully extend the legs while sitting. X-rays of the lumbar spine and sacroliac joints revealed the lumbar spine to have a slight scoliosis with a right convexity. No interarticular defects were evidenced. Some arthritic lipping was seen on the vertebral margins. Arthritic reaction was seen about the articulations at the L-5 levels. The lumbosacral disc space was narrow. His impression was that claimant had lumbrosacral osteoarthritis. He recommended electromyographic examination and this was conducted on June 4, 1980. Her right lower extremity was tested with muscles sampled representing myotomes L3 to S2. All muscles revealed normal insertional activity, no denervation potentials, normal motor units and a normal recruitment pattern. The paraspinals on the right and left at L4 revealed 1+ positive sharp waves and on the right at L5 revealed 2+ positive sharp waves. His impression was that there was paraspinal denervation bilaterally. This may be secondary to arthritis, lumbar stenosis, or extruded nuclear material. The electromyogram was considered positive and Dr. Jarrett recommended myelography.

Claimant apparently did not have the myelogram and at the request of Dr. Manning or Breckenridge was referred to Gerald W. Howe, M.D., an Iowa City orthopedist. She saw Dr. Howe on July 7, 1980 and he examined claimant and repeated x-rays which showed enlarged facets and narrowing at the L5/S1 level. Because of the level of pain which she was experiencing, a lumbrosacral support was recommended. On her last visit to Dr. Breckenridge, claimant continued to have pain.

Claimant was examined by John R. Scheibe, M.D. on September 24, 1980. The following is a summary of the physical examination:

> PHYSICAL EXAMINATION: This 57 year old female person weighs 210 pounds, stands 65 3/4 inches tall with her shoes on. She walks without apparent disability. EENT: The special senses are well preserved. The patient is edentulous and has dentures. The neck is symmetrical. There is full range of motion of the cervical spine. The carotid pulses are palpable without bruits. Heart is normal in size, shape and position and without murmers. The blood pressure is 150/100 (patient takes Inderon daily for hypertension control). The breasts are without nodules. The lungs are clear anteriorly and posteriorly. The upper extremities have a full range of motion. The small and large joints appear normal. The abdomen is obese. The solid organs are not palpable. Pelvic examination is essentially normal for a person who is Para 5, Gravida 5. Examination of the lower extremities reveals equal lengths of 85 cm. from the anterior spine to the medial malleolus on either side. There is full range of motion of the small and large joints of the lower extremities. The ankle and knee reflexes are equal and active. The straight leg raising test is 90 degrees of flexion on the right before pain in the back occurs. There is some question as to decreased cutaneous sensation over the medial aspect of the right calf. The patient can stand on her toes and heels without apparent weakness. Standing nude, facing away from the writer the patient can squat down only with poor facility. There is full range of motion of the back in posterior extension, anterior flexion and lateral flexion without rotation. She can jump up and down in a clumsy fashion. She can stand on her heels and toes as mentioned above. X-ray examination reveals disc narrowing at L-5, S1 and some degenerative arthritis of the lumbosacral spine.

Dr. Scheibe reached the diagnoses of degenerative arthritis of the lumbosacral spine with disc narrowing of L-5, S-1 segments and residuals of back pain with radiation of pain into the right leg secondary to the injury. He considered claimant 100 percent disabled for heavy industrial work and further stated that claimant had permanent partial disability of 25 percent. None of the other physicians appeared to address the issue of permanency.

Claimant testified that she cannot do much of her housework and yard work. She does not participate in recreational activities to the extent that she did before her fall.

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).

Section 85.61, Code of Iowa, states:

> The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

In *Frost v. S.S. Kresge*, 299 N.W.2d 646 (Iowa 1980), the court stated that the Iowa Workers' Compensation Act provides coverage when the injury is closely connected in time, location, and employee usage to the work itself to entitle the claimant to coverage.

The injury here occurred on the premises as defined in Section 85.61(6), Code of Iowa, cited above. Therefore, it is found that claimant's injury arose in the course of her employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 19, 1979 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).

The medical evidence addresses the necessary causal connection to indicate that the injury arose out of the employment. All physicians trace the claimant's difficulties to the injury. The differences appear to be in degree. The fact remains, however, that claimant has not returned to gainful employment. Although Dr. Jarrett indicates that claimant could return to work after his March 19, 1980 examination, this conclusion was conditioned upon negative testing (electromyography) which subsequently was positive. He then recommended a myelogram. The evidence does not disclose whether this testing was conducted. Based upon this information, in addition to the evidence cited above, indicates that claimant has sustained her burden that the resultant condition is related to the injury. It is without question that claimant sustained an injury and that the resultant injury is permanent and to the body as a whole.

The problem for resolution is whether an award of permanency can be made at this time with the record as it now stands. Although Dr. Scheibe assigned a permanent partial disability, it is apparent that claimant's healing period has not ended since the testing recommended by Dr. Jarrett has not been conducted.

Defendants pled that claimant did not give proper notice pursuant to Section 85.23, Code of Iowa. This defense is without merit since claimant informed the witness, Fellows of the fall who in turn informed the supervisory personnel of the circumstances.

WHEREFORE, it is found:

1. That claimant was employed by defendant-employer on January 19, 1979.

2. That on that date, she sustained an injury arising out of and in the course of her employment, said injury being in the nature of a preexisting condition.

3. That said injury resulted in permanent partial disability to the body as a whole which is unable to be determined at this time.

4. That claimant should be paid healing period compensation until such time as she meets the test for cessation of healing period pursuant to Section 85.34(1), Code of Iowa.

THEREFORE, defendants are ordered to pay unto claimant healing period compensation commencing on January 20, 1979 at the rate of one hundred and 44/100 dollars ($100.44) per week until such time as claimant is no longer entitled to healing period compensation.

Defendants are to receive credit for group payments pursuant to Section 85.38, Code of Iowa.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Section 85.30, Code of Iowa.

Defendants are ordered to pay the following medical expense:

Dr. Scheibe	$296.00
Steindler Orthopedic Clinic	40.00
Towncrest X-ray Department	51.00

A final report shall be filed upon payment of this award. Costs are taxed to defendants.

* * *

Signed and filed this 13th day of March, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

EVELYN SICKLES PURDY,
Individually and as mother, Next Friend, and Natural Guardian of **DOUGLAS EDWARD SICKLES, JOYCE MARIE SICKLES, DUANE ERIC SICKLES, DALLAS IRVIN SICKLES** and **DEAN EVERETT SICKLES,**

Claimant,

vs.

ADAIR COUNTY & ADAIR COUNTY SUPERVISIORS,

Employer,

and

STATE AUTOMOBILE & CASUALTY UNDERWRITERS,

Insurance Carrier,
Defendants.

NUNC PRO TUNC ORDER

The appeal decison of March 26, 1981 contained an error in listing the parties claimant and contained some typographical errors on page 3.

That part of the caption listing the parties claimant of the appeal decision is hereby amended to read: "EVELYN SICKLES PURDY, Individually and as Mother, Next Friend, and Natural Guardian of DOUGLAS EDWARD SICKLES, JOYCE MARIE SICKLES, DUANE ERIC SICKLES, DALLAS IRVIN SICKLES, and DEAN EVERETT SICKLES."

On page three of the appeal decision, the portion under (a) should read: "although Dr. Raverby conceded that a cerebral accident could occur, he did not feel the evidence *warranted* that interpretation..." Portion (b) should read: "in Dr. McCormick's opinion, physical stress would not bring *on* a *hemorrhage*."

* * *

Signed and filed at Des Moines, Iowa this 8th day of April, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

EVELYN SICKLES PURDY,
Individually and as Mother,
Next Friend, and Natural
Guardian of **DOUGLAS EDWARD SICKLES, JOYCE MARIE SICKLES, DUANE ERIC SICKLES, DALLAS IRVIN SICKLES** and **DEAN EVERETT SICKLES,**

Claimant,

vs.

ADAIR COUNTY & ADAIR COUNTY SUPERVISIORS,

Employer,

and

STATE AUTOMOBILE & CASUALTY UNDERWRITERS,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed July 28, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code, to issue the final agency decision on appeal in this matter. Submission of the case for decision was delayed for some time because it was remanded to the hearing deputy for a more specific finding. That finding did not change the original decision, which was an arbitration award in favor of the claimant. Defendants appeal from the arbitration in claimant's favor.

* * *

The arbitration award in favor of claimant will be affirmed with the following amplification.

The issue is whether the employee's death was caused by an injury which arose out of and in the course of the employment. A second issue concerns the weight to be given to the expert testimony. Finally, claimant's exhibits 7 and 7A, which consisted of a cassette tape recording and typed transcripts were not admitted into the record by the hearing deputy., That ruling is specifically affirmed.

On November 28, 1975, Carl Sickles suffered a subarachnoid hemorrhage from which he died on December 14, 1975. The facts are well summarized in the hearing deputy's decision. However, it may be pointed out that Mr. Sickles worked for Adair County as a laborer. On November 28, 1975 part of the work involved cleaning a truck and getting it ready for the sander to be mounted. In that connection, a fellow worker, Ray Sorenson, testified as follows:

A. Well, he was just like me and all the rest of us. We just were standing up on the frame of the truck, you know, had the box straight up and hitting the bottom of it so the stuff would roll out the back.

Q. Do you get up in the box, too?

A. Well, we do after what won't come out, we get in there with a shovel and get in there but it's easiest to just raise the box up and hit the bottom of them and it jars it loose.

Q. What kind of a tool or an implement do you use.?

A. Just an old ax, an old single blade ax. We all have one in our trucks, every one of us. In the wintertime a rock freezes in the box and we have to beat it out every load (Sorenson Tr. pp. 6-7).

Further, Ray Stewart, another fellow worker, testified:

Q. Which of the boxes is it then that you would raise up and hit under?

A. The truck box, not the sander.

Q. When you would raise the truck box, does the person that is doing that then kind of get in under it?

A. Yes, usually.

Q. Is this easy work, hard work? How would you describe it?

A. Oh, I would say it's very strenuous work, that particular part of it.

Q. Is that work, is it strenuous enough that it's the kind of work that you had seen would cause Carl to have these problems with shortness of breath and so forth?

A. Very definitely, yes (Tr. pp. 35-36).

Of the doctors mentioned above, Joseph B. Baker, D.O., the osteopath, John T. Bakody, M.D., a neurosurgeon, and Paul From, M.D., an internist, all testified for claimant and stated that there was a causal connection between the nature of the work and the hemorrhage. To the contrary were Mark D. Ravreby, M.D., an internist, and William F. McCormick, M.D., who is certified as a diplomate, American Board of Pathology, and anatomic pathology, neuropathology and forensic pathology, who testified that there was no causal relationship between the work and the hemorrhage.

Althought the case of *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (1974) concerns the standard of evidence in heart attack cases it will be used as a guide in this case because the decedent's problems were vascular in nature. *Sondag* states *inter alia:*

> In this jurisdiction a claimant with a pre-existing circulatory or heart condition has been permitted,

upon proper medical proof, to recover workmen's compensation under at least two concepts of work-related causation.

In the first siutation the work ordinarily requires heavy exertions which, superimposed on an already defective heart, aggravates or accelerates the condition, resulting in compensable injury.

* * *

Claimant in such a case is aided by our liberal rule permitting compensation for personal injury even though it does not arise out of an "accident" or "special incident" or "unusual occurrence."

* * *

In the second situation compensation is allowed when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a pre-existing diseased condition, results in a heart injury (p. 905).

* * *

The opinion of experts need not be couched in definite, positive or unequivocal language.

* * *

("The matter of causal connection between decedent's fatal heart attack and this accident is not within the knowledge and experience of ordinary laymen, but is a question as to which only a medical expert can express an intelligent opinion.") See also *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960) ("In other words the causal connection between the fall and subsequent disability is essentially within the domain of expert testimony"), but cf. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867, 870 (1965) ("However, the weight to be given such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances.").

* * *

The general rule, of course, is that expert opinion testimony, even if uncontroverted, may be accepted or rejected, in whole or in part, by the trier of fact (p. 907).

This is a classic confrontation of medical opinion. In brief, defendants' doctors demurred from finding causal connection for two reasons: (a) although Dr. Ravreby conceded that work could exacerbate a pre-existing condition to the point that a cerebral accident could occur, he did not feel the evidence wanted that interpretation; (b) in Dr. McCormick's opinion, physical stress would not bring upon a hemorrhage. The physician who testified for claimant, on the other hand, believed, basically, that physical stress caused by work could trigger a cerebral hemorrhage.

The hearing deputy accorded more weight to the testimony of claimant's doctors because they all treated the deceased. (Drs. McCormick and Ravreby were called to testify as a result of the dispute, and had never examined the deceased.) Defendants believe that the testimony of the treating doctors should bear less weight here because the deceased was already comatose by the time he was seen by doctors Bakody and From. Even so, they *were* the treating doctors, and, except for decedent's inability to communicate, they obviously treated him. In such a case their testimony is accorded somewhat more weight, albeit perhaps not as much as in the more usual case where the patient can communicate.

Dr. McCormick's testimony was not given as much weight by the hearing deputy because it was based upon a tentative study. One would agree with the hearing deputy in that respect and add that Dr. McCormick's opinion would seem to be in a distinct minority of physicians.

The weight of the testimony of Dr. Ravreby rises and falls on the accuracy of his assumptions. First, he conceded the possibility that the work can aggravate a pre-existing condition:

> A. Yes, particular aspects of work activity can give dramatic, moderate or minimal rises to blood pressure, depending on what they are (Tr. p. 40).

Further, he states:

> A. Because I have no factual representation of any association of some unusual factor in his work or some unusual factor in his work associated with the onset of clinical symptoms. I have none.

* * *

> A. No. I have been told through the hypothetical and from my reading of the records, that there was no association in an unusual or a stressful work-related task at the point in time that he developed symptoms (Tr. pp. 41-42).

Since Dr. Ravreby does not hold with Dr. McCormick's opinion that work stress will not aggravate the pre-existing condition, in order to hold his opinion of causal connection, he must assume that there was no physical stress at work. The evidence, however, is to the contrary. The testimony of Ray Sorenson and Ray Stewart is sufficient to establish that the deceased worked quite hard on the morning of November 28, 1975.

Thus, the facts in this case fit into the "first situation" described above in the *Sondag* case where the condition was compensable where it resulted from heavy exertion, superimposed on a prior condition which aggravates or accelerates the condition. In brief, the deceased had a pre-existing condition, went to work, worked hard, and, because of his work, sustained a subarachnoid hemorrhage which resulted in his death.

WHEREFORE, it is found and held as a finding of fact, to wit:

That on November 28, 1975, Carl Sickles suffered a subarachnoid hemorrhage which caused his death on December 14, 1975.

That the subarachnoid hemorrhage was caused by strenuous work while standing on a truck frame and striking the bottom of the truck box with an ax or similar implement.

That such activities were in the course of the employment and the hemorrhage arose out of the employment.

. . .

Signed and filed at Des Moines, Iowa this 26th day of March, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

LILA SMITH,

Claimant,

vs.

COLLINS RADIO—ROCKWELL INT'L.,

Employer,
Self-Insured,
Defendants.

Arbitration Decision

INTRODUCTION

This matter came on for hearing at the Juvenile Court Facility in Cedar Rapids on January 21, 1981 and was considered fully submitted on February 27, 1981.

No filings were made prior to the filing of the original notice and petition herein. The record consists of the testimony of the claimant, Sydney Smith, Dorothy Larson, Steve Sloan, E. Margaret Dore and Faye Reynolds; the depositions of W. J. Robb, M.D. (2); Dorothy Kranz and Larry Behnke; claimant's exhibit 1; and defendant's exhibits A, B, C, D, and E.

Issues

Did claimant sustain an injury arising out of and in the course of her employment, and, if so, what compensation is due her?

Summary of Evidence

Claimant was employed by defendant-Rockwell International on December 22, 1978. She had many prior back problems. Since it was the Friday before the Christmas holiday, the work schedule was light and the apparent custom was that production employees would go out to lunch, return to work, and leave early. Upon her return after a lunch at which she had consumed a mixed drink, she punched out and spoke to Larry Behnke, a co-employee. She had not seen Behnke for a considerable period of time. Behnke acted as if he wished a Christmas kiss and upon being rejected by claimant, kicked her in the buttocks. There was some dispute as to whether claimant was kicked. Claimant testified that she was, whereas Dorothy Kranz testified that she didn't see the kick or any reaction. Behnke testified that his foot may have come in contact with claimant's coat.

Upon leaving the plant, claimant testified that she had lower back and right buttock pain. She went home and on January 12, 1979 was seen by W. J. Robb, M.D., an orthopedist, who had previosly seen claimant and performed surgery. He caused claimant to be admitted to the hospital on January 13, 1979 where conservative treatment proved unsuccessful necessitating surgery on January 24, 1979 which was a laminectomy at L5 on the right. Claimant returned to work a couple of times and last returned to work on January 11, 1981.

Findings of Fact

1. Claimant was employed by Collins Radio-Rockwell International on December 22, 1978.

2. That on that date, she was kicked by a co-employee, Behnke.

3. That whatever contact that was previously had between claimant and Behnke was work related. Any and all contact of social nature was at work.

4. That the incident described in paragraph two was on the premises of the employer at a time and place where claimant and Behnke could reasonably be expected to be.

5. That immediately following the incident as aforedescribed, claimant suffered back pains and was treated by Dr. Robb.

6. That because of said back pains and resultant surgery, claimant was disabled from acts of gainful employment from January 15, 1979 through May 6, 1979, from July 13, 1980 through September 28, 1980, and from October 9, 1980 through January 11, 1981.

7. That claimant had a laminectomy in 1971 to the L5 disc on the right side.

8. That claimant had a laminectomy in August 1977 to the 4th lumbar disc.

9. That Dr. Robb testified at page 16 of his April 17, 1980 deposition that when claimant was struck, she hyperextended her back.

10. That Dr. Robb testified further that this aggravated a preexisting condition.

11. That Dr. Robb indicated that claimant had a 16 percent increase in her impairment to the body as a whole as a result of this latest injury.

Applicable Law

Section 85.61(6), Code of Iowa, states:

The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Section 85.16, Code of Iowa, states in pertinent part:

No compensation under this chapter shall be allowed for an injury caused:

. . .

3. By the willful act of a third party directed against the employee for reasons personal to such employee.

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.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "in the course of" relates to time, place and circumstances of the injury. *McClure v. Union, et al., Counties*, 188 N.W.2d 283 (Iowa 1971). An injury occurs "in the course of" employment when it is within the period of employment at a place where the employee may be performing his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *Id.* at 287.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 22, 1978 is the cause of the 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.)

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).

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

Claimant's injury can be seen to have arisen out of and in the course of her employment by analysis of the above legal principles in light of the fact. Any contact between claimant and her assailant was on defendant's premises with no social contact made between the principles. There was no assault for reasons personal to claimant because of her involvement with Behnke was only in work. Coupled with Dr. Robb's testimony, it must be found that claimant's condition was aggravated by employment.

The problem which must be addressed is the nature and extent of disability. Claimant, age 39 at the time of the injury, has been employed by defendant for 21 years, and now has difficulty in work. Considering the elements of industrial disability, it is found that claimant has a 25 percent disability to the body as a whole for industrial purposes.

Conclusions of Law

1. That claimant was employed by defendant-employer on December 22, 1978.

2. That on that date, she sustained an injury arising out of and in the course of her employment, said injury being in the nature of an aggravation of a preexisting condition.

3. That because of said injury, claimant is entitled to healing period for forty and five-sevenths (40 5/7) weeks.

4. That claimant's permanent partial disability for industrial purposes is twenty-five (25%) percent of the body as a whole.

5. That the parties stipulated that claimant's gross weekly wage was two hundred eight and 00/100 dollars ($208.00) per week. She is married and entitled to two exemptions, thus entitling her to be compensated at the rate of one hundred thiry-two and 86/100 dollars ($132.86) per week.

6. That defendant is entitled to credit pursuant to section 85.38, Code of Iowa.

Award

IT IS THEREFORE ORDERED that defendant pay unto claimant forty and five-sevenths (40 5/7) weeks of healing period compensation at the rate of one hundred thirty-two and 86/100 dollars ($132.86) per week.

Costs are taxed to the defendant.

* * *

Signed and filed this 30th day of April, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

WAYNE W. SOLOMON,

Claimant,

vs.

RUAN TRANSPORT COMPANY,

Employer,

and

CARRIERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in Review-Reopening brought by Wayne W. Solomon, claimant, against Ruan Transport Company, his employer, and Carriers 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 March 14, 1979. This matter was heard in Mason City, Iowa, on July 29, 1980 and considered fully submitted upon completion of the evidence according to the undersigned deputy's notes.

At issue is the nature and extent of claimant's disability, if any.

There is sufficient conclusive evidence contained in this deputy's notes to support the following statement of facts:

Wayne W. Solomon, age 41, married with two children, is the holder of a GED certificate earned while a member of the Armed Forces in the 1950's. In 1969 claimant began his employment duties for the Ruan Transport Company, employer, beginning as a truck maintenance shop worker. In 1974 claimant was promoted to an over-the-road cement truck driver, after obtaining an Interstate Commerce Commission operator's permit. Claimant's driving duties also consisted of loading and unloading large requirements consisting of 98 pound bags of cement which were dispatched to various locations in adjoining states. On March 14, 1979 claimant was involved in a multi-vehicle accident, during which he struck a jacknifed semi-trailer.

The admitted diagnosis made by St. Joseph Mercy Hospital was as follows:

> The patient is a 40-year-old black male who was heading north on Highway 65 just north of Mason City. It was snowing and visibility was limited. He was driving a Ryan's [sic] cement truck and apparently some cars stopped in front of him and he was unable to get stopped in time. He hit the back of the stopped vehicles. He was not unconscious, but had immediate pain in his neck and back. He was brought to the Emergency Room by ambulance. Exam and x-rays revealed a chip fracture of the anterior portion of the fifth cervical vertebra. The patient is hospitalized for treatment.

W. Janda, M.D., claimant's othopedic surgeon's final discharge summary, as of March 23, 1979, read as follows (claimant's Exhibit #5):

FINAL DIAGNOSIS:

Fracture spinous process and lamina of C7 vertebral. Chip fracture of the body of C5 vertebra. Multiple contusions and abrasions and lacerations of the left leg all related to truck accident 3-14-79.

OPERATION: 3-14-79 suture repair of left leg laceration.

S. Hayreh, M.D., a neurologist, following examination, reported on March 19, 1979 (Claimant's exhibit #6):

IMPRESSION

Considering the above history and examination and x-ray findings, I think Mr. Soloman has the following problems: Post-traumatic syndrome with post-traumatic headaches and there is no clear clinical evidence of subdural hemotoma would treat him symptomatically and watch him further. 2) He has a musculoskeletal neck and shoulder pain. It is difficult to decide at this stage if the weakness of the left shoulder is due to nerve injury or due to associated pain. There is no clear clinical evidence of a lesion along the (unintelligible). I would recommend treating him further for his pain and with the physical therapy to keep his shoulder joints active and muscles active and then evaluate him again in 3 weeks time. If he still has weakness and deficit at that time, he should be further evaluated with EMG studies. Clinically there is no evidence or spinal cord compression.

Following another visit to Dr. Hayreh on May 21, 1979, he described claimant's condition as follows (Claimant's Exhibit #8):

...which he was treated by Dr. Janda with gradual improvement. I saw him again on May 21, 1979 because of pain over the right side of the face. Through his history it was evident that he had a similar type of pain in October 1978 with some evidence of chronic sinusitis in the right maxillary sinus and he was treated surgically with good relief of his pain. This pain returned again. This time it was my feeling that this was a trigeminal neuralgia in the distribution of right maxillary nerve for which I put him on tegretol and then followed him at the Neurology Clinic for the pain with good relief.

Athough he has a history of this pain even before the accident, it is well known that this pain can be triggered by an injury but I cannot confirm that the present attack of his pain was as a result of his accident or not.

In September 1979 after a visit to Mayo Clinic, claimant's condition was diagnosed by Robert P. Dinapoli, M.D., a neurologist, in part as follows (Claimant's exhibit #13):

Mr. Solomon described his primary pain as a dull deep aching or grinding and rather long lasting pain deep in the right cheek. He denied any trigger points or mechanisms. He always has a dull posterior neck and occipital pain. At times this increases, spreads toward the ear and is then followed by his primary pain in the face. Later he develops some similar pain in the temporal region. Occasionally he feels a sharper twinge in addition to his primary pain, but this is rather minor and of no concern. At the present time he is pain free while taking Triavil.

Mr. Solomon admitted to a considerable nervousness and some depression related to his prolonged period of inactivity.

A complete neurologic examination was objectively negative. I was unable to elicit his pain and there were no trigger points.

I told Mr. Solomon I felt he did not have trigeminal neuralgia or any other form of neuralgia and that I did not feel that he was a candidate for any form of surgery. I indicated that this pain was basically a muscle contraction pain and related to his general situation and that it should eventually clear up as he recovers from his neck injury.

Dr. Janda reported his opinion in a letter of January 15, 1980, in part, as follows: (Claimant's exhibit #14):

Received your inquiry of January 7, 1980. Mr. Solomon still complains of upper back and neck pain. He states he has been lifting weights at home, and has been able to lift 60 pounds 75 times. He feels he is unable to do more. He seems to develop pain when he tries to do more. I have been unable to demonstrate any neurologic deficit. I am really unable to explain why he can't do more than 60 pounds.

It should be noted that Mr. Solomon was seen at the Mayo Clinic by Dr. Dinapoli in November 1979 and Dr. Dinapoli found only some residual musculoskeletal pain. Dr. Dinapoli raised a question of possible functional elaboration of pain symptoms. Mr. Solomon's inability to regain full strength may be a manifestation of compensation neurosis.

Whenever he is able to lift 98 or 100 pounds, he should be able to return to work without restrictions. It is really up to him to improve his strength in weight lifting.

In my opinion, there will be no permanent disability. However, if his pain persists and becomes disabling, I would recommend a psychiatric evaluation.

In March of 1980, pursuant to the provisions of §85.39, (Code 1977), claimant was examined by John R. Walker, M.D., an orthopedic surgeon, who reported his findings, in part, as follows: (Claimant's exhibit #15):

His truck hit the back-end of the other semi and upon impact he was unable to move either arm. He was taken, by ambulance, to Mercy Hospital in Mason City and a soft collar was applied immediately. He was unable to move his head because of pain and stiffness and discomfort. X-rays were taken but at that time, only a chipped fracture of C-5 was found. Some two days later, a CAT scan was

performed and apparently a fracture of the posterior spinous process of C-7 was picked up. (This by the way is not unusual in that the posterior spine of C-7 is often difficult to get out on the regular x-ray.)... He was given a Peterson cervical brace and he wore this for about 8 months... I have reviewed Dr. Janda's reports as well as some other reports and apparently Dr. Janda felt that this was a so called trigeminal neuralgia. Dr. Dinapolis, of Rochester, a neurologist, did not agree with this diagnosis and said that it was due to muscle spasm from the fracture and the neck injury. He felt that this would go away and indeed it has.

OPINION: This man is suffering from some rather severe apparently hyper-flexion injuries to the cervical spine. I think it is important to note that upon the impact of hitting the truck in front of him, he had enough spinal shock or stretch of the cervical spinal cord and it's nerves to render him apparently at least temporarily paralyzed, in other words, he was unable to move either arm. Secondly; he appears to have had two fractures, one of which I can see rather clearly, involving the body of C-5 and the second one which I can't see at this point except to state that it is probably healed. Thirdly; it is quite obvious why the man can't lift 100 lbs. by his own statement, it is because it hurts, and I think this is reason enough to accept for his inability to do his heavy job, at least as he describes it to me. I might also add that there is a definite permanent, partial disability amounting to approximately 15% of the body as a whole. Again, I am trying to levee this on the basis of the average man with average activity. Certainly functionally his neck moves in all directions fairly well and if one is to stick to this type of evaluation, of course it would be less. However, on the other hand, this man's job consists of extremely heavy work and I don't think that he is ready to do this and I doubt if he will ever be able to return to this unless he is extremely well-motivated and will put up with undue pain. Also, I would not think that he would last too long on a job such as this at least at this time.

Thereafter Dr. Janda authorized claimant's use of a transcutaneous electrical nerve stimulator for a 30 day trial period (Claimant's exhibit #17) and reported his opinion as to claimant's residual permanent partial disability as follows (Claimant's exhibit #16):

> As you know Mr. Wayne Solomon sustained fracture of the spinous process of C7 which has united and he sustained a small anterior corner fracture of the inferior aspect of C5 which is also healed, has no compression of the C5 vertebrae. I have been unable to detect any evidence for any neurologic deficit. In reviewing the "Guides to permanent impairment" published by the American Medical Association (1977) on page 39 I find that the vertebral fractures are discussed in terms of impairment ratings of the whole man. Since Mr. Solomon has had fracture of the posterior element (spinous process), in my opinion, his impairment would be 5% of the whole man. The chip fracture of C5 has healed without compression; thus, in my opinion, impairment contributed by the chip fracture of C5 would be 0%. Mr. Solomon also seemed to be impaired by pain: I would rate his impairment contributed by this pain as 5% impairment of the whole man. In conclusion, I believe Mr. Solomon has an impairment of 10%, whole person, as a result of neck injury sustained in the truck accident of March 14, 1979.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 14, 1979 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 forgoing legal principles to the case at hand, the claimant has established by a preponderance of the evidence that his disability is chargeable to the industrial injury under review.

One of the cutting issues in this dispute is the duration of the claimant's healing period as contemplated by §85.3(1) Code 1977. Dr. Janda concluded in his progress notes (Claimant's exhibit #20) that the claimant should be able to return to work on February 27, 1980. Dr. Walker in his report of April 30, 1980 (Claimant's exhibit #18) indicates that claimant may improve, but will not be able to return to truck driving activities.

In order to provide guidelines in matters involving such difficulties the commissioner has adopted the following rule: (IC Rule 500—8.3):

> 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.

It is apparent from the medical evidence that claimant had not reached a point where no further improvement is anticipated on April 28, 1980 (Claimant's exhibit #18 & #21).

Claimant is given a clean bill of mental health by Dr. Ronald M. Larson, M.D., a psychiatrist (claimant's exhibit #19).

This 41 year old cememt truck driver will not be able to return to his former occupation at the completion of his healing period. Claimant's limited ability to life together with the increased neck pain he experiences upon riding in a motor vehicle dictates against such activity.

Claimant described a recent attempt to ride in a cattle truck, wherein he was a passenger. He found that during such an attempt his symptoms increased to such an extent he was unable to complete the journey. Claimant is unable to operate a riding lawn mower without an increase in symptoms and finds the need of the stimulator to shorten his pain duration.

Claimant's terminal manager Richard Gladish testified that claimant will need a full release from an attending physician before he is subject to recall to resume his truck driving duties.

It is apparent that this claimant needs additional medical treatment as authorized by Dr. Walker would be appropriate.

WHEREFORE after having heard and seen the witnesses in open hearing and after taking all of the credible evidence contained in this record into account the following finds of fact are made:

1. That the claimant sustained an admitted industrial injury on March 14, 1979 from which he has not recovered.

2. That the rate of weekly entitlement is found to be two hundred sixty-five and 00/100 dollars ($265.00).

THEREFORE, it is ordered that the defendants pay the claimant a healing period as contemplated by §85.34(1), Code 1977 and continue in such payment until the terms and conditions contained herein are met.

It is further ordered that when defendents have any evidence that the termination of healing period disability has occurred, they are to submit the evidence to claimant's counsel and this office. If the parties are unable to reach an agreement as to the cessation of such disability (and amount of permanent disability), a hearing shall be requested by defendants on such issues. Giving due consideration to the prompt obtaining of rebuttal evidence by claimant, a hearing shall be set at the earliest possible time. Defendants shall pay temporary total disability benefits until either an agreement between the parties is reached and this office is given written notice, or defendants, with a prima facie showing that healing period benefits shall cease, shall file a request for immediate hearing for a determination of the cessation of healing period.

* * *

Signed and filed this 11th day of December, 1980.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

IMOGENE SPREE,

Claimant,

vs.

DAVID M. DICKESS d/b/a KESLEY LOCKER,

Employer,

and

FARM BUREAU MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Imogene Spree, claimant, against David M. Dickess d/b/a Kesley Locker, employer, and Farm Bureau Mutual Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on August 1, 1978. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding is $76.37. A hearing was held before the undersigned on May 18, 1981. The case was considered fully submitted upon completion of the hearing.

* * *

Issues

The issues presented by the parties at the time of the hearing are the extent of healing period and permanent partial disability benefits she is entitled to; and credit for overpayment of healing period benefits.

Facts

Claimant testified she received an injury which arose out of and in the course of her employment with defendant-employer when while stepping on the first step of a ladder she fell with the ladder. Claimant indicated she hurt her right wrist and ankle in the fall and that same day went to see a Dr. Teigland. Claimant disclosed that Dr.

Teigland informed her that a bone in her wrist had been fractured and her ankle sprained. A cast was applied to claimant's wrist. Four weeks later claimant was again seen by Dr. Teigland and then was referred by him to David F. Poe, M.D. Claimant testified that Dr. Poe put another cast on her arm and also placed a cast on her ankle. Claimant revealed that Dr. Poe took off her casts in the middle of September but gave her a gauntlet to wear on her wrist.

Claimant testified that she tried to work for defendant-employer for a few days in August of 1980 but was unable to continue.

Claimant disclosed that in October 1978 she had returned to driving a bus which she had done for many years as a second job. Claimant also indicated she occasionally worked as a waitress after her injury on a part-time basis. Claimant also disclosed that in October of 1980 she tried working for 2 or 3 days. Claimant stated that on December 12 or 15, 1980 Dr. Delbridge told her that her arm had progressed as far as it would and that she could return to work. A week later claimant returned to work for defendant-employer for 3 to 4 days a week.

Nancy Schrage testified she is claimant's daughter and was living with claimant at the time of claimant's injury. Ms. Schrage testified regarding claimant's activity prior to and following claimant's injury.

The parties stipulated that if W. E. Riley had been called to testify he would have indicated he was the defendant-insurance carrier's claims representative handling claimant's case. The stipulation also indicated that Mr. Riley attempted to determine the end of claimant's healing period and was unable to do so until March 31, 1980.

David F. Poe M.D., who testified by way of report, indicated claimant had been seen by her family physician "who manipulated a radial styloid fracture" and placed claimant's arm in a cast. Dr. Poe revealed he first saw claimant on August 28 at which time there was a solid union of the fracture with a mild 2 mm. proximal displacement of the distal fragment and a small step in the articular surface. In his report of April 30, 1979, Dr. Poe disclosed claimant was released to light duty work on January 16, 1979. In his report of July 16, 1979 Dr. Poe stated:

> She certainly is suitable for light duties and wrapping light meats would be within her ability. Wrapping heavy meats greater than 5 or 10 pounds would be unsuitable.

Dr. Poe wrote a report dated March 24, 1980 in which he indicated claimant's healing period ended one year from the date of her injury. In a report dated June 18, 1980, Dr. Poe opined that claimant's permanent partial impairment was 10 percent of the right hand.

Arnold Delbridge, M.D., who testified by way of reports, indicated he went over claimant's previous records and x-rays as well as performed an examination which revealed that claimant's right hand grip strength was only one-third of claimant's left hand grip strength. Dr. Delbridge also stated claimant's "pinch was down as well." Dr. Delbridge examined claimant again on October 10, 1980 and showed improvement. On December 23, 1980 Dr. Delbridge examined claimant again and rated claimant's permanent partial disability of 15 percent of the upper extremity. In his report of May 12, 1981, Dr. Delbridge stated:

> I feel that the date of Mrs. Spree returning to meat packaging would be the date that she could have returned to some type of work. The date given for her return to light duty was January 16, 1979. At that point however no meat packages over five or ten pounds were to be handled.
>
> Mrs. Spree should be under work restrictions in the sense that she should not have to utilize the extremity in question her right wrist to manipulate heavy objects over fifteen or twenty pounds and she should not do a lot of pushing or shoving of heavy objects with her wrist.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 1, 1978 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).

Analysis

Claimant has met her burden in proving she has some permanent impairment as a result of her injury on August 1, 1978. The evidence revealed that claimant had a radial styloid fracture which is a fracture of the wrist rather than the hand. Since claimant's injury went beyond the hand, it is considered as an injury to the upper extremity because section 86.34 does not have a schedule for the wrist. More weight is given the testimony of Dr. Delbridge regarding claimant's disability because he gave claimant a rating as to claimant's upper extremity rather than limiting his evaluation to the hand. From the record as it presently stands, it would be mere conjecture as to Dr. Poe's rating on claimant's upper extremity. Therefore, it is determined that claimant has a permanent partial disability of 15 percent of her right upper extremity as a result of her injury on August 1, 1978.

Dr. Poe opined claimant's healing period disability would have ended on August 1, 1979 which was one year after her injury. However, Dr. Poe's determination is clouded by his own report of October 2, 1979 in which he indicated that claimant was going to be kept on light duty and would again be seen in three months. Furthermore, the May 12, 1981 report is confusing as to when claimant's healing period would have ended. It can not be determined if he thought claimant had reached maximum recovery on January 16, 1979, the date claimant returned to light duty, shortly before December 31, 1980 when he dictated his opinions of claimant's permanent partial disability, or some date in between. Dr. Delbridge's report of December 31, 1980 does disclose that claimant had improvement as late as October 10, 1980. Obviously, if the right questions had been asked in as deposition, each doctor could have clarified their determinations and cleared the confusion.

One might argue that claimant's healing period ended when she started driving a school bus in 1978 or when she worked as a waitress but there is no evidence which would indicate that either of those jobs were substantially similar to the job she was engaged in at the time of her injury. Consequently, it is determined that claimant reached maximum recuperation on October 10, 1980.

In that claimant's healing period ended on October 10, 1980, there no longer appears to be an issue on overpayment of healing period benefits.

Findings of Fact and Conclusions of Law

WHEREFORE, the following findings of fact and conclusions of law are made as a result of the evidence presented:

Finding 1. As a result of her injury on August 1, 1978, claimant has some permanent impairment to her wrist.

Conclusion A. Claimant met her burden in proving she had a permanent partial disability of fifteen (15%) percent of her upper extremity as a result of her injury on August 1, 1978.

Finding 2. Claimant reached maximum recovery on October 10, 1980.

Finding 3. Claimant started driving a school bus in October of 1978 and occasionally worked as a waitress prior to October 10, 1980.

Finding 4. Claimant's bus driving job and waitress job were not substantially similar to the job she was performing on the date of her injury.

Conclusion B. Claimant's healing period ended on October 10, 1980.

. . .

Signed and filed this 28th day of May, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

BLANE STEFFES,

Claimant,

vs.

IOWA BEEF PROCESSORS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner dated June 3, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

. . .

This is the second proceeding before the industrial commissioner. In the first matter, the deputy industrial commissioner ordered that healing period payment be paid until it was shown that the healing period had ended. That ruling was appealed to the industrial commissioner and to the district court.

In the instant case, defendant filed in review-reopening to show that claimant's healing period had ended. The hearing deputy ruled on August 17, 1979 that defendant was to pay claimant during the period of his disability "as defined by §85.34(3), Code of Iowa."

The hearing deputy correctly stated the facts and propositions of law. His decision will be affirmed with the following amplification.

Although claimant can draw weekly compensation only for the period of his disability under §85.34(3), he is a "permanent total." That is, the outlook is dim for him to regain any earning capacity. Part of the reason for his disability is "psychogenic." (See e.g. Dr. Myers's deposition of March 21, 1977, p. 14. All references to Dr. Myer's testimony are from that particular deposition.) In fact the record is shot through with references to psychological problems. Although Mr. Steffes may not be a very sympathetic claimant because of his mental condition, there is substantial evidence of that condition being connected to the original injury. For example, Philip F. Myer, D.O. says in a report of October 2, 1978.

In my opinion, Mr. Steffes has recovered from his injuries as much as he probably ever will. It is my opinion based upon reasonable medical certainty, that Blane Steffes will remain under treatment for this injury for an indefinite period of time, probably for the rest of his life. During the time that I have treated Blane, he has tried to return to work and has never been able to do so successfully. In my opinion, he is unable at this time to engage in any substantial gainful activity because of his physical and emotional status. And I feel that these physical and emotional symptoms probably related to his injuries will probably keep Mr. Steffes from engaging in any gainful employment for the rest of his life. Mr. Steffes, in my opinion, has been continuously unable to engage in substantial gainful activity since February 24, 1976, and I feel that inability to be gainfully employed will continue.

It is true, of course, that Dr. Myer backs off from this categorical statement when he says claimant "is probably partially, if not totally, functionally disabled for the rest of his life" (p. 8), that he would benefit from long-term psychological counseling (p. 15), and that he might do some type of sedentary work (p. 19). However, the record shows that claimant has been unable to work for over three years (from the date of the injury to the hearing of April 1979). And, as stated above, the record clearly shows the disability is connected to the injury. Claimant should cooperate toward obtaining his own rehabilitation, and he should attempt to work. As of the date of the hearing, however, claimant was unable to work, and it appeared his status would not change in the indefinite future.

Defendant also raised the issue that claimant should be refused payment of compensation benefits because he refused to accept certain treatment. *Stufflebean v. Fort Dodge*, 233 Iowa 438, 9 N.W.2d 281 (1943) is often cited for the proposition that an unreasonable refusal to submit to offered treatment which does not endanger claimant's life or health and that is shown to be able to reduce claimant's disability will deprive claimant of compensation by way of reduction, suspension, or forfeiture. The headnote of the Iowa Report, indeed, states the foregoing as a proposition of law, but the *Stufflebean* decison itself does not hold that at all.

In *Stufflebean*, the court states the issue: "Was the refusal to submit to a curative treatment so unreasonable as to forfeit the right to any compensation during such refusal?" (p. 440, Iowa Report) The court never answers this question. Later the court states (p. 441) that "we are not disposed to hold that the record is such as to present us solely a question of law." And finally, one notes near the end of the decision that the court speaks of the rule in the subjunctive:

> ...[W]ere we to hold that the refusal to accept curative treatment should suspend the right to compensation at this time, that would not necessarily adjudicate the questions of proximate cause and liability for compensation in the event of aggravation at some later date. (p. 443).

Thus, one is not persuaded that *Shufflebean* stands for the proposition defendant contends it does. Besides, that was the issue presented at the first Steffes hearing, back in October 1977, which is now on appeal to the district court. The evidence was presented to the deputy industrial commissioner and the brief point was made, yet the deputy in his decision of January 4, 1978 does not find in defendant's favor. Merely incorporating the evidence of the first hearing into the second hearing does not mean defendant is entitled to a second determination of an issue already decided.

WHEREFORE, it is hereby found and held as a finding of fact to wit:

That on February 14, 1976 claimant sustained a personal injury which arose out of and in the course of his employment.

That said injury entitles claimant to weekly compensation benefits at the rate of one hundred sixty dollars ($160.00) per week for permanent total disability during the period of such disability.

* * *

Signed and filed at Des Moines, Iowa this 12th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

BERNARD STILWELL

Claimant,

vs.

ARMSTRONG RUBBER COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed April 27, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue

the final agency decision on appeal in this matter. Defendants appeal from an adverse arbitration decision.

* * *

Considering defendants' quandary, perhaps the rule was applied a bit too strictly. Defendants' exhibit A is therefore admitted into the record.

Except for the slight modification of the inclusion of exhibit A into the record, the decision of the hearing deputy is affirmed; however, the findings of fact and conclusions of law are by the undersigned deputy industrial commissioner.

This case concerns a dispute over whether or not claimant's use of a buffing machine caused an injury to his low back. The records show that claimant had prior back trouble, so the issue is whether there was a work connected occurrence and, if so, whether it caused any disability. The issues listed in pre-hearing order and those which are being considered on appeal, therefore, are whether claimant sustained an injury which arose out of and in the course of his employment; whether there is a causal connection between such alleged injury and his disability; and the extent of such disability. Defendants' brief makes four points, of which number three was disposed of above. The other three brief points concern the above issues.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 25, 1979 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).

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).

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. * * * *

A claimant is not entitled to recover for the results of a preexisting injury or disease, but only for an aggravation thereof which resulted in the disability found to exist. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251. In *Ziegler v. U.S. Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591 (1960), 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 Company*, 253 Iowa 369, 375, 112 N.W.2d 299, the court quoted 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.

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 Railways 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 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. * * * *

The law stated in defendants' brief points one, two, and four is quite correct. Specifically, brief point four states:

> Where claimant is afflicted by a condition which is likely to progress or recur so as to finally cause disability, it does not become a personal injury as contemplated by the Iowa Workers' Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued.

One would add to that brief point that the aggravation theory would broaden the concept and is the correct way to approach this case. The evidence clearly shows claimant had a preexisting condition and that it was aggravated by the incident of using the buffer. Although Santiago Garcia, M.D., a general practitioner, refutes this theory, the evidence of Joe Fellows, M.D., a qualified orthopedic surgeon, supports it. The opinion of the latter physician is felt to have more weight because of his expertise.

Findings of Fact

1. On April 25, 1979, claimant was an employee of Armstrong Rubber Company. (Tr. 22)

2. On April 25, 1979, claimant strained his low back while operating a buffing machine. (Tr. 11, 13, 16; defendants' exhibit J).

3. The strain of operating the machine aggravated a preexisting condition and caused a disc protrusion at the L-4/L-5 level. (Fellows depo., 14, 21)

4. As a result of the disc protrusion, claimant had a lumbar laminectomy on September 27, 1979. (Fellows 12)

5. Claimant recuperated from his injury from April 26, 1979 to April 1980. (Fellows 21)

6. Claimant had a prior lumbar laminectomy at L-4/L-5 in 1975. (Fellows 17)

7. As a result of the second lumbar laminectomy on September 27, 1979, claimant sustained a permanent physical impairment of ten percent (10%) of the body as a whole. (Fellows 21-22)

8. Claimant has a twelfth grade education and completed a short refrigeration course in 1947. (Claimant's exhibit 1)

9. Claimant worked for the employer on a non-permanent basis in the 1950's and then continuously from 1959 to 1979.

10. Claimant's work was as a laborer, a janitor and jeep driver. (Tr. 10)

11. Claimant can do light or sedentary work. (Fellows 22; claimant's exhibit 1)

The parties stipulated that the rate of weekly compensation in the event of an award would be one hundred seventy-five and 10/100 ($175.10).

Non-contested matters upon which an award is partially based include mileage expenses and the amount of the medical and hospital bills. Those items will therefore be made a part of the award in this final agency decision.

Conclusions of Law

On April 25, 1979, claimant sustained an injury which arose out of and in the course of his employment.

There is a causal relationship between the injury and claimant's disability.

That the injury caused healing period disability from April 26, 1979 through April 8, 1980.

That the injury caused industrial disability of thirty-five percent (35%).

That the correct rate of weekly compensation is one hundred seventy-five and 10/100 ($175.10).

THEREFORE, defendants are hereby ordered to pay compensation benefits unto claimant for a period of forty-nine and six sevenths (49 6/7) weeks at the rate of one hundred seventy-five and 10/100 ($175.10) for the healing period disability and for a period of one hundred seventy-five (175) weeks at the same rate for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further order to pay the following medical expenses:

Dr. Vander Linden	$ 62.35
Dr. Fellows	1,330.00
Outpatient Services, Collins Mem. Hosp.	96.00
Dr. Hayne	680.00
Iowa Methodist Hospital	7,406.63

Defendants are to receive credit pursuant to §85.38, Code of Iowa.

Defendants are ordered to pay mileage expenses of fifteen cents ($ .15) per mile prior to July 1, 1979 and eighteen cents ($ .18) per mile for mileage expenses incurred after July 1, 1979.

Costs of this action are taxed to the defendants to include expert witness fee for Roger Marquardt. See §622.72.

Defendants are to file a final report upon payment of this award.

* * *

Signed and filed at Des Moines, Iowa this 12th day of June, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

FREDRICK H. STOOKESBERRY,

Claimant,

vs.

DOUDS STONE, INC.,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed July 28, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter.

* * *

A review-reopening decision of December 27, 1979 shows that the hearing deputy awarded claimant 150 weeks of compensation for 30% permanent partial disability to the body as a whole, those amounts to be paid over and above a healing period. Defendants appealed, arguing that the award was too high.

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

Claimant was injured on November 22, 1976 when a rock struck him on the head. Although he was wearing a hard hat, he sustained a neck injury. Defendants argue that the award was too high for the reasons stated in their brief, part of which is quoted here:

> "Claimant's academic progress as a student in high school and college was very satisfactory and claimant had no problem in passing courses and handling the college work. (Hearing transcript [HT] pp. 38-39) Claimant considers himself smart enough to complete college education. (HT pp. 12, 11. 22-24) Claimant exercises daily, walking and jogging two miles per day, doing 50 sit-ups per day and performing bending and twisting and range-of-motion exercises. (HT pp. 27-28) At the time of hearing claimant was enrolled in the Colorado School of Trades in a gunsmithing course. (HT pp. 30) Gunsmithing involves no heavy lifting. (HT pp. 32, 11. 14)
>
> Claimant has completed 60 hours of college work (HT pp. 41, 11. 8) Claimant's wife is employed on a full-time basis as a military liaison person in the United States Army. (HT pp. 10, 11. 9-19) Claimant's wife's army career has required her to be away from home for periods of time during which the claimant was the only parent at home during these absences and assumed the parental role of taking care of parties' two minor children (HT pp. 41-42)
>
> The heaviest weights claimant is required to lift in gunsmithing are an average of 5 to 6 pounds. (HT pp. 42, 11. 19) Claimant is making good progress in his course of study in gunsmithing. (HT pp. 42, 11. 22-24) Claimant's physical exercises and jogging are enjoyable to the claimant. (HT pp. 43-44) There is no reason why claimant will not complete his course of study in the gunsmithing school. Once the course of study is completed, claimant will have a good entry into the job market in the gunsmithing field and will earn wages comparable to those of a laborer (which was the type of work claimant was involved in on the date of the accident.) (HT pp. 44-45) [pp. 2-3 defendants' brief]

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 22, 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).

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 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. * * * *

Further, "a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted." *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980).

There are facts other than those recited by defendants, facts which show claimant has problems with his physical disability. The following is a part of the transcript which concerns claimant's going to a gunsmith school but not being able to be a full time student:

Q. And why did you terminate being a 40-hour week student?

A. I was leaving after five or six hours because I couldn't take the strain. It was the first thing that resembled work that I had done in a long time and I was suffering a lot of pain so I found out I—I didn't know they even had a short shift. So when I found out about that, I enrolled for it, for the shorter course.

Q. And what kind of a pain were you experiencing?

A. My upper back and neck. A little bit of everything from—the motion of working at a desk would cause my—these muscles here, these shoulder muscles from here on in to squeeze up. And then bending over a lot—I did that a lot at first—would aggravate that and my neck because they're all together. And they were intense pains and continual. So that's why. That is the kind of pain I had.

Q. Do you have that pain when you are on the five-hour a day shift?

A. Yes, but it's not as intense.

Q. Okay. When are you scheduled to complete that school?

A. I can't say because it is self-paced. I am going along above average and they say the only schedule they use is 21 months until you are close to completion, then they can give you an estimated time of, say, early graduation—or what they call working graduation. You get a job and that.

Q. Now, does being a gunsmith require lifting?

A. Yes. Not heavy lifting, but lifting of several pounds in certain stages of gunsmithing.

Q. Does that bother you?

A. Yes.

Q. Where does it bother you?

A. In my shoulders and these neck muscles and the back between this shoulder blades and on out. That was the most strenuous of that stage of gunsmithing I have gone through so far (pp. 31-32).

Further, the claimant's work history shows a proclivity for manual labor, not intellectual effort. (Transcript, pp. 13-15)

After a period of almost 30 weeks, the claimant looked for work at several places subsequent to his injury but was unable to secure a job. (Transcript, pp. 23-26) In addition, Jack W. Brindley, M.D., a qualfied orthopedic surgeon, rates claimant's permanent partial functional disability at 10%. J. R. Scheibe, M.D., rated the disability at 15% of the body as a whole.

Thus, we have a permanently injured claimant with a work history of manual labor. At age 33, he looked for work after his injury but was unable to find it. On the other hand, this claimant is obviously bright and educable.

As the above citations show, our Supreme Court has given us a qualitative method to reach a quantitative result. Applying those qualitative standards, one may conclude that the claimant's disability is moderately severe. Although his future *may* be bright financially, it is clear that the sort of work with which he has experience is foreclosed to him, perhaps forever. Thirty percent permanent partial disability is not too high.

There is an aspect of the hearing deputy's decision which should be clarified. On page three, he quotes Dr. Scheibe from two different reports. It should be noted that the hearing deputy alternated the language which he extracted from the reports. The reports were dated November 7, 1977 and September 5, 1978; paragraphs two and three are from the 1977 report and the first and last paragraphs are from the 1978 report.

WHEREFORE, it is hereby held as a finding of fact, to wit:

1. That on November 22, 1976 claimant sustained an injury which arose out of and in the course of his employment.

2. That as a result of the injury, claimant was unable to work for twenty-nine and four-sevenths (29 4/7) weeks.

3. That as a result of the injury, claimant sustained permanent partial disability to the body as a whole.

4. That claimant has been paid his healing period benefits.

5. That claimant's permanent partial disability for industrial purposes is thirty percent (30%) of the body as a whole.

. . .

Signed and filed at Des Moines, Iowa this 30th day of September, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

LEO JOSEPH STRIEF,

Claimant,

vs.

JOHN DEERE DAVENPORT WORKS,

Employer,
Self-Insured,
Defendants.

This is a proceeding in arbitration brought by Leo Joseph Strief, claimant, against John Deere Davenport Works, employer, self-insured, for benefits as a result of an injury on June 24, 1979. On August 28, 1980 this case was heard by the undersigned. This case was considered fully submitted on completion of the hearing.

The record consists of the testimony of claimant, Fredrick Cook, Phillip Kulper, Sandra Strief, Ronald Kulper, Keith Hammer, and Marilyn Raymond and claimant's exhibit 1. At the beginning of the hearing the parties stipulated that claimant's rate of compensation is $259.68 and that as a result of his hernia operation he was off work from June 26, 1979 through August 27, 1979.

Issues

The issues presented by the parties at the time of the 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 temporary total benefits he is entitled to.

Facts

Claimant, who has worked for defendant for approximately two years, testified that on the evening of June 24, 1979 he was working for defendant as a welder in section 544. Claimant's job required him to lift skid shoes from a basket on a skid on the floor and then to weld the skid shoes onto a bucket with the use of a wire welder. The skid shoes were made out of 3/4 inch to 1 inch steel approximately three to four feet long, approximately six inches wide and weighed 25 to 30 pounds. Claimant stated that when he arrived at work he felt good and talked with Fredrick Cook and Phillip Kulper. Claimant testified that he finished one bucket and was bending down to pick up a skid shoe from the basket when he felt a pain in the area of his navel upon straightening up. Claimant indicated the pain, which he had never experienced before, was like someone sticking him with a knife in the area of his navel. Claimant testified that he kept on working and lifting out skid shoes. Claimant disclosed that his pain diminished, but increased as he continued to work and bend. Claimant testified that he informed his foreman about the incident and was seen by the nurse in the dispensary. Claimant indicated that the company nurse told him that she could see no redness and had him go back to work. Claimant also testified that the company nurse said for him to go to his own doctor. Claimant indicated that he continued to work the rest of his shift but did not accomplish much. The following day claimant was seen by R. A. Ott, M.D., who when examining claimant pushed a protrusion back in the area of claimant's navel. Claimant stated that on July 5 he was operated on and is substantially healed. Claimant revealed that a month prior to his injury he missed work because of stomach cramps and on June 18 had missed work because of a 102 degree fever.

Fredrick Cook, a co-employee of claimant's stated that on the evening of June 24, 1979 he talked to claimant prior to starting work and that the claimant exhibited no signs of pain. After working about 1½ hours he noticed claimant appeared to be in pain.

Phillip Kulper testified that he also saw claimant before starting work on June 24, 1979 and though claimant looked okay he later noticed that claimant appeared in a depressed state. Phillip stated that he wanted claimant to go to the dispensary and told claimant's supervisor about claimants' condition.

Claimant's wife testified that prior to going to work on June 24 claimant appeared to be fine and had watched T.V. all day Saturday and Sunday.

Keith Hammer, who was claimant's supervisor on the evening of June 24, stated that prior to starting work that evening claimant told him he hadn't been feeling well for a couple of days. Mr. Hammer indicated that after the last

break period claimant stated he still felt bad and requested to go to the dispensary. Mr. Hammer testified that he could not tell that claimant was in any pain. Mr. Hammer disclosed that claimant did not tell him of his symptoms or indicate if the problem he was having at the beginning of the shift was the same problem he wanted to see a nurse about. Mr. Hammer also revealed that even though claimant had slowed his work down that evening, he still met his quota.

Marilyn Raymond testified that she was the company nurse on duty the evening of June 24, 1979 and remembered claimant coming in indicating pain in the umbilical area. She stated that claimant did not give her a history of pain or stress or a job-related injury and upon examination could not see anything which would indicate a problem.

In his clinical record of July 1, 1979 Dr. Ott revealed that he saw claimant on June 25 with regards to complaints of pain in the umbilical area. Dr. Ott indicated in the clinical record that claimant had a very tender reducible umbilical hernia.

Application of Law

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on June 24, 1979 which 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 claimant also has the burden of proving by a preponderance of the evidence that the injury of June 24, 1979 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).

Analysis

Based on the evidence presented and the principles of law previously stated, claimant has met his burden of proving he received an injury arising out of and in the course of his employment with the defendant on June 24, 1979. Claimant's testimony regarding his condition of health at the beginning of work on June 24, 1979 is supported by the testimony of his wife, Fredrick Cook, and Phillip Kulper. The testimony of Keith Hammer contradicted claimant's testimony but is also a little confusing since Mr. Hammer stated he could not see that claimant was having any problems or was in any real pain even though he saw claimant sitting around a lot and even asked claimant if he could try to make it through the shift.

Claimant has, however, failed to meet his burden in proving that his umbilical hernia was caused by the work-related injury. Claimant failed to have any doctor testify by way of report or deposition that the injury claimant received at work caused the umbilical hernia or aggravated a previous condition. Claimant did give a history to Dr. Ott that his pain started at work, but that does not mean Dr. Ott causally connected the injury and the hernia. Marilyn Raymond testified without objection that physical exertion could cause a hernia, but she was not qualified as an expert witness and in no way indicated that physical stress caused claimant's umbilical hernia. Without some medical evidence being presented by claimant on the causal connection of the injury and the umbilical hernia he has failed to meet his burden.

Findings of Fact

WHEREFORE, it is found:

Claimant received an injury arising out of and in the course of his employment with the defendant on June 24, 1979.

Claimant failed to prove by a preponderance of the evidence that his umbilical hernia was causally connected to said injury.

THEREFORE, claimant is to take nothing from these proceedings.

Defendant is to pay the costs of this action.

* * *

Signed and filed this 12th day of September, 1980.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

ELIZABETH T. SUN,

Claimant,

vs.

K. S. SUN, M.D., P.C.,

Employer,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed September 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. This is an appeal by claimant of a proposed arbitration decision which denied her death benefits as the surviving spouse of K.S. Sun, M.D.

* * *

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

Dr. Sun was an opthalmologist. He left the McFarland Clinic in Ames in 1970 and set up K.S. Sun, M.D., P.C. It was his habit to entertain people at the Des Moines Golf and Country Club. On September 11, 1976, he entertained three people at the club; afterwards, Dr. Sun was killed in an automobile accident on the trip back to Ames. The question presented on appeal is whether Dr. Sun, an employee of his own corporation, was in the course of his employment at the time of his death.

The evidence is split, but the hearing deputy's view that the death was not in the course of employment is the better position.

Doctor and Mrs. Sun did not live together much of the year, she living in Colorado with the children. (There was no evidence of a legal separation, simply of a somewhat different kind of living arrangement.) She testified that Dr. Sun called her on the day prior to his death:

> We have a summer home in Colorado and he had been out there for two weeks. He spent a week, then came back a week, then came out another week and he always flew and I always drove. He flew back and I was trying to get ahold of him to tell him when I would drive back and I got him the night before the accident at home about 7:00 Iowa time. He was in a terrible hurry and he said, "I am going out. I am going out tomorrow night on business. I will call you when I get home and it will be late." Then he said something I didn't understand and he was in such a hurry I didn't follow it up. He just said goodbye (p. 10).

Ralph M. Brugger, M.D., testified that he was a partner in the McFarland Clinic in Ames and a member of the board of directors for Dr. Sun's professional corporation. With respect to the nature of such entertainment, he testified:

Q. In your involvement, had the Swartz [sic] and Miss Cordts in the night of his company been within the class of persons that he was encouraged to cultivate and entertain businesswise?

A. Yeah. I think it was two-fold. I think he didn't do anything totally for business or for pleasure alone. I think that he always combined both things (p. 13).

Q. I have provided—I don't know whether you have seen this or not, Mr. Scherle, but I have a check here drawn on the corporation, $76.75 to the Country Club and it bears your signature, a piece to at least—in payment of that expense incurred the night of his death. I take it then as the remaining member of the board of directors you did approve that as a business expense; is that correct?

A. Yes (p. 14).

Q. You just testified, Doctor, and forgive me if I misstated, but I believe your testimony at this point is that you discussed it with the accountants and Dr. Sun and you testified that he was unable to distinguish or to break out what was social and what was business and that therefore everything was lumped in as a business expense until the I.R.S. posed a question about it?

A. I think it was all agreed that there was some element of business, it was a matter of what percent and since we couldn't say that it was just 50 percent business or 80 percent business or 20 percent business, we couldn't do it. We would submit it and if it was acceptable to the people, auditing the books, doing his income tax, it would be acceptable to us because we didn't know how to separate. Like I say, other than when his kids came and with due respect for his wife, he was good to her, but he didn't spend a lot of time because they had different personalities but I would guess that it would be a toss up between his kids and his practice.

He really—his practice was his life and everything he did revolved around (pp. 25-26).

Robert Dreher, an attorney, was the lawyer for Dr. Sun. With respect to the nature and extent of the entertainment, he testified as follows:

Q. Then in summary, and again, correct me if I'm wrong in any aspect of this, but you advised him to join the Des Moines Club and advised him to take the dues for both the Des Moines Club and Des Moines Golf and Country Club off as as a business expense because they were going to be used more than 50 percent of the time for business affairs?

A. That's right.

Q. That was with the idea that they would also be used socially but more than 50 percent would be business?

A. Yes (pp. 8-9).

On the other hand, there was testimony that Dr. Sun's activities that evening were not for purposes of business. For example, James Edward Lincoln, the intramanager of the club house facility at the Des Moines Golf and Country Club testified with respect to his impressions of Dr. Sun's activities:

Q. Was there any indication that night that this was anything other than a social event.

A. I really can't tell you.

Q. Mr. Lincoln, based on your observations of Doctor Sun's activities here at the club, could you give us a percentage breakdown as to what you felt, again based on your observations, percentage of business versus purely pleasure, social activities here at the club that Dr. Sun participated in?

A. Well, I would figure maybe 60-40 and I might—it was more social. He played a lot of tennis and swam and I would say it was 60 percent social. That's my opinion. (p. 7)

Frederick and Margaret Schwartz were good friends of Dr. Sun and were guests of his on that tragic evening. Mrs. Schwartz had actually worked for Dr. Sun two half days per week but had since stopped such work in order to take care of her aunt, Ms. Cordts, who had injured herself. Margaret Schwartz had visited Ms. Cordts in Wisconsin the week prior to the accident. Mr. Schwartz and Dr. Sun also went to Wisconsin to bring Mrs. Schwartz and Ms. Cordts back to Ames. Some time after that, they all went to Des Moines. With respect to the nature of the dinner, Mr. Schwartz testified:

Q. Referring to the, again, the date of accident which was September 11, 1976, when were the arrangements for that evening out first made: Was it a planned event or spontaneous?

A. It was quite spontaneous. We had been out the weekend before. He was our guest in northern Wisconsin, spent the night at the home of a woman who was with us in the car who died soon after. He was so delighted with the visit at her place at a lake in northern Wisconsin and he wanted to do something for this hostess there and she was coming back with us to Iowa. So he said, "You're going to be my guests at the Des Moines Country Club."

. . .

Q. Had you been to the Des Moines Golf and Country Club with Doctor Sun before?

A. Yes, yes.

Q. Approximately how many times?

A. Five or six times, I would say.

Q. And I believe he was also a member of the Des Moines Club here in town?

A. Yes.

Q. Were you his guest at any time there?

A. Yes.

Q. Again, approximately six times?

A. Yes.

Q. Something like that?

A. Yes.

Q. I gather, then, that your outings together were more or less on a reciprocal basis?

A. Yes, our entertainment was not as lavish as his.

Q. It was the company that counted, right?

A. Yes (pp. 10-11).

Similarly, Mrs. Schwartz testified:

Q. In other words, what you're telling me is that you felt that he, by his mannerisms and things, that he wanted you to be knowledgeable in his business?

A. Yes.

Q. Is that correct?

A. Yes.

Q. But your impression was, on this particular night and on these other social events, that the purpose was personal and social and not business?

A. Yes. There are other times when we went out when there were just the four of us but, see, my aunt was along so it was a social time but sometimes he did discuss when there were just Doctor Sun, the three of us, we would get together and he would discuss things at the office and the work he was doing.

Q. This wasn't one of those evenings?

A. That was not (p. 10).

Q. Did you, like your husband, recommend that to some people that he was a good doctor?

A. Yes, I surely did.

Q. And he was your doctor also, wasn't he?

A. Yes.

Q. Your entire family's doctor?

A. Yes.

Q. Your husband has indicated that there were actually some out-of-town patients that came at your suggestion?

A. Yes, that's right.

Q. Was it also contemplated that you would continue your employment as it was with him as soon as your aunt was sufficiently recovered?

A. Yes (pp. 12-13).

An employee's injury which is connected with a social occasion is compensable if the employee's participation is both beneficial and authorized by the employer. *Farmers Elevator Co., Kingsley v. Manning*, 286 N.W.2d 174 at 177 (Iowa, 1979). See also 1A, Authur Larson, *Workmen's Compensation Law*, §22.30, pp. 5-113 to 5-121 (1979). At p. 5-113, Larson states:

> When the activity consists of entertaining customers, the benefit lies in the ultimate business gain in enhanced sales, and, as we have seen when the employee is authorized to conduct this kind of promotion this becomes a familiar kind of covered activity.

Of course, Dr. Sun could and would authorize himself to do as he pleased in his own business. The question therefore becomes whether or not his actions were beneficial to K.S. Sun, M.D., P.C., the employer.

Claimant's statement of exceptions protest that the hearing deputy's decision "omits reference to the testimony relevant to the real purpose of the event and to the ultimate effect of the event and like events upon the business of the Employer Corporation." Of course, no summary or series of quotations can state the complete record. In the evidence above, one has recited evidence both for and against claimant's position, but no claim is made that such evidence is complete. The deputy recited enough evidence to show his reasons for his decision and such is sufficient.

Claimant's statement of exceptions also states as follows:

> The Deputy Commissioner gives no weight to the fact that one of the guests was an employee; that two of the guests were patients; and that two of the guests had over a long period of time, referred patients to Dr. Sun. That the record is replete with evidence to the effect that Dr. Sun was constantly involved in the furtherance of the corporate business. That the very purpose for which the membership in the Des Moines Club was acquired was to further the interests of the corporate business. That Dr. Sun had been encouraged to use the club membership for business purposes. That the expenses incurred were treated as business expenses and accepted as such by the Internal Revenue Service.
>
> That Dr. Sun had disassociated himself from the McFarland Clinic, and, therefore, was dependent upon persons such as Mr. and Mrs. Schwartz for referral business.

First of all, one should say that none of the guests were employed by Dr. Sun at the time of the accident, Mrs. Schwartz having ceased her employment. Further, one is not bound by the fact that Dr. Sun used his membership in the Golf and Country Club for business purposes such as tax writeoffs. Considering the testimony of Mr. and Mrs. Schwartz (and *all* the testimony in this regard is somewhat speculative), the use of the country club membership was more for personal than business reasons. There is no showing, for instance, that Dr. Sun received any real benefit in the way of a significant number of new patients from such activity.

Another portion of claimant's statement of exceptions should be remarked upon. She states:

> That the Deputy Commissioner has violated the first rule of Workmen's Compensation Law. *The facts are to be construed liberally in favor of the employee.* The Deputy Commissioner here has done the exact opposite. He has construed the facts most favorable for the employer. (Emphasis in original)

The underlined portion is a misstatement of the law. In *Bodish v. Fischer, Inc.*, 257 Iowa 516, 137 N.W.2d 867 (1965), the court says on page 519 that "[we] are required to consider the evidence in light most favorable to the claimant." by use of the word "we" the court means itself, not the deputy industrial commissioner. The deputy industrial commissioner is to consider the evidence impartially, not in favor of one or the other.

WHEREFORE, it is found and held as a finding of fact, to wit:

1. That K.S. Sun, M.D., was killed in an automobile accident on September 11, 1976.

2. That said accident occurred after he entertained some friends at the Des Moines Golf and Country Club in Des Moines, Iowa.

3. That claimant has failed to show that Dr. Sun's death arose out of and in the course of his employment.

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

* * *

Signed and filed at Des Moines, Iowa this 16th day of October, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

HARVEY J. THOMPSON,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants appealing a proposed decision in arbitration in which claimant was awarded medical expenses, healing period and permanent partial disability payments.

* * *

Claimant contends that his blood and liver disorders are either directly causally related or aggravated by his exposure to chemicals during his period of employment for defendant-employer.

Claimant, whose work for this employer began on August 4, 1967, denied having any prior problems with his blood or liver, denied any symptoms of nausea, exhaustion, weakness, or dizziness, and further denied any chemical exposure while working for a previous employer.

During the period from August 4 to August 26, 1967, claimant claimed he was working as a jeep driver with the duties of transporting tires and getting supplies for the curemen. The supplies included benzene liquid which was obtained from fifty-gallon drums; band ply dope (KB609), which was in a liquid form made from dry mica; and blemish paint (AL479) in which benzene was used as a thinner. Claimant's awareness of benzene's being used in the plant came from his contact with the supervisors and the card which he filled out when he got supplies. Claimant agreed that he worked as a power trucker (jeep driver) from August 27, 1967 to April 17, 1968.

Beginning in April and through July 15, 1968 claimant functioned as a mold cleaner, cleaning molds with alcohol. This job, however, did not occupy his time exclusively, and he did other tasks also.

From July 16, 1968 to February 18, 1969 claimant was a green tire repairman. Claimant described this process as follows:

> You would take the metal—take the swab, as I said, you know, and I would clean the area and then apply this repair cement. I believe that's what they called it, this black sticky stuff, to the area, go on to the next tire, and do it, the same thing, and give the repair cement time to more or less set up. I would then come back and cut a piece of rubber, and insert it onto the tire covering the hole, and then it's sort of a little round roll-up thing with a serrated edge on it. You pressed with it, you know, and then go on to the next tire doing the same thing.

The paint used on the tires would burn the skin. Part of this job classification included filling benny pots, which were containers welded to a stand which sat about three feet above the floor. The pots had a filter inside which made a sort of cover; however, the claimant related that "a lot of the time the liquid would be above the filter, but when—as a tire cureman, my experience was that the springs in the filter would always pop out, and most of them the filter would just by lying down in there, so your liquid would be laying on top of the filters." Claimant testified that the lids were frequently left off the pots and the chemical would "slosh" out. Although cotton gloves were worn when the benzene was being applied, they would become saturated.

It appears that during this time claimant periodically stripped bed tires. In discussing the use of benzene in the process, claimant said:

> In stripping the green tire you would start either at the seam of the rubber, or if you couldn't do that, you would cut out an area. You would use a knife—you had a knife, and you would cut an area out, and you used, as I say, lots of benny on that to separate this rubber from the carcass, and alot of times some would come easy, and sometimes they were very hard. You had to use a lot of benzene. In doing this, your hands would get quite dirty.

According to the claimant, benzene was poured directly from the can onto the tires, and his hands were dipped directly into the benzene for cleaning.

Claimant worked as a jacket cureman from February 19, 1969 through July 27, 1969 and said that with this process rubber gloves were worn and rags were dipped in benzene, which would run inside the gloves. The benzene, which was kept on a cart, was used to clean the tires and then liquid D.C. dope and tread dope was applied to some tires. Bead lube was brushed on all the tires.

Claimant testified to having been a utility man from July 26, 1969 to August 10, 1969 and from September 22, 1969 through November 12, 1969; a jacket cureman from August 11, 1969 through September 21, 1969 and from November 13, 1969 through June 14, 1970; and as a power trucker from June 15, 1970 through August 9, 1970 and from January 29, 1973 through March 18, 1973. Claimant's

exhibit A shows claimant layed heavy-duty tires from September 27, 1971 through July 30, 1972.

Claimant asserted that paint was thrown on him on two occasions in 1970. The first time he was hit by a mixture of orange and blemish paint. The second time claimant was hit by blemish paint mixed with "other stuff." This paint was removed with kerosene.

Claimant believed that from 1970 on, except for brief periods, he had worked as a bagomatic cureman. In this process claimant stated:

> My job required me,... to take and prepare my tires, which was to clean the tires necessary with benzene and a wire brush. I used a cotton swab with a metal bracket about four inches; three, four inches long. You would swab this tire to clean the dirty portion of the tire, and you wore cotton gloves, which a lot of times became wet, you know, from the benzene.
>
> I used the silicone to silicone rough bags. When the bags get old, they get quite rough. If I had a new bag, one that was just placed on the stand, after it was warmed up dry, I would silicone the new bag, and in doing this, you use a sponge. You had a gallon bucket with silicone, and you used a sponge. There you didn't have a glove because you just reach in with your hands and kind of smooth the silicone out and just rub the bag out, you know. This was done in order to keep the tire from seizing to the bag, making sure you didn't get too much silicone on the bag, because that causes separations in tires. If you got too much silicone in the mold, you had to use alcohol to swab the, you know, to clean this up with. After you did this, a lot of times—Well, to clean my hands I would use the spray, you know, the soap, you know, a lot of times.
>
> * * *
>
> This was a soap that—a special soap they made up for spraying certain molds, the 55 molds to keep the tires from seizing onto the lid. I would place the tire on the mold onto the bag. According to what type of tire it was, like nylon tires I had to use the D.C. dope on the bead. Deep tread tires I used it on the bead area and the tread area. There was a 614 ring that was laid down there. I had to apply this to the tread area, the bead area; also to the No. 4 ring in the mold. This D.C. dope now, in using it, I notice it had a very stong odor when I applied it to the No. 4 ring.

Claimant recalled having become dizzy, nauseous, and achy from the fumes on several occasions. He also remembered having suffered heat exhaustion, and he portrayed the work conditions thusly:

> In working as a bagomatic cureman, conditions, the working conditions, the area was very hot, humid at times, especially in the wintertime. In the summertime it was just real hot. It seemed like the air was just stagnant, you know, there was no air movement at all. It was just heat in the wintertime. It was very hot and humid. We had very poor ventilation, very poor ventilation. The ventilation that we did have in the wintertime—and at times they would shut the fans down, because at one time when they had this gas shortage, when they first come [sic] out with that, they were trying to conserve energy out there, so they were shutting these fans down because it was taking the heat out of the building, you know, and at that time it was very bad to work in there. Sometimes we would sneak and turn the fans on. Then working conditions were very bad. .

In 1972 claimant said there was an opportunity for overtime work which involved cleaning molds, the bagomatic machines, the panels on the machines, the dope tanks, and the blemish paint tanks. Claimant claimed he was told to

> [go] get the solution, to be sure to use rubber gloves because it was very potent, and swab the machines down, the panels, the tanks, or what have you, and I was told not to get it on my skin. In the event I did get it on my skin, I was to wash it immediately.

The fluid was characterized by claimant as clear and slightly oily. Payment for the cleaning work was made under other job classifications as there was no classification for cleaning. Claimant's exhibit A shows that on February 3, 15, 16, and 19 claimant was paid for eight hours of laying tires with an additional three and seven-tenths hours on February 3 for green tire repair, an additional four hours for power trucking on February 5, 15 and 16, and seven and three-tenths hours for green tire repair.

Company medical records show that claimant missed work in August of 1972 because of exhaustion.

From April 1, 1974 to December 6, 1974 claimant was a clock supervisor whose duties were to supervise the curemen and the jeep drivers and to train new layers; and therefore, he was still involved with chemicals.

Claimants prior medical history included a broken left knee and an appendectomy in 1955, a tonsillectomy in 1957, a hernioplasty in 1962, and right knee surgery in 1966.

A number of hospital records have been submitted. Claimant initially say R. W. Overton, M.D. in February or March of 1972. He was complaining about stomach aches and complaining about a tired, rundown feeling. On April 16, 1972, claimant was admitted by Dr. Overton to Mercy Hospital with an admitting diagnosis of chest pain. Dr. Gordon, M.D. saw the claimant on a consultant basis, and when he found claimant's electrocardiogram within normal limits rendered a diagnosis of "[c]hest pain, ?

etiology." The hematology survey report listed a hemoglobin of 14.4 gms.; 45.6 vol. % microhematocrit; 5,840,000/cmm red blood cells; 4,200/cmm white blood cells; the differential white count of 18% neutrophils, 77% lymphocytes, and 5% eosinophils; 145,000/cmm platelets with the following interpretation: "RBC's show normocytic normochromic cells. WBC's show relative lymphocytosis. No abnormal cells seen. Platelets slightly decreased. On April 22, 1972, claimant's hemoglobin was 15.3 gms.; the microhematocrit was 48.1 vol %; 6,2220,000/cmm red blood cells; 4,800/cmm while blood cells which could be divided into 31 percent neutrophils, 62 percent lymphocytes, 2 percent monocytes, and 5 percent eosinophilia. No abnormal cells found. Platelets: Present and adequate. Above changes may be seen in subsiding or convalescent stage of viral infection." Claimant was discharged on April 25, 1972 with a diagnosis of "[v]iral pleuritis" and [t]ransitory leukopenia, probably secondary to a viral infection."

On August 4, 1972 claimant was again admitted to Mercy with an admitting diagnosis of blood problem. Claimant was seen in consultation by Y. Prusak, M.D., whose impression was "[r]ule out diabetes mellitus, exhaustion, lymphocytosis." On August 5, 1972, claimant's hemoglobin was 14.2; the microhematocrit was 44.1; the red blood cell count was 5,700,000/cmm; the white cells 4,200/cmm; the differential white count was broken down to 22% neutrophils, 75% lymphocytes, 2% monocytes, and 1% eosinophils; and 144,000 platelets. The interpretation was "RBC: normochromic, normocytic. WBC: neuropenia with relative lymphocytosis. Platelets: adequate. Impression: Chronic neutropenia of undetermined etiology." A liver profile of August 7 was "[e]ssentially normal." A bone marrow study performed on August 5, 1972 said in summary, "Both erythroid and myeloid series show orderly maturation." The pathologist's impression was "essentially normal marrow." He commented.

> In review of persistent but stable neutropenia lasting more than four months, chronic chronic [sic] familial type of benign neutropenia is a possibility. Since the condition is not uncommon in black population, the CBC on parent's blood does not always give the definite answer (non-sex-linked dominant). Although there is no evidence of bone marrow suppression so far, the nature of the patient's job warrants periodic check up.

Dr. Overton's final diagnoses were familial neutropenia and psychogenic fatigue.

Claimant was again admitted on February 6, 1974 and subsequently on March 1, 1974. The admitting diagnosis in March was a kidney stone.

Claimant returned to Mercy Hospital on December 8, 1974 with admitting diagnoses of gastritis, diabetes mellitus, and hypothyroidism. On December 17, 1974 a peripheral blood smear was conducted on claimant's mother. The report said, "Essentially Normal Smear except slightly decreased Number of Leukocytes and platelets. No changes of Blood Smear Since 1972 peripheral Blood Smear (p-328-74) for Mrs. Bobby Thompson is essentially normal without Blood dyserasia." The hematology report gave a hemoglobin of 14.4; a microhematocrit of 42.7; 5,900,000/cmm red blood cells; 4,000/cmm white blood cells; the white count was differentiated at 34% neutrophils and 66% lymphocytes; and 126,000/cmm platelets. The interpretation was:

> The blood cells are normal. There is a slight lymphocytosis with occasional atypical lymphocytes. The platelets are slightly decreased. Suggest repeating the studies in one month or less.

A liver profile dated December 16, 1974 and performed by Joseph Song, M.D., was normal. A bone marrow study dated December 13, 1974 contained the following summary:

> Normocellular marrow with normal M:E. ratio. There is normal maturation of myebid series with mild decrease in granulocytis cells beyond the metamyelocytes stage, whereas lymphocytes are relatively increased. Magakaryocytes are adequate with tendency of less production of platelets.

The pathologist's impression was "[e]ssentially normal bone marrow. Suggestive of chronic familial neutropenia with possible chronic ITP. Essentially no change of bone marrow since 8-5-72." The diagnosis was "[n]ormal bone marrow." A liver biopsy done on December 23, 1974 showed "marked fatty metamorphosis."

Claimant returned to Mercy on February 9, 1975 for a spleen scan, liver scan, and liver profile. The liver profile was normal. The hematology survey report resulted in a hemoglobin of 13.7; a microhematocrit of 40.0; 5,740,000/cmm red blood cells; 4,500/cmm white blood cells; the differential white count was separated into 28% neutrophils, 65% lymphocyte, 5% monocyte, 1% eosinophils, 1% basophils; and 120,000 platelets. This interpretation was "[s]light decrease in platelets, otherwise normal peripheral blood and blood coagulation profile."

On April 8, 1975 claimant was admitted to the hospital for pain in the left side of the abdomen.

On June 29, 1975, claimant, complaining of fatigue, tiredness, nausea, shortness of breath, and vague pains, was back in the hospital with an admitting diagnosis of lung and possible liver problems. The final diagnosis was "1) Occasional ovalocytes or hemogram. Significance unknown. 2) Abdominal pain, significance unknown." The hematological survey report showed hemoglobin 14.1; a microhematocrit of 43.0; 5,960,000/cmm red blood

cells; 3,000/cmm white blood cells which were differentiated into 29% neutrophils, 69% lymphocytes, 1% monocytes, and 1% eosinophils and a platelet count of 177,000. The interpretation given was "Essentially normal hemogram with occasional ovalocytes." A liver profile was interpreted as normal. Pulmonary function studies were normal as was the EEG.

Methodist Hospital admitted claimant on October 22, 1975 with an admitting diagnosis of "unexplained leukemia." A nuclear medicine report included a diagnosis of "[n]ormal stationary imagining of the liver. Enlarged spleen." A peripheral blood smear gave a diagnosis of "[b]orderline thrombocytopenia. Neutropenia, Monocytopenia." The special hematology bone marrow summary read, "No toxic changes" with a diagnosis of "[i]ncreased iron stores." A Menghini liver biopsy was diagnosed as "[l]arge droplet hepatitis fatty change." Two surgical pathology reports listed diagnoses of "[c]lotted blood from bone marrow" and revealed an enlarged liver. A summary at discharge listed pancytopenia, splenomegaly, splenic hyperfunction and fatty infiltration of the liver.

Thomas A. Bruce, an employee of defendant employer who began working in November of 1969, had worked with claimant. He was under the impression that the substance referred to as "benny" had been "slowly phased out," as had D.C. tread dope. The benny pots were, he asserted, habitually left open. The witness estimated that tread lube would be applied to "seven to 20 or 30 out of a possible 150 or 200." According to Bruce, ventilation in the area improved after the new addition to the plant was added in 1974. When tires were removed from the mold, he stated that fumes would hit the worker's face. Bruce, on three separate occasions, took part in the cleanup project and complained of the fumes and odor from the "acid" compounds obtained from the janitor and an instantaneous skin burn. The witness said the "acid compound," which comes in a plastic container, was a "clear, sort of gray" paste applied with a brush. The paste was wiped off with a yellow-green soap solution.

Larry Eshelman, who is presently chief compounder at Firestone and who began work there in 1967, described his job as "liaison or coordinator" between the chief chemist and the chemical engineers throughout the plant. The witness said that master formulas were received from Akron and then adapted for use in the Des Moines plant. Eshelman declared that the only carbon tetrachloride, which he described as a clear, colorless liquid used in the Des Moines plant, was kept in quart bottles in a cabinet in the analytical lab and that a number of solvents would fall into the category of those which are clear, colorless, and which have a distinctive odor. The witness described RP10091 by saying:

> RP refers to rubber pigments. There's a prefix for all of our materials. 10091 is a code number assigned to it. As these materials come up, they have a code number on them. This is a light fraction naphtha, coming off somewhere between gasoline and kerosene, somewhere in the range about 200° Farenheit to 300° Farenheit. It's not a pure chemical. It's an aliphatic hydrocarbon in your straight chain and naphthalenic which is again a compound. It is an aliphatic. It isn't an aromatic at all. It has a small amount of aromatics included in it.

D.C. dope, AK929, was identified as "mineral spirits, a high naphtha again, some silicone, and a red dye..."; RP4732 as isopropyl alcohol; RP4081 as hexane, an aliphatic hydrocarbon; RP12400 as trichloro ethane; RP8593 as mineral spirits; and DM1051 as stripping gas, a high extract naphtha. Eshelman verified that specification for total aromatics was five percent but that at the present time benzene could constitute only one percent and that the only compound concerned here which would be effected by that specification was RP10091. In the witness's experience, RP12400 was most likely to be used for cleaning. He said methyl chloroform would be authorized and a possible material to be used for cleaning.

John Kitrell, senior chemical engineer at Firestone, first started work in January of 1967 and was at that time responsible for all the materials used in the heavy-duty building and curing area. He listed the uses for RP10091 as follows:

> It's used as a base solvent in a number of materials we use, blemish paint. It's used in what we call cement, which are materials used to stick various components of the tires together. It's used as a building solvent to assist in the building of the tire. It's also used as a solvent to tear down a tire, to take one apart, again, because it does dissolve rubber.

Because of a strike, the witness was building tires. He estimated that less than 50 percent of the tires required cleaning by the use of RP10091, although he suggested the percentage could vary between individual workers and more physical contact with RP10091 would occur in the heavy-duty building area. Kittrell did not recall ever having seen any carbon tetrachloride available outside the laboratory. The witness agreed that generally speaking the hotter the area where a given substance is contained, the faster the substance will evaporate.

Leroy J. Main, plant safety engineer at Firestone, whose training and formal education has been in the industrial areas, began work for defendant in 1966. He recalled a federal OSHA inspection on September 14, 1974 during which all areas of the plant were checked for solvents, noise, and noise exposure, and dust. A citation following that inspection lists the violation as employee's being exposed to excessive dust. Inspections were also made by other groups. One of Main's duties was to "monitor ventilation in general work atmosphere and in specific processes," and he recalled that significant changes were made in 1972 and 1973 in intake ventilation and minor

additions in exhaust ventilation capacity because the plant had greater exhaust capacity than incoming air capacity. In the area in which claimant worked, Main said there were windows which could be opened as well as forced ventilation. When a complaint was received from Dr. Peterson in 1975, Main investigated claimant's work area where he said essentially the same chemicals were being used in 1972. Main, who was of the opinion that more solvent was used in building than in heavy-duty cure, also did sampling of high solvent areas with a Mr. Mehler who came from the corporate office. On January 23, 1976 the witness conducted air sampling which he described thusly:

> Well, Your Honor, a fellow would need to establish as closely as we possibly could under test conditions the approximate concentrations that Mr. Thompson would have been exposed to a substance commonly referred to as D.C. dope. I wanted to determine as accurately as I could whether or not there might have been a significant exposure under adverse ventilation conditions that could sure posibly [sic] have existed during that time. We did this by first determining an average number of tires and representative sampling in terms of tire size that Mr. Thompson would or might have worked on during his work shift. I believe this was per rounds of tires laid. To start out with, we wanted to do something that would compensate or tend to compensate for the absence of the wall of glass that had been removed. In trying to simulate conditions as closely as we could to Mr. Thompson's work period, we cut down—We cut off all ventilation in the new addition to the east, closed up all exterior openings, and we allowed the exhaust fans—out of a total of five which had existed during Mr. Thompson's work period, we allowed two exhaust fans out of five to run. This would be directly above and midway between E and F lines, and conducted the experiment under these exhaust conditions, which for all practical purposes, there was no air movement in there at that time.
>
> Under those conditions we took an individual and had him apply in rapid succession this D.C. dope to the number of tires which would represent an average amount completed during one round of tire laying.

He continued:

> Another test situation was applying D.C. dope to a number of tires which represented the average number to which D.C. dope had been applied during a single round of tire laying.
>
> Another test situation was a doubling of the maximum number of tires to which he could possibly have applied D.C. dope in a given round.
>
> Air sampling in the breathing zone of the operator performing this work was conducted with exactly the same type of equipment described as having been used in the passenger tire room previously. I believe that describes basically the sampling techniques.

Main said the tubes were then sent to the laboratory for analysis, resulting in "sample 1 which represented exposure during one round of laying tires on the E line, the exposure time was one minute 35 seconds, and during this period there was an exposure of 147 parts per million." "Sample 2 represented the exposure during one round of laying tires, and this would be his maximum possible." "The number of tires treated in this case, may I say, represented the highest expected number that he might possibly have applied D.C. tread dope to under average operating conditions, and his exposure was determined to be 95 parts per million." The third sampling "represented the doubling of what we consider to be the amount stated in Sample 2, and during this time he was exposed to 28 parts per million." According to Main the threshold limit value was 200 parts per million. The witness said Spray-Clean, a mild caustic soap, and Actasheen, a "more heavy-duty type" of cleaner were used in the plant for cleaning equipment; and while he did not have personal knowledge of what was actually used by claimant and he was "not totally familiar with the total extent of usage" of some materials, he denied that carbon tetrachloride was used or available for cleaning purposes. He said it was possible that the clear, watery-appearing substance used by claimant could be methyl chloroform. Main also was unaware how much chemical exposure claimant might have had through skin contact.

George L. Wilson, who had worked for the Department of Health and as an industrial hygienist in the rubber industry, began work out of Akron, Ohio for defendant-employer in 1965. He said all formulas for solvents used in the various plants were kept in Akron. Although he did not know when the ban had taken place, the witness said the use of benzene had been prohibited except for laboratory purposes or as an essential raw material. Benzene was included in RP10091 because as the witness understood, "the supplier can't get it all out if it's in there. They would love to get it out, because they can sell it better some other way. In the final analysis, it's hard to go beyond a certain stage of purification." Wilson thought the most important factors in chemical exposure were the "quantity taken into the body and the time in which it is taken in; the total length of exposure." Reading from a notice from the National Institute of Occupational Safety and Health, he described threshold limit value as:

> Threshold limit values refer to airborn concentrations of substances, and represent conditions under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect. Because of wide variation in individual susceptibility, however, a small

> percentage of workers may experience discomfort from some substances at concentrations at or below the threshold limit; a smaller percentage may be affected more seriously by aggravation of a preexisting condition or by development of an occupational illness.

More specifically, he testified regarding the threshold limit value of benzene 25 parts per million:

> [I]t means the average concentration over an eight-hour time period that something that's exposed to 25 parts per million, then that would be presumably a safe level. This doesn't mean the concentration can never go above 25, but it does mean if it does go above 25 there must be a similar offset, during which it must be below 25, so that the average or threshold limit value would not exceed 25.

The threshold value limit is 400 parts per million for rubber solvent, and the witness said it was possible to conduct tests and to deduce that

> since the solvents, in these cases sprayed on green tires, essentially all evaporate quite rapidly, the air concentration of the benzene has got to be somewhere in the vicinity of its concentration in the apparent material. Now, that may not be the exact relationship, because it may evaporate a little slower or a little faster, but it can't be far different because this whole mixture of RP10091 is a mixture of solvents.
>
> Therefore, the benzene concentration has got to be somewhere in the vicinity of the percentage of the benzene in the apparent material which in this case varies from time to time, but hangs in or around 1 percent or less most of the time.

Also important was skin notation. Wilson read:

> "Skin Notation. Listed substances followed by the designation 'Skin' refer to the potential contribution to the overall exposure by the cutaneous route including mucous membranes and eye, either by airborne, or more particularly, by direct contact with the substance. Vehicles can alter skin absorption. This attention-calling designation is intended to suggest appropriate measures for the prevention of cutaneous absorption so that the threshold limit is not invalidated." The rubber solvent has no skin notation.

However, the witness believed benzene had the skin notation. As corrective action should concentration higher than that acceptable be found, Wilson suggested, "remove the man from the exposure by some means of making him more remote from the operation, stop using the chemicals is always a permissible action, use a less toxic chemical for the action; but on a practical basis, in most cases, it boils down to some kind of ventilation." He further stated:

> [W]e don't ordinarily recommend specific items in way of protection. We point out the hazards and that appropriate protection should be taken. We don't tell the plant—let's say they bring in a new chemical, it's a severe eye hazard—"Thou shalt wear eye goggles with side shields." We will, in our directions for safe handling start off with the words, "In the case of eyes, prevent eye contact." No one a thousand miles away or any distance away from the plant can sit there and act like God and tell them exactly what to do. We give them the leeway to search out within the methods, means how they are going to use this chemical to take protection we recommend.

John E. Gustafson, M.D., plant physician at Firestone since August 1, 1973, had not examined claimant himself; however, he had received available hospital and medical records. A report from Dr. Gustafson to Mr. Serpento is included in the record. That report appears to summarize claimant's admission to Mercy Hospital and includes the doctor's comments regarding seven diagnoses contained in the discharge summary. The doctor commented that the diagnosis of gastritis "[d]id not seem to be related to any toxic effect." A longer comment related to the diagnosis of leukopenia. The doctor wrote:

> This type of blood count can be found in viral infections ("atypical lymphocytes" are characteristic of mononucleosis and the test was positive in a 1-14 dilution). As long as the absolute number (% x total) is over 1500, most pathologists would not consider this abnormal. Toxic products can cause reduction of the neutrophils, and this is usually an acute process and easily recognized by the pathologist exam of the bone marrow. Inconceivable that pattern would be the same from 1972 to 1974 if on a toxic basis.

Dr. Gustafson said in regard to the diagnosis of thrombocytopenia, "Not low enough count to be symptomatic, significant, or of toxic origin. Lack of change of great significance." The doctor's opinion concerning the diagnosis of "fatty liver, question chemical etiology, nondrinker—" was:

> Fatty metamophosis probably related to general obesity and not to toxic effect. Any toxic effect should involve some of the cellular functions which would show up in the myriad of liver function tests which were done.
>
> Benzene effect on liver would be to produce atrophy of hepatic cells and not to produce a "fatty metamorphosis."

Dr. Gustafson's final comment stated:

> Never have I looked at a chart with so many lab tests, x-rays, and special procedures with so little justification on history, physical, or progress notes. It is possible that the physician may have had more extensive office notes and the medical record is merely incomplete.
>
> I see no evidence on this record that Firestone employment has contributed in any way to this employee's health problems, if he has any, which I doubt.

Charles R. Peterson, M.D., reported to defendant-employer claimant's hospitalization from December 8, 1974 through December 24, 1974 resulted in a liver biopsy which showed "a marked fatty metamorphosis" probably caused by exposure to chemicals. The doctor stongly recommended that claimant be transferred so that he could avoid contact with chemicals. Dr. Peterson supplemented that report with a letter of January 22, 1975 to include diagnoses of thrombocytopenia and neutropenia.

Paul From, M.D., board certified internist, first saw claimant in June 1975 when he was asked by claimant's counsel to evaluate claimant. Dr. From reviewed the hospital records of claimant's previous hospital admission, took a history, conducted a physical and ordered a number of laboratory studies. The doctor found "an abnormal peripheral blood study in which he [claimant] had abnormal cells in his blood called ovalocytes" and leukopenia. On January 31, 1976, Dr. From saw claimant following a suicide attempt and found a leukopenia and "a slight decrease in neutrophils" which the doctor said was not as bad in June of 1975, which the doctor assumed meant claimant's condition was improving. The doctor believed claimant's blood disorder was produced by chemical exposure. Later Dr. From responded:

> Q. Again, in your report to Mr. Duckworth, you said these things: in the absence of any other known causative factors to produce leukopenia and neutropenia, and in the absence of other toxic factors which might cause fatty metamorphosis of the liver, and in the absence of any evidence of hepatitis of a viral nature in the liver biopsy, and in the presence of a history of exposure to chemicals which could produce similar findings, it would be my opinion that Mr. Thompson probably has sustained damage from infection of Benzene, Toluene, and Xylene."
>
> Were you saying, Doctor, as I think you were from this statement, that the basis of your conclusions that if we can't produce any other cause, then this is the probable cause?
>
> A. That is correct.

The doctor said:

> These aromatic hydrocarbons tend to have an affinity for fat tissue. They, in fact, are urged as a solvent to dissolve those kinds of organic substances, so it gets into the body, either through the skin, some of them can, or through inhalation, or ingestion. It gets into one blood stream. It's carried throughout the blood, and wherever it comes in contact with fat, it tends to stay there.
>
> Areas of the body which have fat which seem to be peculiarly affected by this especially are the liver, nerve tissue, so that you see a lot of these acute intoxications showing up as a brain syndrome, and so forth, as hepatitis, and in great concentrations.
>
> Whenever these chemicals tend to get out of the body, they're going to tend to have damage there. The bone marrow by the way, has a lot of fat in it, so it picks it up and stays in the bone marrow, and it just irritates and destroys or changes the function in the cellular structure. The only way we can get material out of our body in any respect would be through the skin, and sweat, breathing it out, detoxifying it through the liver, putting it out through the guy or through the kidney into the urine, and so by whichever route these things get out, usually the organ which excretes them has a high concentration of it.
>
> These tend to be detoxified more by the liver, in some excretions, by the kidney, and this aromatic hydrocarbon gives us changes in nerve tissue, and brain and peripheral nerve tissues, liver, kidney and bone marrow. Those are where the fat is that holds them in.

In explaining the function of the marrow he said:

> The marrow is where they are basically formed. We have other tissues in our body which can assume the function of the bone marrow in case it's destroyed, or which also helps the marrow, and this is the spleen, and a certain part of the liver can enter into the function of hematopoiesis or blood regeneration. The lymphoids very rarely could enter into that, but if a person had a total ablation of his bone marrow, and he was still having some blood cells, they have got to come from some place, so that's the only tissue that could possibly enter into any blood-forming activity, and it isn't nearly as good in those areas as it is in the bone marrow.

In addition to the leukopenia, Dr. From cited liver changes which he said "usually signifies that the cause of

that is a chemical toxin to the liver itself." His examination revealed claimant's liver somewhat enlarged below the right costal margin. Dr. From said if the liver can be palpated beneath the costal margin there is hepatic enlargement which means that "the liver is filled with something that it shouldn't, and, in this case, it seems it's a fatty substance, because we'd already had a liver biopsy which had shown fatty changes in the liver." The doctor avowed the significance of palpation of the liver by one examiner and inability to palpate by another examiner could be that "[o]ne of the two examiners may be wrong. If the liver had definitely been enlarged at one time, and now it wasn't enlarged, one of two things has happened. Either it has gone back to normal, which is quite possible, or it's in a process of shrinking due to scarring, so it becomes smaller." Concerning damage to the lungs, the doctor said:

> Overwhelming exposures would cause an acute irritation of the lung tissue, with what we call pulmonary edema. Irritation of the air sacs themselves come about through his carbon tetrachloride inhalation and exposure. If he had any of those things, certainly, in June of 1975, there was no evidence of any functional abnormality of his respiratory system.

In regard to possible aggravation the doctor said:

> If one has this condition [familial or cyclic neutropenia], and periodically his white cell count goes down for some unknown reason, and then you add on a condition through some toxic injury which is going to further lower the white count, the two together would certainly make it go much lower than certainly the cyclic neutropenia or familial neutropenia would tend to, and he may get more out of the toxic irritation than he had simply because he tends to go down periodically from the cyclic parts. It would certainly aggravate an underlying condition such as that.

Although Dr. From thought it reasonable to say claimant's condition would be permanent, he acknowledged a tendency toward "some slow improvement in this particular patient as there has been a withdrawal from the solvents." He further recognized the possibility that claimant would totally recover from his blood problem and that the liver would return to normal. However, he said it was more likely to "go on to a thoracic condition of the liver, a scarring process." The effect of that scarring process was difficult to predict in that:

> [t]he liver has at least 64 chemical functions. One can't predict what functions are going to be disturbed. These have to do with blood-forming elements, again, with sugar, protein, fat metabolism, temperature regulation of the body, detoxification of chemicals and drugs that we take into the body, a total of 64 unknown functions. Which of these 64, and any combination, might be affected, would then determine what happens to the body, but you simply do not function at a normal level if you have a thoracic condition in your liver.

Another possibility, according to the doctor, was that:

> [w]henever the bone marrow has been irritated, or any other part of what we call the raticuloendothelial system, which has to do with the destruction of blood-forming elements, something may happen that triggers up the process that we call leukemia.

The doctor ruled out cyclic or familial neutropenia because no one else in the family had it. While the doctor suggested the claimant would have to do "more or less sedentary" work, avoiding exposure to "any sort of an irritation or toxic chemical or solvent, at the time of his deposition as well as in June of 1975 he believed claimant was capable of returning to work. In testifying Dr. From assumed that claimant was using hydrocarbons throughout the day for more than half his working time when he became a supervisor, that claimant's exposure to benzene began in 1972, that the ventilation was not excellent with an increase in heat and that none of the chemicals involved contained a high percentage of the solvents.

Jack Spevak, M.D., board certified pediatric hematologist and oncologist, was requested to see claimant by John Gustafson in the summer of 1975. He saw and talked to claimant, examined Dr. Peterson's records, and looked at blood smear and bone marrow studies. On October 22, 1975 Dr. Spevak admitted claimant to the hospital and performed a number of tests, which included "blood counts, p. 7, 11, 9-12" as well as "B12 levels, p. 7, 11, 15-20." The doctor found no liver enlargement, and his only positive physical finding was mild splenomegaly or enlargement of the spleen. The doctor reported the laboratory findings as follows:

He had a hemoglobin of 14 grams; a red blood cell count of 5.91 million, and hematically 44 volumes percent. He had a white count of 3,700, and the white blood cell differential showed 17 percent neutrophils, 81 percent lymphocytes, 2 percent monocytes. The absolute neutrophil count was 650 neutrophytes per cubic millimeter of blood. His blood smear showed a reduction in platelets. The erythrocytes showed some hyperchromia, occasional target cells and some ovalocytes. There was mild anisocytosis and poikilocytosis. The white cells were reduced in number, and the neutrophils were likewise decreased, and his bone marrow examination—he had a—what I felt to be a normal

cell marrow. There were normal plasmic maturation pattern. The granulocytic elements were reduced in relationship to the erythroid elements, and he had a ME ratio of 1.2. His iron store were increased. There was no evidence of leukemia. The liver function studies that were carried out were normal.

I would like to go back to the blood count that he had done. He had platelet counts of 136,00, 113,000, and 93,000. He had reticulocytes counts of 1.2 percent, 2.3 percent, and 1.4 percent. Hemoglobic electrophoresis was normal. A sickle cell preparation was normal. He had a normal prothrombin time, 11.9 seconds with a 12.9 second control. Partial thromboplastic time was 23 seconds with a control of 23 seconds.

SGOT, 27; the LDH, 154; the alkaline phosphatase, 61. He had a total bilirubin of 0.6 milligrams percent with a direct bilirubin of 0.4 milligrams percent. The FGPT was 27 units. The fatal hemoglobin 2.2 percent; the serum iron was 51 micrograms percent, and the iron binding capacity 237 micrograms percent. He had a thyroid T-3 and T-4 thyroid function studies, which were normal. Serum phosphate level was 2.9 mpgl, which is normal. Serum B12 was a thousand mpgl, which was normal. The study for hepatitis was reported as normal. Fluorescent anti-nuclear factor was reported as negative. He had chest x-rays which was reported as showing no abnormalities of the heart and lungs, and medial spinal structures.

Claimant's count of 3,400, the doctor testified, could be normal as white counts for blacks were lower than those for whites, with a normal range for a black adult reaching from 1,300 to 7,000 Dr. Spevak considered a platelet count below 150,00 as low. Dr. Spevak proposed four diagnoses. The first was splenomegaly of an undetermined cause. The second was possible by hypersplenosism [sic]. The third was pancytopenia secondary to the hypersplenism, which he later said "should be modified to actually leukopenia and thrombocytopenia." The fourth was fatty infiltration of the liver. Regarding the relationship between claimant's exposure to chemicals and the diagnoses, the doctor said:

> . . . I felt that I was unable to answer that question at that time, and I felt that there might be other factors that could have contributed to the same findings, and yet at the same time I could not say that the exposure to benzene, which was in the solvent, over a period of time, was not—did not play a role in the physical findings and that laboratory findings. It seems, again, that his complaint of fatigability, tiredness, and other complaints seemed out of proportion to what I was finding objectively, that is, by physical examination, and by laboratory tests.

Later the doctor stated that "[w]ith regard to the findings in the liver, it is possible that those could be from the basis of chronic exposure to solvent, and yet there are other causes for fatty infiltration of the liver." Still later Dr. Spevak affirmed that he could not give a definite answer to the etiology of the claimant's symptoms and physical findings. Fatty metamorphosis, thrombocytopenia, leukopenia, neutropenia, and pancytopenia would all be compatible with chemical intoxication. Although the doctor felt unqualified to definitely diagnose the etiology of the fatty infiltration of the liver or the splenomegaly, he said that he knew "that benzene can cause damage to the bone marrow, that is, marrow aplasia. [He] didn't feel that he [claimant] had those findings." Dr. Spevak suggested that neutrophil counts would vary with the time of day, illness, medications, and laboratory variations.

Gerrit W. H. Schepers, M.D., a board certified toxicologist, currently director of the heart and lung programs of the Veterans Administration, has had various involvements with the field of industrial medicine. He testified chemicals could enter into the body three ways:

> You can inhale them. They are mostly volatile substances. One may absorb them through the skin through either their coming directly in contact with the bare skin, or because they soak into the clothing of the worker in industry; and the third would be that they could be swallowed.
>
> Now, the swallowing occurs to a small extent as part of the process of breathing, because at nighttime, the lungs would reject part of the material which had been absorbed into the lungs or attached to the lungs and cleared up through the trachea, and during sleep the individual would swallow them so they go into the stomach. They could also swallow it through contamination of food they may be eating or storing in the work area. Other methods of swallowing would, of course, be deliberate poisoning attempt.

Dr. Schepers who described carbon tetrachloride and trichloroethylene as industrial solvents and cleaning agents which evaporated quickly and could be used to dissolve fatty substances, said they affect the human body by

> mediat[ing] their toxicity primarily through their great volatility, their ability to be absorbed. They are totally absorbed swiftly into the body through any surface they can come into contact with, the lungs, the skin, or the alimentary tract, and a further harmful influence they have is their great capacity to attach to and be retained in all parts of the body where there are fatty ingredients; so once a person or animal has been exposed to these substances, they soak into the brain, which is about 90 percent fatty materials; into the subcutaneous tissues, into the

alimentary tract, which is fatty; into the bone marrow, which is about 30 percent made of fat; and also into the liver and the kidneys, where there are many fatty materials in the liver cells as a normal process, and where also fatty materials are metabolized, and they then interfere with the normal functioning of these organs and systems by changing the individual, normal actions of the cells which compose the systems, and damaging the cells, damaging them temporarily or permanently.

They can be retained selectively for protracted periods in various organs. It is unpredictable just how they will do it, and it also depends on whether the exposure has been singularly to the chemical; or, as more often happens in industries where they have mixtures of exposures to different quantities, and their ratios of these chemicals and other chemicals, they are considered to be among the more hazardous of the substances which necessarily have to be used in industry in order to make industry function.

The doctor also discussed the phenomenon of potentiation whereby

> two substances, for example, that might minimally interfere with the functions of the liver or the bone marrow or the brain, each by themselves not sufficient to produce symptoms of progressive disease, if the exposure occurs to the both of them, then major and different effects may result which could be proportionately way out of line with quantities that—that effects might have been anticipated to have.

Dr. Schepers examined claimant and also examined his hospital records. The doctor, testifying from a photograph he had made from a slide of claimant's liver, noted:

> a large number of large white spaces of irregular size. They tend to be round, and these white spaces would normally be called vacuoles, and presumatively they could be fatty materials. I cannot confirm absolutely that they are fatty materials, because their contents probably have been removed, and that is part of the process of preparing a slide of this kind; because in order to cut it into thin ribbons as shown there, one must imbed it in paraffin wax. You must dissolve the wax subsequently, and in that process, any fatty materials would also be removed, and presumatively, therefore, I believe the average pathologist would call these fatty globules, but I am aware of the fact that they could also be something else. It could be watery globules. There is no way of proving it now.

The second important feature displayed by these photographs is that where individual walls of the hepatocytes for the liver cells are visible. These are clearly seen. They are thickened walls. This is not a normal appearance of the liver, in which the wall is usually a very thin dividing line, one wall between the other. This is an abnormality.

The third clearly evident abnormality in this case is the variation in the size of the nuclei of these liver cells, these pericytes. They vary not only in size, but they vary in location in the cell. Normally they would be in the center of the cell, but they vary also in color density.

The difference, for instance, between the cell I am pointing out here and the cell I am pointing out over there, one is twice as dark as the other, and yet they are equally therein, and they are stained by the same dyes.

Another abnormality which is cleary shown is that most of the cells—the nuclei of most of the cells have a dark dot in them which tends to lie off to the side on the edge of the nucleus. That is called the nucleololei, and I think I can show better in the subsequent slide, there are little white spots on these, and some of these nucleololei are being pushed out of the nucleus. This is why they are lying on the side of the nucleus.

A fourth abnormality clearly shown, to where I am pointing, is that some of the liver cells have two nuclei. A normal liver cell should have only one, and here where I am showing there are two lying one adjacent to the other, where each has two nuclei in it.

Now, these are all abnormalities indicating that these cells are very sick, and the part that is overwhelmingly important in these pictures is that every one of these cells is disordered. There is not a normal liver cell in that field.

Another abnormality he noted was:

> a large proportion of these [cells] have oversized nuclei like the one I am pointing to, which is seen in two planes of space; and, of course, the nucleus globular would have three planes to consider.
>
> This nucleus would be almost 28 times as large as that adjacent to it. That is a clear abnormality, and this cell itself is many multiples as large as the cell immediately adjacent to it. Liver cells should normally be approximately the same size.

The doctor presumed the white spaces were fatty material, but he said there was no way to know what they were. Dr. Schepers, however, testified that "chemical initiated damage can occur in the liver without liver profile

abnormalities." While looking at a photograph made from a bone marrow biopsy slide, Dr. Schepers noted "not cluster or organized grouping of white cells at all. Just the red cells arranged in columns between fatty globules, and then semimature white blood cells sparsely interposed among the red cells. This is a basically evident abnormality that is clearly shown here." He continued:

> [I]n a normal bone marrow biopsy specimen, one would expect to find the embryonated centers, as they might be called, of white cells more evenly dispersed throughout the bone marrow without the star contrast between the bloody area, the red cell bloody area and the white cell area, as shown here.
>
> The second feature which I think the photographs portray is the disturbance in what I know as the normal sequence of cells, the way they mature in bone marrow. There are some of the cell groups, whole clusters of them, which are not represented in numerically adequate numbers. For instance, what we call the metermyelocytes and the band cells are quite scarce, and they refer to a class of cells which are intermediate between the first series of cells that come from the stem cells.
>
> There is a class of cells known as the stem cell from which all the cells originate, and the stem cells has a multipotential capacity to make different kinds of cells, and these next series are called blasts, so they would be myeloblasts, lymphoblasts, monoblasts, and thromboblasts. These blasts should be formed in a genetically determined healthy fashion in proportionately adequate numbers, according to the kind that the body normally should have.
>
> Then after the blast series come what are called metermyelocytes, the myelocytes, and metermyelocytes. Then after that only come the cytes themselves, in other words, the different individual types of cells, and then they differentiate into mature forms. There is a lack of some intermediate steps in here that I don't see.

Again examining a photograph made from a slide, this time of a bone smear, the doctor recognized

> the relative lack of white cells as compared to red cells, or it could be expressed relative preponderance of red cells compared to white cells, whichever way one wishes to say it; and the lack of intermediate step cells. I find some myelocytes and some blast cells, and then I find mature cells, but not the intermediate step, so there is apparently some gap in the seriation of the cells.

He continued:

> The red cells also show abnormalities in that they are irregular in size. They are irregular in shape. They are irregular in staining density. There are quite a number of cells that are transparent in the middle and dense along the edges.

Dr. Schepers affirmed that the abnormalities he noted were consistent with chemical intoxication in that:

> the bone marrow capacity to differentiate in a normal orderly fashion is interrupted, so that abnormal series of cells are produced.
>
> The different cell series differ in their sensitivity to different types of chemicals. Some chemicals will wipe out all the stem cells, and then the net result is that the person develops what is known as aplastic anemia. That's the most severe type of damage.
>
> Other chemicals will selectively wipe out the capacity of the bone marrow to form individual categories or clones of cells, as they are called, or it may change the manner in which these clones evolve, so that they will skip certain stages of maturation and, say, go directly from a myeloblast phase to, for instance, the mature cell, leaving almost no trace of intermediate states.
>
> These are all examples of the fingerprints that chemical intoxication leave, and then other chemicals will hurt both the white cell series and the red cell series; yet other chemicals will have an adverse effect on the maturation and the development of the megakarocytes, and therefore, also the platelets, the thrombocytes, and there is really a very large spectrum of possibilities that chemicals may induce.
>
> Some chemicals will do the opposite. In other words, instead of reducing the number of cells totally, or selectively reducing individual clones or categories of cells, it will stimulate their growth, and the net result is a preponderance of one type of cell over the other, and the more this tends to be a preponderance of immature cells, the closer this gets to leukemia; and we know, for instance, that a substance like benzene can induce leukemia both in man and in animals.

The doctor, who did not know of a familial disease which could produce claimant's disability, found a causal relationship between the industrial exposure and the medical condition which he recognized in claimant and that the occupational history and the occupational exposure were "the sole explanation for claimant's illnesses beginning in 1972. He said the features of claimant's hospitalization record from April 17, 1972 were consistent with a pulmonary microembolism when produced by chemical exposure. Dr. Schepers, who presumed the concentration of benzene would vary with suppliers, was assuming that claimant handled benzene

"and other solvents in a personal fashion from what I was told by him and by the reports; that he got these materials onto his skin; that he was close enough to the materials to potentially have breathed them as he was applying them to surfaces. To me, that is meaningful exposure, even if the concentration of benzene is only approximately one percent, as defined here." He also assumed that claimant spent half his day handling chemicals, that claimant was exposed to chemicals even when he was not personally using them and that claimant's greatest exposure to chemicals occurred when he was using carbon tetrachloride. He said, "[A]ny employee, including Harvey Thompson, working with chemicals would sustain some damage, but it would require an X factor, in addition to the damage that would be inherent to make him sick to the degree that he would become unable to do his work or would have symptoms." The doctor's testimony appears to indicate he was looking very specifically at claimant's reactions as evidenced by the following:

Q. Doctor, if you were to assume what you did in my hypothetical question that while using the DC tread dope, that Mr. Thompson suffered dizziness and neausea [sic], what would that indicate to you?

A. It would indicate that substance was present and being released while he was using the dope, that it is capable of producing those symptoms in Mr. Harvey Thompson.

Q. With that knowledge, would you need to know the specific PPM, or parts per million of that chemical in the air to make a judgment as to the effect of that chemical on the individual?

A. That information is irrelevant at that point, because we already have proof that the person is responding to the existence of the chemical.

Dr. Schepers thought that claimant's condition would continue for "an unlimited period" and that "it would not be in his [claimant's] best interest to resume employment under circumstances where further exposure to chemical environmental hazards may occur." In further limitation, the doctor said claimant could do work involving only moderate physical exertion. Dr. Schepers believed the accepted standard for benzene of 25 parts per million was too high. The doctor said that while isolated low counts could occur, the normal range of white corpuscles in an adult would be five to eight thousand.

John Edward Kasik, M.D., board certified internist with a Ph.D. in pharmacology, was at the time of his deposition, director of respiratory therapy at Oakdale University Hospitals and the V.A. On January 28, 1976 he saw claimant and without the benefit of claimant's previous records recorded the following history:

> Basically, the patient was well—claimed to be well until 1972. In the spring, he began to develop episodes of sudden shortness of breath—dyspnea with air hunger and a feeling of not feeling well, at that time. This was without wheezing or cough. He stated that these spells were episodic, sometimes associated with anterior chest pain—knife-like, just to the left of the sternum, which seemed to go through to the back. He also had at that time, but not associated with the dyspnea, episodes of upper abdominal distress. These episodes culminated in a series of hospitalizations, where he was told that he had an abnormal ECG and an enlarged heart. He had no history at that time of ankle edema or paroxysmal and noctural dyspnea, PND, or known cardiac disease.
>
> He was not found to be hypertensive at that time. He was treated at that time with a variety of medications, but the problems continued. He was seen by a series of physicians, and I have the physicians summarized by name. He was hospitalized several times. The diagnoses given to him were diabetes mellitus, hyperthyroidism, gastritis, hypersplenism; and he was told that his back pain was secondary to a sclerotic right sacroilliac [sic] joint.
>
> He improved and stated that dyspnea occurred with only moderate to severe exercise.

Dr. Kasik went on to testify:

> He denied cough, sputa, wheezing, or symptoms that might be associated with hyperventiliation [sic] syndrome. He has eposides currently that consist of feeling lightheaded, but without vertigo, numbness or tingling. These symptoms sometimes occur upon standing, but may occur at other times.
>
> He is unaware of cardiac symptoms, loss of control or fainting, with the episodes. He stated to me he felt good at the time I saw him.
>
> His back problems appeared to have responded to exercise therapy, and that was under the care of Dr. Peterson. He denied weight loss; on the contrary, he says he has a chronic problem with a tendency toward obesity.
>
> He denies weakness, lethargy, anorexia or malaise except for the spells of feeling lightheaded at times. He is nervous at times, but ascribes this to the fact that he is not working. He says he misses work and wishes that he could return.
>
> The past history shows he has had some knee injuries as a result of athletics—baseball. He denies any other problems that might be of medical significance.
>
> He had an appendectomy and had repair of an umbilical hernia.

A review of symptoms was a detailed one and was essentially negative.

Now, addendum. This was an addendum that I got from the patient as we went through the history. The patient told me that on occasion he had thrombocytopenia and leukopenia, the cause of which is unknown. The diagnosis is of hypersplenism. It has been suggested that this is 2 percent to benzene or other chemicals at work. Then it went on to recoup what his job was. He discussed in terms of curing tires and the solvents he used. He did not know what the solvents involved were, but he denied specifically in the history alcoholism, known liver disease. Bleeding tendency on history of infections. There is no history of known cause for abnormal blood count.

Then I went on to say that the case is now in the course of litigation, and he was sent for pulmonary evaluation.

Speculate for a moment, just for the sake of discussion, if one had a patient who had been exposed to benzene and we were to speculate that he had a liver disease, and I could find no evidence of liver disease either by history, by physical examination, or by appropriate laboratory studies in this patient. My opinion of this patient, after I had examined him, was he was a normal individual; that in looking at the three areas which were really accessible, the chest, the heart-lungs, and liver, I could find nothing that would indicate that he had an abnormality.

Dr. Kasik proposed that if claimant were sent to him by an insurance company for pulmonary studies, he would say 'This man is completely insurable in regards to his work.'

With respect to claimant's exposure to toxic chemicals, the doctors responded, "He [claimant] was unaware of them. I asked him specifically about that, partly because I have a secondary interest in toxicology—and talked to him, and he was not. He simply didn't know. He simply described the nature of his job." Dr. Kasik asserted the key to the situation was exposure, not concentration. He was aware of benzene causing difficulties with bone marrow. The doctor had not examined other medical records because he did not want his view to be prejudiced. Dr. Kasik said his physical examination was normal, including the liver function tests. Regarding the blood count, the doctor reported a white count of 3,600 with "29 percent segmented polymorphonuclear leukocyte and monocyte count." There was irregularity of cell type and the doctor guessed that claimant would have a hemoglobin disorder. There was not, according to Dr. Kasik,

Henry Edward Hamilton, M.D., board certified internist with a sub-specialty certification in hematology, had reviewed claimant's records and had read the depositions of Drs. Schepers, From, Spevak, and Kasik, but had not examined claimant. Dr. Hamilton acknowledge that thrombocytopenia, neutropenia, pancytopenia and leukopenia could develop from chemical exposure. He found that since 1962 claimant's red blood cells had been below average in size with target cells and ovalocytes and that these conditions were not related to iron deficiency or to toxicity from hydrocarbons. Dr. Hamilton also found claimant to have a consistently larger number of red cells than normal, an elevation in A-2 hemoglobin, an enlarged spleen and increased iron stores in the marrow, which pointed him to a diagnosis of thalassemia. The doctor did not find a diseased marrow. Dr. Hamilton said that people exposed to hydrocarbons have low reticulocyte counts, marrows that are "wiped out," lowered production of blood cells with a normal size. The doctor said he looked at "acute, severe toxicity respect to and/or chronic toxicity" in analyzing claimant's record. With respect to claimant's white blood cells, the doctor said claimant's polymorpholeukocyte to lymphocyte ratio was reversed. Further, he testified:

evidence that any of the compounds that I see before me are capable of causing pulmonary disease in a patient. My specialty is pulmonary disease. I have been asked a specific question or to give a professional opinion about whether this man has pulmonary disease or not, and in my opinion, he does not. To buttress that, I can say that the patient has not been exposed to any of the substances that I know of that have a recognized deleterious effect upon the pulmonary systems—the upper airway, based upon my knowledge of toxicology, including toxicology of benzenes, and so on. There is no evidence that this substance is toxic to the organs normally involved in respiration. I am aware of the fact that benzenes and toluene have been indicated in individuals with hepatic disease.

He does have a large spleen, and large spleens often do in fact take out white blood cells, or sequester them at an accelerated rate, and they take out specifically the polys. We don't know why they do it, but they do, so I think I'm perfectly comfortable. I think he has no disease here, no injury. There is nothing. There is no toxic depression of these cells...

Dr. Hamilton found claimant's platelet values no problem and suggested his platelets functioned "magnificently well." The doctor noted claimant had many megakaryocytes. The presence of these cells was, in his view, important in that megakaryocytes would be one of the earliest cells to go into hydrocarbon poisoning.

Dr. Hamilon, who thought chemicals could create fat in the liver, found no toxic changes in claimant's liver but rather that it was infiltrated with fat because he is well-nourished. The doctor found nothing in the drug history that would "alarm" or "alert."

Norman G. White, who has a Ph.D. in pharmacology and toxicology with certification in industrial hygiene and who had worked in various ways with chemical exposure problems and with hydrocarbons, testified that toxicity is determined by a combination of the duration level and frequency of exposure accompanied by the mode of entrance into the body. He specified that in the industrial situation

> you must then know when he goes into the plant; you must know basically what that level is for the material or combination of materials that he is exposed to; you must know how much he is there. Knowing how much is there you have to determine how long that man is exposed to it, how frequently he is exposed to it each time he is and whether or not he has a continuous exposure, whether or not from other sources and then you must know the mechanism by which it is detoxified in the body, excreted. This goes back again and is part of the number you arrive at as a dosage level that is safe and all of these factors must be evaluated in determining and added to what you know about the condition of the man himself and his general state of health, whether or not he is an alcoholic, a drug addict, what other drugs he might be on, the extent to which he is taking other drugs and the possibility of whether or not there might be an additive effect or synergistic effect involved.

Over claimant's objections White proposed:

> If the total amount of solvent used in a week were volatilized one time thorough mixing in the area, the maximum concentration that this amount of material will produce is 5,700 parts per million. With calculation of the rate of turnover, assuming a complete air change every 3.18 minutes, the concentration that this amount of material will produce is 21 parts per million. This is with regard to the major constituent in the solvents used, which are hydrocarbons that have a TLV of 500 parts per million.

On a further breakdown he said the benzene concentration would be 171 parts per million maximum with instantaneous volatility and with a complete air change 0.063. The threshold limit value, which the witness described as "that level which will not produce any harmful effects," was in 1972 25 parts per million with a proposal to lower to 10 parts pending. Applying these factors, White said the concentration could be increased 396 times using 25 parts or 158 times using 10 parts and still be "in the acceptable noninjurious level." In regard to toluene White said that because the methyl group provided a handle, toluene could be "oxidized to benzoic acid, esterfied and eliminated through the kidneys" in a mechanism "so efficient that it removes toluene almost as rapidly as it is taken in" so that toluene would not accumulate in the body. The witness said the percentage of toluene and benzene in RP10091 would vary with the supplier. According to White, this detoxification would not be available for benzene. Skin contact with hydrocarbons would result in "severe chapping" leading to a "cracking down into the live tissue resulting in secondary infection." The witness did not consider absorption through the skin as a factor in claimant's case. White acknowledged that some individuals would be more susceptible to chemical exposure than others.

Alexander Ervanian, M.D., board certified anatomical and clinical pathologist, neither saw nor examined claimant. Dr. Ervanian, who found no abnormalities in claimant's exhibits 19 through 23 compatible with chemical intoxication, disagreed with Dr. Schepers' findings of various abnormalities and, more specifically, Dr. Ervanian believed that the visibility of hepatocytes walls was normal, that nuclei in the liver could occupy any position within the cell including the membrane of the nucleus, that two nuclei in liver cells was not abnormal and that a bone marrow specimen could not be taken out of context. When the doctor was asked the hypothetical that was asked of Dr. Schepers, he responded, "I think there's absolutely no relationship between his job and his current problem." Dr. Ervanian testified that he saw nothing in the evidence he examined which would lead him to conclude that claimant suffered from poisoning by some chemical in the Firestone plant. In reaching this conclusion, the doctor, who said he was unfamiliar with toxic levels of benzene and toluene, made no assmuptions in regard to exposure levels in that he did not consider ventilation, exposure to multiple chemicals or protective clothing which might have been used by claimant. In relation to specific chemicals, Dr. Ervanian testified that carbon tetracholoride would cause zonal necrosis of the liver and that while claimant had fat cells, no necrosis was present. Benzene, he said, "ordinarily does not harm the liver" and would affect the granulocytes in the bone marrow. He would not agree that fatty metamorphosis alone would be compatible with exposure to hydrocarbons. Although Dr. Ervanian could not find an objective cause for claimant's problems, he found "some evidence" of thalassemia trait, which he explained thusly:

> Thalassemia is an abnormality of the red cells, which tends to be an inherited abnormality—it is an inherited abnormality. The parents themselves may not have evidence of it, but they carry the gene for the abnormality, and it can be transmitted to their

children. I don't want to go into fantastic detail about thalassemia, because large books are written about it, but, basically, in thalassemia, what they have is a problem in the structure of the hemoglobin molecule, and this manifests itself in a variety of ways, and those patients who have a full-grown thalassemia disease, they have extremely rapid destruction of red cells, and become severely anemic, and have to get blood transfusions. Then there are patients who have only the trait, do not have the full-grown disease, but do manifest enough abnormalities so the disease can't be diagnosed.

But basically it's an abnormality of the cell production because of an abnormal hemoglobin. How, it's very common in Negros [sic], incidentally. It's common in Negros [sic] and in people who have a derivation from around the Mediterranean Basin. It occurs in other people as well, but those people have the highest incidence of it. Most of the thalassemia patients that we see do tend to be Negros [sic] or Italians, or something like that.

He has several features of thalassemia minor. Thalassemia minor is the same thing as thalassemia trait. He has a large spleen. That's abnormal. He has abnormally small red cells, which has been documented on several blood examinations, some which I've looked at over here. The size of his red cells are definitely abnormally small. The mean corpuscular volume is definitely abnormally small.

In a Negro patient who has an abnormal hemoglobin content, a large spleen, and abnormally small red cells, the No. 1 diagnostic thing to think of is thalassemia, and in order to confirm this, you have to do a couple of tests. You have to test for hemoglobin F, which is one of the normal hemoglobins that everybody has, but in some patients with thalassemia trait, hemoglobin F is increased, and you have to test for another hemoglobin, which we call hemoglobin A-2. All normal people have hemoglobin A-2 in small amounts. The average for normal people is around 2.5 percent or less of the total hemoglobin. Patients with thalassemia trait, as I've indicated, may have hemoglobin F elevated, or they may have hemoglobin A-2 elevated. This patient, Mr. Thompson, has an elevation of hemoglobin A-2 of 5.4 percent, which is twice the normal amount.

Furthermore, examination of his bone marrow indicates that he has an increased amount of iron storage in his bone marrow, which is also a further manifestation of the fact that he may have a low-grade destruction of red cells.

The doctor said he did not know if thalassemia minor could have been aggravated by exposure to chemicals. Dr. Ervanian, based on the lack of evidence of damage he saw in the material he examined, assumed "it was safe for claimant to return to his work area."

Also included in this record is the pathology report on Vertis L. Lathon, a co-worker of claimant's, which lists the primary cause of death as "[l]iver cirrhosis, postnecrotic, diffuse." Accompanying letters and reports from Roy W. Overton, M.D. reveal the doctor's suspicion that Mr. Lathon's illness was job related.

Forty-two year old claimant, a high school graduate, served in the air force for less than a year. He worked as a fork-lift operator for Iowa Pack and for a brief period at the post office before going to Firestone. Claimant said he had attempted to get back to work and has applied to numerous companies, but he was not able to find a job. The parties argued that it was defendant-employer's desire to return claimant to work in a non-chemical area, but that he had not returned to work because of a union problem.

For an injury to be compensable a claimant must establish by a preponderance of the evidence that his injury occurred "in the course of" and also "arose out of" his employment. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 28 (1967).

The claimant must prove by a preponderance of the evidence that some employment incident or activity brought about the cause of the health impairment upon which he bases his claim.*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). Whether an injury has a direct causal connection with the employment or arose independently out of the employment is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960). 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).

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

The present case consists of conflicting medical testimony. Absolute certainty as to the cause of claimant's disabilities are causally related to his exposure to chemicals while working for defendant-employer.

In reaching the conclusion that claimant's condition was causally related to his employment, greater weight was given to the testimony of Dr. Schepers, From, and Spevak. Drs. Schepers, From, and Spevak all noted fatty deposits in claimant's liver. Dr. From's testimony indicated that fatty metamorphosis of the liver could be due to chemical exposure. According to Dr. Spevak all his

diagnoses, including fatty infiltration of the liver, would be compatible with chemical intoxication. In addition, Dr. Schepers affirmed that claimant's liver and bone marrow abnormalities were consistent with chemical intoxication.

Dr. Hamilton attributed the infiltration of claimant's liver with fat to the fact that claimant was "well-nourished." Dr. Ervanian agreed that claimant's liver had fat cells, but he disagreed that fatty metamorphosis alone would be compatible with hydrocarbon exposure.

Both Dr. Schepers, a board certified toxicologist with extensive experience in occupational diseases and toxicology, and Dr. From, a board certified internist who has treated patients exposed to chemicals, examined claimant. They each testified that claimant's condition was produced by chemical exposure. Dr. Spevak, a hematologist, also examined claimant, and although he was unable to definitively state that a causal relationship existed between claimant's disease and claimant's exposure to chemicals, he did not rule out the possibility.

Dr. Kasik's specialty is pulmonary disease. Claimant was sent to him for pulmonary evaluation and not a hemotological evaluation.

Neither Dr. Hamilton, an internist with a subspecialty in hematology, nor Dr. Ervanian, a pathologist, felt that claimant's disorder was work related; however, neither had examined claimant. Their conclusions were based on claimant's records and results of previously administered tests.

Claimant's objection to the deposition of Dr. Ervanian is noted. New evidence is generally not allowed to be presented on appeal; however, even with the inclusion of Dr. Ervanian's testimony, claimant sustained his burden of proof by a preponderance of the evidence.

Since the injury is to the body as a whole, claimant's disability must be evaluated industrially and not merely functionally. The factors which may be considered in determining industrial disability are claimant's age, education qualifications, experience, and his future inability to earn a living because of his disability. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963).

Claimant has a high school education and has worked primarily in the rubber industry. Both Dr. Schepers and Dr. From stated that claimant could only perform moderate exertion or sedentary work and must avoid further exposure to chemicals. Claimant has sustained a 20% industrial disability.

WHEREFORE, it is found:

That claimant sustained an injury arising out of and in the course of his employment, the last exposure being December 7, 1974.

. . .

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

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

WILLIAM TRACHTA,

Claimant,

vs.

UNIVERSAL ENGINEERING,

Employer,

and

SENTRY INSURANCE,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

In the appeal decision filed August 25, 1980, page 3, paragraph 6 should have read:

The Iowa Supreme Court has also stated that a defendant-employer's refusal to give any sort of work to a claimant after he suffered his affliction may justify an award of disability. Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).

. . .

Signed and filed this 5th day of September, 1980.

ROBERT C. LANDESS
Industrial Commissioner

WILLIAM TRACHTA,

Claimant,

vs.

UNIVERSAL ENGINEERING,

Employer,

and

SENTRY INSURANCE

Insurance Carrier,
Defendants.

Appeal Decision

This is an appeal by the claimant from an arbitration decision wherein claimant was awarded temporary total disability and certain medical expenses. Claimant seeks to gain permanent partial disability benefits.

* * *

On May 9, 1978 the claimant testified that while lifting a piece of metal at work, he felt a pop in his back as he was turning and raising the metal into position. He reported the incident to his foreman but thought little of it and finished his day's work. His back was tightening up as the day wore on, and he informed his foreman that he may not be in to work the next day.

On May 10, 1978 the claimant saw the company physician, who told claimant to return to work. However, due to his stiffness and pain in his back, claimant instead saw Dr. G. L. VanSlyke, his family physician. Dr. VanSlyke ordered him to stay home and return to see him on May 13, 1978.

On May 13, 1978, claimant returned to see Dr. VanSlyke but instead saw Dr. James W. Turner at Dr. VanSlyke's request. It was Dr. Turner's impression that claimant was suffering from "acute back strain superimposed upon rather pronounced lumbar spondylosis." He recommended another week of bed rest along with heat and aspirin in regular doses.

Following a discussion with his brother-in-law, an executive with the defendant-employer, claimant returned to work on May 22, 1978. Apparently, claimant had not been medically released to return to work but did so to keep peace in his family. Claimant testified that he still had back pain and pain in his left leg. The testimony of a co-worker verified claimant's complaints of pain and difficulty in doing his job without help. Claimant did not seek further medical attention until August 7, 1978, although he testified to constant trouble with pain in his lower back and left leg.

On August 6, 1978 claimant was involved in an incident where his motorcycle tipped over. The motocycle was at rest with the claimant on it, when the claimant's foot slid out from under him on wet grass causing the motorcycle to tip over. Claimant fell to the ground on his right side. The only apparent injury was to his right thigh, as he fell on some smoking pipes he had in his right front pants pocket. The motorcycle did not touch him when he fell, according to the claimant's testimony, and he rode it home shortly thereafter.

The next day before starting work on August 7, 1978, the claimant stated he felt a burning sensation in his right thigh. Upon investigating the cause of this sensation, claimant discovered a large bruise to his right thigh. Claimant decided to forego working that day and returned home. That evening, at his wife's insistence, claimant went to the hospital emergency room where he was seen by a Dr. Mulert.

In his report, Dr. Mulert remarked that claimant had a lateral thigh hemorrhage to his right leg. At no point in his report did Dr. Mulert mention any complications to any other part of claimant's body besides his right thigh. Claimant was treated solely for a large bruise to his right thigh. Dr. Mulert told the claimant to follow up on his thigh injury with Dr. VanSlyke.

Claimant saw Dr. VanSlyke on August 11, 1978 complaining of low back pain as well as pain in his left hip. Claimant apparently had favored his right leg due to the bruise in his right thigh, causing more pain in his low back and lower left extremity. Dr. VanSlyke had the impression that claimant was suffering from a sprain of the lumbrosacral spine. Claimant was admitted to the hospital on the evening of August 14, 1978.

Claimant was seen by Dr. Fred J. Pilcher, an orthopedic surgeon, while in the hospital. It was Dr. Pilcher's impression that claimant had an L-5 nerve root irritation, most likely caused by a herniated disc. On August 23, 1978 a myelogram was performed which showed a herniation of the L-4, L-5 disc on the left. On August 30, 1978 the claimant underwent surgery for his herniated disc.

Dr. Pilcher indicated that claimant had progressed nicely since his surgery, and that a good result had been obtained by the surgery. He also stated that while claimant was certainly not well as of November 30, 1978, he released claimant from a physical standpoint to begin working again. As to the precipitating cause of the condition he found when he operated on the claimant, Dr. Pilcher stated that he could not imagine that the motorcycle incident could rupture a disc, but "as I have stated, anything is possible, but with his previous history, I had reason to believe that it was probably related to this other business at his work and maybe intermittent or chronic back problems was the cause."

Dr. Pilcher testified that he had not seen the claimant to specifically examine him for the purpose of a disability rating. However, he stated that the claimant would be permanently disabled to the extent of five to ten percent.

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. *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 claimant has the burden of proving by a preponderance of the evidence that the injury of May 9, 1978 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). However, testimony of any expert must be taken in its entirety along with all other testimony bearing on a causal relation. *Burt v. John Deere Waterloo Tractor Works, supra.*

Based on the evidence presented in the record and the above principles of law, it is clear that claimant has met his burden of proving that he received an injury arising out of and in the course of his employment that caused this disability upon which he now bases his claim. It is clear from both expert and lay testimony that claimant injured his back while working for the defendant-employer on May 9, 1978. It is also clear from the record that the motorcycle incident of August 6, 1978 did not cause claimant's back problem.

The record fully explores what effect, if any, the motorcycle incident had upon claimant's disability. Most pointedly, the physician who examined claimant in the emergency room after the incident excluded any mention whatsoever of any back complications caused by claimant's fall. At best, Dr. Pilcher, the surgeon who treated claimant's disc problem, stated that it was possible the motorcycle incident could have ruptured the disc, just as anything is possible. However, the law requires more than mere possibilities. Dr. Pilcher did state that the ruptured disc was probably related to the incident at work. This, coupled with the lay testimony that supports Dr. Pilcher's opinion, is sufficient to carry the claimant's burden of proof.

Claimant's back injury is to his body as a whole, and he is entitled to have his injury evaluated industrially as opposed to just functionally. This tribunal has previously stated the factors to consider 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. *Becke v. Turner-Bush, Inc.*, Appeal Decision filed January 31, 1979.

> The Iowa Supreme Court has also stated that defendant-employer's refusal to give any sort of work to a claimant's inability to find any other suitable work after making bona fide efforts to find such work may indicate or justify an award of disability. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).

The defendant-employer has offered work to the claimant since he suffered his affliction. In fact, claimant bid out on lighter work with the defendant-employer but did not go to work upon receiving the bid. The claimant testified that he had difficulty doing menial household chores like carrying groceries or shoveling snow, so he did not see how he could work full time. In addition, claimant was 51 years old on the date of the hearing and was married with four nondependent children. Claimant says that he is healed, but not fully recovered from his surgery. He has had nine and a half years of formal education, and has taken courses in gerontology required by the state in conjunction with the operation of his small nursing home. Claimant owns and operates two rental properties in Cedar Rapids, and one rental property in the state of Florida. Claimant has had extensive experience with farming and manual labor in his lifetime and has also owned and operated a small hardware store for four years. The only functional disability rating in the record was given by Dr. Pilcher as between five and ten percent. In applying the above set of facts and circumstances to the factors to be considered in determining industrial disability, it is found that claimant has a ten percent disability to the body as a whole.

WHEREFORE, it is found:

That the claimant received an injury to his back on May 9, 1978 which arose out of an in the course of his employment.

That said injury is the cause of the disability upon which claimant has based his claim.

That claimant is entitled to healing period benefits from May 9, 1978 until May 22, 1978, and from August 7, 1978 until November 30, 1978; a total of eighteen and two sevenths (18 2/7) weeks at the rate of one hundred seventy-seven and 89/100 ($177.89) per week.

That claimant is entitled to certain medical expenses as a result of his injury and disability.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

CONNIE VAN BLAIRCOM,

Claimant,

vs.

AMF LAWN AND GARDEN,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from an order filed April 1, 1981 authorizing claimant to obtain an examination and evaluation by the Mayo Clinic in Rochester, Minnesota at defendants' cost together with the necessary transportation expenses.

The examination was requested pursuant to the second unnumbered paragraph of section 85.39, The Code. The prerequisite of an evaluation by an employer-retained physician which the employee believed to be too low is conceded. The limited issue on appeal is whether or not the claimant is entitled to an examination outside the state of Iowa under the provisions of section 85.39, Code.

Defendant-appellant asserts that the language of section 85.39 in the first unnumbered paragraph which restricts examinations by employers geographically but not in frequency should be carried over to the second unnumbered paragraph of section 85.39 which allows the employee one examination by a self chosen physician without any mention of geographical restraint.

The issue has been previously discussed in *Shannon v. Department of Job Service*, 33rd Biennial Report of the Industrial Commissioner, p. 98.

Iowa Code §85.39 expressly reveals the legislature's intent to distinguish between the obligation to submit to examination imposed upon employees and those imposed upon employers when it is the employee who is requesting the evaluation. The statute clearly limits the employer-requested employee exam to "some reasonable time and place within the state" and "to a physician or physicians authorized to practice under the laws of this state." This restriction has been seen as a protective shield for the employees who are submitting to an examination by physicians who are not chosen by them. When the employee is choosing the physician, as in the case in an employee-requested evaluation, the safeguard provided by requiring an examination within the state by an Iowa doctor is unnecessary. It is to be noted that the element of reasonableness pervades the employee-requested examination section and operates as a protective device for the employer.

Defendants further question the constitutionality of section 85.39, Code, as not affording equal protection.

Although it is recognized a constitutional issue must be preserved throughout an administrative proceeding it is equally recognized that an administrative agency must presume the laws under which it operates are valid and does not have authority to rule on the constitutionality of such statutes.

Nothing in this order should be construed as predetermining whether or not the fee for the employee-requested examination is "reasonably necessary." In other words the statute is not interpreted as directing all costs to be paid by the employer for an examination requested to be conducted at some remote and exotic place merely on whim. In such a case it could be determined that the fee for the examination was not "reasonable" and that the transportation expenses incurred were not "reasonably necessary."

Nevertheless, it is concluded that section 85.39 does not restrict evaluations to be made by a physician of the employee's choice, when the prerequisite conditions have been met, to a physician authorized to practice under the laws of this state and located in this state.

WHEREFORE, defendants' appeal is dismissed.

* * *

Signed and filed this 26th day of June, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT VAN BLARICOM,
Claimant,
vs.
FRANK FOUNDRIES CORPORATION,
Employer,
and
ALEXSIS RISK MANAGEMENT SERVICES, INC.,
Insurance Carrier,
Defendants.

Ruling

NOW on this day the matter of defendants' motion for order requiring examination of employee, claimant's resistance thereto, and defendants' response to claimant's resistance, comes on for determination.

On March 9, 1981 claimant filed a motion for an order requiring the claimant to be examined by a doctor in Chicago alleging that defendants had claimant examined at the University of Iowa Hospitals and Clinics and that the physicians there refuse to give evidentiary depositions or to be present for testimony at the hearing and, therefore, that it is necessary to have other evaluation so that additional medical testimony can be presented on hearing. In resistance claimant asserts that he had already submitted to one examination at the University of Iowa Hospitals and Clinics, that defendants are doctor shopping, that the Chicago physician is not located within the state, that the doctor selected is "well known to be an Employer's physician," and that the doctor who examined claimant at the University of Iowa is willing to give a deposition. Defendants' response to claimant's resistance claims that the claimant requested examination at the University of Iowa Hospital, that defendants are not "doctor shopping," that 85.39 should not be interpreted to inhibit defendants from obtaining proof, that defendants will pay costs, and that the additional examination will be helpful to the commissioner.

Iowa Code section 85.39 provides in pertinent part that "[a]fter 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*... [emphasis added.]"

The statute clearly requires an 85.39 examination to take place *within the state* and to be performed by a doctor authorized to practice *in this state*. This deputy industrial commissioner cannot order an examination requested by defendants outside the state of Iowa by a physician not known to be licensed in Iowa. See *Kammerude v. John Deere Dubuque Works*, p. 97; *Shannon v. Department of Job Services*, p. 98; and *Gregory v. U.S. Homes*, p. 100, 33rd *Biennial Report of the Industrial Commissioner*.

It is noted that defendants' cover letter accompanying their motion makes reference to a hearing. However, no request for hearing was made within the motion. See Industrial Commissioner Rule 500—4.4.

WHEREFORE, it is found:

That climant cannot be ordered to undergo examination in Chicago, Illinois.

THEREFORE, it is ordered:

That defendants' motion for order requiring examination of employee must be and is hereby overruled.

* * *

Signed and filed this 19th day of March, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

VIRGINA VAN GORP,
Claimant,
vs.
WINPOWER CORPORATION
Employer,
and
THE TRAVELERS INSURANCE CO., and ROYAL GLOBE INSURANCE CO.,
Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed June 30 and July 31, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendant-employer and Royal Globe Insurance Company were to pay healing period benefits from January 24, 1978 until the test of §85.34(1) is met and to pay medical and allied benefits.

. . .

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

In 1976, claimant sustained an injury which arose out of and in the course of the employment with Winpower Corporation and for which she was paid compensation benefits. The insurer for that injury was the Travelers Insurance Company. A companion case was recently heard by another deputy industrial commissioner.

Claimant was hurt again on January 23, 1978 when she and another employee were lifting a piece of equipment. Defendants filed a memorandum of agreement and paid some compensation benefits. In about a year, the claimant had surgery for an extruded intervertebral disc at L-4, L-5.

Defendant-employer and Royal Globe claim that they should not have to pay the running healing period benefits. To support this argument, they ask that certain facts be considered, some of which are recited below.

On June 19, 1978, James E. Laughlin, D.O., stated:

> Virginia Van Gorp has been a patient of mine for a considerable length of time with a back problem. I have never been able to establish a diagnosis that would explain the severity or duration of her symptoms.
>
> I referred her to Mayo clinic and a report from Mayo's is enclosed for your review. Apparently Mayo Clinic also could not establish a diagnosis.
>
> I have advised Mrs. Van Gorp that she need not return to me as I have not been able to establish a diagnosis and have exhausted every possible treatment modality known to me.

On July 28, 1978, Dr. Laughlin wrote:

> Mrs. Van Gorp has contacted me stating that your company has informed her that I had released her to return to work and this is not a correct statement.
>
> In my letter I stated that I could find no objective symptoms but that the patient had subjective symptoms of severe pain. To date there is no way to rate or measure the degree of pain that a person is experiencing.

Finally, on February 12, 1979, Dr. Laughlin states:

> I reviewed all of this patient's old records including hospital records as well as office records and after reviewing this and talking with the patient I feel that this patient sustained her initial injury on October 25, 1976 and that her injury of January 23, 1978 was an aggravating factor of a previously existing condition.
>
> It is, of course, too early to establish a partial permanent impairment rating for this patient, although I do expect some partial permanent impairment. I would not be able to give this rating for approximately six to eight months from the time of her surgery. I would anticipate that it will be at least 4-6 months before the patient would be able to return to work after a surgery of this nature.
>
> I feel that 60% of Mrs. VanGorp's [sic] disability is due to the first injury and that 40% of her disability is due to the second injury.

In his deposition, Dr. Laughlin stated:

> My feeling in this case is that the patient—at the surgery table I found—I did find a ruptured disc, or a protrusion of a mass on a nerve, basically.
>
> And I felt that—and , again, this is empirical because I have no way to prove one way or the other—but I felt that probably this disc ruptured at the initial injury or thereabout.
>
> The patient's symptoms were similar over a long period of time. And the real, real problem for me in this case was I felt she had a ruptured disc, but could not prove it, and I went through many numerous tests, consultations at Mayo's, a lot of things to try to prove that she had a ruptured disc, because I don't operate on people normally that I can't prove they have got a ruptured disc before surgery, and out of sheer desperation between both me and the patient in this case I finally never did prove that she had a ruptured disc until I operated on her and found one at the surgery table.
>
> So the fact that her symptoms were very similar over a period of time I felt that she probably ruptured the disc at the first injury (pp. 16-17).

Q. (Udelhofen) What I am getting at is: Does the statement reflect the probabilities that you believe are involved in which injury is currently causing her temporary disability or inability to work?

A. Yeah. I knew what you were going to ask because this—this is—I had the request. As you know in the legal profession, there's some things that there is just no good answer to and you got to hang your hat on something. And in the medical profession there's some things that are not—there is no good answer to and you just have to be strictly arbitrary.

And this is one particular case where it's strictly an arbitrary thing. I had to have some numbers because you need numbers to get your case settled, and I have to give you numbers.

I'll give you my reasoning, but right off the bat I'll say it's strictly an arbitrary thing and I just picked it out of the air, but my reasoning is we had—with

good medical or reasonable medical certainty that the ruptured disc probably occurred at the time of the first injury, that the second injury was probably an aggravation of her preexisting condition. Therefore, I felt that more than 50 percent of her—of her problem should be attributed to the first injury than to the second, so that gave a little more weight to the first injury, which is the way I feel it should be (pp. 29-30).

However, it should be pointed out that Dr. Laughlin also testified as follows:

> Okay. Let's get some times here. Let's see. Her initial injury was in October, '76. Then she went back to work on or about April 4th.
>
> She had initial injury. She was off six months, returned to work with pain, had another injury, did not work for approximately a year and then had surgery.
>
> In that context, I would say the conclusion I would have to make is that whatever happened during this second injury aggravated the back to the extent that she was worse off than she was after her first injury, and I'm going strictly on the time frame.
>
> I don't know how good that is, but it's really kind of all I have got to go on is she got back to work six months after the first injury. She was not able to return to work for a year after her second and, subsequently, did have to have surgery.
>
> . . .
>
> Q. (By Mr. Luginbill) Right. And I am not asking you to try to do that. I am just trying to point out that prior to that date she was able to work and something occurs and it appears that it acted upon her condition to such an extent that thereafter January 23, 1978, she is no longer able to work because of the pain, so at least we know it acted upon her to such an extent that thereafter she wasn't able to work, is that correct?
>
> A. Yes (pp. 19-20).

Further, when an employee is injured, "The employer is liable for all consequences that naturally and proximately flow from the accident." *Oldham v. Scofield and Welsh*, 222 Iowa 764 at 767, 226 N.W. 480; 296 N.W. 295 (1936).

Professor Larson in his *Law of Workmen's Compensation* §12.20, at p. 3-316 states that "Most of the problems in this area are medical rather than legal."

It should be first pointed out that Dr. Laughlin recanted his 60-40 apportionment of the disability (Laughlin deposition, p. 29). The question, then, is simply this: What caused claimant to be off work for an indefinite time beginning January 23, 1978?

One believes the deputy industrial commissioner was correct. Although, as shown above, Dr. Laughlin is not totally steadfast in his opinions, on pages 19-20 of his deposition, he states that claimant was unable to work for a year after the second injury and she had surgery. Since the hearing was only one month after surgery, the deputy rightly concluded that she would be off work because of the injury for an indefinite time.

One should also point out that Dr. Laughlin's remarks in June and July of 1978 were made before he had the advantage of knowing the results of the surgery. Thus, on February 12, 1978, he is able clearly to state that the "injury of January 23, 1978 was an aggravating factor of a previously existing condition." So, the sequence is again shown to be logical: Claimant is hurt in 1976 and returns to work. She is hurt in 1978, does not return to work and has surgery one year later. She is laid up as a result of the surgery at the time of the hearing.

The undersigned deputy industrial commissioner did not consider the report of Donald W. Blair, M.D., because it was not a part of the record. The deputy industrial commissioner apparently did consider the report, but the result of the decision shows that it was disregarded. That is, Dr. Blair gave a functional disability rating of 10% of the body as a whole; the deputy industrial commissioner awarded a running healing period, not based upon any permanent functional disability. Defendant-employer and Royal Globe likewise used Dr. Blair's report (in their appeal brief). Again, it is not a part of the record and will not be used to make a determination in this case.

It should be stated, however, that the report would carry little if no weight anyway: Dr. Laughlin's surgery was subsequent to the report and would change all Dr. Blair's findings.

WHEREFORE, the proposed review-reopening decision is hereby adopted as the final decision of the agency as modified. It is found:

That claimant sustained an injury which arose out of and in the course of her employment on January 23, 1978.

That as a result of said injury, claimant missed work from January 23, 1978 into the indefinite future.

That claimant probably sustained a permanent injury on said injury date but that no apportionment of permanent disability can be made between said injury and the prior injury until a later date.

. . .

Signed and filed at Des Moines, Iowa this 30th day of September, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

FAY MONROE VAN METER,

Claimant,

vs.

UNION CAB COMPANY,

Employer,

and

EMPLOYERS MUTUAL CASUALTY CO.,

Insurance Carrier,
Defendants.

Ruling

Defendants have filed a motion to dismiss claimant's appeal. Claimant filed a resistance to the motion to dismiss, a motion for more specific statements, and a motion to strike the motion to dismiss.

A decision sustaining defendants' motion for summary judgment was filed in this matter by the deputy industrial commissioner on August 4, 1980. Claimant's notice of appeal was filed on September 3, 1980.

Claimant has entitled his notice of appeal as "Belayed." Claimant contends his appeal should be allowed although untimely "because the said judge failed to state the time to file this said appeal within this said court action." No authority is cited nor is the commissioner aware of any requirement that a deputy industrial commissioner must advise a party to a workers' compensation proceeding of the time and manner of the appeal.

Defendants request that claimant's notice of appeal be dismissed since it was not timely filed. Iowa Code §86.24 states "[a]ny 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 85 or 85A may appeal to the industrial commissioner in the time and manner provided by rule." Industrial Commissioner Rule 500—4.27 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.

This rule clearly states that the appealing party has twenty days following the day in which the deputy commissioner's decision, order or ruling is filed in which to file a notice of appeal with the commissioner.

Iowa Code §4.1(22) provides the method for computing time in applying rule 500—4.27. It states in part: "[i]n computing time, the first day shall be excluded and the last included, unless the last falls on a Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday . . ." Therefore, under rule 500—4.27, the last day on which an appeal could be filed from the August 4, 1980 decision of the deputy industrial commissioner was August 25, 1980.

Even if there was good cause for the belated appeal this commissioner could not allow such appeal. Section 17A.15(3) provides "When the presiding officer makes a proposed decision, that decision then *becomes the final decision* of the agency *without further proceedings unless* there is an appeal to, or review on motion of, the agency *within the time provided by rule.* (Emphasis supplied.)

The Iowa Supreme Court in *Barlow v. Midwest Roofing Co.*, 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) stated:

> 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 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, the commissioner has no jurisdiction to hear an appeal when the time prescribed for filing the appeal has passed. The commissioner is limited to the exercise of those powers prescribed in workers' compensation law. He cannot extend his jurisdiction to include matters expressly excluded by this law.

The deputy industrial commissioner's decision was filed on August 4, 1980. The twenty-day period prescribed in rule 4.27 expired August 25, 1980. The notice of appeal

was not filed until September 3, 1980 and therefore was untimely since it extended past the twenty-day period required by the rule.

Based upon these considerations, claimant's request for an appeal must fail.

WHEREFORE, it is found:

That claimant's appeal was not timely filed.

THEREFORE, it is ordered:

That claimant's notice of appeal be dismissed.

* * *

Signed and filed this 19th day of September, 1980.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOHN E. VANNI, by Anne Theresa Vanni, Surviving Spouse and Administrator of John E. Vanni, Estate,

Claimant,

vs.

RINGLAND-JOHNSON-CROWLEY CO.,

Employer,

and

BITUMINOUS CASUALTY CORP.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed September 24, 1980 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Claimant appealed an adverse ruling on a motion for a summary judgment.

* * *

The findings of fact and conclusions of law in the ruling on the motion for a summary judgment are affirmed and that ruling shall be the final agency decision, with the following amplifications.

John E. Vanni sustained an injury arising out of and in the course of his employment on July 18, 1974. As a result, he was paid a healing period of 43 weeks, 3 days and permanent partial disability to the left leg for 40 weeks (20% of the leg). On April 4, 1979, while working for another employer, he suffered a heart attack and died.

On May 9, 1979, Anne Theresa Vanni, the surviving spouse and administrator of the employee's estate, filed an action in review-reopening and benefits under §85.27. The dispute as described in the petition was extent of healing period to leg and body as a whole, extent of permanent partial disability, and medical mileage. There is no claim that claimant's death was caused by the injury of 1974.

The basic issue is whether claimant has standing to bring the action or, in the alternative, whether an action even exists.

First, claimant states that it was error to grant the summary judgment because there was an issue of material fact that defendants were not entitled to judgment as a matter of law. IRCP 237(c). Although one realizes the industrial commissioner basically is under the rules of civil procedure (500—4.35), strict adherence to those rules should be unnecessary where the other party is not misled. See e.g., *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 and *Cross v. Hermanson Bros.*, 235 Iowa 739, 16 N.W.2d 616. Here, claimant knew the issue that the deputy was going to rule upon and fully participated in the hearing.

Claimant also states that the action survives the employee's death. Section 611.20 and 611.22, *Dille v. Plainview Coal Co.*, 217 Iowa 827, 250 N.W. 607 (1913); *Cardamon v. Iowa Lutheran Hospital*, 128 N.W.2d 266 (Iowa, 1964). The deputy industrial commissioner adequately discusses this point, and nothing will be added, except to emphasize that the *Dille* case concerned a compensable death as opposed to this case wherein Mrs. Vanni is claiming disability payments on account of her husband's injury.

Claimant also states that the right to maintain an action is a property right that §85.31(4) is unconstitutional. The industrial commissioner does not have the power to declare an act of the legislature unconstitutional. Therefore, no ruling will be made on that issue.

Finally, claimant states that §85.31(4) does not prohibit an action for *accrued* benefits. That code section 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 therefore shall terminate.

Claimant's argument, in essence, is that Mrs. Vanni should be able to collect disability benefits for the period of time between the last payment of said disability to claimant and the time of his death. Obviously, such benefits are accrued. However, claimant fails to point out that said benefits are unliquidated. That is, where the injured worker dies for reasons not associated with the injury, the workman's compensation law has no provision in it for the surviving spouse or estate to bring an action for an unliquidated number of weeks of weekly benefit payments.

THEREFORE, defendants motion for a summary judgment is sustained.

* * *

Signed and filed at Des Moines, Iowa this 27th day of October, 1980.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

DAVID L. VESTAL,
Claimant,

vs.

NATIONAL BY-PRODUCTS, INC.,
Employer,

and

FIREMAN'S FUND INSURANCE CO.,
Insurance Carrier,
Defendants.

Order

By order of the industrial commissioner filed January 14, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Defendants appeal from an arbitration decision which ruled that claimant had sustained an injury which arose out of and in the course of his employment as a result of an accident on May 30, 1979.

On February 22, 1980, the pre-hearing order was filed and stated that the only issue to be heard at that time was the issue of an injury arising out of and in the course of the employment, adding that the issues were bifurcated, "and the balance of the hearing will take place later, if claimant prevails on the issue arising out of and in the course of the employment."

As a result of that order, a hearing was held on March 26, 1980 with the results stated above, to-wit that claimant prevailed on the issue of arising out of and in the course of the employment. Thus, the case at this point is incomplete.

In outlining the procedures to be followed in cases where all the issues are not heard at the first hearing, Rule 500—4.2, I.A.C., states in part: "If the order on the separate issue does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal."

In *Elsberry v. Boone County*, filed January 14, 1980, the Industrial Commissioner stated:

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.

Finally, Section 17A.19(1), Code of Iowa States in part:

Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action. However, nothing in this chapter shall bridge or deny to any person or party who is aggrieved or adversely affected by any agency action the right to seek relief from such action in the courts.

1. A person or party *who has exhausted all adequate administrative remedies* and who is

aggrieved or adversely affected by a final agency action is entitled to judicial review thereof under this chapter (Emphasis supplied).

Applying the above principles to the case at hand, it is clear that the parties have not finished their case before the Iowa Industrial Commissioner. The balance of the case should be heard before any action on appeal be taken. Of course, the issue on which the appeals were attempted in this case will be preserved for any future appeals.

And, finally, the agreement of the parties as recited in the pre-hearing order, cited above, indicates a commitment to complete a hearing on all the issues before any party should file an appeal. The parties should be held to their pre-hearing agreements.

WHEREFORE, it is found that the appeal by the employer and insurance carrier is interloculatory in nature.

THEREFORE, it is ordered:

That the appeal by the employer and insurance carrier is hereby dismissed. The case will be returned to the ready-to-assign category for further handling.

* * *

Signed and filed at Des Moines, Iowa this 20th day of February, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

GLENN WARDEN,

Claimant,

vs.

DUBINSKY BROTHERS THEATRES,

Employer,

and

HOME INDEMNITY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from an arbitration decision wherein claimant was awarded temporary total disability benefits and related medical expenses as a result of an injury arising out of and in the course of employment on April 24, 1977.

* * *

Although, as the deputy indicated, contrary inferences could be drawn from the evidence, no compelling reason is presented to do so.

Claimant has had prior episodes of back pain resulting from prior employments, the longest of which was over a period from 1970 to 1973. Claimant had been relatively pain free in the low back area from then until a few weeks after taking a tumble down some stairs at his place of employment. This incident gave rise to a diagnosed contusion to his left knee. He was treated on April 24 and 28 for his knee. Claimant indicated that around the middle of May 1977 he started experiencing intermittent low back pain that would come and go but extending in duration with each onset.

Claimant did not seek further medical treatment until November 2, 1977 when he went to the outpatient department at St. Vincent's Hospital in Sioux City. The history taken at that time did not include the incident on April 24, 1977 but did include a slip and fall incident of a few days earlier. It also listed back difficulties since 1970. The same is true with the history contained in the St. Vincent's report of November 1977 treatment. On December 2, 1977 claimant went to St. Luke's emergency room by ambulance after being unable to get out of bed that day. Again no history was given of the April 1977 incident but only of the recent and remote episodes. On each of these three occasions claimant had the bill sent either to himself or to the employer's group carrier.

When some indication was made that surgery may be necessary, claimant opted for medical care by Dr. Sebek, who had cared for claimant previously. The first disclosure of the April 1977 incident was made to Dr. Sebek on January 3, 1978 and then again on February 20, 1979. This was during follow-up care after hospitalization for conservative care to his back.

That the April 24, 1977 incident took place is undisputed. The issue is whether or not the back condition and resulting disability is causally related to this injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 24, 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).

The experts' opinions will be taken along with all other facts and inferences in the record to determine whether there was the necessary causal connection between the injury and disability to permit a recovery. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W.2d 732 (1956). Claimant need not prove that an employment injury be the sole proximate cause of disability but only that it is directly traceable to an employment incident or activity. *Langford v. Keller Excavating and Grading, Inc.*, 191 N.W.2d 667 (Iowa 1971).

The only evidence regarding claimant's developing back problem subsequent to the April 24, 1977 incident is the testimony of the claimant. The deputy did not note any reason to doubt claimant's credibility and the record does not disclose sufficient cause to doubt the claimant. Although the medical history elicited for treatment rendered in November and December 1977 did not contain reference to the April 24, 1977 incident, this is understandable in view of the more recent incident which exacerbated claimant's back condition and was more prevalent in his mind. Claimant did indicate that following the April incident he started having intermittent back pain that increased in duration. Dr. Sebek first learned of the April incident in January 1978 and in his testimony it was clear that he believed the April incident to be a precipitating event to claimant's back disability.

Dr. Sebek did not expect claimant to have a permanent disability as a result of this injury. Dr. Sebek at the time of his deposition on July 3, 1979 thought the condition of claimant's back would get better during the summer and that if so, then claimant could "get working and doing something." The deputy allowed temporary disability benefits from the first day of disability (December 21, 1977) to the date of Dr. Sebek's deposition testimony (July 3, 1979). At the hearing on August 28, 1979 claimant testified as to his thoughts concerning his ability to perform work. Although he felt that he was getting gradually better, the testimony when taken as a whole would indicate that temporary disability was continuing at that time. An award of temporary disability beyond that time, however, would be predicated upon conjecture and surmise.

WHEREFORE, the following findings of fact are made, to wit:

1. That the claimant sustained an industrial injury on April 24, 1977 which arose out of and in the course of his employment.

2. That claimant experienced intermittent episodes of low back discomfort which increased in duration following his return to employment.

3. That on November 1, 1977 claimant slipped on wet pavement resulting in an exacerbation of his symptoms.

4. That the claimant has been unable to perform acts of gainful employment from December 2, 1977 to August 28, 1979, the date of the hearing.

* * *

Signed and filed this 9th day of October, 1980.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

LYNN WATSON,

Claimant,

vs.

HANES MOTOR COMPANY,

Employer,

and

AID INSURANCE SERVICES,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is two proceedings in arbitration brought by Lynn Watson, claimant, against Hanes Motor Company, employer, and Aid Insurance Services, insurance carrier, for benefits as a result of injuries on January 19, 1979 and February 28, 1979. On October 6, 1980 this case was heard by the undersigned. This case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant and Williard Hanes, claimant's exhibits 1—8; and defendants' exhibits A and B.

Facts

Claimant testified that on January 19, 1979, after working for defendant for approximately a year as a trainee mechanic, he injured himself when while working

on a truck he slipped on a greasy floor and fell, hitting his left side on a floor jack. Claimant indicated he did not have immediate pain and hoped he wasn't hurt bad. Claimant stated he continued to have pain on the following two days and went to the hospital on Monday, January 22, 1979. Claimant indicated he was seen by Kenneth P. Anderson, D.O., in the emergency room, was examined and had x-rays taken. Claimant disclosed that Dr. Anderson put something around his rib cage and instructed claimant to take it easy and remain off of work. Claimant stated he reported his injury to Mr. Hanes on January 22, 1979. Claimant stated that on approximately February 24, 1979 he received a release to return to work from Dr. Anderson. Claimant testified that he was again injured on February 28, 1979 when, while helping another mechanic, he slipped and fell against a car hurting the flat part of his back. Claimant went back to see Dr. Anderson on March 1, 1979. Claimant indicated he tried to see Dr. Anderson again to get a release to return to work but was unable to see him. Claimant disclosed he also attempted to see another doctor. Claimant testified that prior to the January 19, 1979 injury he had had no back pain "that year." Claimant stated that because of his back pain he saw Bruce Nelson Gates, D.C., on February 28, 1980 and saw a Bates, D.C., sometime thereafter.

On cross-examination claimant revealed that he had prior injuries to his back but could not remember the circumstances surrounding them. Claimant even indicated that he may have been in a car accident after the injuries in January and February of 1979 but again could not remember.

Willard Hanes testified that he owned the defendant business and that claimant worked for him in January and February of 1979 as an apprentice mechanic. On January 19, 1979 claimant made no complaints and worked on his own car installing an exhaust system on January 20, 1979. Mr. Hanes stated that claimant first informed him of his alleged injury on January 22, 1979 but had been complaining of pain for two weeks as a result of wrestling his girl friend. Mr. Hanes stated that it was March 13, 1979 before claimant informed him of his second alleged injury.

Issues

The issues presented by the parties at the time of the pre-hearing and the hearing are whether claimant received injuries arising out of and in the course of his employment; whether there is a causal relationship between the alleged injuries and the disability on which he is now basing his claim; and the extent of temporary total disability benefits he is entitled to.

Applicable Law

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on January 19, 1979 and February 28, 1979 which 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 claimant has the burden of proving by a preponderance of the evidence that the injury of January 19, 1979 and February 28, 1979 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).

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

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

Analysis

During claimant's direct-examination it appeared that claimant was having some difficulty remembering but was careful and deliberate in how he testified. On cross-examination it was quite evident that he could not remember material matters such as injuries prior to and after his injuries in January and February of 1979. Claimant's demeanor also indicated a lack of credibility.

Based on the evidence presented and the principles of law previously stated, claimant has failed to prove he received an injury that arose out of or in the course of his employment on January 18, 1979. Although claimant testified regarding the incident on January 19, 1979 and reported it to Mr. Hanes on January 22, 1979, the emergency room history contains nothing about an injury at work but states that the injury occurred while coughing. Furthermore, as Mr. Hanes testified, claimant had been complaining about pain for a week or two as a result of wrestling his girl friend and had worked on his own car the day following the alleged incident on January 19, 1979. Although the evidence reveals that claimant had a fracture of the left rib cage, claimant did not meet his burden in proving that he received the fracture as a result of a work related injury.

Claimant has met his burden in proving he received an injury arising out of and in the course of his employment with defendant on February 28, 1979. Claimant's testimony was supported by the history he gave Dr. Anderson. It would appear from Dr. Anderson's report of July 30, 1979 that claimant's injury of February 28, 1979 caused no disability. In that report, Dr. Anderson stated:

> ...He did return on 3/1/79 complaining that while he was at work, he was squatting between cars, he injured his left ribs by striking them against a car bumper. There was no sign at that time of any specific damage to his ribs, but rather a muscular injury and was given symptomatic therapy for this.
>
> I believe that Mr. Watson is suffering from no long term sequela from his initial rib fracture, and that he was able to return to work on 2/24/79 with a good prognosis.

The report of Dr. Gates as well as the bill of Dr. Bates fail to indicate that claimant's injury on February 28, 1979 necessitated any restriction on work or lost days of work. Although claimant testified regarding his lost work, the medical evidence failed to reveal it was causally connected to his February 28, 1979 injury.

Claimant has met his burden in proving that the March 1, 1979 examination by Dr. Anderson was causally connected to his injury on February 28, 1979. The claimant has failed to prove any of his other bills are related thereto. The bill of Dr. Bates contains no explanation of his charge and the bill of Dr. Bates contains no history or statement that the examination related to an injury on February 28, 1979. An explanation by both doctors is especially important since claimant, at the time of hearing, had a lapse of memory on subsequent injuries.

Findings of Fact

WHEREFORE, it is found:

Claimant has failed to show by a preponderance of the evidence that he received an injury arising out of and in the course of his employment on January 19, 1979.

Claimant has met his burden of proving he received an injury arising out of and in the course of his employment on February 28, 1979 but failed to show that he missed any work because of said injury or that it resulted in any permanent disability.

Claimant met his burden in proving that the March 1, 1979 examination of Dr. Anderson was causally connected to his February 28, 1979 injury.

THEREFORE, defendants are to reimburse claimant twelve and 50/100 dollars ($12.50) for the March 1, 1979 bill of Dr. Anderson.

Defendants are to pay the costs of this action.
A final report is to be filed when this award is paid.

* * *

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

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

ARLIE M. WEAVER

Claimant,

vs.

SMULEKOFF'S FURNITURE,

Employer,

and

U.S. FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by the claimant, Arlie M. Weaver, against Smulekoff's Furniture, the employer, and U.S. Fidelity & Guaranty, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged injury which occurred January 2, 1979. This matter was heard in Cedar Rapids, Iowa on September 3, 1980 and upon the filing of two evidentiary depositions on October 16, 1980 the record was closed.

* * *

The primary issue requiring resolution is whether or not the defendants have established by a preponderance of the evidence their affirmative defense that claimant failed to abide by the provisions of Section 85.23, Code 1979 and did not report the injury of January 2, 1979 to his employer within 90 days.

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

Claimant, age 68, had been a shipping department employee of the defendant-employer since 1970. The essence of claimant's testimony appears to be that he was required to use a defective two-wheeled cart (claimant's exhibit 1) during his working career with an inherent defect, and as a result thereof, his right foot was injured.

Claimant retired January 5, 1979 and sought medical attention for this "work related" injury on April 20, 1979 from James Turner, M.D. (deposition, page 1, line 18).

None of the witnesses produced at this hearing admitted that claimant informed them orally or in writing that claimant had sustained a right foot injury on January 2, 1979. Claimant was clear in his testimony that the foot abnormality found by Dr. Turner was connected to his employment activities.

THEREFORE, after having heard and seen the witness, and taking all of the credible evidence contained in the undersigned's notes into account, the following findings of fact are made:

That the claimant was an employee of the defendant-employer on January 2, 1979.

That the claimant failed to notify the defendant-employer of his intention to urge a claim of industrial injury on April 22, 1979.

That more than ninety (90) days had expired between January 2, 1979 and April 22, 1979.

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

Costs are taxed to defendants.

* * *

Signed and filed this 17th day of February, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

BARBARA J. WEBB,

Claimant,

vs.

IOWA BEEF PROCESSORS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant has appealed from a proposed arbitration decision, a denial of a request for rehearing and an order which overruled the special appearance of defendant. It was determined in the proposed arbitration decision that, pursuant to Iowa Code Section 85.71, this agency has jurisdiction over this contested case proceeding. Claimant was awarded healing period and permanent partial disability benefits.

The record on appeal consists of the testimony of the claimant and Frances O'Brien; claimant's exhibits 1 and 2; defendant's exhibit A; the deposition of David G. Paulsrud, M.D.; and appeal brief of the defendant.

This tribunal has consistently held that jurisdiction of a claim based soley upon a claimant's Iowa domicile is proper based upon its interpretation of Iowa Code section 85.71(1). Until such time as the statute is amended or the court rules either the statute unconstitutional or the interpretation erroneous, we shall continue to interpret section 85.71(1) as conferring this jurisdiction.

As defendant has made reference to the briefs which were filed in *Miller v. Iowa Beef*, we shall refer to the holding in that case as precedent along with numerous other cases on the same issue in which this defendant was a party.

Defendant also raises the issues of whether they should have been allowed to submit additional evidence or granted a rehearing, and whether claimant sustained her burden of proof with regard to permanency. The additional evidence which defendant desires to present prior to the filing of the deputy's arbitration decision or in a rehearing proceeding would have no impact upon the determination of claimant's industrial disability. The newly acquired evidence was directed predominantly to claimant's motivation. Claimant's motivation, however, was fully taken into consideration by the deputy in determining claimant's industrial disability.

According to the Iowa Supreme Court in *McDowell v. Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976), the burden of proof may refer to the burden of producing evidence or the burden of persuading the fact finder. Claimant did produce evidence with respect to her present disability. The evidence presented by claimant was sufficient for the inference of permanency to be drawn. Claimant, therefore, met her burden of persuasion.

On reviewing the record, it is found that the deputy's findings of fact and conclusions of law in the arbitration decision filed October 30, 1980, the ruling on request for rehearing filed on November 25, 1980 and the order overruling the special appearance filed June 12, 1979 are proper.

WHEREFORE, the holdings of findings of fact and conclusions of law of the order filed June 12, 1979, the ruling filed November 25, 1980 and the arbitration decision filed October 30, 1980 are adopted as the final decision of the agency.

It is found and held:

That this tribunal has jurisdiction over this contested case proceeding.

That claimant sustained an injury in the course of her employment with defendant which manifested itself on or about January 30, 1979.

That as a result of such injury claimant is ten percent (10%) industrially disabled and was in a state of healing from February 22, 1979 to March 18, 1979.

THEREFORE, it is ordered:

That defendant is further ordered to pay the claimant healing period benefits from February 22, 1979 through March 18, 1979 at the rate of one hundred sixty-nine and 67/100 dollars ($169.67) per week.

Compensation that has accrued to date shall be paid in a lump sum.

That credit is to be given to defendant for the amount of compensation previously paid by them for this injury under the Nebraska Compensation Law.

That costs of this action are taxed to the defendant pursuant to Industrial Commissioner Rule 500—4.33.

That interest shall run in accordance with Iowa Code section 85.30.

That a first report of injury shall be filed by the defendant within ten (10) days after this decision is filed. A final report shall be filed by the defendant when this award is paid.

. . .

Signed and filed this 21th day of April, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

VERNON WEST,

Claimant,

vs.

RINGLAND-JOHNSON-CROWLEY,

Employer,

and

AID INSURANCE,

Insurance Carrier,
Defendants.

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines on January 15, 1981 at which time the record was closed.

A review of the commissioner's file reveals that an employers first report of injury was filed on July 24, 1980. The record consists of the testimony and deposition of the claimant; the deposition of Michael W. Kent, M.D.; claimant's exhibits 1 through 11; and certain payroll records.

The issue for determination is whether claimant sustained an injury arising out of and in the course of his employment on June 9, 1980 which resulted in his entitlement to compensation.

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

Claimant, age 57, was employed by defendant-employer on June 9, 1980. He was a bricklayer involved in the construction of the Banker's Life Building in Des Moines. On June 9, 1980 claimant was assisting in setting a steel and brick lintil over an elevator door. This weighed about 250 pounds. Claimant assisted two others in carrying the lintil to a sawhorse and claimant got on the sawhorse and when it was lifted, claimant was forced to lean backwards. Claimant felt a tearing sensation in between his groin and rectum when he was leaning back. Claimant continued to work for the half hour remaining in the day. He stopped by his mother's to pick up a lawn mower and proceeded home. When he arrived home, he urinated and noted that his urine was extremely bloody. His wife called the family physician, R. J. Foley, M.D., who recommended that claimant see him the following day. The claimant's wife became distraught and took the claimant to Lutheran Hospital. Claimant was not hospitalized at that time because of a bed shortage. He was eventually hospitalized at Lutheran on June 11, 1980. Blood cultures at Dr. Foley's office on June 10, 1980 showed no blood.

Claimant was seen by Phillip H. Kohler, M.D., a Des Moines urologist, on June 12, 1980 when he was in the hospital. Claimant had a gross hematuria which was associated with pain on urination. He was seen by Dr. Kohler's partner, Michael Kent, M.D., also a urologist on June 13, 1980. Claimant's intravenous urogram showed normal appearing upper tracts. He underwent a cystourethroscopy and a transurethral resection of the prostrate for relief of outlet obstruction. Claimant was released from the hospital on June 20, 1980 and went home. The diagnosis was gross hematuria. Claimant's history indicated that he had to urinate two or three times a night in the years preceding the incident. The prostate tissue removed was benign. Claimant's hematuria, or blood in the urine, did not, however, cease. Some time later, on September 2, 1980, claimant was again hospitalized and underwent a cystouroscope. Dr. Kent found a prostate urethra which was well resected. The positive finding was at the bladder neck area the mucosa was in folds and had the appearance of edematous

inflammatory polyps. Claimant was released from this hospitalization on September 11, 1980. Dr. Kent does not feel that claimant's condition is permanent. Claimant returned to work on October 27, 1980.

Dr. Kent wrote a letter in which he stated that the lifting incident "could serve as an inducement to cause an enlarged prostate to bleed and therefore might have been an aggravating cause."

The following testimony explores this point:

Q. * * * I guess I'm going to ask you, Doctor Kent: when you use the term "might have been an aggravating cause," are you engaging a little bit in speculation at this point, or do you have an opinion based upon a reasonable degree of medical certainty that that is what caused the bleeding that Mr. West outlined here and was part of my background question?

A. Just to preface it by again stating that the most common cause of bleeding from a man's lower urinary tract is in the age group of fifty to seventy, as we've been discussing, is benign enlargment of the prostate, with that in mind and with the incident as he described it, I would say this probably could have been an aggravating cause.

Q. Okay. Would you be able to state it was an aggravating cause, Doctor Kent, with a reasonable degree of medical certainty at this stage, based upon your experience and education and treatment of the patient?

A. Yes.

* * *

Q. The stretching or lifting or whatever the cause might be, how would this commence bleeding?

A. Well, by lifting or severely stretching backwards, where you still had to use your intra-abdominal and pelvic floor musculature, you would develop fairly high pressures that would come to bear on the prostate and its vasculature, and this could cause the prostate to bleed.

* * *

Q. But isn't it also a possibility as well as perhaps a probability, that in a breakdown of small vasculature, to use your term, in the prostate area, wouldn't that just more or less bring more fully the attention of the patient and then result in the diagnosis of a problem that preexisted that incident?

A. Probably.

Q. In other words, just kind of flag the problem?

A. Yes.

Q. But regardless of whether the vasculature was ruptured or bleeds temporarily, whatever the case may be, Mr. West, regardless of any intervention of any kind of traumatic incident, was bound, in your opinion, was he not, for the operating table to alleviate this benign prostatic hyperplasia?

A. There is a reasonable degree of medical certainty that with time, be it months or few years with his already preexisting symptoms, that these would have increased and he probably would have come to this type of procedure.

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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 9, 1980 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).

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).

An injury need not be the sole proximate cause of the disability but the disability need only be directly traceable to it. *Langford v. Kellar Excavating and Grading, Inc.*, 191 N.W. 2d 667 (Iowa 1971).

Evidence indicating a probability or likelihood of causal connection is necessary to generate a jury issue, but, such probability may be inferred by combining an expert's "possibility" testimony with nonexpert testimony that the described condition of which complaint is made did not exist before the occurrence of those facts alleged to be the cause thereof. *Becker v. D & E Distributing Co.*, 247 N.W.2d 727 (Iowa 1976).

When an employee is hired, an employer takes him subject to any active or dormant health impairments incurred prior to his employment, for purpose of workers' compensation. *Ziegler v. U.S. Gypsum Co.*, 252 Iowa 613, 106 N.W.2d 591 (1961).

This is a hard case to decide. However, based upon the principles enunciated above, it is found that claimant has established his claim. What if claimant had had a preexisting back condition which exhibited its symptoms at the time of injury? The law would surely hold that such a condition was caused by employment within the meaning of the Iowa Workers' Compensation Law. Dr. Foley's opinion causally connecting the disability to the injury is on a form. Dr. Kent's opinion is not couched in unequivocal terms, but, coupled with other evidence, shows that the necessary causal connection has been made.

The record shows that claimant was paid $5,905.68 for the thirteen weeks consecutively worked prior to the injury, or $454.00 per week. Claimant was married, and entitled to claim two exemptions. This entitles him to be paid $261.05 per week in weekly compensation. Although the evidence indicates that claimant may have missed some work because of a strike by another union, the dictates of Section 85.36(6), Code of Iowa, militate to the holding that the thirteen consecutive weeks pay "earned in the employ of the employer" must be extended.

The parties stipulated as to the fairness of medical bills and that in the event of an award that claimant would be entitled to 19 5/7 weeks of temporary total disability.

WHEREFORE, it is found:

1. That claimant was employed by defendant-employer on June 9, 1980.

2. That on said date, he sustained an injury arising out of and in the course of his employment, said injury being in the nature of an aggravation of a preexisting condition.

3. That because of said injury claimant was temporarily and totally disabled to the extent of nineteen and five-sevenths (19 5/7) weeks.

4. That the correct rate of compensation is two hundred sixty-one and 05/100 dollars ($261.05) per week.

5. That claimant has incurred medical expenses which should be paid.

THEREFORE, it is ordered that defendants pay unto claimant nineteen and five-sevenths (19 5/7) weeks of temporary total disability compensation at the rate of two hundred sixty-one and 05/100 dollars ($261.05) per week.

It is further ordered that defendants pay unto claimant the following approved medical and mileage expenses, to wit:

Iowa Lutheran Hospital	$4,503.02
Hilltop Clinic	861.25
Dr. Kent	1,475.00
Des Moines Anesthesiologists, P.C.	441.00
Medicine (Dahls)	17.25
Mileage (143 x $ .20)	28.60

This award has accrued and shall be paid in a lump sum together with statutory interest pursuant to Section 85.30, Code of Iowa.

Costs of this proceeding are taxed against the defendants.

A final report is to be filed upon payment of this award.

* * *

Signed and filed this 23rd day of March, 1981.

JOSEPH. M. BAUER
Deputy Industrial Commissioner

No Appeal.

ROGER A. WHEELER,

Claimant,

vs.

THORPE WELL COMPANY,

Employer,

and

MARYLAND CASUALTY COMPANY,

Insurance Carrier,
Defendants.

This is a proceeding in review-reopening brought by Roger A. Wheeler, claimant, against Thorpe Well Company, employer, and Maryland Casualty Company, insurance carrier, for the recovery of further benefits as to the result of an injury on October 13, 1978. Claimant's rate of compensation as indicated in the memorandum of

agreement previously filed in this proceeding and stipulated to by the parties, is $190.95. A hearing was held before the undersigned on July 15, 1980. The case was considered fully submitted upon receipt of defendants' letter and attached report filed on September 8, 1980.

The record consists of the testimony of claimant, Joan Wheeler, John Wesley Thorpe, and Harold Rouse; claimant's exhibits 1 through 8; and defendants' exhibits A through G.

Facts

Claimant, who started working for defendant-employer in 1968, received an injury which arose out of and in the course of his employment with defendant-employer on October 13, 1978 when while working making things ready so he could stop working for the day, a 15 pound hook fell, giving him a glancing blow to the right side of his head, shoulder, and back. Claimant disclosed that at the time of his injury he did not have a hard hat on and thinks the blow knocked him out. Claimant was taken to the hospital by ambulance and had his head stitched up. Claimant stated he had pain in his head and shoulder and was so bruised up he could not feel his back. Claimant indicated he was off work for 6 weeks and 4 days and upon returning to work was terminated. Claimant testified that he remained unemployed from October 1978 until June 1979 when he obtained a position as a carpenter for Polk County buildings and grounds.

Claimant indicates that since the accident he has been unable to stand stress, is forgetful, is dizzy, and has headaches which have become progressively worse. Claimant testified that he has passed out 5 or 6 times since the injury. Claimant also stated that prolonged standing or walking hurts his back and he has had sexual problems since the injury.

Joan Wheeler testified that since her husband's accident he has withdrawn socially, experiencing headaches, and exhibits neck, head, and shoulder pain. Mrs. Wheeler also supported claimant's testimony as to his memory and changed sex life.

Three reports of William R. Boulden, M.D., were received into evidence and are set out, in part, as follows:

October 23, 1978

This patient was examined at Lutheran Emergency Room, on 10/16/78, for a fracture of the right scapula.

I followed up with him today for this fractured right scapula, as well as his head and neck trauma. The family is desiring a neurosurgery consult with Dr. Hayne, because the patient is having problems with sleeping too much and severe headaches. I feel that an evaluation by him would be justifiable. They wanted him to see Dr. Hayne, so therefore I have made arrangements for an appointment with him.

I took x-rays of the cervical spine, just to make sure there were no abnormalities of the cervical spine, because of the trauma, and I found no abnormalities.

I have recommended him to continue with the physical therapy. I will follow up with him in a week. I will keep you informed of his progress.

November 20, 1978

I have followed up on Roger Wheeler for his right shoulder problem. There is [sic] no abnormalities of the right shoulder and I feel that everything will continue to work and continue to improve.

I recommended that he be released back to work on November 29, 1978. I feel that he should have minimal problems and I have recommended no further follow up on our part, unless he does develop problems.

December 27, 1978

This patient was again seen in the office on 12-26-78 for a follow-up of neck pain and shoulder problems secondary to trauma. This is getting better and he is having less and less bad days. He is still having alot [sic] of cervical headaches.

Three reports of Robert A. Hayne, M.D., were received into evidence and state, in part, as follows:

November 14, 1978

I saw your pateint [sic] , Roger Alan Wheeler, for examination on November 6, 1978. You will recall he is a thirty-seven year old man who had a history dating back three weeks at which time a hook fell and struck him on the right side of his head and top of the right shoulder. He sustained two lacerations of the head and one of these required suturing. He stated that x-rays at Lutheran Hospital had showed a "cracked" shoulder blade. X-rays of the cervical spine were reported to be negative. He has continued to have some headache with a feeling of pressure in the posterior part of the head. Along with his symptoms, he stated he had been tired most of the time.

Neurological examination showed the blood pressure to be 110/70. Strength and coordination of the upper and lower extremities were normal. The

optic fundi were normal. A computerized scan of the head taken at Iowa Methodist medical Center on November 8, 1978, showed no evidence of a complicating intracranial hematoma formation.

May 20, 1980

He was seen by me on the last occasion on December 18, 1978. At that time he was continuing to have headache. He had returned to work approximately a week before the examination and after working a day, he stated he was "fired". I placed him on Nicotinic acid to be taken 50 mg. three times a day. He had an appointment with me on March 26, 1979, but he failed to keep this appointment.

I feel he has made a good recovery and he has no permanent functional impairment.

September 2, 1980

Responding to your inquiry, it is my opinion the neurological examination on July 28, 1980, of Roger Wheeler was entirely within normal limits. I have based my evaluation of a 5% of body disability soley [sic] on Mr. Wheeler's subjective complaints to me at the time of the examination.

In his report of February 28, 1979, Stuart R. Winston, M.D., stated:

We saw Mr. Wheeler in consultation on January 11, 1979. He described his injury of October 13, 1978, during which a hook fell and struck his head on the right parieto-occipital region and the right shoulder. He was stunned but not unconscious and was not wearing a hard hat. He had sutured lacerations. The skull films were negative. Later, films of the right scapula showed a fracture, and he was referred to Dr. Boulden. He was then sent to Dr. Hayne, had a computerized brain scan, which showed a "bruise" but no clots. He had no EEG. * * * *

Last week after a shower the patient had a blackout and severe headaches and blurring of vision which lasted for two or three days. He states that he is dizzy when he jumps up quickly. He also states he has difficulty in gaining an erection and has no interest in sexual intercourse. Cervical spine films taken by Dr. Boulden, which we reviewed, were negative.

His entire neurological examination except for some muscle spasm in the nuchal region was normal. It is to be mentioned that he has esotropia O.S. when he is unrefracted and this has been lifelong.

Essentially, his neurological examination, therefore, was normal without evidence of increased intracranial pressure or focal neurological deficit.

We obtained an electrocardiogram, which was normal, as was an EEG, ENG, and electrodiganostic [sic] studies of the nuchal region and right upper extremity. We reviewed the computerized brain scan from Methodist and felt it was normal. The only abnormalities on his screen of blood work were elevated cholesterol and alkaline phosphatase levels.

It is my impression that he suffers from headache, syncope by history, which I cannot find a cause for, and depression.

Daryl I. Engelen, D.C., who testified by way of report, stated he started treating claimant on May 23, 1979. Dr. Engelen disclosed that claimant gave a history indicating he was struck by a falling hook while working for defendant-employer on October 13, 1978. In his report of Cctober 23, 1979 Dr. Engelen stated:

Upon digital examination and motion palpation of the cervical spine, extreme tenderness and fixation of upper cervical area were noted, along with spasms of the occipital muscles.

Derifield leg check indicated cervical syndrome right with ¾" deficiency.

X-RAY EXAMINATION: The x-ray examination of 5-2-79 revealed no apparent pathology, however did exhibit structural derangment [sic] of cervical spine, including loss of normal cervical curve, left sinple [sic] scoliosis and subluxation complex of occipital-atlanto axial area.

In his report of June 9, 1980, Dr. Engelen opined that as of June 2, 1980 claimant had a 25 percent impairment of the cervical spine and felt claimant might have to have chiropractic care for life.

John C. Garfield, Ph.D., a licensed clinical psychologist, saw claimant on 3 occasions in June of 1979. In a report dated September 20, 1979, Dr. Garfield stated:

In my clinical judgment it is clear that Mr. Wheeler's accident 11 months ago has triggered pervasive and debilitating psychological reactions with sumptoms [sic] of anxiety and reactive depression being the most prominent. On the basis of my impressions gained during clinical interviews with Mr. Wheeler, and corroborated by the psychological test findings, he is now suffering from a moderately severe psychological disorder. Given the severity of his disorder, a course of short to medium-term psychotherapy is recommended barring a sudden amelioration of his condition as a result of a return to productive employment.

Issues

The issues presented by the parties at the time of the pre-hearing and the hearing are 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 permanent partial disability benefits he is entitled to.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 13, 1978 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).

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.

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 Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961).

In *Parr v. Nash Finch Co.*, (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980) and *Blacksmith v. All American Inc.*, 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earnings, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

Analysis

Based on the evidence presented and the principles of law previously stated, claimant has met his burden of proving his headaches and neck, shoulder and back pain are causally connected to his injury on October 13, 1978. Claimant's testimony is supported by the medical evidence and his wife's testimony.

Dr. Engelen opined that claimant had "as of June 2, 1980" a 25 percent impairment of the cervical spine. Although Dr. Engelen opined claimant might have to have chiropractic care for the rest of his life, Dr. Engelen did not state that the rating he gave was a permanent rating. Furthermore, the greater weight he gave was a permanent rating. Furthermore, the greater weight of medical evidence contradicts Dr. Engelen's opinion.

Dr. Boulden, who was claimant's original treating physician, stated in his report of October 23, 1978 that he found no abnormalities of claimant's cervical spine. As disclosed previously, Dr. Hayne, in his report of May 20, 1980, stated he felt the claimant had a good recovery with no permanent functional impairment. Dr. Hayne gave claimant a 5 percent of the body as a whole disability in his September 2, 1980 report but qualified that evaluation by indicating there was no objective evidence that supported that percentage and disclosed that claimant's neurological examination was within normal limits. Dr. Winston's report reveals that the results of his examination were also normal.

Dr. Garfield's report does not appear to be up to date in that since June of 1979 claimant has been re-employed. The evidence does not reveal if claimant's employment with Polk County started after Dr. Garfield's examination but it would be mere conjecture to assume that report would be the same. Dr. Garfield himself expressed that employment might completely change claimant's condition.

Claimant is 39 years old, with a high school education. As disclosed by Dr. Garfield's report, claimant is quite intelligient. Claimant has worked as a laborer, carpenter, and has worked for defendant-employer's well digging and water pump business for 10 years. There was no evidence of any physical restrictions placed on claimant by any physician as

well as no medical evidence that disclosed he could not have returned to his previous position or any other area of work he was qualified for previous to his injury.

It is noted, however, that claimant was terminated by the defendant-employer upon his return to their employment. John Wesley Thorpe testified that claimant's accident pointed up claimant's deficiencies. Weighing the testimony of Mr. Thorpe, as well as claimant's, and observing their demeanor, the conclusion must be reached that claimant was fired because of the injury. Claimant's actual earnings were diminished from the time of his firing until the date he was hired by Polk County. Claimant's earnings were also diminished in the amount or difference in what he made with claimant at the time of his injury and his starting salary with Polk County. Even though claimant is quite intelligent, his lack of continued education and age are hindrances in obtaining employment. The fact that claimant was fired may also keep him from employment for which he is otherwise fitted.

Based on the aforementioned evidence and the principles of law stated, claimant has met his burden in proving he received a 7 percent industrial disability as a result of his injury.

Findings of Fact

WHEREFORE, it is found:

That as a result of his injury on October 13, 1978 claimant has little, if any, functional disability, but met his burden of proving a seven (7%) percent permanent partial disability.

THEREFORE, defendants are to pay unto claimant thirty-five (35) weeks of permanent partial disability benefits at a rate of one hundred ninety and 95/100 dollars ($190.95) per week. No determination is made as to healing period benefits because it was not an issue presented.

Defendants are also to reimburse claimant for the following medical bills:

Neuro Associates, P.C.	$ 20.00
Dr. Engelen	388.00

Defendants are not ordered to reimburse claimant for the expenses of Dr. Garfield in that section 85.27, Code of Iowa, does not appear to cover a psychologist.

Interest on this award is to be paid by defendants as provided in section 85.30, Code of Iowa.

A final report is to be filed when this award is paid.

Defendants are to pay the costs of this action.

. . .

Signed and filed this 16th day of January, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DIANE ROSE WINTERS, as Surviving Spouse of Kenneth E. Winters, Deceased, et al.,

Claimant,

vs.

JOHN B. TE SLAA,

Employer,

and

AMERICAN MUTUAL INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Amendment To Appeal Decision

Defendants filed an application for rehearing pursuant to Iowa Code section 17A.16 on March 4, 1981. Claimant filed a resistance to defendants' application for rehearing on March 13, 1981 which granted defendants' application for rehearing solely as to the issue of whether the appeal decision should be modified to allow credit for amounts paid by defendants to the surviving spouse pursuant to the proposed arbitration decision filed November 26, 1979. Defendants' rehearing application was denied in all other respects. The defendants took advantage of the opportunity to submit briefs prior to March 24, 1981.

The proposed arbitration decision filed November 26, 1979 ordered defendants to pay claimant one hundred fifty-three and 13/100 dollars ($153.13) per week commencing January 15, 1979.

WHEREFORE, it is determined:

That defendants are entitled to credit for any amounts paid to claimant pursuant to and subsequent to the proposed arbitration decision filed November 26, 1979.

THEREFORE, it is ordered:

That defendants be given credit for amounts paid to claimant pursuant to and subsequent to the November 26, 1979 arbitration decision.

* * *

Signed and filed this 27th day of March, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

DIANE ROSE WINTERS, as Surviving Spouse of Kenneth E. Winters, Deceased, et al.,

Claimant,

vs.

JOHN B. TE SLAA,

Employer,

and

AMERICAN MUTUAL INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed arbitration decision in which she was awarded compensation for the death of her spouse in addition to burial benefits.

The record consists of the transcript of the hearing; the deposition of Robert W.Dykstra; the deposition of Maxine Te Slaa; claimant's exhibits 1 through 20; defendants' exhibit A; and appeal briefs of the parties.

The issue on appeal is the method used by the deputy to compute decedent's gross weekly wages, as well as the sufficiency of the award.

Decedent was employed as a part-time truck driver for John B. Te Slaa Trucking when he received fatal injuries on January 15, 1979, arising out of and in the course of his employment. At the time of his death, decedent was married and had six dependent children. In the year prior to his death, decedent also worked as a truck driver for K-Products, Vande Berg Trucking and Valley Feed and Seed. In addition, claimant owned five and one-half acres on which he grew corn and raised livestock.

Decedent's W-2 form from Te Slaa Trucking indicates that he was paid $2,856.44 in 1978. However, there is testimony to substantiate the fact that decedent was paid in 1978 by Te Slaa Trucking an additional $1,664.50 from which taxes were not deducted. This amount was not included on the W-2 form from Te Slaa Trucking.

Therefore, decedent's total wages paid by Te Slaa amount to $4,520.94. In addition, during 1978 decedent received wages of $7,720.16 from K-Products, $159.00 from Valley Feed and Seed and $70.00 from Vande Berg. Decedent's total wages earned as a truck driver in 1978 amounted to $12,470.10.

The 1978 tax return, filed by claimant after decedent's accident, reflects wages totaling $10,805.60. However, this amount does not take into account the additional unreported $1,644.50 decedent earned when he worked for Te Slaa.

The deputy correctly determined that decedent's weekly wage should be computed pursuant to Iowa Code section 85.36(10). However, the deputy further determined that the earnings of the decedent for the twelve months prior to his death were correctly reflected on line 31 of claimant's 1978 tax return. The $11,421.96 adjusted gross income figure reflects a reportable farm income of $616.36. This amount, $11,421.96, was then used by the deputy to compute decedent's gross weekly wages.

Claimant contends, however, that decedent's gross weekly earnings were much higher than that computed. According to claimant, decedent earned numerous items of income in 1978 which were not reported on the 1978 tax return. These items include $2,849.20 for care of foster children (based upon decedent's 25 percent time contribution), $2,310.00 for the sale of Cocker Spaniel litters, approximately $2,327.00 for custom baling ditch hay, $800.00 for hauling hay, $702.00 for the baling of a neighbor's hay, $562.50 earned by trimming trees, $1,340.00 for selling old railroad ties, $2,370.00 for the unsold 1978 corn crop, and $1,153.81 from a home mortgage interest adjustment. These items of income added to claimant's wages earned from employers, along with his farm income, result in an alleged 1978 income of approximately $28,061.81.

There is substantial evidence contained in the record that while decedent worked part-time for Te Slaa, his wages were less than usual weekly earnings of a full-time truck driver in the area where he worked. Decedent's co-worker, Robert Dykstra, and Te Slaa's bookkeeper, Maxine Te Slaa, both testified that a full-time truck driver for Te Slaa earned approximately $20,000.00 per year. Therefore, decedent's weekly earnings were properly computed using Iowa Code section 85.36(10) which states:

> 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. (Emphasis added.)

The first unnumbered paragraph of section 85.36 states:

> 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: (Emphasis added.)

Iowa Code section 85.61(2) defines "employee" as "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for any employer..." a person is not an employee if the "employment is purely causal and not for the purpose of the employer's trade or business." Iowa Code section 85.61(3)(a).

The term "employment" implies that a contract is required on the part of the employer to hire and on the part of the employee to perform service. *Henderson v. Jennie Edmundson Hospital*, 178 N.W.2d 429, 431 (Iowa 1970). There are certain factors which are taken into consideration when a determination must be made as to whether an employer-employee relationship exists. These factors include the right of selection, or to employ at will; responsibility for the payment of wages by the employer; the right to discharge or terminate the relationship; the right to control the work; and that the party sought to be held as the employer be the responsible authority in charge of the work or be the party for whose benefit the work is performed. *Id.*

There is no doubt that decedent's jobs as a truck driver with four companies listed on the W-2 forms involved employee-employer relationships. Therefore, the total earnings from these jobs during the twelve months prior to the fatal injury can be used to compute decedent's weekly earnings.

The remaining sources of income present a problem. Section 85.36(10) states that the weekly wage is based upon earnings from "employment," and, for example, decedent's farm operation involved no employer-employee relationship at all. There was no contract express or implied to perform the farm's duties for any employer. Further, the decedent's farming operation was actually self-employment is admitted by claimant. As a result, based upon the requirement of section 95.36(10) that earnings be from "employment", any profit or potential profit decedent realized or would have realized at a later date from his farming operation can not be used to compute the weekly earnings. This rationale also applies to all the income producing activities decedent was engaged in which fail to meet the "employee" "employment" requirements of the workers compensation statute. The income from baling and selling ditch hay falls within the self-employment category, as does the income produced from accumulating and selling railroad ties. Any income produced from these endeavors was solely a result of self-motivation and was not earned as an "employee." The same conclusion must be reached with regard to the sale of pure-bred puppies. Even if the breeding and subsequent sale of the dogs were entirely accomplished through the decedent's efforts, the "employee" "employment" tests are not met and the income cannot be used to calculate decedent's weekly earnings.

Hauling hay interstate and trimming trees with his father, and custom baling hay for a neighbor, could arguably be considered "employment"; however, the evidence does not support this contention. Decedent's father, Lewis Winters, testified that he and his son hauled hay togther and split the profit, with the father receiving somewhat more since he purchased the fuel. Decedent's father also helped his son trim trees on occasion, basically by providing the equipment and the fuel. In addition, decedent custom baled a neighbor's hay during 1978, for which he was paid $600.00.

The evidence in the record does not support the possible conclusion that an employee-employer relationship existed between decedent and his father, or between decedent and his neighbor, Al Rens. Decedent's father testified that the hay hauling and tree trimming were cooperative endeavors and that the profits were split. No "wages" were paid to decedent, decendent's father exerted no control over his work and there was no indication that the work was performed for the father's benefit. Actually, the record indicates that the work was performed for the mutual benefit of both decedent and his father.

There is also a lack of proof to substantiate any claim that decedent's neighbor, Al Rens, may have "employed" decedent to custom bale his hay. The testimony indicates

that custom baling hay for neighbors in the area was another intermittent source of income for decedent. There is no evidence which indicates that Al Rens controlled claimant's work, had the right to terminate claimant or was the responsible authority in charge of claimant's work. As a result, the income decedent earned by hauling and custom baling hay and that earned by trimming trees cannot be used to compute decedent's weekly earnings.

The final items of alleged income must also be disallowed for use in the calculation of decedent's weekly earnings. The money received for the care of foster children is not considered income. This money is received so that the foster family can provide necessities for the children under their care. The question of whether caring for foster children can be considered an "employment" need not be addressed, since public policy dictates that the money received for such care not be considered earned income.

Likewise, there is no support, statutory or otherwise, for the contention that the home mortgage interest adjustment be considered earnings.

Claimant cited numerous cases in the appeal brief as support for the contention that other sources of income can be considered when computing the wage basis for rate computation. These cases can be distinguished, however, since in each, an employee-employer relationship did exist, and the additional sources of compensation were, or would have been paid by the employer.

Although not directly on point, further support for the proposition that the legislative intent was that only earnings as an employee from an employer be considered is contained in the definition of "gross earnings" contained in section 86.61(12):

> 12. *"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 allowances, and the employer's contribution for welfare benefits. (Emphasis supplied.)

WHEREFORE, it is determined:

That decedent was employed by Te Slaa Trucking, Valley Feed and Seed, K-Products and Vande Berg in the twelve months preceding his fatal accident.

That decedent earned twelve thousand four hundred and seventy and 10/100 dollars ($12,470.10) as a result of his employment with these companies.

That decedent was paid less than the usual weekly earnings of a regular full-time adult laborer in the locality.

That Iowa Code section 85.36(10) be used to compute decedent's gross weekly earnings.

That decedent's other sources of income in the twelve months before his death were not earned in any employer-employee relationship and therefore, cannot be used to compute decedent's gross weekly earnings.

That, based on decedent's earnings of twelve thousand four hundred seventy and 10/100 dollars ($12,470.10) during the twelve months prior to his death, a gross weekly wage of two hundred forty-nine and 40/100 dollars ($249.40) is computed which results in a compensation rate of one hundred sixty-nine and 39/100 dollars ($169.39).

That claimant's Motion of Surviving Spouse Pursuant to Iowa Rule of Civil Procedure 134 be granted since defendants did not hold the request objectionable and had no reasonable ground to believe they might prevail on the matter.

That defendants have failed to make any of the filings required by the Iowa Industrial Commissioner's office.

That the case be remanded to a deputy for determination of the issue regarding the application for partial commutation.

* * *

Signed and filed this 12th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

GEORGE WOOD, JR.,

Claimant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS,

Employer,

and

FARMERS INSURANCE GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

Defendant-employer and Farmers Insurance Group appeal from a nunc pro tunc order dated July 11, 1980; an amended nunc pro tunc order dated July 15, 1980; and an addendum to amended nunc pro tunc order filed July 21, 1980.

The issues, as indicated in appellates' indication of limited review on appeal are:

1. Whether or not the deputy in any formal order made a decision as to whether or not certain payments by Farmers Insurance Group are entitled to be credited against the final award.

2. It is the contention of the employer and insurance carrier that the letter of July 21, 1980, is not a part of the decision in this case and that in fact and in reality the Deputy Industrial Commissioner made no conclusion of law as to whether or not any payments already made by Farmers Insurance Group may not be credited against the final award.

3. That in the event the Industrial Commissioner determines that a decision was made concerning credit then that and that decision is set out in the July 21, 1980, letter, then that decision is the one that we are requesting to be reviewed and reversed.

4. The only issue that I am aware of has to do with the right of credit and whether or not any real decision was actually made in that connection.

A conference call on February 10, 1981, between counsel for the parties and the undersigned further refined the issues to be whether or not defendants, Pacific Intermountain Express and Farmers Insurance Group, had made payment of the five percent permanent partial disability award pursuant to the review-reopening decision filed February 29, 1980 and whether or not they were entitled to credit as against the permanent partial disability award for payments made prior to the award.

Subsequent to the conference call, defendants were requested to send copies of all drafts issued to the claimant for the injury of June 14, 1977. Claimant's rate of compensation for temporary total disability or healing period benefits is $174.00 per week. His rate for permanent partial disability is $160.00.

Prior to November 14, 1977, the records show that claimant was paid 14 4/7 weeks of compensation at the rate of *$174.00* per week. Subsequent to November 14, 1977 and prior to the award, the records show that claimant was paid compensation for 30 1/7 weeks at the rate of *$174.00* per week. Subsequent to the award, claimant and his attorney were paid one check in the amount of $1,813.68. The decision of the deputy, although somewhat confusing, intended to award claimant 23 5/7 weeks of healing peirod compensation subsequent to November 14, 1977 and a permanent partial disability of 25 weeks. This latter amount equals $4,000.00. All of the payments prior to the award were at the rate of $174.00 per week and were therefore in excess of the amount due for permanent partial disability. The only amount paid subsequent to the award was $1,813.68. Although the draft is noted that it is in payment of temporary disability compensation, the cover letter to claimant's attorney indicates it was in payment of the award made by the decision of the deputy. This amount will then be allowed as credit against the $4,000.00 obligation for permanent partial disability. As to whether or not defendants are entitled to credit for overpayment of healing period benefits prior to the award, a short legislative history is necessary.

At least back to 1959 and until July 1, 1976, part of the first unnumbered paragraph of §85.34, Code of Iowa read:

> In the event weekly compensation had been paid to any person under any provision of this chapter or chapter 85A other than is 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.

Chapter 1084, Acts of 1976 Regular Session of the General Assembly amended the section effective July 1, 1976 thus:

> Sec. 7. Section eight-five point thirty-three (85.33), Code 1975, is amended to read as follows:

85.33 Temporary disability. The employer shall pay to the employee for injury producing temporary disability and begining upon the ~~eighth~~ *fourth* day thereof, weekly compensation benefit payments for the period of his disability, including the ~~periodical~~ increase in cases to which section 85.32 applies.

Sec. 8. Section eight-five point thirty-four (85.34), unnumbered paragraph one (1), Code 1975, is amended to read as follows:

> 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 *under section eighty-five point thirty-three (85.33) of the Code* had been paid to any person ~~under any provision of this chapter or chapter 85A other than is 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~~ *the healing period.*

The previous quoted portion of §85.34 now read thus:

> In the event weekly compensation under section 85.33 had been paid to any person for the same injury producing a permanent partial disability, any such amounts so paid shall be deducted from the amount of compensation payable for the healing period.

Prior to July 1, 1976, an employer or insurer could have a credit against the permanent partial disability payments for any overpayment of healing period. The amendment, perhaps inadvertently allows only a credit against the healing period for temporary total disability payments. The law does not specifically provide for credit for overpayment of healing period benefits against permanent partial benefits. Since the legislature specifically provided for such a credit when a permanent total disability is involved [§85.34(3)] 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.

WHEREFORE, credit is not to be allowed for overpayments of healing period benefits against permanent partial disability benefits.

THEREFORE, defendant, Pacific Intermountain Express and Farmers Insurance Group, are entitled to credit against the permanent partial disability award of twenty-five (25) weeks of permanent partial disability at the rate of one hundred sixty dollars ($160.00) for a total of four thousand dollars ($4,000.00) to the extent of one thousand eight hundred thirteen and 68/100 dollar ($1,813.00) leaving a balance due of two thousand one hundred eighty-six and 32/100 dollars ($2,186.32).

* * *

Signed and filed this 20th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

GEORGE WOOD, JR.,

Claimant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS

Employer,

and

FARMERS INSURANCE GROUP,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

The first two sentences of the third full paragraph on page two of the appeal decision filed February 20, 1981 are amended to accurately reflect the record. Those sentences should read:

> Prior to November 14, 1977, the records show that claimant was paid 15 4/7 weeks of compensation at the rate of *$174.00* per week. Subsequent to November 14, 1977 and prior to the award, the records show that claimant was paid compensation for 35 1/7 weeks at the rate of *$174.00* per week.
>
> In all other respects the appeal decision stands filed.

* * *

Signed and filed this 25th day of February, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

PAULA MARY ZIMMERMAN,

Claimant,

vs.

L. L. PELLING COMPANY, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

By order of the industrial commissioner filed March 2, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3 to issue the final agency decision on appeal in this matter. Both sides appeal the review-reopening decision of the hearing deputy.

The pre-hearing order stated that one issue in the case was that of causal relationship between the alleged injury and the disability, and that the other issue was the extent of temporary/healing period/or permanent partial disability.

Claimant received a very serious injury which left her left thigh terribly disfigured. The hearing deputy ordered as follows:

> That claimant shall, if she desires, undergo the surgical procedure outlined by Dr. Stilwell in his testimony.
>
> That claimant shall have sixty (60) days from the date of this order to make the determination of whether or not to undergo this surgery and the undersigned shall be promptly advised by her counsel of that decision.
>
> That the cost of these surgical procedures and related expenses shall be borne by the defendants.
>
> That Dr. Stilwell shall, at the expense of the defense, report to the undersigned on a quarterly basis concerning claimant's status and his prognosis regarding her condition.
>
> That the undersigned shall retain jurisdiction over this matter and a determination of the extent of claimant's disability, if any, will be made upon completion of Dr. Stilwell's treatment.

Thus, the above mentioned issues are left undecided. Since all the issues should be ruled upon before the matter is reviewed on appeal at the final agency level, the case will be remanded.

THEREFORE, the matter is remanded to the hearing deputy to weigh and consider the evidence as to the issue of causal relationship between the alleged injury and the disability and the issue of the extent of disability and to render a supplemental decision. The undersigned deputy industrial commissioner does not intimate what the decision should be.

* * *

Signed and filed at Des Moines, Iowa this 20th day of May, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

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