Volume II

1981 - 1982

IOWA INDUSTRIAL COMMISSIONER REPORT

Decisions on Selected Cases

July 1, 1981 — June 30, 1982

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
Des Moines, Iowa

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This report is published pursuant to section 86.9, The Code.

DALE ALDERMAN,

Claimant,

vs.

WILSON & COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant has appealed from a proposed interim in decision in which the deputy ordered the claimant to appear and testify at the review-reopening hearing.

The issue on appeal is whether claimant, because of his psychological state, is able to testify at the review-reopening proceedings.

The record on appeal consists of the transcript of the proceedings; claimant's exhibit 4; defendant's exhibit A; and exhibit 9, and that of Todd F. Hines, Ph.D.

A prior agency review-reopening and arbitration decision, which awarded the claimant 25 percent industrial disability, was appealed by the claimant to the Polk County District Court which modified the award by finding the claimant was entitled to a running healing period. The district court's decision was affirmed on appeal to the Iowa Court of Appeals on January 28, 1982. The Supreme Court of Iowa denied further review on March 1, 1982.

During the pendency of the above action, claimant filed another review-reopening petition, claiming that he was totally disabled. Claimant was not present to testify when this matter came on for hearing on June 2, 1981. As a result, the sole issue addressed in the deputy's interim decision and in this appeal decision is whether claimant, because of his psychological state, is able to testify.

Dr. Hines, a clinical psychologist, has been treating claimant since September 1978. (Hines deposition exhibit 1.) When asked how he would go about summarizing claimant's mental state and the change therein between January 1979 until the date of the deposition on July 2, 1981, Dr. Hines stated that he would rely upon test evaluations and his knowledge of claimant gained in approximately fifty clinical sessions. (Hines deposition, page 13.) On February 2, 1981 Dr. Hines administered the Minnesota Multiphasic Personality Inventory to claimant in order to compare the results with those of tests administered in 1977 and 1978. (Hines deposition exhibit 1.) In a progress report dated February 13, 1981, Dr. Hines noted that claimant's condition had worsened and that "[t]here is an overlay of significant fear and anxiety which results in constant agitation.... He feels helpless and hopeless. Social withdrawal and alienation are pronounced and occur as a function of his self image of worthlessness." (Hines deposition exhibit 1.)

Dr. Hines held a session with claimant on May 22, 1981. At that time he was of the opinion that:

> ... [claimant] was in an extremely vulnerable, fragile state emotionally and showed a great deal of anxiety response and a lot of depression and indicated to me that he was very concerned that he was going to be asked to testify again and that when he testified previously it had been an extremely traumatic experience for him, and I became concerned that if he were asked to testify again that it could be dangerous to him emotionally.
>
> * * *
>
> It was traumatic because I think at this juncture Mr. Alderman is in a position of generally being frightened of most new experiences. As I said, he's very vulnerable. He's very concerned that he will not be understood. He's very concerned that people don't believe and value his pain experience and as he related it to me he felt that he had been intimidated by the process.

When asked whether he discussed the stressful nature of the judicial process with claimant, Dr. Hines responded:

> Oh, yes. We talked about the fact that that's basically, as you indicate, the way the process goes and that that's something that he needs to do and that as part of his own growth and development and treatment he needs to be able to face experiences that are difficult for him.

At some point between Friday, May 22, 1981 and Thursday, May 28, 1981, Dr. Hines and claimant's counsel had a discussion with regard to the advisability of the claimant testifying at the June 2, 1981 hearing. From the information Dr. Hines received from the claimant in the next office visit (June 19, 1981), it appears that the claimant thought he was not required to testify at the June 2, 1981 hearing:

> The events that he related to me consisted primarily of receiving a letter from you (claimant's counsel) on Thursday the week before that accident saying that he would not have to testify personally, and early Friday morning a knock at his door at which there was a woman driven there in a car by a man, both of those people unknown to him, a woman who refused to identify herself, who thrust a paper at him, and he refused to take it, and she then identified it as a subpeona, and he again said that he would not take it and asked her where she was from, and she indicated she was from a law firm, and he said, "What law firm?" And she indicated a law firm downtown, and she then told him that she had an expense check for him, but he would have to take the subpeona to get the expense check, and he indicated to her that he would not do that and closed the door and those people left. He indicated to me that he was extremely upset by that. He was so upset by that that it was necessary for him to get out of the house and he and his wife essentially spent the next two to three days at the home of his mother because of his very high state of fear and anxiety. (Hines deposition, pages 81 and 82.)

Jeanne Allen, the process server hired by defendant to serve a subpeona on the claimant for the June 2, 1981 hearing, testified that she attempted to serve the subpeona on a Saturday, but that claimant refused to take it, stating that his attorney had told him he did not have to accept the subpeona. (Transcript, page 8.)

Dr. Hines sent the following letter dated May 29, 1981 to claimant's counsel:

> This is to confirm our recent telephone conversation in which I strongly recommended that Dale Alderman not be required to offer live testimony in proceedings related to his industrial disability.
>
> As you know, I have seen Mr. Alderman regularly for some three years. He has become increasingly fragile and vulnerable to emotional trauma. He has the potential for serious, perhaps life-threatening, psychological reactions to environmental stress. When he was last required to offer live testimony, the process was highly traumatic to him and he seems not to have fully recovered to this date in the sense that mere discussion of the experience quickly precipitated physiological stress responses and the cognitive disruption characteristic of extreme anxiety. Another experience of this type could produce even more severe psychological consequences.
>
> It is clearly my opinion that it is not in his best interests to be subject to any further requirement for live and direct testimony if any other options are available. (Claimant's exhibit 4.)

Dr. Hines testified that he did not anticipate that the claimant would be capable of testifying in the foreseeable future and that he would continue to be vulnerable and find it a traumatic experience. (Hines deposition, pages 65 and 66.)

Industrial Commissioner Rule 500—4.35 provides:

> The rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and chapters 85, 85A, 86, 87 and 17A, or obviously inapplicable to the industrial commissioner. In those circumstances, these rules or the appropriate Code section shall govern. Where appropriate, reference to the word "court" shall be deemed reference to the "industrial commissioner."

Code section 86.18 provides in relevant part: "2. The deposition of any witness may be taken and used as evidence in any pending proceeding or appeal with the agency."

Iowa Rule 144 of Civil Procedure states in relevant part:

> Any part of a deposition, so far as admissible under the rules of evidence, may be used upon trial or at an interlocutory hearing or upon the hearing of a motion in the same action against any party who appeared when it was taken or stipulated therefore, or had due notice thereof, either:
>
> * * *
>
> (c) For any purpose, if the court finds... that deponent is dead, or unable to testify because of age, illness, infirmity or imprisonment.
>
> (d) On application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard for the importance of witnesses testifying in open court.

Iowa Rule 17 of Civil Procedure states:

> If, during pendency of an action, a party is judicially adjudged incompetent, or confined in any state hospital for the mentally ill, or if his physician certifies to the court that he appears to be mentally incapable of acting in his own behalf, his guardian shall be joined with him, or, if there be none the court shall appoint a guardian ad litem for any party thus adjudged, confined or certified.

The testimony to which Dr. Hines refers was that of claimant taken in a deposition on March 11, 1981. Clearly, that deposition was intended to be a discovery and not an evidentiary deposition, the matters addressed in claimant's discovery-oriented deposition must be more thoroughly explored for purposes of the review-reopening proceeding. There appear to be circumstances in claimant's life, unrelated to his industrial injury, which may alter the outcome of his case. Post-1979 incidents which may have had an adverse psychological impact upon claimant were mentioned in claimant's deposition as well as in the deposition of Dr. Hines. These incidents can best be described by claimant himself at the review-reopening hearing.

During the review-reopening hearing claimant's testimony will be given under the observation of a neutral trier of fact. The hearing officer's presence should serve to diminish the trauma or stress claimant may experience during the proceeding. The absence of a neutral trier of fact during the discovery deposition may well have served to increase the stress experienced by claimant. Testifying during a discovery deposition could be more traumatic for an individual than testifying at a hearing, since, by its very nature, a discovery deposition is oriented toward discovering and eliciting facts not previously known which may lead to admissible information. It is more difficult to adequately prepare a party or witness as to what can be expected and what type of information is likely to be sought when the format is that of a discovery deposition versus that of a review-reopening hearing. Additionally, at a discovery deposition, a party does not have the opportunity to present his case which is afforded to him at a hearing. When a review-reopening proceeding takes place, discovery has been completed, thereby giving the attorney an opportunity to discuss with the witness what information is likely to be sought from the opposing attorney.

Dr. Hines did not indicate that claimant was incapable of acting on his own behalf. In fact, although Dr. Hines was of the opinion that claimant should not testify since he was vulnerable to traumatic experiences, he testified that he did discuss with the claimant the advisability of confronting stressful situations. Claimant has testified in at least two previous instances. Advance preparation of claimant with respect to information which the opposing attorney might attempt to elicit and a discussion concerning the role of the hearing officer as well as the differences between testifying at a hearing versus testifying at a discovery deposition, might well serve to greatly reduce claimant's apprehension about testifying.

Findings of Fact

1. Claimant's testimony as to his condition and causation is essential to the trier of fact for determination of the present review-reopening proceeding.

2. Claimant is not incapable of acting on his own behalf.

3. The status of claimant's prior award has now been fully determined by judicial review.

THEREFORE, it is ordered:

That this case be returned to the ready-to-assign category.

That claimant shall appear and testify at such hearing or the matter will be continued or dismissed depending on the circumstances at that time.

* * *

Signed and filed this 26th day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

EDWIN ALLEN,

Claimant,

vs.

J. M. ALLEN,

Employer,
Uninsured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Edwin E. Allen, the claimant, against J. M. Allen, the employer who is in violation of Section 85.1, Code of Iowa, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial accident which occurred on January 25, 1980.

This matter was heard in Mason City on September 29, 1981 and was fully submitted at the conclusion of the hearing.

Based upon the undersigned's notes, this record consists of the testimony of the claimant, his spouse, Donna Rapp and the defendant employer, together with the following exhibits: Claimant's exhibits 1 through 5, medical bills; claimant's exhibit 6, affidavit; claimant's exhibits 7 through 10, rent receipts; and defendant's exhibit A, affidavit.

Based upon the undersigned's notes, there is sufficient credible evidence to support the following statement of facts:

Claimant, a young married man with one child, performed maintenance duties for the defendant employer in exchange for a rental reduction. The defendant employer admitted the existence of such an arrangement during his testimony. The defendant employer further admitted that he received notice of claimant's alleged industrial injury within a "short time" after January 25, 1980.

Claimant and his wife testified that claimant fell while shoveling snow at an entrance to the defendant employer's property. The claimant felt immediate pain in his right hand and was unable to continue his snow shoveling activity. His spouse testified that she finished clearing the sidewalk and that after supper the family drove to the residence of Don Rapp. During the course of the visit, the two couples drank beer and played cards. Claimant sought medical assistance the next day.

Defendant denies claimant fell while shoveling snow, producing as a witness, Donna Rapp, who was present during the Friday night get-together. She testified that the claimant made no complaints or reference to hand pain during the time he was at her home, and used both hands during the card-playing festivities. Mrs. Rapp further testified that claimant's wife told her that claimant had fallen enroute home following the party. The testimony of Mrs. Donna Rapp is given the greater weight in this decision, in light of her apparent disinterest in the outcome of this dispute.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 25, 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).

In applying the foregoing principles to the case at hand, it is clear that the claimant has failed in his burden of proof.

WHEREFORE, after taking into account all of the credible evidence contained in this deputy's notes and after having seen and heard the witnesses in open hearing, the following findings of fact are made:

1. That the claimant was an employee of the defendant employer on January 25, 1980.

2. That the claimant did not sustain an industrial injury while so employed.

3. That the claimant did sustain a fracture to his right hand, but that the circumstances surrounding the injury are such as to make the injury noncompensable, claimant having fallen on his employer's premises at a time when he was not in the course of his employment.

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 as provided in Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 21 day of October, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

CAROLYN JUNE AMENDT,

Claimant,

vs.

MEAD CONTAINERS,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Carolyn June Amendt, the claimant, against her employer, Mead Containers, and the insurance carrier, Liberty Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act on account of an injury she sustained on May 8, 1980. This matter came on for hearing before the undersigned at the Webster County Courthouse in Fort Dodge, Iowa, on October 28, 1981. The record was considered fully submitted on December 17, 1981.

On November 14, 1980 defendants filed a first report of injury concerning a May 1980 date of injury.

The record consists of the transcribed testimony of the claimant, of Roger Harris, of Timothy Trusty, of Larry St. John and of Linda Gottschalk; claimant's exhibit 1, V.A. lien information; claimant's exhibit 3, a July 15, 1980 report from Robert A. Hayne, M.D.; claimant's exhibit 4, an August 1, 1980 statement from Michael W. Stitt, M.D.; the deposition testimony of Donald W. Blair, M.D., including one deposition exhibit; defendants' exhibit A, a November 11, 1980 letter from Dr. Daniel J. Cole, M.D.; defendants' exhibit C, a December 16, 1980 letter from Robert A. Hayne, M.D.; defendants' exhibits D through H, outpatient emergency records from Trinity Regional Hospital; defendants' exhibit I, report of accident investigation; defendants' exhibit J and K, employment applications; defedants' exhibit L, drawing of accident site; defendants' exhibit M, return to work slip; defendants' exhibit N, May 14, 1980 note signed by Roger Harris; defendants' exhibit O, claimant's absentee record; defendants' exhibit P, defendant employer's file regarding a May 1980 injury; defendants' exhibit Q, defendant employer's file regarding a June 1979 injury; and packet of varied medical bills filed by the claimant on November 3, 1981. Defendants' objection to the admissibility of claimant's exhibit 2 based on Industrial Commissioner Rule 500—4.17 was sustained. Defendants' objection to claimant's exhibit 3 was overruled. Defendants' objections to various medical bills on the ground of authorization (except for Dr. Stitt and Dr. Hayne) and of causal connection were noted. In light of the determinations made below, the objections are sustained. Claimant's objection to defendants' exhibit C was noted as going to the weight, not the admissibility of the exhibit.

Issues

The issues to be determined include whether the claimant received an injury which arose out of and in the course of employment; whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to temporary total/healing period and medical benefits; and whether claimant gave defendant employer timely notice of a work related injury in accordance with Code section 85.23

Recitation of the Evidence

Claimant testified that on Thursday, May 8, 1980, and about 20 minutes before the end of her shift, she was struck in the lower back by a load of flat boxes moving down the main conveyor. Claimant explained that she had been attempting to push a 3' x 2' x 3' load of boards out from the minor track at her work station and onto the main conveyor when she was hit. She had one leg on the main track at the time. Claimant recalled falling against her load, causing 90% of the boards to fall across the floor. She estimated there were 1500 boards on the pallet and stated that usually 20 to 50 boards would be bundled together. There were no eyewitnesses.

Claimant testified that her foreman, Roger Harris, approached her after the occurrence and told her to pick up the mess. She recalled telling him that she hurt her back. She then cleaned up the area and went home. Claimant testified that she worked the next day but toward the end of the shift told Timothy Trusty, another foreman, that her back was bothering her, that she had informed Roger the day before, and that she was going to the hospital. According to the claimant, Trusty approved her seeking medical care. (Claimant did not recall telling Trusty about this incident in the fall of 1980, as she apparently had stated at the time of her deposition [not offered into evidence].)

Claimant was seen at Trinity Regional Hospital at 1715 hours on May 9, 1980. She complained of low back pain radiating down both legs and up to the thoracic spine, of numbness in the toes, and of tingling in the cervical spine commencing at 1400 hours. Claimant "[d]enies traumastates lifts at work." (Defendants' exhibit H.) A hospital note dated May 9, 1980 indicated that the claimant should have been off work May 12, 1980. (Defendants' exhibit P, page 2.) However, the claimant went back to work on Monday, May 12, 1980 and worked until noon at which time she went to see her family doctor, Daniel J. Cole, M.D. On direct examination claimant implied that she gave the hospital note to Larry St. John and Linda Gottschalk in personnel on May 12, 1980; on cross-examination claimant seemingly agreed she gave a note from Dr. Cole to St. John and Gottschalk on that Monday. (No note dated May 12, 1980 from Dr. Cole appears in the record. There is one for May 14, 1980. [Defendants' exhibit P, page 3.] Dr. Cole saw the claimant on both dates according to defendants' exhibit A, page 2.) Claimant insisted that she advised St. John and Gottschalk from the beginning that her problem was work related and continued to do so whenever she brought in medical "off work" slips during subsequent weeks. (Slips dated May 14, 1980, May 21, 1980, May 28, 1980, June 9, 1980 and June 16, 1980 from Dr. Cole and August 15, 1980 from Michael W. Stitt, M.D.)

In an attending physician's statement on an accident and sickness claim form, Dr. Cole on May 28, 1980 indicated claimant's condition was a "[L]umbosacral strain" and "[t]his injury was possibly due to employment." (Defendants' exhibit P, page 9 [reverse side]. The front side bears the signature of Linda Gottschalk, is dated June 5, 1980 and indicates a "no" as the employer's statement to whether the injury arose out of employment. Neither "yes" nor "no" is checked as a response to the same question in the portion of the claim filled out and signed by the claimant on May 21, 1980.) In a letter dated December 9, 1980 and addressed to defendant carrier, Dr. Cole summarized his involvement in claimant's case and the conclusions he reached about the cause of her condition:

> Concerning your letter of December 8, 1980 on Carolyn Amendt, I can give you the following information. She was first seen in the Emergency Room on 5-9-80 for complaints of low back pain radiating down into both legs and numbness in her toes also radiating up into the thoracic spine. She complained of some tingling in her back and aches and pains with movement that started at approximately 2:00 p.m. the day of her visit to the Emergency Room. She related that she had been doing lifting at work, but did not know of any actual trauma occurring. She was seen by the ER doctor, started on muscle relaxants and referred to me. I saw her on 5-12-80 at which time I felt she had a lumbosacral strain. She had a positive straight leg raising test on the right side and she went out to the hospital for x-rays and she was to continue on Parafon Forte. I saw her again on the 14th of May and she was still having back pain. I added some Tolectin DS. X-ray showed a loss of normal lordotic curve of the back which is compatible with a perivertebral muscle strain. On the 21st of May I saw her and her back was still bothering her. I recommended some outpatient therapy. On the 9th of June she felt that her back had improved enough that she could go back to work. She returned to me on the 16th, stating she was having more trouble after going back to work and I referred her to Dr. Robert Hayne in Des Moines.
>
> I think with the fact that her symptoms of numbness in the lower extremities started while at work the day of May 9th it would indicate that this was a work related injury. Dr. Hayne felt that she possibly had a herniated lumbar disc but wanted to try conservative medical therapy before suggesting any cervical intervention.... (Defendants' exhibit B, pages 2 and 3.)

In a letter dated July 15, 1980 and addressed to Dr. Cole, Robert A. Hayne, M.D., states that he examined the claimant on July 9, 1980. The history he received was that the claimant "strained her low back region packing at work two months ago." Although he agreed with Dr. Cole's diagnosis of a possible herniated lumbar disc, he felt that in view of claimant's short period of symptomatology that she should continue on conservative measures. He recommended claimant change jobs noting that her present job required repetitive lifting of 50 pounds. He released the claimant to return to light duty work on July 14, 1980 and thanked Dr. Cole for referring the patient to him. (Claimant's exhibit 3; see also defendants' exhibit P, page 12.) According to the claimant she was to return to Dr. Hayne on a p.r.n. basis and did contact him after a couple of weeks. Claimant reported that she was advised Dr. Hayne was on vacation and was referred to John T. Bakody, M.D. (Claimant apparently told Dr. Blair she had been referred to Dr. Bakody by Dr. Stitt. [Blair deposition, page 12.]) Claimant knew nothing about the August 18, 1980 appointment which Dr. Hayne indicated she failed to keep. (Defendants' exhibit C.) Claimant recalled that Dr. Bakody performed a myelogram which yielded negative results. According to the claimant's testimony, Dr. Bakody essentially dismissed her from his care. (No reports from Dr. Bakody were offered into the record.)

According to Mr. St. John's testimony, when claimant received the release to return to work from Dr. Hayne in July of 1980, defendants requested she see Dr. Stitt for a routine return to work physical. However, defendants' records indicate that Dr. Stitt did not release the claimant to return to work but rather continued to see her for follow-up office visits through October 6, 1980. (Claimant's exhibit 4 and defendants' exhibit P, page 16.) In an attending physician's statement dated August 1, 1980, Dr. Stitt's diagnosis is "[p]t. hit in back at work on 5-9-80 at Mead Container. Acute low back." (Neither Mr. St. John nor Ms. Gottschalk recalled seeing this document. Ms. Gottschalk acknowledged that normally it should have been in claimant's personnel file but was not. Her explanation was that it may have been sent directly to the accident and sickness carrier since claimant had applied for and was receiving benefits through that program. [See generally defendants' exhibit P, pages 11, 13 (both sides), 14 to end.]) In a letter dated November 11, 1980 and addressed to claimant's attorney, Dr. Stitt reiterates that claimant reported to him "that she was hit in the back at work on May 9, 1980." However, he did "not have the details of the mechanism of injury." (Defendants' exhibit A.)

Claimant testified that she was dissatisfied with Dr. Stitt's care, and when she noticed her legs being numb for days at a time, she decided to seek treatment at the Veterans Administration Hospital in Des Moines. (She had served in the Navy for 2 months.) Claimant indicated that Donald W. Blair, M.D., has been her primary treating physician since that time. Claimant in fact was first seen at the V.A. hospital on October 8, 1980. (Blair deposition exhibit 1.) Dr. Blair testified that he first examined her on November 3, 1980 and formed the impression that she had "right sciatica" and "recurrent myofascial strain, lumbosacral, and a transitional L-5 vertebra." (Blair deposition, page 4.) He reported that the history he received from the claimant was one of pushing a load of boxes as another load of boxes struck her in the right lower back region. He felt that the back strain and sciatica could have been precipitated by such an injury, especially taking into consideration the preexisting transitional vertebra. (Blair deposition, page 7 and page 20.) He noted that everyone is subject to backache but that a person who has a preexisting condition similar to that of the claimant and who is doing heavy work is more likely to experience such symptoms at an early date. (Blair deposition, pages 20 and 21.) Although Dr. Blair did not display detailed knowledge about claimant's job with defendant employer, he noted that he anticipated early on that the claimant would need to change to lighter work such as a desk or sedentary position. (Blair deposition, pages 9 and 10.) He did not think she had reached maximum improvement as of February 12, 1981, the last time he saw her before being deposed. (Blair deposition, pages 10 and 11.)

Claimant testified that she still follows the home traction program recommended by Dr. Blair. (Such area was not explored by either counsel at the time of Dr. Blair's deposition.) Claimant did not feel she was continuing to make any improvement and indicated she experiences no problems as long as she is inactive. She agreed she was healthy enough to look for a job.

With regard to any prior back problem, claimant testified that she originally thought she had suffered a back strain at work on June 29, 1979 but later found out that her discomfort was due to a kidney infection. Trinity Hospital outpatient emergency record for June 29, 1979 indicates that claimant complained of thoracic pain radiating up to her neck as a result of lifting boxes at work. (Defendants' exhibit D.) Such incident was documented by the employer's records as entailing boards. (Defendants' exhibits I and Q. However, claimant did not recall reporting that such strain occurred from stacking boards.) Then, a Trinity Regional outpatient emergency record for Monday July 1, 1979 states that claimant hurt her lower back exactly a week ago when she slipped and hit her back on three steps. On this occasion, a urinary tract infection is diagnosed. (Defendants' exhibit F. See also the reverse side of defendants; exhibit M wherein it is noted that claimant reported falling and bruising her kidneys after outpatient treatment on that Monday.) A similar document dated August 10, 1979 indicates that claimant's low back pain and urinary infection were not yet resolved. Claimant testified that once the kidney infection was cured, her back discomfort ceased.

Claimant further reported that she fell off a horse at some time prior to the date of injury in issue and bruised her ribs. Although claimant testified on direct examination that she additionally injured her back in July of 1979 when she fell into a doorway at her mother's home, during cross-examination she denied testifying to such an incident. (Transcript page 15, pages 65 and 66. See also page 78.)

Defense witness Roger Harris, a supervisor for defendant employer for 33 years and supervisor of the finishing department on May 8, 1980, testified that he did not recall the incident described by the claimant. Mr. Harris explained that sometime in early May 1980 his supervisor, a Bruce McClintock, asked him to talk to the claimant about a back injury for which she had been receiving medical treatment. Mr. Harris stated that he asked the claimant if the back problem was work related and she denied any such connection. He recalled documenting this for the personnel file on the same day he spoke to the claimant. His note bears the date of Wednesday May 14, 1980. (Defendants' exhibit N.) Mr. Harris indicated that he was the individual claimant should have contacted if she had been injured or needed medical treatment. He pointed out that Mr. Trusty was not claimant's supervisor. He testified that he was not aware of claimant's contention that her problem was work related until much later when he was so advised by either Mr. McClintock or Mr. St. John.

Timothy Trusty, a supervisor for defendant employer since 1967 and maintenance supervisor on the alleged date of injury, testified on behalf of the defense. He did not recall the Friday conversation claimant related they had with regard to her back problem and wanting to go to the hospital. He denied that claimant asked him for permission to go to the hospital. Mr. Trusty recalled a conversation he had with the claimant about a week before Mr. Harris' investigation. According to Mr. Trusty, claimant told him her back hurt but she did not know what caused the problem. Mr. Trusty stated that several months later he first knew the claimant was alleging a work injury.

Mr. Trusty further testified that he questioned claimant's description of how she was injured because, if she had been standing at her normal worksite she would not have been in a position to have been struck from behind. He illustrated the process. (Defendant's exhibit L.) Mr. Trusty did acknowledge that if claimant moved around the minor track and stood on the opposite side of her work site, she could have been struck as she described the incident.

Larry St. John, defense witness, testified that he has been defendant employer's manufacturing manager since July of 1977 and that his position includes personnel duties. He stated that he first knew of claimant's problem when she returned from the doctor's office on May 12, 1980. Thereupon he directed that Mr. Harris investigate the matter.

Defense witness, Linda Gottschalk, secretary for defendant employer's manager for 14 years, testified that she first knew claimant was alleging a work related injury in October of 1980 when claimant's attorney called her. She testified that claimant's absentee record indicated that claimant last worked on May 12, 1980. (Defendants' exhibit N.) She further testified that in the subsequent conversations she had with the claimant, a work related injury was not mentioned.

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 of body of an employee. * * * The injury to the human body here contemplated must be something whether an accident or not, that acts extraneously to the natural process of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body. * * * *

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

In the course of employment means that the claimant must prove her injury occurred at a place where she reasonably may be performing her 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 May 8, 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 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., supra*. 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, supra*. 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 purpose behind Code section 85.23, the notice provision, is to afford the employer an opportunity to investigate the facts surrounding an alleged injury. Notice is not necessary where the employer or the employer's representative have actual knowledge of the occurrence of the injury. *Hobbs v. City of Sioux City*, 231 Iowa 860, 2 N.W.2d 275, 276 (1942). Notice and actual knowledge contemplate that the injury will be presented as being work related. *Robinson v. Department of Transportation*, 296 N.W.2d 809 (Iowa 1980).

Analysis

Claimant's testimony with regard to the occurrence of an injury and her reporting of a work related injury to defendant employer was contradicted by the testimony of all four defense witnesses. Although the undersigned observed that the demeanor of the claimant at the time of the hearing appeared credible (insofar as she seemed to be sincere and to believe she was telling the truth) as that of the other witnesses, the record viewed as a whole does not support claimant's version of events and strongly suggests that her recall of past words and actions is inconsistent, at best. A number of such contradictions were set forth in the recitation of the evidence. (It should be noted claimant's explanation of why she did not report her 1979 back condition as an injury in answer to defendants' discovery [because she felt it was related to a kidney infection] was deemed reasonable.) The most noticeable contradiction was her denial on cross-examination of what she had stated on direct examination. More importantly, the fact that the medical histories, which Trinity Regional Hospital, Dr. Cole and Dr. Hayne received from the claimant, contain no mention of more than lifting at work makes claimant's account of her injury suspect. Indeed, the Trinity Regional Hospital records indicate that claimant's onset of pain occurred on May 12, 1980, not May 8, 1980. The first mention of a hit in the back appears in Dr. Stitt's report dated August 1, 1980. Even then there are no details regarding what actually happened. Only Dr. Blair reiterates a history similar to claimant's testimony. Additionally, claimant's description of how the injury occurred did not suggest that she moved around the minor track to push the load onto the main track, as Mr. Trusty indicated she would have had to do in order to be in a position to be struck from behind. Although Mr. Harris and Mr. Trusty acknowledged that the fact they did not recall the incident was not the equivalent of such occurrence being an impossibility, such testimony coupled with the lack of any eyewitnesses to the incident (claimant testified that her co-workers were in the restroom at the time of the injury but helped her pick up the boards upon their return to the worksite — yet, she produced no such witness on her behalf) suggests that their lack of recall of such event is based on a non-occurrence of the alleged injury. Finding that claimant sustained an injury in the course of and arising out of her

employment on May 8, 1980 would amount to mere speculation in light of the present record.

Even if claimant's theory of injury had been based on lifting per se, she would not have sustained her burden of proving that such work activity resulted in the alleged disability. The Trinity Regional Hospital records only note that claimant lifts at work. No weights nor frequency are established. On May 28, 1980 Dr. Cole indicated that claimant's condition possibly was related to her employment. Yet, this reports suggest that the only operative history he employed was that found in the hospital record. On July 15, 1980 Dr. Hayne implied that claimant's lifting of 50 pounds repetitively was a source of her problem. The record does not establish that claimant was required to lift that amount. Whereas claimant described the materials as boards and at one point suggested a board might weigh a pound (she estimated the load she pushed consisted of 1500 boards and weighed 1500 pounds), Mr. Trusty explained that the material claimant handled was corrugated cardboard and was bundled in groups of 20 to 50 and removed from one off the floor track to a pallet on another raised conveyor. Finally, under a lifting theory of injury, the histories received by Dr. Stitt and Dr. Blair would be deemed inaccurate. (It is noted that although Dr. Blair did touch upon the impact heavy lifting would have on a preexisting back condition such as that he found in the claimant's case, he too displayed no accurate detailed understanding of what the claimant's job entailed.)

In light of the findings made above the merit of the affirmative defense of notice is not determinative in this case, but for the sake of completeness such issue will be analyzed. The purpose behind the notice provision is to allow the employer a timely opportunity to investigate the circumstances surrounding a claim that an injury occurred at work. Claimant's counsel suggested in questioning that the employers were aware of such an injury early on and claimant's alleged statement to Mr. Harris denying her condition was work related should be discounted because of inconsistency in their testimony regarding when such conversation took place. As stated earlier, claimant's recall of events and conversations appears poor. The record viewed as a whole essentially corroborates the testimony of the defense witnesses. Mr. Trusty testified that the claimant advised him about a week before her conversation with Mr. Harris that her back was bothering her and she was going to seek medical care. She did not mention a work-related injury. Mr. Harris testified that he talked to the claimant on May 14, 1980, the date he wrote the note indicating she had denied her problem was work related. This would be not quite a week after her conversation with Mr. Trusty. The record indicates that claimant had a note from Trinity Regional Hospital when she returned to work on May 12, 1980 that probably was the note she presented to personnel so she could leave at noon to see Dr. Cole. (Although claimant's counsel at one point convinced Mr. St. John that the doctor's note which triggered the investigation was that of Dr. Cole, the record does not support such finding. Defense counsel likewise confused the two notes when cross-examining the claimant.) At some point thereafter, Mr. Harris was instructed to investigate the matter. Claimant testified that she returned to defendant employer's premises on numerous occasions. Obviously, she would return with Dr. Cole's first note, dated May 14, 1980, to verify that she should continue to be off work. Hence, Mr. Harris' testimony that he spoke with claimant that day is entirely possible.

Clearly, it was the defendants who initiated an investigation merely on the basis that claimant had back pain for which she was seeking medical care. Claimant not only did not report a work related injury but, according to Mr. Harris, denied any such incident. Thus, Dr. Cole's May 28, 1980 notation on the accident and sickness benefit application that claimant's condition was possibly employment related was not something defendants could be expected to consider as a notice of work related injury in light of earlier events. However, Dr. Stitt's notation that claimant reported being hit in the back at work was dated August 1, 1980. However, the last office visit at that time appears to have been on July 21, 1980. On it's face such note would have satisfied 90 day notice of a work related injury to a representative of defendant employer. Dr. Stitt was the company doctor. In a typical case, where such history would be the first indication of a potential claim for compensation, the defendants would accordingly begin an investigation of the facts. Here an investigation had already been conducted very soon after the alleged date of injury. Hence, the investigation findings were viewed as the true account of what occurred (and did not occur) at the time of the alleged injury, as was indicated in the analysis of whether claimant sustained an injury in the course of and arising out of her employment on May 8, 1980.

Finding of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. On or about Thursday May 8, 1980 claimant began to experience back pain for which she sought medical care after work on Friday, May 9, 1980. Claimant returned to work on Monday, May 12, 1980 but left at noon to seek further medical care. Claimant has not returned to work since.

Finding 2. On May 14, 1980 claimant denied that her injury was work related in response to questioning by defendant employer. Not until sometime in July of 1980 did claimant report to the company doctor that she had been hit in the back at work. No details of such injury were given.

Finding 3. Only the medical history received by a doctor who began treating the claimant in October of 1980 contains a description of the injury as claimant reported it at the time of the hearing. Aside from the company doctor's notation stated in Finding 2, the rest of the medical records revealed that claimant reported no trauma.

Finding 4. Mention was made of the fact claimant did lifting at work. The medical experts, who suggested that such activity might be the cause of her back problem (not claimant's stated position), did not demonstrate an accurate knowledge of what claimant's job entailed.

Conclusion A. Claimant has failed to establish that she sustained an injury in the course of and arising out of her employment on May 8, 1980.

Conclusion B. Defendant employer did receive timely notice of claimant's contention that she sustained a work related injury when she alleged being hit on the back at work to the company doctor.

Order

THEREFORE, it is ordered that claimant's application for benefits be denied.

Costs of the proceeding are taxed to defendants. See Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 16th day of February, 1982.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

RUSSELL A. ANDERSON,

Claimant,

vs.

HENKEL CONSTRUCTION COMPANY,

Employer,

and

IOWA CONTRACTORS WORKERS GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 29, 1982 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 consists of the transcript; the deposition of Adrian James Wolbrink; claimant's exhibits 1 through 13, inclusive; defendants' exhibits A, B, and C; and the answer by defendants to interrogatory #9.

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

Claimant was a foreman, an employee of Henkel for some 24 years; he was riding home from a remote job site with a fellow foreman, in a company-owned pickup.

Claimant's presence in the pickup was in the course of the employment either as an exception to the going and coming rule or because the truck was an employer-owned conveyance, both theories being thoroughly discussed by the hearing deputy and in claimant's appeal brief. One is also impressed by the remarkably analogous Arizona case wherein a construction foreman who was injured while riding home from a remote job site with a construction superintendent was held to be in the course of his employment. *J. D. Dutton, Inc., v. Industrial Commission,* 120 Arizona 199, 584 P2d 1190 (1978). As stated by the hearing deputy, a benefit to the employer is easily inferred.

WHEREFORE, the proposed arbitration decision is adopted as the final decision of the agency.

THEREFORE, it is ordered:

That defendants pay unto claimant temporary total/healing period benefits at a rate of two hundred ninety-nine and 85/100 dollars ($299.85) per week until such time as claimant is no longer disabled or the test for the termination of healing period is met.

That defendants pay unto claimant mileage expenses from July 25, 1980 to June 30, 1981 totalling one hundred fifty-two (152) miles at the rate of twenty cents ($.20) or thirty and 40/100 dollars ($30.40).

That defendants pay unto claimant mileage subsequent to July 1, 1981 totalling forty (40) miles at a rate of twenty-two cents ($.22) or eight and 80/100 dollars ($8.80).

That defendants pay unto claimant the following medical expenses:

Forest Park Pharmacy	$ 7.40
Drug Town	16.42
Lyon County Ambulance	30.00
Merrill Pioneer Community Hospital	68.00
Ronald M. Larsen, M.D.	65.00
Masters Chiropractic Clinic	135.00
North Iowa Medical Center	478.05
Park Clinic	422.75

That defendants pay unto claimant, pursuant to Industrial Commissioner Rule 500—4.33, the cost of the medical report of A. J. Wolbrink, M.D., and the cost of the medical report of C. O. Adams, M.D., a total of thirty-three dollars ($33.00).

That defendants receive credit for benefits paid pursuant to Iowa Code §85.38(2).

That defendants pay unto claimant interest pursuant to Iowa Code §85.30.

That defendants file a final report when this award is paid.

* * *

Signed and filed at Des Moines, Iowa this 15th day of April, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

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

VIRGIL J. ANTHONEY,

Claimant,

vs.

FLEXSTEEL INDUSTRIES, INC.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed February 17, 1982 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 consists of the transcript; claimant's exhibits A, B, C, and D; and defendants' exhibits A, B, C, D, and E.

The result will be the same as that reached by the hearing deputy. The findings of fact and conclusions of law are those of the undersigned deputy industrial commissioner.

Summary

The dispute arises over the question of whether epididymitis was caused or aggravated by an employment lifting incident or was unconnected to the employment. Claimant testified to the lifting incident, and the medical reports constitute the medical evidence.

Issue

Based on the record, the hearing deputy awarded five weeks of temporary total disability and certain benefits under §85.27. The issue is one of causal relationship or, alternately, whether there was an injury within the terms of the workers' compensation law. The weekly compensation rate of $370.78 is not contested on appeal, nor are the amounts of the medical bills. Likewise, there is no dispute on appeal over the length and character of disability.

Applicable Law

This case is governed by the definition of personal injury announced long ago by our supreme court in *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). Under that case, a preexisting condition or disease which is lighted up or accelerated by the work may be compensable. There must be a causal relationship between the original condition and the lighting up or acceleration. Where the medical expert's history is based upon an inadequate or incomplete history, the expert's opinion is not binding upon the industrial commissioner. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967), *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W. 2d 867 (1965).

Analysis

Claimant was treated by Luke C. Faber, M.D., the employer's medical director and examined by Denis D. Faber, M.D., a urologist and by George K. Kraemer, M.D., also a urologist. Of these well-qualified physicians, only Dr. Kraemer gave an unequivocal opinion which best seems to consider the history given by claimant. That opinion stated "in all likelihood, [claimant had] underlying prostatitis which flared up into epididymitis, and in all likelihood was related to his description of the incident." (Defendants' exhibit C) Certainly, from one's own knowledge from prior cases, epididymitis can be aggravated by trauma. On the other hand, Dr. Luke Faber said the epididymitis was not related to work, he recited virtually no history. Dr. Denis Faber recites a history but gives no opinion as to cause. That being the case, there being no reason to disbelieve claimant's version of the hideabed incident, and considering Dr. Kraemer's opinion, it is clear that claimant should prevail.

Findings of Fact

1. Claimant was an employee of Flexsteel Industries, Inc. as of September 29, 1980. (Tr. 4)

2. On that date, while moving a hideabed, he landed flat footed on the ground while holding up his end. (Tr. 5-7)

3. The incident caused pain in his groin. (Tr. 6)

4. The incident flared underlying prostatitis into epididymitis. (Defendants' exhibit C)

Conclusions of Law

Claimant sustained an injury arising out of and in the course of his employment and causing five (5) weeks of temporary total disability and entitling him to benefits under §85.27, The Code.

Order

Defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of five (5) weeks at the rate of three hundred seventy and 78/100 dollars ($370.78) per week for temporary total disability beginning October 8, 1980, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay the following expenses under §85.27:

Medical Associates Clinic, P.C. (Dr. Kraemer)	$ 53.20
Dubuque Urology Service, P.C. (Dr. D. Faber)	24.00
Finley Hospital (10-8-80)	31.25
L. C. Faber, M.D.	100.00

Costs of his action are taxed against defendants.

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

* * *

Signed and filed at Des Moines, Iowa this 18th day of May, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

STEVEN ARTHUR ARGUELLO,

Claimant,

vs.

ALUMINUM COMPANY OF AMERICA,

Employer,
Self-Insured,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Steven Arthur Arguello, the claimant, against Aluminum Company of America, his self-insured employer and holder of a certificate of exemption as provided in section 87.11, Code of Iowa, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on August 13, 1976 as a result thereof. Claimant was paid a healing period of 77.429 weeks together with an award of 50 weeks for 100 percent functional loss of one ear as contemplated by Section 85.34(2)(r), Code 1976, at the agreed weekly rate of $139.27.

This matter was heard in Davenport, Iowa on July 9, 1981 and commensurate with the filing of the last evidentiary medical deposition, the record was closed on August 19, 1981.

This record requires a resolution of the claimant's disability, if any.

A partial transcript of proceedings has been provided wherein the claimant, Larry Delf and Emil M. Stimac, M.D., testified together with the evidentiary depositions of Patrick G. Campbell, M.D., and Brian F. McCabe, M.D., as well as the following exhibits:

Claimant's exhibit
1 — Memorandum
2 — Closing notice
3 — Attendance record
4 — Hospital records
5 — Hospital records
6 — Medical report
7 — Medical report
8 — Medical report
9 — Medical report

Defendant's exhibits A through L — Medical reports.

There is sufficient credible evidence contained in this deputy's notes to support the following statement of facts:

Claimant, now aged 32, single and an employee of the defendant for eight years, sustained a fracture of the frontal bone and the temporal bone on August 13, 1976 as the result of being struck by a flying railroad spike. Claimant then was paid the following periods of time lost from work due to necessary medical treatment:

Date Disabilities Began	Disability Ended	Weeks	Days
08/14/1976	05/30/1977	41	3
07/13/1977	07/17/1977	—	5
07/19/1977	10/16/1977	12	6
08/26/1980	01/19/1981	21	—
01/23/1981	02/01/1981	1	3

The initial medical report following claimant's transfer to University of Iowa Hospital as contained in a report under the date of September 16, 1976, states as follows (Claimant's exhibit 1):

> Steven Arguello was an inpatient at University Hospital from August 24, 1976 until September 3, 1976 following a head injury sustained in a fork lift accident and initial treatment at St. Lukes Hospital in Davenport.
>
> On admission he was stuporous with purposeful responses to noxious stimuli. No focal signs were noted. There was profuse bleeding from a right eyelid laceration. Skull x-rays showed the right orbital fracture through the orbital roof extending into the frontal sinus. He also had total third nerve palsy.
>
> He subsequently developed severe cerebral edema and was treated conservatively with fluid restriction and steroids. He improved with this treatment and at the time of discharge he was fully alert and oriented. Mild ptosis of the right eye was noted. Extra-ocular eye movements were full and his vision was grossly intact. Both pupils were reactive to light. No cranial nerve involvement was noted and his neurological examination was essentially normal. He was fully ambulatory and undergoing outpatient physical therapy.
>
> He was transferred to his local hospital to your care. He was also evaluated by the ENT and Ophthalmology Services who recommended further follow-up by his local physicians.

Claimant was also treated by John C. VanGilder, M.D., a neurosurgeon at Iowa City, Iowa who reported in part as follows (Defendant's exhibit G):

> Steven Arguello was seen in the Neurosurgical Outpatient Clinic on October 19, 1976. He was admitted to our hospital in a comatose state on August 14, 1976 and discharged on September 3, 1976. He gradually improved and x-rays demonstrated a fracture of the frontal sinus. Subsequent to his becoming awake, he has been unable to hear in the right ear and has had dizziness with ambulation. This is of different quality at different times and is exacerbated by changing positions. He has been seen by ENT who on two

repeated audiograms have demonstrated complete deafness in the right ear.

X-rays have been recently obtained of the right temporal bone which demonstrate to me a fracture across the petrous portion in the roof in an anterior-posterior diameter.

> On physical examination he is alert, oriented and cooperative X3. His gait is slightly wide based and he is unsteady on his feet. He can walk alone, but it is easier to use a cane. His reflexes are +3 and symmetrical in the lower extremities, and +2 and symmetrical in the upper extremities.

Claimant was followed by various physicians thereafter, with his complaints of "ringing in the ear" continuing. Upon claimant's return to gainful employment as worker in the foil mill department, he found that the noisy work environment made it difficult for him to continue. Claimant was suffering from a loss of equilibrium, which came on daily without warning and an increased ringing in the ears. A previously installed pacemaker was removed in 1977. Claimant has been transferred to the maintenance department and is now a janitor responsible to clean washrooms resulting in a reduction of $.85 per hour in wages. Claimant is now earning $10.45 per hour as opposed to the $11.04 hourly wage being paid to foil department employees.

On June 30, 1977 claimant became a patient of Patrick G. Campbell, M.D., a psychiatrist in Davenport, Iowa, upon referral by Dr. Stimac, the plant physician.

Claimant testified that a pacemaker was inserted that summer and then removed a short time thereafter. Dr. Campbell testified on page 9, line 4 and continuing (Deposition) as follows:

Q. Did you then develop a course of, or, a relationship with Steve insofar as the psychiatric treatment was concerned?

A. Well, at that time, he appeared to be depressed. He wasn't eating, he wasn't sleeping, and he was down. And he complained about all these depressive symptoms, increasing of the other symptoms, which, to me, it appeared to be a depressive illness was developing as part of the posttraumatic disorder, emotional disorder. He was having depressive symptoms. It's going to go on for a long period of time. And so initially I was going to try him on some antidepressant medication. And there was a little lull in communication between me and Dr. Stimac at that time. I didn't follow up with a lot of contact. I went ahead and started treating him for depression, put him on medication, which commonly does produce arrhythmia.

Q. What is that, sir?

A. It changes the heart rhythm. And this is kind of unusual for a young person, but he got into trouble on the job, immediately passed out or something on the job, and they checked his pulse, which was way below normal, and had him hospitalized. Well, fortunately, he called me in time to let me know what he was doing. *And I interceded at the hospital before the cardiologist inserted a pacemaker.* He was unaware of the fact that I had started him on the medicine and he thought the condition was due to something else. So this all happened in a very short period of time after I started taking care of him. That was a brief problem. We took him off the medicine, and it was kind of difficult to — you know, when you are trying to deal with depression without medication, it just takes a lot more time. [Emphasis added.]

In light of the foregoing conflict, the claimant's version of the installation of a pacemaker is given the greater weight in this decision on the basis that claimant's testimony in this record, and accordingly, the entire medical testimony of Patrick G. Campbell, M.D., is given little weight.

Brian F. McCabe, M.D., a neurotologist, describes his medical speciality as an otolaryngolist, who specializes in hearing balance problems, facial nerve problems, et cetera, (Deposition, p. 4, l. 18) testified that he first saw the claimant on December 6, 1977. Whereupon, his medical examination revealed the following (Deposition, p. 7, l. 6 and continuing):

A. . . . Subjectively, he had a total loss of hearing in the right ear. Audiometry was performed, which bore that out. Hearing was normal in the left ear, except for a 25 db drop at 4,000 and 8,000 cycles.

Q. This was the left ear?

A. The left ear, yes, the only hearing ear.

Q. What significance did that have, if any?

A. That together with his history of loud sound exposure at work, indicates to me very early sound damage in the left ear.

Q. What does sound damage mean, sir?

A. The term is noise induced hearing loss or acoustic trauma, and it is a result of overdriving a susceptible ear to noise damage.

Q. What is the best treatment for that, a non-noisy atmosphere?

A. That's the only treatment.

Q. The only treatment?

A. Yes.

Dr. McCabe who expressed the medical opinion that while most people overcome motion intolerance through an adjustment process (Deposition, p. 9, l. 7), claimant is "apparently one of those few individuals that physiologically cannot completely compensate" (Deposition, p. 18, l. 6). The doctor further states that claimant has motion intolerance on the basis of his testimony (Deposition, pp. 33, 34, 35 and 36). Dr. McCabe expressed the opinion that the claimant has a permanent functional impairment of 15 to 25 percent (Deposition, p. 40, l. 23).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 13, 1976 is the cause of the disability on which he now bases his claim. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W.2d 732 (1956). The question of causal connection is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960).

In applying the foregoing legal principles to the case at hand, it is clear that claimant has sustained his burden of proof in establishing by his testimony and the corroborative medical evidence presented that his physical abnormalities are causally connected to the industrial injury under review.

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' 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, Id.*, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered [citing *Martin, supra,*]. In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

In applying the foregoing legal principles to the case at hand, it is concluded that the claimant has sustained an industrial disability of 35 percent of the body as a whole at this time. Dr. McCabe concluded that the claimant has a functional impairment of 15 to 25 percent of the body as a whole due to a combination of claimant's hearing loss, motion intolerance and impaired communication ability (Deposition, p. 40, l. 16).

On January 30, 1981 the parties hereto entered into the following agreement (Claimant's exhibit 1):

> In accordance with the provisions of Article XII, Paragraph C., parties agree that Steven Arguello is to be medically placed in classification of Sweeper-Janitor effective 1981 February 2.
>
> For the purpose of determining departmental seniority accumulation under a., b., and d., of Article VIII, B, he will be considered as having in the new department the amount of departmental seniority held in his former regular (own) department. This provision shall cease to apply whenever he has accumulated five (5) or more years of departmental seniority in the new department or voluntarily [sic] transfers to a different department, whichever occurs earlier.
>
> Should the occasion arise where it is determined by department Management that no work is avilable within his medical restrictions, Mr. Arguello will be sent home withour [sic] company liability for compensation.
>
> Such placement may be re-examined at any time Mr. Arguello's medical conditions change or the departmental working conditions prove to be unsatisfactory.
>
> Nothing in this agreement is intended to prevent Mr. Arguello from returning to the Foil Mill Department if in the future, his medical conditions so change as to warrant his return and work levels permit.

Based upon the foregoing agreement and the testimony of Dr. McCabe who urges that claimant not return to the "foil room" due to the hearing deficiency in claimant's left ear, it is clear that claimant should not continue in his prior employment duties, but rather accept on a permanent basis defendant's janitorial position. Claimant should be guided by Dr. McCabe's diagnosis that any further prolonged exposure to excessive noise could result in further left ear hearing loss.

Defendant is to be complimented for its conduct in providing substitute employment. Claimant is urged to accept defendant's offer of janitorial duty in the administrative building where the claimant will experience a diminished voice level exposure. This young man at age 32, however, finds himself in a substantially lessened employment posture. His work experience is limited to that of a plant laborer and foil mill helper. Given his current physical condition of motion intolerance, hearing discrimination difficulty and psychiatric difficulty, claimant's outlook for other employment is bleak.

WHEREFORE, after having heard and seen the witnesses and after taking into account all of the credible evidence contained in this deputy's notes, the following findings of fact are made:

1. That the claimant sustained an admitted severe head injury on August 13, 1976 resulting in the complete loss of hearing in his right ear.

2. That the claimant continues to have balance problems.

3. That the claimant has expressed the wish to resume his past duties in the foil room.

4. That by reason thereof, claimant is medically required to be removed from a noisy environment.

5. That the claimant's current functional impairment is found to be twenty-five (25) percent of the body as a whole.

6. That the claimant now has some difficulty in hearing with his left ear.

7. That the claimant has been under the care of a psychiatrist due to the residual effects of the industrial injury and that such care continue in the future.

8. That based upon claimant's comparatively young age and lack of formal education, his industrial disability is currently found to be thirty-five (35) percent of the body as a whole.

THEREFORE, it is ordered:

That commencing on August 13, 1976 the defendant pay the claimant a period of permanent partial disability of a one hundred seventy-five (175) week duration at the agreed weekly rate of one hundred thirty-nine and 27/100 dollars ($139.27).

That defendant be given credit for those amount previously paid with accrued benefits payable in a lump sum together with statutory interest from the date due as contemplated by Section 85.30, Code of Iowa.

That defendant is ordered to provide future substitute psychiatric care for that period of time, in the opinion of the treating physician, which is sufficient to restore the claimant's mental health to approximately the condition as it existed the day prior to the injury.

That costs are charged to the defendant and shall include the cost of transcription of the medical evidentiary deposition of Dr. Patrick G. Campbell and Dr. Brian F. McCabe together with an expert witness fee of one hundred fifty dollars ($150) payable to each physician as contemplated by Section 622.72, Code of Iowa.

That defendant is further ordered to file a final report.

That a caveat to the claimant appears to be in order wherein it is urged that he accept the proffered change in janitorial assignment to the office building so as to provide a quiet work place as suggested by Dr. McCabe.

* * *

Signed and filed this 21st day of September, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

GEORGE ARMSTRONG,

Claimant,

vs.

STATE OF IOWA BUILDING & GROUNDS,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed May 21, 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 and §85.27 decision which allowed him a 10% permanent partial disability to the body as a whole and certain medical and hospital benefits.

The record on appeal consists of the transcript containing the testimony of claimant; the deposition of Remi Jere Cadoret, M.D., and the deposition of Todd F. Hines, Ph.D.; and claimant's exhibits 1, 2, 3, and 4. The result of the review-reopening case is basically affirmed, except that more medical benefits will be allowed under this decision.

Claimant's compensable injury, at first a double hernia, occurred when he lifted a mop bucket full of water. Since that episode on July 26, 1978, cliamant has had a series of physical and mental problems. Generally, the evidence did not show any real physical disability after the hernias were repaired. The mental problems persist and are connected to the injury.

The issues are (a) the extent of permanent partial disability, (b) the extent of healing period disability, (c) the extent of benefits under §85.27, and (d) the extent to which the *Auxier* decision may apply in this case.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 26, 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).

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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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).

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. * * * *

The supreme court of Iowa has defined "personel injury to be any Impairment of health and 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. * * * *

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

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

Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978) states in part as follows:

> We hold, 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 *Auxier* issue can be handled simply. In this case, claimant did in fact return to work, worked for one or two days and then stopped working, he says, because of the injury. There is an issue, of course, as to whether the alleged disability after claimant returned to work is compensable; however, there appears to be no question that claimant would not be entitled to an *Auxier* notice under the circumstances. Claimant returned to work, and the employer took him back in apparent good faith. The *Auxier* case does not go so far as to state that the notice is due under such circumstances.

With respect to the issue of permanent partial disability, the main evidence is that of Todd F. Hines, Ph.D., a qualified psychologist, and Remi Jere Cadoret, M.D., a qualified psychiatrist. Their evidence may be taken together. Except for Dr. Hines' opinion that the mental problem is related to the injury, the opinion of Dr. Cadoret is preferred slightly because he is a psychiatrist, making him qualified in both physical and mental diagnostics. One is convinced, then, that claimant sustained his mental condition because of the injury, and Dr. Hines' explanation of this is sufficient. However, the extent of the disability is more in the realm of Dr. Cadoret. The tenor of Dr. Cadoret's opinion was that the disability was not severe, being a low level anxiety.

Claimant returned to work on October 9, 1978 because he was released by Joseph M. Torruella, M.D.; claimant had had surgery for compensable hernias and had healed. There is no good showing that his numerous other complaints were disabling, indeed that they were compensable, except for the mental condition, which appears to be permanent and static, a condition that is not susceptible to a healing period.

With respect to the dispute over whether or not certain examinations and treatment were authorized, the record seems clear. Dr. Torruella was the employer-chosen physician and consulted with Paul From, M.D. Dr. Hines, James M. Caterine, M.D., and Peter D. Wirtz, M.D., all examined claimant upon the recommendation of Dr. From. Thus, the treatment was, by inference, authorized by the employer because its chosen physician started the series of referrals.

Findings of Fact

1. Claimant hurt himself at work on July 26, 1978 when he lifted a mop bucket full of water. (Tr. 23, Toruella reports in claimant exhibit 2)

2. The nature of the injury was a bilateral hernia. (Toruella in claimant exhibit 2)

3. The work injury caused an emotional problem. (Hines report in claimant exhibit 2)

4. Prior to the injury, claimant was psychologically vulnerable, and the work injury triggered the condition. (Hines depo., 11)

5. Claimant is not a good candidate for therapy and his psychological condition is therefore permanent. (Hines report in claimant exhibit 2)

6. Claimant's permanent psychological condition is not totally and permanently disabling. (Cadoret depo., 25, 28)

7. Claimant was born July 8, 1917. (Tr., 6)

8. Claimant finished the 11th grade. (Tr., 6)

9. Claimant's work has generally been as an unskilled laborer. (Tr., 6-21)

10. Claimant returned to work October 9, 1978. (Tr., 26)

11. Dr. Torruella was the employer-chosen physician. (Tr., 24)

12. Dr. From saw claimant as a consultant to Dr. Torruella. (Tr., 24, Dr. From report of April 18, 1979 in claimant exhibit 2)

13. Dr. Hines examined claimant upon the recommendation of Dr. From. (Dr. From report in claimant exhibit 2; Dr. Hines report in same exhibit)

14. Dr. Caterine examined claimant upon the recommendation of Dr. From. (Dr. Caterine's bill in claimant's exhibit 1)

15. Dr. Wirtz examined claimant upon the recommendation of Dr. From. (Wirtz report December 14, 1979 in claimant exhibit 2)

16. There was insufficient evidence that the Veterans Administration and hospital bill concerned claimant's work injury.

17. There is insufficient evidence that the tests, treatments and a diagnosis by Dr. Foreman was authorized pursuant to §85.27

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of his employment on July 26, 1978, which caused a double hernia and a compensable mental condition.

The mental condition is permanent and entitles claimant to a ten percent (10%) permanent partial disability to the body as a whole for industrial purposes.

Claimant is entitled to healing period benefits from July 31, 1978 to October 9, 1978, a period of ten (10) weeks.

As a result of claimant's injury he is entitled to certain medical benefits under §85.27, listed in detail below.

As the parties stipulated, the proper rate of weekly compensation is ninety-nine and 04/100 dollars ($99.04).

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of fifty (50) weeks at the rate of ninety-nine and 04/100 dollars ($99.04) per week for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

Defendants having paid ten (10) weeks of healing period, no further healing period benefits are ordered.

Defendants are ordered to pay the following expenses under §85.27:

Mercy Hospital (July/August 1978)	$2,790.57
Dr. Torruella	804.00
Iowa Lutheran Hospital	96.00
Todd Hines, Ph.D.	450.00
Dr. From	125.00
Dr. Caterine	25.00
Dr. Wirtz	152.00

Costs are taxed against defendants.

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

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

Appeal to District Court; Pending.

PAUL R. BALDWIN,

Claimant,

vs.

CARTER-WATERS CORPORATION,

Employer,

and

LIBERTY MUTUAL INSURANCE, COMPANY,

Insurance Carrier,
Defendants.

Partial Commutation Decision

Introduction

This is a proceeding brought by Paul R. Baldwin, the claimant, against his employer, Carter-Waters Corporation, and the insurance carrier, Liberty Mutual Insurance Company, seeking a commutation under the Iowa Workers' Compensation Act.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on April 15, 1981. The record was considered fully submitted on April 15, 1981.

An examination of the industrial commissioner's file reflects that on June 5, 1977 a first report of injury was filed and on June 14, 1977 a memorandum of agreement was filed. On April 15, 1981 a form 2A was filed with the industrial commissioner reporting the amount of compensation benefits paid as of that date.

The parties stipulated at the time of hearing that the applicable weekly compensation rate is $127.21. Additionally, it was stipulated that the claimant has not returned to his former employment and is continuing to be paid benefits. The parties also indicated that the medical bills have been paid.

The record in this case consists of the testimony of the claimant, of David S. Habr, Ph.D., Paul Michael Baldwin, Beverly Baldwin; claimant's exhibits 1 and 2; and defendants' exhibit A and B.

Issue

The issue to be determined is whether the claimant's application for partial commutation should be granted.

The original notice and petition in this case are captioned "partial commutation." However, an examination of the figures contained in that document reflect that the claimant is attempting to commute all rather than a portion of his future benefits. It is also noted that the claimant is attempting to leave the medical aspect of the case open for future payment by the defendants. In light of the apparent confusion between a partial and full commutation, the undersigned will consider the application as one for a partial rather than a full commutation of benefits.

Findings of Fact

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

By filing the memorandum of agreement on July 14, 1977 the defendants have admitted that the claimant was an employee and sustained an injury which arose out of and in the course of his employment. The form 2A filed April 15, 1981 reflects that the claimant had as of that date received 197 weeks of benefits for a total of $25,060.37.

The claimant testified that he would like a "partial commutation" and believes that it is in his best interest to receive same. He is of the opinion that he would feel more financially secure with a lump sum settlement. The funds, according to the claimant, would be used to enlarge his house and to undertake some needed repair work on his farm, the balance of the funds would be invested. The claimant owns a 240 acre farm which his son farms for him. Mr. Baldwin was able to do extensive chores on the farm prior to his injury, but since that date he has not been able to do so. There is a $10,000 outstanding mortgage on claimant's farm at this time and the claimant expressed a desire to pay off this mortgage. He does not know the exact cost of various other repairs which he would like to undertake on his property.

The undersigned deputy closely observed the claimant and is of the opinion that the claimant may have some difficulty in managing a large sum of money. The claimant indicated that he trusts his wife and son to manage his affairs and would leave the management of any commuted sum to them.

David Habr, Ph.D., is an economics consultant and testified at length concerning the percentage return claimant could derive from investing the funds received from this partial commutation in various forms of AAA rated bonds. The information provided by Dr. Habr is most informative; however, due to the apparent confusion in terms of the status of the pleadings in this case, his testimony as to the investment value of these funds is not of as much assistance in a partial commutation situation as it would be if this were to be considered by the undersigned as a full commutation.

The claimant's wife testified that she has been married to the claimant for 33 years. She testified to an increase in expenses since the claimant's injury because of his inability to run the family farm, particularly because the family must now obtain hired help to do the work Mr. Baldwin once did. Mrs. Baldwin estimated that it would cost $15,000 to $16,000 to make certain remodeling changes in the claimant's house. These remodeling changes are necessitated, according to this witness, because of the claimant's epilepsy and body tremors and his inability to sleep. This witness has been required to sleep on the living room couch for many months due to the fact that she cannot stay in the same bed with claimant because of his tremors. Mrs. Baldwin testified she feels she must be nearer to the claimant during these epileptic seizures. This witness is of the opinion that a commutation would relieve the claimant of some of the anxieties and concerns that he has about his financial security. She indicates that the claimant is concerned about losing the farm. She confirmed that the farm mortgage is around $10,000. She testified to various repairs which must be done on the farm itself including fencing repairs, painting the barns, shed and roof repair, hog house repair and a new heating system in the house. She had general estimates as to cost of a few of these items, but the testimony is not clear as to the total amount involved.

The claimant's son, Paul Michael Baldwin, testified he is a farmer and farms his parents' 240 acre farm. He indicates that prior to the injury the claimant helped the witness with the farm work, but now the claimant is unable to do so and the hired man has been employed to assist in this process. This witness confirmed that the buildings on the claimant's property need work and that the house needs to be remodeled so that the claimant and Mrs. Baldwin can properly live.

Applicable Law

Section 85.48 provides:

When partial commutation is ordered, the industrial commissioner shall fix the lump sum to be paid at an amount which will equal the future payments for the period commuted, capitalized at their present value upon the basis of interest calculated at five percent per annum, with provisions for the payment of weekly compensation not included in such commutation, subject to any provisions of the law applicable to such unpaid weekly payments; all remaining payments, if any, to be paid at the same time as though such commutation had not been made.

The leading case in Iowa on commutations generally is *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (Iowa 1964) wherein the court noted in part:

> Admitting, arguendo, if death appears imminent, the period during which compensation is payable cannot be definitely determined, it does not follow that the commissioner or the court should speculate on a claimant's life expectancy. That is not what the statute says or means. The statute contemplates a determination of the extent of disability resulting from the injury. When claimant's condition became stabilized he was found to be totally permanently disabled. Under such a finding the statute fixes the period during which compensation is payable.
>
> . . .
>
> The court should not act as an unyielding conservator of the claimant's property and disregard his desires and reasonable plans just because success in the future is not assured.

Section 85.45 of the Code sets out general considerations which apply in commutation situations. That section provides:

> Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:
>
> 1. When the period during which compensation is payable can be definitely determined.
>
> 2. When it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefore.
>
> 3. When the recipient of commuted benefits is a minor employee, the industrial commissioner may order that such benefits be paid to a trustee as provided in section 85.49.
>
> 4. When a person seeking a commutation is a widow or widower, a permanently and totally disabled employee, or a dependent who is entitled to benefits as provided in section 85.31, subsection 1, paragraphs "c" and "d", the future payments which may be commuted shall be indicated by probability tables designated by the industrial commissioner for death and remarriage, subject to the provisions of chapter 17A. [citations]

Analysis

Having heard the testimony and reviewing the facts and figures in this case, the undersigned deputy is of the opinion that it is in the best interest of the claimant to approve a partial commutation of benefits. Additionally, a partial commutation is being approved as opposed to a full commutation because of the discrepancies in the pleadings in this matter.

Both the claimant and his wife as well as their son have testified at length concerning repairs that are needed on claimant's farm property. There has also been substantial testimony concerning house renovation which appears to be necessitated because of the claimant's physical condition and the resulting changing lifestyle of the family.

The testimony is clear that there is approximately a $10,000 mortgage outstanding on the farm property. It appears to the undersigned that the claimant will obtain substantial piece of mind if sufficient funds can be provided him to pay off that mortgage. The required house repairs, while somewhat speculative in terms of exact amount, appear to be in the neighborhood of $15,000 to $20,000 and the necessary farm repairs, while also somewhat speculative in terms of precise figures, may be in the neighborhood at the present time of approximately $5,000.

This case appears to be a permanent total disability situation entitling the claimant to lifetime benefits under Section 85.34(3). The period of compensation is thus determinable. The claimant's life expectancy at age 56 at the time of the hearing was 1,113 weeks. As reflected in the memorandum of agreement, the agreed upon rate of compensation is $127.21 per week.

Based on the record in this case, a partial commutation of 350 weeks of compensation will be approved. Three hundred fifty weeks equals a factor of 298.1974 times $127.21 the applicable rate equals a partial commutation of $37,933.69. The 350 weeks are to be taken from the first part of the remaining period rather than the last part of the remaining period.

During the course of this hearing, testimony was presented concerning claimant's counsel's attorney's fee in this matter. An examination of the industrial commissioner's file does not reflect that counsel for the claimant was in any way involved in the liability aspect of this case. In fact, it appears there was no dispute as to liability and the carrier simply filed a memorandum and began paying benefits. The commissioner's file reflects that his only function has been to initiate the commutation proceeding and handle the necessary legal matters attendant thereto.

Section 86.39 provides:

> All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 85 and 87 shall be subject to the approval of the industrial commissioner, and no lien for such service shall be enforceable without the approval of the amount thereof by the industrial commissioner. . . .

The testimony is that counsel's fee in the event of the approval of a full commutation would be in excess of $17,000. In light of the limited activities of claimant's counsel with respect to this file and the necessary work to be performed in connection with the preparation of this commuta-

tion proceeding, it is the opinion of the undersigned that a fee of this size is not justified and will not be approved. A fee, however, of $2,500 will be and is hereby approved.

Conclusions of Law

WHEREFORE, it is found that the claimant has sustained his burden of proof and established his entitlement to a partial commutation in the amount of three hundred fifty (350) weeks or thirty-seven thousand nine hundred thirty-three and 69/100 dollars ($37,933.69).

THEREFORE, it is ordered that the partial commutation requested by the claimant is hereby approved for three hundred fifty (350) weeks in the amount of thirty-seven thousand nine hundred thirty-three and 69/100 dollars ($37,933.69).

* * *

Signed and filed this 17th day of August, 1981.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

SHARON Y. BATES,

Claimant,

vs.

FRENCH & HECHT,

Employer,
Self-Insured,
Defendant.

Review Reopening Decision

This is a proceeding in review-reopening brought by the claimant, Sharon Y. Bates, against her employer, French & Hecht, a holder of a certificate of exemption as contemplated by Section 85.11, Code of Iowa, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on June 26, 1980. This matter was heard in Davenport, Iowa on July 8, 1981 and commensurate with the filing of the last evidentiary medical deposition, the record was closed on October 15, 1981.

With the exception of a form 2A, defendant made all of the necessary statutory filings wherein it was agreed that claimant's weekly rate of benefits was to be $218.85 per week. Claimant received three days of benefits following her inability to perform acts of gainful employment from June 27, 1980 to July 2, 1980.

The record, according to this deputy's notes, consists of the testimony of the claimant, the deposition of Paul Howard Beckman, M.D., together with the following exhibits: Claimant's exhibits 1 through 6, medical reports; and defendant's exhibit A, medical report.

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

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

Claimant, aged 28, a married resident of East Moline, Illinois, had been a five year punch press operator for the defendant employer. On June 26, 1981, while pulling in a large 38 inch wheel rim weighing approximately 100 pounds, claimant indicated back and neck pain together with hearing a pop sound. Claimant was sent to a hospital emergency room and was seen by the plant physician, Paul Beckman, M.D., the following day. (Deposition, page 6, line 4.) Dr. Beckman, after prescribing oral medication, concluded claimant should remain off work until June 30, 1980. (Deposition, page 7, line 8.) Thereupon, following the June 30, 1980 physical examination, claimant was returned to light duty which consisted of sweeping the floor. Following an examination of July 3, 1980, Dr. Beckman no longer found the minimal spasms in the left paralumbar region and recommended light duty restrictions for an additional ten day period. Thereupon, claimant took vacation until July 17, 1980 at which time she saw Dr. Beckman again. Claimant was complaining of low back pain during this period, especially when attempting to bend. Dr. Beckman sent the claimant to M. A. Sanguino, M.D., the following day who reported on July 29, 1980 as follows (Claimant's exhibit 2):

> Mrs. Sharon Bates was hospitalized under my neurological care at Lutheran Hospital from July 19 to July 25, 80, with a diagnosis of Lumbar paraspinal sprain, and poss. lumbar disc, that was never ruled out. She is to go back to work to her regular duties next thursday [sic] July 31, 1980.

On August 4, 1980 Dr. Sanguino reported as follows: "Mrs. Sharon Bates when [sic] back to work on July 31, 1980. Last friday [sic] August 1st. [sic] she couldn't finish her shift because of continuos [sic] pain. Today, I am sending her for physical therapy at Lutheran Hospital and she is to stay off of work until further notice."

On August 21, 1980 the doctor reported as follows (Claimant's exhibit 2):

> Mrs. Sharon Bates is not doing very well. She continues to have lower backache, and she says that she has some difficulty bending and difficulty with pushing or pulling. She has been treated with conservative treatment, but in spite of this, she continues with this complaint. She was seen in consultation by Dr. Blecher and he agreed that she has strain of the back, but a herniated nucleus pulposus was certainly a distinct possibility, and he did not feel that a myelogram was indicated at this time. He believed that she should be continued on conservative treatment.
>
> She was started on conservative treatment while in the hospital, and she has continued as an outpatient at

Moline Lutheran Hospital, but in spite of this, she continues to have problems. She has tremendous difficulty getting to sleep. The neurological examination remains essentially unremarkable.

It is my impression that the patient has a residual of lumbar paraspinal strain although the possibility of a lumbar disc has to be considered. She had thoracic lumbar spine x-rays and chest x-rays that were essentially normal. She also had an electromyogram that was normal. I told her that I will try her on conservative treatment with an exercise program to be carried out at home for another two weeks, and in the meantime, she will be started on tricyclic compounds to see if we can alleviate the sleep disturbance.

The claimant was released to resume employment on August 25, 1980 by Dr. Sanguino and by Dr. Beckman who advised a weight loss program.

A general lay-off was instituted by the defendant in September 1980 which included the claimant who remained on lay-off status until March 1981.

Claimant began to treat with Herbet R. Wood, D.C., on August 28, 1980, the date of her last examination by Dr. Beckman, who after excusing claimant from employment, released her to light duty on September 30, 1980 (Claimant's exhibit 3) with a 25 pound weight restriction. In Dr. Wood's final report of January 15, 1981, he stated in part as follows (Claimant's exhibit 3):

Mrs. Bates was placed on a decreased frequency schedule of care from August 28, 1980 to December 15, 1980 at which time she was re-evaluated. Mrs. Bates's [sic] progress has been favorable with substantial reduction of her pain and discomfort and with improvement in some areas of the orthopedic and neurologic findings. There has also been improvement in the cervical lordosis and the lumbar scoliosis, however a complete return to normal has not yet been established neither with regard to the physical nor radiographic findings. Due to the persistence of these findings, further recommendations for treatment were suggested as follows:

1 visit per week for 2 months
1 visit every other week for 3 months

Mrs. Bates is capable of doing most of her household chores without any discomfort unless she combines several of her duties into one day (ie. laundry and cleaning or laundry and vacuuming, etc.). If she separates the duties into separate days she gets along well.

It is my opinion that Mrs. Bates will suffer a temporary permanent disability of 8% for approximately 2 years. This would permit enough time for the injured soft tissues to mend and for the restoration of the normal cervical and lumbar curvatures. The disability is rated according to the following:

I. Neck and Thoracic
   A. Exam — 1%
   B. X-ray — 2%
   C. Pathology — 0%

II. Lumber — Lumbosacral
   A. Exam — 2%
   B. X-ray — 3%
   C. Pathology — 0%

F. Dale Wilson, M.D., following an examination of April 28, 1981, reported in part as follows (Claimant's exhibit 4):

Diagnosis: I. Lumbosacral strain with weak, painful back, very much improved.

II. L3-L4 clinical disc syndrome which is improved, minimal findings now, the nerve route [sic] irritability on the left side has subsided and there is only a faint trace in muscle spasm and local tenderness.

The injury sustained on June 26, 1980, was the caustive factor with respect to the symptoms, pathology and disability found on this examination. Recommendations for further medical care include restoring her to work force with the advice of the company doctor who will know the limitations that she has to work under and she should not be sent back to work with restrictions, but she should be advised what to watch for and where trouble will occur. She is anxious enough to get back to work that I think she can manage it. To quote the restrictions which she can manage under: "Be very careful of anything over 50 lbs. and be very suspicious of rapid motion with that weight and to avoid any jolts and jerks of that spine." The chiropractor's recommendation of treatment for four months seems somewhat restrictive and I think she could be encouraged to return to work sooner than that on the advice of the company physician. Meanwhile, she shall continue on with her exercise program and continue to walk more; her weight control is extremely important.

The present condition of ill being has reached an essentially permanent state and it may improve somewhat further so that there will be no symptoms but his [sic] probably will come about after she returns to work. The prognosis is favorable for this back. She can return to work she likes this job, [sic] I see no need for rehabilitation.

Steven R. Jarrett, M.D., following an examination of April 28, 1981, reported in parts as follows (Defendants' exhibit A):

IMPRESSION: Normal neuromusculoskeletal examination.

RECOMMENDATIONS: In my opinion, I find no evidence of permanent partial disability in regards to the neuromusculoskeletal system.

Claimant testified that she was still on lay-off status as of the date of the hearing, notwithstanding that the lay-off period had ended in March 1981, and while she still was having low back pain, she is currently able to do most of her housework.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 26, 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).

In applying the foregoing legal principles to the case at hand, it is apparent that the claimant has supplied competent medical evidence in support of her contention that she was totally disabled from July 17, 1980 until August 28, 1980 in light of Dr. Beckman's testimony that he sent claimant to Dr. Sanguino. (Deposition, page 12, line 18.) Claimant thereupon went on lay-off status and received 14 weeks of unemployment compensation benefits. Section 85.27 reads in part as follows:

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

In applying the foregoing statutory language to the case at hand, it is apparent that the physicians chosen by the defendant had indicated that no further treatment or care was necessary and had thereby released and discharged claimant as recovered, fit for employment. It is further apparent in light of the testimony of Paul Beckman, M.D., who following an examination of March 26, 1981 stated as follows (Deposition, page 18, line 21):

> Q. Now, doctor, after this March 26th, 1981 visit, did you have occasion to give Sharon Bates a slip pertaining to her capability to work?
>
> A. At the time of her visit — the same date, light duty, not to exceed 10 pounds lifting, and advised to avoid stooping or bending repetively.

That the medical decision to suspend further treatment made in August of 1980 was premature, it is concluded that the expenses incurred by the claimant when treating with Dr. Wood are within the purview of Section 85.27.

The singular most troublesome aspect of this case is claimant's current employment status. The lay-off has ended, but due to the weight restrictions placed upon the claimant by Drs. Beckman and Wood, claimant testified she is denied employment notwithstanding the medical prognosis that her condition is not of a permanent nature.

In the case of *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (1980), the court stated as follows:

> 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. See e.g., *Wood v. Industrial Commissioner*, 13 Ariz. App. 449, 452-53, 477 P.2d 568 571-72 (1970); *Rosenau v. Bros. v. Workmen's Compensation Appeal Board*, 10 Pa. Cmwlth. Ct. 462, 464-66, 311 A.2d 160, 161-62 (1973). Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. See e.g., *Dean v. Industrial Commission*, 113 Ariz. 285, 551 P.2d 554 (1976); *Franklin Fabricators v. Irwin*, 306 A.2d 734 (Del. 1973). [See generally 2 A. Larson, *supra*, §57.61.]

In applying the foregoing legal expression of public policy to the case at hand, it is concluded in light of the defendant's refusal to "give any sort of work" to the claimant, she is thereby entitled to an award of five percent of the body as a whole. Admittedly, claimant has not sought other employment, but her testimony that she considers herself an employee of the defendant is given substantial weight in this decision.

WHEREFORE, after having heard and seen the witnesses in open hearing and after taking into account all of the credible evidence contained in this deputy's notes, the following findings of fact are made:

1. That the claimant sustained an admitted industrial injury on June 26, 1980.

2. That as a direct result thereof, the claimant was unable to perform acts of gainful employment for which she has not been paid weekly benefits beginning on July 17, 1980 to August 28, 1980 or six (6) weeks.

3. That based upon the current state of this record, claimant has not sustained any permanent functional impairment of the body as a whole.

4. That the claimant is currently under a ten (10) pound weight restriction and that by reason thereof is being denied re-employment by the defendant.

5. That as a result of such refusal, claimant has established an entitlement to an award of twenty-five (25) weeks of permanent partial disability.

THEREFORE, it is ordered:

That the defendant pay the claimant an additional six (6) week period of temporary total disability at the agreed weekly rate of two hundred eighteen and 85/100 dollars ($218.85).

It is further ordered that beginning on September 1, 1980 defendant pay the claimant a twenty-five (25) week period of permanent partial disability; all accrued benefits being payable in a lump sum.

It is ordered that statutory interest is payable on the above entitlement from the date due.

It is further ordered that the defendant pay the claimant the following medical expenses she has incurred in order to treat the injury under review.

H. R. Wood, D.C.	$1,311.00
M. A. Sanguino, M.D.	215.00

Costs are charged to the defendant.

Defendant is to file a final report.

* * *

Signed and filed this 13th day of November, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

MADONNA M. BEHRLE,

Claimant,

vs.

WILSON FOODS CORP.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant appeals from a proposed arbitration decision filed on April 14, 1981 in which claimant was denied compensation.

The record on appeal consists of the testimony of claimant, Dona Stender and Rene Friberg; the deposition of Reid Motley, M.D., claimant's exhibits 1 through 5; and defendant's exhibit A.

Claimant states the issue on appeal:

Whether the claimant carried her burden in establishing an injury arising out of her employment.

Claimant is presently twenty-six years old, married and has no dependent children. She began working at Wilson on October 25, 1976. Her duties with the employer involved assembling corrugated boxes.

Claimant testified that on June 19, 1978 she experienced no problems with her left eye when she arrived at work. Shortly after her shift began claimant testified that her left eye began watering and was irritated. A breakdown of the line occurred and she went outside where it was warmer. Claimant stated that she had difficulty keeping her eye open due to the brightness and the watering and irritation. When claimant returned to the assembly line she asked to see the nurse.

The company nurse, Rene Friberg, testified that claimant came in to her office on June 19, 1978 complaining of blurred vision in her left eye. She specifically asked claimant whether she had been involved in an accident. According to Friberg, claimant stated that possibly on Wednesday, June 14 something might have happened to her left eye. Ms. Friberg noted on the nursing chart "no specific fb (foreign body) or injury possible irritated at work." Claimant's eye was irrigated at that time with Collyrium.

Ms. Friberg testified, however, that claimant's statement that something might have happened to her eye on June 14 did not correlate to the condition of claimant's eye. She stated that the eye is fast healing. Ms. Friberg testified that within a reasonable degree of probability based upon her nursing background that she did not believe claimant sustained an irritation to her eye at work.

Claimant's co-worker, Dona Stender, testified that she talked with claimant before beginning the shift on June 19, 1978, and that claimant's eye appeared to be normal. She did admit, however, that she never looked directly into claimant's left eye. Ms. Stender confirmed claimant's recitation of the line breakdown and the watering of her eye at that time.

Reid Motley, M.D., a board certified opthamologist, first examined claimant on May 7, 1968. At that time he discovered claimant had a "congenital opacity" problem which did not interfere with her vision. Glasses were prescribed for claimant's blurred distance vision.

Claimant was next seen on August 26, 1970. At that time her vision was worse, especially in her left eye. There was some edema and haziness around the congenital defect. Dr. Motley diagnosed herpes involvement and treated it with a broad spectrum antibiotic and a specific antiherpetic medication. Claimant's left eye had cleared by September 28, 1970. At that time her vision was 20-25.

On October 29, 1970 claimant's left eye was worse once again. The haze gradually improved and the antiherpetic medication was discontinued on January 21, 1971. At that point her left eye vision was 20-25, improved from 20-80.

On June 22, 1978, three days after plaintiffs alleged injury, Dr. Motley diagnosed "classical dendritic ulcer" which he testified was indicative of herpes corneal infection. Claimant was treated with a specific antiviral agent.

Dr. Motley stated that herpes infections can occur in susceptible individuals without any known cause, or they can occur following minor trauma to the eye. The trauma can be caused by irritants, dust, chemicals or wind or anything that causes a breakdown on the eye's surface.

After an initial clearing, claimants left eye showed a full-blown ulcer again on June 30, 1978. By July 6, 1978, claimant's left eye condition had worsened. There was a considerable amount of swelling although the ulcer had disappeared. According to Dr. Motley, claimant's eye had entered the second phase of herpes when the virus invades the deeper layers of the cornea.

Claimant's eye had substantially cleared by July 28, 1978 but when claimant experienced further problems on August 11, 1978, Dr. Motley referred her to the University Hospital in Iowa City. Dr. Motley last examined claimant on August 11, 1978.

J. Krachmer, M.D., in Iowa City, agreed with Dr. Motley's diagnosis but when claimant's condition improved he discontinued the antiherpetic medication due to its side effects. Claimant was seen regularly in Iowa City until December 5, 1978 when the doctor noted claimant's eye "look good."

In order for an injury to be compensable, 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, 405, 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. *Mussleman v. Central Telephone Co.,* 261 Iowa 352, 355, 154 N.W.2d 128, 130 (1967).

Whether the injury "arose out of" the employment is essentially within the domain of expert testimony. *Id.* at 360; *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). The evidence must be based upon more than mere speculation, conjecture and surmise. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). The possibility of a causal connection is not sufficient, a probability is necessary. *Id.*

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).

Expert medical evidence must be considered with all other evidence introduced which relates to causal connection. *Burt v. John Deere Waterloo Tractor Works, supra.* The claimant's burden of proving an injury arising out of her employment is not discharged by creating an equipoise. *Volk v. International Harvester Co.,* 252 Iowa, 298, 302, 106 N.W.2d 649 (1960). A claimant has the burden of showing by a preponderance of the evidence that the injury arose out of the employment. *Musselman v. Central Telephone Co., supra.*

According to Dr. Motley's testimony, claimant had a previous history of eye disorders resulting in the same symptoms claimant experienced at the time of her alleged injury. Dr. Motley stated that claimant gave no history of an injury, only that she had some irritation. He was unable to say from his examination of claimant whether her work environment had caused her eye problem. Dr. Motley testified that it was as likely that claimant's herpetic eye problem spontaneously developed as that claimant's work environment had caused the problem. According to Dr. Motley, the herpes becoming active could have resulted in the reddening and tearing of claimant's eye.

Neither claimant or her co-worker, Dona Stender, testified to irritants in the work environment or a trauma which could have caused the herpes flareup in claimant's left eye.

Findings of Fact

1. Claimant was "in the course of" her employment on June 19, 1978 when the alleged injury occurred.

2. Claimant's left eye began to tear shortly after she began work.

3. Claimant's co-worker verified the watering in claimant's left eye *after* the breakdown of the assembly line.

4. Claimant saw the company nurse and reported her eye was irritated.

5. Claimant did not report an injury to her eye.

6. No irritants in the work environment existed.

7. Claimant had been previously treated for herpetic ulcers of her left eye.

8. Claimant's physician, Dr. Motley, diagnosed "classical dendritic ulcer."

9. Herpes involvement of the eye can occur spontaneously.

Conclusions of Law

1. Claimant's left eye problem did not "arise out of her employment."

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

Costs of the arbitration proceeding are taxed to defendants. Cost of the appeal are taxed to claimant.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROLAND BEINTEMA,

Claimant,

vs.

SIOUX CITY ENGINEERING CO.,

Employer,

and

GREAT AMERICAN INSURANCE CO.
and MARYLAND CASUALTY CO.,

Insurance Carriers,
Defendants.

Review-Reopening and Arbitration Decisions

This is a combined proceeding in review-reopening and arbitration brought by Roland Beintema, the claimant, against his employer, Sioux City Engineering Company, and the insurance carriers, Great American Insurance Company and Maryland Casualty Company to recover benefits under the Iowa Workers' Compensation Act on account of injuries he sustained on July 14, 1976 and July 10, 1979 respectively. This matter came on for hearing before the undersigned at the Woodbury County Courthouse in Sioux City, Iowa, on June 25, 1981. The record was considered fully submitted on July 24, 1981.

On October 20, 1976 Great American Insurance Company filed a first report of injury concerning the July 14, 1976 injury. On November 1, 1976 defendant Great American filed a memorandum of agreement indicating that the weekly rate for compensation benefits was $163.78. On July 11, 1977 defendants filed a form 5 indicating that 17 weeks of temporary total disability (September 20, 1976 through October 24, 1976 and November 23, 1976 through February 14, 1977) had been paid pursuant to the memorandum of agreement.

On September 12, 1979 Maryland Casualty Company filed a first report of injury (and a denial) concerning a July 12, 1979 date of injury. At the time of the hearing, claimant recalled that the incident he was alleging as an injury occurred on July 10, 1979, not July 12, 1979.

The record consists of the testimony of the claimant; the testimony of Robert L. Wetzel; joint exhibit 1, varied medical reports identified by a cover sheet; Great American exhibit 1, a lease-option agreement; Great American exhibit 2, a January 21, 1980 letter from Robert Wetzel to the claimant advising claimant that healing period benefits would end and permanent partial disability benefits begin as of February 14, 1980; Great American exhibit 3, a May 27, 1980 letter from Sheila Jones to the claimant, explaining the insurance carrier's analysis of his industrial disability; Great American exhibit 4, a settlement agreement between the insurance carrier and the claimant regarding the extent of his industrial disability; Maryland exhibit 1, consisting of an August 24, 1979 letter report from A. D. Blenderman, M.D., office notes for January 10, 1977 and duplicates of joint exhibit 1 (item 4A; item 9, pages 3 and 4; item 2, page 2); the deposition testimony of the claimant (offered by Maryland); claimant's 1979 and 1980 income tax returns filed July 2, 1981; a July 10, 1981 letter report from Dr. Blenderman filed July 15, 1981; and the July 1, 1981 letter from claimant's counsel to Dr. Blenderman, filed July 20, 1981. Maryland objected to Dr. Blenderman's report insofar as Dr. Blenderman was answering a hypothetical question which has no support in the record. Such objection goes to the weight of the evidence and will be addressed below.

Issues

According to the parties at the time of the hearing, the issues to be determined include whether claimant sustained an injury in the course of and arising out of his employment on July 10, 1979; whether claimant's disability is causally related to either the July 14, 1976 or July 10, 1979 injury or to both injuries; the nature and extent of the disability; which carrier is responsible for a portion of the healing period already paid and which carrier is responsible for any additional permanent partial disability (Great American ceased coverage as of December 31, 1976); and the rate of compensation for the July 10, 1979 injury.

Recitation of the Evidence

Claimant, who had worked for defendant employer as a general laborer and heavy equipment operator since 1973, testified that on July 14, 1976 he experienced back pain upon moving a substantially heavy concrete pipe. The following day he went to Dr. Torbert, his family physician, who gave him some medication which failed to relieve the pain. Claimant returned to work despite the discomfort until one morning when he was unable to get out of bed. At that point claimant contacted E. C. Callaghan, M.D., who hospitalized him from September 20, 1976 to September 23, 1976 and who consulted A. D. Blenderman, M.D., for further evaluation and treatment. Examination at that time indicated:

> . . . the patient has moderate restriction of motion of the low back because of low back midline pain at L4 and 5 radiating across the low back at these levels. There is no palpable muscle spasm present but the patient complains of moderate pain on pressure over the 4th and 5th lumbar vertabra [sic] most pronounced at L5. There is a lesser degree of discomfort on palpation over the adjacent sacrospinalis muscles at these levels and pain on stressing the sacroiliac joints, but this is minimal in degree. There is no discomfort on palpation on either sciatic notch.
>
> Straight leg raising can be carried out to 90 degrees at which time the patient complains of increase in the pain at the lower lumbar level but no actual radiation of pain into either leg.
>
> He [sic] reflexes are normal and skin sensation is normal on both legs. (Joint exhibit 1, item 1, page 3.)

X-ray of the lumbar spine on September 20, 1976 revealed:

Examination of the lumbar spine fails to demonstrate evidence of recent fracture. There is mild scoliosis of the spine convex to the right. There is marked narrowing of the lumbosacral interspace with spur formation with lesser narrowing of the 3rd interspace level. There is noted a sclerotic area probably representing a bone island, overlaying the right sacro-iliac joint. (Joint exhibit 1, item 1, page 5.)

Although claimant testified at the time of his deposition that he did not tell any of his treating physicians about a low back injury he received in the late 1950's when he rolled his car and although he did not recall any lasting discomfort from such incident, Dr. Blenderman did note that claimant was injured previously in a car wreck and had suffered subsequent episodes of recurrent low back discomfort from time to time. He added that claimant had not required any specific treatment for such episodes. Dr. Blenderman did not record any specific activity or injury that preceded the 1976 onset of acute pain. His diagnosis was chronic lumbosacral strain with discogenic syndrome L5 level. (Joint exhibit 1, item 1, page 3).

Claimant was successfully treated with pelvic traction and physiotherapy. Claimant was also fitted with a chair-back brace because of the heavy work he was required to do in his employment. (Joint exhibit 1, item 1, pages 2 and 3.) Dr. Blenderman saw the claimant in follow-up office visits on September 23, 1976 and October 19, 1976. On the latter occasion, claimant indicated a desire to return to work using the backhoe, and Dr. Blenderman approved as long as claimant did not have pain while wearing his brace. Claimant was started on an exercise program. (Joint exhibit 1, item 2, page 1.) On November 2, 1976 Dr. Blenderman discharged the claimant but recommended that the claimant avoid heavy lifting for a couple months, continue exercises indefinitely and wear the back support only while working. (Joint exhibit 1, item 3, pages 2 and 3.)

Claimant returned to work sometime in late October or early November of 1976. On November 29, 1976 claimant's complaints to Dr. Blenderman included pain in the left lower back, posterior left hip, and posterior left leg with numbness in the leg. Physical examination revealed a 50 percent loss of motion of the back in all directions, palpable muscle spasm in the left lower back from L-2 through L-5 to left of the midline, pain on palpation over the 4th and 5th lumbar vertebrae and over the left sciatic notch and painful straight leg raising on the left at 45 degrees. Dr. Blenderman advised the claimant to wear his back support and remain off work. (Join exhibit 1, item 4, page 1.) Dr. Blenderman saw the claimant on December 13, 1976 and noted slow improvement in claimant's condition. (Joint exhibit 1, item 4, page 2.) On January 10, 1977 claimant complained of a nagging, aching sensation in the same back and hip areas. The leg pain and numbness had ceased. Claimant inquired into whether any further medical investigation could be done. Accordingly, Dr. Blenderman referred him to Walter E. Eckman, M.D., for neurosurgical consultation. (Joint exhibit 1, item 15, page 1; Maryland exhibit 1, pages 3 and 4.)

On January 31, 1977 Dr. Eckman examined the claimant and recorded a history of the pipe injury and course of treatment that was essentially consistent with the rest of the record. (However, he apparently was not aware of claimant's prior auto accident or of claimant's return to work in late 1976.) He commented that claimant was unable to recall any significant leg pain or numbness other than slight diffuse weakness. Claimant reported that his back pain was aggravated by bending and sitting, not by standing or walking. Dr. Eckman reported his findings and impression:

> On examination:
>
> Back: shows no distinct abnormality. He has no significant paraspinal muscle spasm. He relaxes each side well when alternately lifting each leg. He has good forward bending; can touch his toes and reverses his lumbar lordosis very well. He has no specific pain with backward bending or side bending. On straight-leg raising he does have a very slight positive response which induce [sic] back pain at elevations about 80 degrees; this is more marked on the left side than the right.
>
> Neurological examination:
>
> Mental status: entirely normal.
>
> Cranial nerves: II through XII are entirely normal.
>
> Sensory examination: to pin, position and vibration is normal.
>
> Motor examination: muscle bulk and tone are normal. Strength is normal throughout to manual testing. Co-ordination, station and gait are all entirely normal.
>
> Reflexes: he has intact deep tendon reflexes which are fairly brisk and symmetrical. He has bilateral down-going plantar responses.
>
> Impression:
>
> Probable lumbar degenerative disc disease. (Joint exhibit 1, item 4A, page 2.)

Dr. Eckman did not think claimant suffered from a disc herniation but suggested that claimant might have disc degeneration at one or more levels. Dr. Eckman noted that the claimant seemed eager to attempt a return to work rather than undergo further tests including a possible myelogram. (Joint exhibit 1, item 4A, pages 2 and 3.)

Claimant thereafter returned to work and, but for occasionally missing a day or two of work on account of back pain, was able to carry out his job assignments. However, claimant testified that he always had back pain — some days were worse than others. He was made a working supervisor sometime in 1978. Although claimant testified that the tasks he performed remained essentially unchanged, review of the entire record, including claimant's deposition testimony, indicates that he mainly operated heavy equipment and supervised others. (See for example claimant's deposition, page 27.) He stopped wearing his chair brace for awhile in 1978 and 1979.

Then on July 10, 1979 claimant found himself in the unusual circumstance of having to work unassisted on a couple newly poured cement catch basins. Claimant explained that he used a shovel and trough to level each 3/4 yard of cement and the work took him no more than one hour. He guessed the weight of a shovel with wet cement would be 30 or 40 pounds. (Deposition testimony versus hearing testimony.) Although claimant agreed that he had helped pour and level cement on occasion since his 1976 injury, he indicated such assistance usually consisted of supervising. Claimant recalled that he noticed no back discomfort until that evening. Apparently, he stayed home from work July 11, 1979 and then returned to work July 12, 1979 only to experience further pain at the end of that day. Claimant has not returned to work since that time. According to the claimant, the back pain was a lot worse than any temporary flareups he had experienced during the prior 2½ years. Claimant also maintained this was the first time he noted any leg pain.

Dr. Blenderman saw the claimant on July 18, 1979 and reported the following history, findings, and recommendations:

> The patient returns for re-evaluation stating that his discomfort in his low back gradually subsided following his last visit and he returned to his usual job running heavy equipment and doing construction work.
>
> Off and on ever since then, however, he has had a little discomfort in his lower back and on occasion a little aching sensation in the back of the thighs, especially on the left thigh — sometimes going to the level of the knee. However, he said he was able to continue doing his work.
>
> Around spring of this year the pain seemed to gradually start getting a little bit more frequent and longer in duration, until about a week ago when he started having marked increased pain to a degree where he had to take some time off work because of the pain. The patient states that now the pain is located in the left lower back and goes into the back of the left buttock, down the back of the thigh to the level of the knee, accompanied by a cramping sensation in the posterior thigh muscles. He says he has a slight tingling sensation in the left leg to the level of the knee, but not below this point. On occasion, he has a slight cramping sensation in the posterior thigh muscles on the right, but most of the time it is on the left.
>
> He has had no one incident causing recurrence of pain, but has never really been totally pain free since he saw me at his last visit. Therefore, it would appear his present discomfort is simply a continuation of the earlier problems that he had back in 1977.
>
> Physical examination reveals a well-developed white male, who as he stands with his back to the examiner has a normal lordotic curve and there is no list of the trunk either to the left or right. Range of motion of the back is about 50 percent limited because of low back midline pain at L-4 and 5, radiating to the left and into the posterior buttock with flexion, extension and lateral bending right and left.
>
> There is no palpable muscle spasm present in the back. The patient has pain on pressure primarily over the 4th and 5th lumbar vertebrae and none above this point. He also has pain on palpation over the muscles to the left of the midline at these levels, but none to the right. He has mild discomfort on palpation in the left sciatic notch, but none on the right.
>
> Straight leg raising on the right to about 70 degrees intensifies the left lower back pain and gives posterior left buttock pain, but no right leg pain. Straight leg raising on the left to about 60 degrees intensifies the left lower back pain and gives posterior left thigh pain to the level of the knee.
>
> Reflexes and sensation are normal on both legs and all muscles appear to be functioning normally on both legs.
>
> X-rays of the lumbar spine were taken here in our office on this date. These x-rays show marked narrowing of the 5th lumbar disc with a large spur anterior to the disc on the inferior border of L-5 and the superior border of S-1. There is a lesser degree of spurring along the anterior-superior border of the 5th and 4th lumbar vertebrae and mild narrowing of the 4th disc, though this is minimal in degree.
>
> DIAGNOSIS: Recurrent Lumbosacral Pain, accompanied by severe narrowing of the 5th lumbar disc.
>
> Discussion: It would appear that the patient's neurocanal posteriorly is now so narrow that excess motion pinches the nerve on one or both sides and then produces the aching and cramping sensation in the thighs and sets off the muscle spasm in the back.
>
> I have therefore recommended that he stay off work for two weeks, reapply his previously-supplied back support, use a hot tub soak t.i.d. for 30 minutes and he was started on Parafon Forte one or two q.i.d.
>
> He is to return for re-evaluation in two weeks, at which time we will re-evaluate. (Joint exhibit 1, item 7, pages 4 and 5.)

As of August 2, 1979 Dr. Blenderman noted that claimant had increased pain on palpation over the muscles in the left lower back and buttock and that claimant experienced moderately intense pain down the back of the left leg upon straight leg raising on the left at 50 degrees. (Joint exhibit 1, item 7, page 3.) Dr. Blenderman hospitalized the claimant from August 6, 1979 to August 10, 1979 for pelvic traction and physiotherapy which gradually relieved his back and leg discomfort. (Joint exhibit 1, item 7, page 2.) Claimant was refitted with a back brace and put on an exercise program. However, on August 22, 1979 claimant returned to Dr. Blenderman and complained of left lower back and left thigh discomfort and on September 21, 1979 of continued back

discomfort and pain in both legs (more on the right). Examination on the latter date revealed:

> Examination reveals pain on palpation in the midline at L4 and 5 as well as over the muscles on either side of the midline at these levels and pain on palpation in both sciatic notches, more on the right than on the left. He resists straight leg raising more than about 45 degrees on both legs but the right leg seems to give the most discomfort with pain going down the back of the right leg to the midcalf region and on the left leg to the midthigh region posteriorly as well as pain in the lower back with either leg raising. (Joint exhibit 1, item 8, page 4.)

Accordingly, Dr. Blenderman hospitalized the claimant from September 25, 1979 to September 27, 1979 for re-evaluation by Dr. Eckman and a myelogram. Dr. Eckman received a history from the claimant that included the return to work with only occasional pain prior to development of fairly severe pain on July 13, 1979. Dr. Eckman notes that no specific cause for the onset of pain was given. Claimant indicated that walking and standing aggravated his condition. Claimant denied symptoms involving the right leg. Dr. Eckman reported his findings:

> Examination:
>
> He has good motion of his back, I think full range with good reversal of his lumbar lordosis. He does have, on testing straight leg raising, mild bilaterally positive responses with radiation into his back. He does have interestingly high arch feet, with cock-up deformities of the toes bilaterally and I am not sure that I noted this previously.
>
> Neurological Examination:
>
> Mental status is normal.
>
> Cranial nerves 2-12 are normal.
>
> Sensory examination is fully intact throughout to pin, position and vibration.
>
> Motor examination shows muscle bulk and tone are normal and strength is normal throughout to manual testing.
>
> Coordination, stationand [sic] gait are all normal.
>
> Reflexes — he has fully intact deep tendon reflexes, which are brisk and symmetrical. Has bilateral downgoing plantar responses. (Joint exhibit 1, item 8, pages 6 and 7.)

The myelogram taken on September 25, 1979 revealed evidence of lateral defects at L4-5 bilaterally and at L3-4 on the left. Prominent central defects at L3-4 and L4-5 were also noted. Such findings were considered consistent with a narrow spinal canal with degenerative disc disease at 3-4 and 4-5 causing lateral stenosis or encroachment of the nerve roots against the facets. An EMG likewise was conducted but was normal. Since there was no obvious disc herniation, conservative treatment was pursued. Claimant was advised to remain off work and to report to Dr. Blenderman in a month. (Joint exhibit 1, item 8, pages 2, 3, 8 and 9.)

Claimant did see Dr. Blenderman on October 26, 1979 with complaints of continued low back pain but only a mild ache and tingling sensation referrable to the front of the right thigh. Surgery was discussed. Dr. Blenderman recommended that the claimant return to work for 6 weeks. Dr. Blenderman theorized that if claimant experienced marked increased discomfort, claimant would be better able to decide about pursuing surgery or, if he did not suffer increased discomfort, he would be better able to elect continued conservative management. (Joint exhibit 1, item 12, page 2.) Dr. Eckman saw the claimant on October 31, 1979 and indicated that he had nothing major to offer in the way of further treatment. (Joint exhibit 1, item 10.)

Claimant testified that before attempting a return to work, he tried changing snow tires at home. He experienced immediate discomfort after lifting one of the tires. Dr. Blenderman saw the claimant on November 15, 1979 and noted claimant's complaints of low back and right leg pain upon changing the tire. As on October 26, 1979, examination findings revealed pain on pressure in the midline at L-3, 4 and 5 with involvement of the adjacent muscles at those levels. The examination on November 15, 1979 also demonstrated slight pain on palpation in the right sciatic notch and increased posterior right thigh and calf pain upon straight leg raising. Dr. Blenderman concluded that the claimant would not be able to return to work as a heavy equipment operator because of the stresses such work would place on claimant's low back. He suggested the claimant contact Vocational Rehabilitation. Surgery was discussed again, but claimant was reluctant to pursue it because Dr. Belnderman was unable to give him better than a 50 percent guarantee his condition would be totally relieved by any operation. Dr. Blenderman referred the claimant to Dr. Eckman for final evaluation. (Joint exhibit 1, item 12, pages 2 and 3.) Dr. Eckman re-evaluated the claimant on December 10, 1979 and found that claimant's symptoms were virtually unchanged. He had nothing further to offer the claimant. (Joint exhibit 1, item 11.)

Dr. Blenderman next saw the claimant on November 20, 1980 and recorded the following recent history of claimant's condition:

> This patient was last seen approximately one year ago. Since that time he says he has been getting along at least fairly well, though he says he has always continued to have some degree of discomfort in the left leg. Last summer for a period of about two weeks he had moderate increased pain in the left lower back and left leg, then gradually the discomfort started to improve.
>
> About two weeks ago, again for no particular reason, he started having increased lower back pain and left leg pain and now says the left leg not only hurts all the way down the back of the leg to and including the

foot, but in addition, he has a numb, tingling sensation in the leg. (Joint exhibit 1, item 14, page 3.)

Examination that date revealed:

> . . . the patient has about 25 percent loss of motion in the lower back because of lower back pain. With flexion to about 70 degrees he complains of low back midline pain and posterior leg pain down to the mid-calf area.
>
> He has pain on lateral bending right and left, with a mild degree of ache in the posterior left thigh with both maneuvers, but not on hyperextension.
>
> There is no palpable muscle spasm present.
>
> The patient complains of pain on pressure over the 4th and 5th lumbar vertebrae and the adjacent paravertebral muscles on either side of the midline at these levels. He has mild pain on palpation in the left sciatic notch, but none in the right.
>
> Straight leg raising on the right to 90 degrees increases pain in the left lower back, but produces no right leg pain. Straight leg raising on the left to 45 degrees gives moderate pain down the back of the left leg to the mid-calf area.
>
> His patellar reflexes are minimal on the left leg, but the Achille's reflexes are present. He has partial loss of sensation along the lateral aspect of the left thigh, calf and foot. (Joint exhibit 1, item 14, pages 3 and 4.)

Dr. Blenderman hospitalized the claimant from November 21, 1980 to November 26, 1980 for pelvic traction and physiotherapy which gradually relieved the back and leg discomfort. Claimant was advised to continue wearing his back support both day and night, to soak in a hot tub three times a day and to return to Dr. Blenderman in 2 weeks for re-evaluation. In the interim, he was to avoid any heavy lifting. (Joint exhibit 1, item 14, page 2.)

Dr. Blenderman's most recent office note (December 11, 1980) reads:

> The patient returns for re-evaluation stating that he is getting along better. He says the discomfort in his low back and left leg has now subsided to about the degree it was prior to his recent flareup of pain.
>
> Physical examination reveals mild pain on pressure over the lower four lumbar vertebrae and over the muscles to the left of the midline, as well as over the left sciatic notch. Straight leg raising to 90 degrees gives left lower back pain and posterior leg pain, mild in degree.
>
> It appears the patient is getting along reasonably well. He has been advised he can do whatever work he thinks he can handle, where [sic] his back brace while working, but leave it off in the evenings and during the night. See me for a final evaluation in one month. (Joint exhibit 1, item 15, page 3.)

In a letter dated January 15, 1980 and addressed to Great American Insurance Companies, Dr. Blenderman opined that claimant had 25 percent disability of the spine which equated to 15 percent disability of the body as a whole. (Joint exhibit 1, item 12, page 1.) In answering questions addressed to him by International Rehabilitation Associates, Inc., in March of 1980, Dr. Blenderman indicated that claimant could lift up to 30 pounds but not repetitively, could bend at the waist but not excessively, could stand or walk during an eight hour shift and could otherwise function in a supervisory position requiring no excessive physical exertion. (Joint exhibit 1, item 13.)

With regard to the causal connection issue, Dr. Blenderman's opinion, as found in three reports offered at the time of the hearing, was that claimant's present symptomatology was a continuation of the back problems which became significant after the 1976 injury. (Joint exhibit 1, item 7, page 5, and item 9, page 2; Maryland exhibit 1, page 2.) After the hearing, claimant's counsel related the following to Dr. Blenderman in a letter dated July 1, 1981:

> This office is representing the claimant. His history to us indicates an unusual assignment of working alone on or about July 12, 1979, when he was required to handle very heavy materials and suffered a recurrence of his back problems.
>
> In representing Mr. Beintema I need in the record an answer to a hypothetical question as to whether this additional history which apparently was not given to you, would make the July 12, 1979, an aggravation of the original 1976 injury.

In a letter dated July 10, 1981, Dr. Blenderman responded:

> I have in hand your letter in which you ask me to answer a hypothetical question.
>
> According to your statement you need on the record an answer to the following question, according to the patient the history given to you indicated an unusual assignment of working alone on or about July 12, 1979, when he was required to handle very heavy materials and suffered a recurrence of his back problem.
>
> You wish to know whether or not this type of injury would thereby cause an aggravation of the original 1976 injury.
>
> Since during the 1976 injury it was noted that the patient had the moderate narrowing of the fifth lumbar disc with spurring along the anterior edges of the fourth and fifth lumbar vertebra which would lead him to have a rather poor mechanical back at best. Any additional injury to this area such as heavy lifting would undoubtedly cause a flare-up of the pre-existing condition and cause a further aggravation.

According to the hearing transcript and the undersigned's notes, claimant is 43 years old. (The deposition transcript records 63 years.) He graduated from high school, received

8 weeks of military police training while in the service, and completed 3 semesters of general college work. His employment history includes 7 years in the army (earning $212.00 per month at the time of discharge), general farm labor (earning $160.00 to $180.00 per month) for about 4 years, and sewer and water construction for three employers including Sioux City Engineering. The latter work entailed common laborer task and the operation of heavy equipment such as backhoes and front-end loaders, and claimant earned from $2.10 per hour to $333.00 per week.

Claimant has not returned to work since July 12, 1979. Since July 1980 he has tended the bar he and his wife purchased in 1976, 2 or 3 nights a week from 6 p.m. until about midnight or 2 a.m., depending on the night and the business. He does no lifting and can sit part of the time. According to claimant's tax return, he and his wife earned $6,883.88 from the bar business in 1980. Claimant explained that he had not worked in the bar for two weeks because he and his wife recently hired a manager. Actually, they had entered into a lease option agreement with the manager apparently contingent, in the claimant's mind, upon the manager's obtaining a liquor license. (Great American exhibit 1.) Aside from his own business, claimant has not looked for employment elsewhere since July 12, 1979 and displayed no interest in looking for such employment after the bar transaction is completed. He is considering operating a cafe and indicated that he and his wife had done so far a year and a half in the mid-1970's.

Claimant's present complaints include back discomfort. He clarified that his back does not bother him all the time but he did not think he could do a day's work. Stooping occasionally causes him pain. He can stand 2 to 3 hours if he has something to lean on. Sitting does not cause him discomfort. He has not tried to do much lifting but thinks he can not do so.

Robert L. Wetzel, claims manager for Great American Insurance, testified that in addition to the healing period shown on the final report previously filed July 11, 1977, Great American Insurance paid claimant 31 weeks of healing period benefits from July 1979 through February 14, 1980 at the 1976 rate. He identified the correspondence between the carrier and the claimant which led to the informal settlement on the figure of 20 percent industrial disability. (Great American exhibits 2 through 4.)

Applicable Law

The claimant must prove by a preponderance of the evidence that his injuries 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 injuries occurred at a place where he reasonably may be performing his duties. *McClue v. Union, et al., Counties,* 188 N.W.2d 283 (Iowa 1971).

Arising out of suggests a causal relationship between the employment and the injury. *Crowe v. DeSoto Consolidated School District,* 246 Iowa 402, 68 N.W.2d 63 (1955).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of July 14, 1976 and July 10, 1979 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).

The opinions of experts need not be couched in definite, positive or unequivocal language. *Sondag v. Ferris Hardware,* 220 N.W.2d 903 (Iowa 1974). An opinion of an expert based upon an incomplete history is not binding upon the commissioner, but must be weighed together with the other disclosed facts and circumstances. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965). The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. *Sondag v. Ferris Hardware, supra.*

While a claimant is not entitled to compensation for the results of a 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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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).

Section 85.34(1), Code of Iowa, 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 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.

Section 85.33 of the Code states: Temporary disability. The employer shall pay to the employee for injury producing temporary disability and beginning upon the 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.

Analysis

Despite the stated issues, it is evident that the parties do not seriously dispute that claimant sustained a flareup of pain on July 10, 1979 after working on the catch basins. The real concern is whether the subsequent time loss from work and any additional permanent partial disability were related to the work done that day or to the underlying condition previously aggravated by the 1976 injury. In this case the issues of arising out of employment and causal connection with respect to the 1979 injury are interwoven, and those matters in turn blend into the causal connection issue with regard to the 1976 injury.

Dr. Blenderman causally relates claimant's problems to the 1976 injury until asked by claimant's counsel about a 1979 incident. At that point, Dr. Blenderman agrees that an additional injury, such as heavy lifting, would cause further aggravation of the preexisting condition. Such latter opinion is not given any weight because Dr. Blenderman was not advised of the specifics of the later injury. He was not told what weight claimant lifted or how often or how long claimant performed such task. (Maryland's counsel correctly points out that Dr. Blenderman subsequently stated that claimant was limited to 30 pounds of non-repetitive lifting. One must wonder if Dr. Blenderman would consider the leveling with a trough and some lifting of a 30 to 40 pound shovel with cement over less than an hour's time to constitute heavy lifting that would materially aggravate claimant's preexisting condition.) Likewise, Dr. Blenderman was not advised that claimant did not experience pain until later in the evening. How he would compare the two episodes was not explored.

From review of their reports and notes, it is obvious that neither Dr. Blenderman nor Dr. Eckman were aware of a specific July 1979 incident. (While the recitation of the evidence reveals that Dr. Blenderman was not aware of a July 1976 work injury initially, he later did refer to such incident. Dr. Eckman was aware of the July 1976 episode from the onset of his participation in treating the claimant.)

Furthermore, analysis of the clinical findings of both doctors over the years does not reveal any significant, permanent additional symptom appearing only after the July 1979 injury. Although claimant testified that he did not have leg pain following the first injury, Dr. Blenderman's findings indicate that claimant did experience left leg pain upon 45 degree straight leg raising in November of 1976. While such symptom apparently was resolved by early January 1977 to the point where claimant did not even recall the matter upon first seeing Dr. Eckman later that month, and although the claimant later demonstrated left leg pain at 60 degrees straight leg raising following the second work injury (at 45 degrees after his August 1979 hospitalization) and testified that he has had left leg pain since, such facts do not establish by a preponderance of the evidence that the second injury was a material aggravation per se of the preexisting condition. By October 26, 1979, the date on which Dr. Blenderman recommended an attempted return to work, claimant demonstrated only a mild ache and tingling sensation at the front of the right thigh. (Claimant denied right leg pain following the 1979 injury yet clinical reports document such complaints. The latter are believed.)

Instead of attempting a return to work, claimant first tried to change snow tires at home and, according to Dr. Blenderman, returned to Dr. Blenderman with back and right leg complaints. (It was then that Dr. Blenderman decided claimant could not return to work because of the stresses he thought operating heavy equipment would place on claimant's back.) Yet, almost a year later claimant returned to Dr. Blenderman complaining of increased lower back pain and left leg pain and gave a history of no particular incident that provoked the pain. Straight leg raising was positive on the left at 45 degrees. As on prior occasions, hospitalization for pelvic traction and physiotherapy resolved the increased pain to a prior level of discomfort. On December 11, 1980 straight leg raising on the left at 90 degrees produced only mild left low back and posterior left leg pain. At the time of the hearing claimant's complaints were referrable to low back pain. He did not mention any actual difficulty connected to left leg discomfort.

Thus, based on the record as a whole, the undersigned must conclude that the 1976 injury was the material aggravation that left claimant susceptible to further temporary aggravations upon certain activity. Although claimant alleged that between the two injury dates he was a working foreman and still performed all the varied tasks associated with defendant employer's business, upon further questioning, he clarified that his main work concerned the operation of heavy equipment and supervising others in such matters as pouring cement. It requires no strain of reason to assume that claimant would have had other flareups between the 1976 injury and the 1979 episode had he done more lifting. It is not established that had claimant returned to work and avoided heavy lifting, that he would not have been able to carry out his explained duties as a working foreman. Claimant's statement that he could not operate heavy equipment today is given no weight in light of his acknowledgment that only the bouncing caused discomfort to his back on occasion, operating the levers did not. Clearly, Dr. Blenderman's November 15, 1979 conclusion that claimant could not return to work as a heavy equipment operator was based on a determination that claimant could not do any heavy lifting (later implicitly defined by him as something under 30 pounds) since claimant was unable to change snow tires without a flareup of pain.

Claimant's failure to attempt a return to work as a working foreman or to investigate the possibilities of lighter work with defendant employer, his failure to look for any employment (outside of the family bar business) at any time since the 1979 injury, and his failure to actively pursue any form of vocational rehabilitation weigh heavily in the undersigned's determination of his loss of earning capacity as a result of the 1976 injury. Claimant is a relatively young individual in terms of today's life expectancy for a 43 year old individual. He has a basic formal education and obvious on-the-job training not only in construction work but in assisting in the management of a cafe and a bar. Perhaps indefinite plans of buying another cafe have contributed to the lack of interest in returning to work. Although claimant's present complaints were of occasional back pain and some difficulty bending and presumed inability to do much lifting of any kind, the two flareups of back pain in 1979 upon lifting

do indicate that claimant's ability to engage in many tasks associated with his prior jobs and with the employment market in general has been significantly limited. Accordingly, taking all the industrial disability factors into consideration, it is determined that claimant has sustained a 30 percent loss of earning capacity.

Claimant reached maximum recovery following his 1976 injury when he returned to work on or about February 15, 1977. His additional time off in 1979 was due to a temporary flareup of pain following the work injury, to another flareup of pain following the home injury, and to his decision not to return to work as analyzed above. Claimant's condition did not substantially improve or worsen since February 15, 1977. Additional tests done in 1979 (instead of 1977 because claimant did not wish to pursue further diagnostic study and his doctors were agreeable to his preference to return to work) did not yield any evidence of significant change.

The temporary flareup of pain following the July 10, 1979 injury lasted until October 26, 1979, the date on which Dr. Blenderman recommended claimant attempt a return to work. Maryland Casualty Company is responsible for such temporary total disability. The parties agreed that claimant was earning $333.00 per week and was married at the time of the 1979 injury. Claimant testified that he supported two children, ages 12 and 15, at the time of such incident. (See 2 exemptions claimed for those children on claimant's 1979 tax returns.) Accordingly, claimant is entitled to 4 exemptions. The applicable rate of compensation is $207.14 per week. In effect, the claimant shall receive the difference between the 1976 and 1979 rate for a period extending from July 10, 1979 to October 26, 1979, minus one day when claimant worked. Great American Casualty Company is entitled to reimbursement of $163.78 per week for the same period of time.

Insofar as Great American overpaid claimant what they thought was temporary total disability or healing period from October 27, 1979 to February 15, 1980, there is no credit against the permanent disability award. *Ardith Caputo v. United Concern for Children, a Corporation, d/b/a Mother Goose Child Care Center, and Employers Mutual Companies,* Appeal Decision filed August 29, 1980.

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant sustained a low back injury in the late 1950's and thereafter suffered periodic episodes of low back discomfort which did not necessitate treatment.

Finding 2. On July 14, 1976 claimant experienced low back pain while moving a substantially heavy concrete pipe in the course of his employment duties as a general laborer and heavy equipment operator.

Finding 3. Claimant worked with pain until the pain became disabling and necessitated hospitalization on September 20, 1976.

Finding 4. Claimant returned to work in late October of 1976 but was hospitalized a month later for low back and left leg pain.

Finding 5. Claimant returned to work in mid-February of 1977 and at some point thereafter became a working foreman. He experienced constant back pain but missed only a few occasional days from work due to the discomfort.

Finding 6. On July 10, 1979 claimant performed the unusual task of pouring and leveling two cement catch basins unassisted. He usually only supervised such work. He experienced low back pain later that evening and subsequent temporary bilateral leg pain. Claimant worked on July 12, 1979. He has not returned to work to date.

Finding 7. Following two hospitalizations which included a myelogram that failed to reveal evidence of a herniated disc, claimant was advised by his treating physician to attempt a return to work on October 26, 1979. Instead, claimant changed snow tires at home which caused low back and right leg pain.

Finding 8. The weight of the medical evidence indicates that claimant's preexisting back condition was materially aggravated from the July 1976 injury and resulted in permanent partial disability. The 1979 injuries amounted to flareups of the already materially aggravated condition.

Conclusion A. Claimant proved by a preponderance of the evidence that the 1976 work injury is the cause of the permanent partial disability he claims and that the 1979 flareup was a work related injury resulting in temporary total disability from July 10, 1979 through October 26, 1979, minus July 12, 1979 (the one day he worked).

Finding 9. Claimant is 43 years old, graduated from high school, received military police training in the service and has finished 3 semesters of college.

Finding 10. Claimant's employment history includes farm and construction work and assistance in managing a previously family owned cafe and more recently a family owned bar.

Finding 11. Claimant has not attempted a return to work as a working foreman, an investigation into the possibilities of lighter work with defendant employer, a search for employment elsewhere, or active pursuit of vocational rehabilitation. Claimant and his wife are in the process of disposing of the bar and have indefinite plans regarding the purchase of a cafe.

Finding 12. Claimant's present complaints include occasional flareups of back pain, being unable to stoop without occasional pain and being unable to do any lifting. He can stand 2 to 3 hours if he has something to lean on. Sitting does not cause discomfort.

Finding 13. Claimant has a fifteen (15%) percent impairment of the body as a whole as a result of the twenty-five (25%) percent impairment of the spine. His medical limitations include lifting no more than thirty (30) pounds and avoiding repetitive lifting or excessive bending.

Finding 14. Two episodes of lifting in 1979 resulted in flareups of claimant's back condition.

Conclusion B. As a result of the July 1976 work injury, claimant has sustained a thirty (30%) percent loss of earning capacity.

Finding 15. Following the first injury and course of treatment, including two (2) hospitalizations, and a brief period of working between those hospitalizations, claimant returned to work in mid-February of 1977 and continued to work without significant time off from work for back pain until the temporary flareup of pain in July of 1979.

Finding 16. The medical evidence reveals no significant amelioration or pejoration in claimant's condition from mid-February of 1977 to the date of the hearing.

Conclusion C. Claimant's healing period ended in mid-February of 1977.

Finding 17. After the July 10, 1979 work injury, claimant was advised on October 26, 1979 by his treating doctor to attempt to return to work.

Conclusion D. As a result of the flareup of back pain on July 10, 1979, claimant was temporarily totally disabled through October 26, 1979 (minus the one day he worked).

Finding 18. At the time of the 1979 work injury, claimant was earning three hundred thirty-three and 00/100 dollars ($333.00) per week, was married and was providing support for two children, aged 12 and 15.

Conclusion E. The applicable weekly rate of compensation for the July 10, 1979 injury is two hundred seven and 14/100 dollars ($207.14).

Finding 19. Great American Insurance Company paid the claimant healing period benefits from September 20, 1976 through October 24, 1976, from November 23, 1976 through February 14, 1977 and from July 13, 1979 through February 14, 1980. They are completing payment of permanent partial disability benefits based on twenty (20%) percent industrial disability.

Finding 20. Great American Insurance Company ceased workers' compensation coverage of defendant employer on December 31, 1976.

Conclusion F. Great American Insurance Company has paid claimant all necessary healing period benefits for the 1976 injury — no further healing period benefits are due and owing. Great American Insurance Company is entitled to reimbursement for benefits paid from July 1979 through October 26, 1979. Great American Insurance Company is not entitled to credit against remaining permanent partial disability benefits due and owing for the October 27, 1979 to February 14, 1980 overpayment of the temporary total disability/healing period benefits.

Order

THEREFORE, it is ordered that Great American Insurance Company pay the claimant one hundred fifty (150) weeks of permanent partial disability at the rate of one hundred sixty-three and 78/100 dollars ($163.78) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of February 15, 1977. No additional healing period benefits are awarded.

Maryland Casualty Company is ordered to pay the claimant temporary total disability benefits from July 10, 1979 through October 26, 1979 at the rate of two hundred seven and 14/100 dollars ($207.14) per week (minus the one day claimant worked.)

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

Credit is to be given Great American Insurance Company for the amount of permanent partial disability compensation previously paid by them. Great American Insurance Company is entitled to reimbursement for the benefits they paid claimant from July 10, 1979 through October 26, 1979 at one hundred sixty-three and 78/100 dollars ($163.78) per week, the 1976 rate of compensation.

Costs of the proceeding are taxed to the defendants equally. See Industrial Commissioner's Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by both defendants when this award is paid.

* * *

Signed and filed this 9th day of September, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

ALAN E. BERG,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner dated September 18, 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 arbitration decision.

The record on appeal consists of the transcript of the testimony; the deposition of Peter D. Wirtz, M.D.; claimant's exhibits 1, 2, 3 and 4 (the latter being the deposition of James E. Laughlin, D.O.); and defendants' exhibit A.

The result in this final agency decision will be identical to that reached by the hearing deputy.

The facts show that claimant injured himself at work on December 6, 1978 when he hurt his knee as he slipped on some oil. Some months later, he had an operation on his left knee and a tear of the lateral meniscus was found. The question for determination is whether the need for the operation and the disability resulting from it stemmed from the December 1978 incident.

The problem arises because on December 18, 1978, claimant saw Marshall Flapan, M.D., a qualified orthopedic surgeon, who diagnosed tenderness at the medial aspect, not the lateral meniscus. However, Dr. Flapan ordered an arthrogram which was performed on December 27, 1978.

The radiologist, A. J. Elliott, M.D., said the arthrogram showed a normal medial meniscus and a questionable tear of the lateral meniscus. Dr. Flapan, on the other hand, reviewed the arthrogram and found a "suspicious area of the peripheral portion" of the medial meniscus.

James E. Laughlin, D.O., found a tear in the lateral meniscus which might be directly traceable to the incident but for at least two intervening knee episodes, one in the employer's parking lot in April 1979 and one while jogging in May 1979. Dr. Laughlin did his surgery in June of 1979 and in March of 1980 claimant had to have further surgery as a result of another accident.

The issues are stated by claimant: "Whether the surgery and disability to the claimant's knee are causally related to the December 6, 1978, knee injury at work?... If so, the extent of causally related disability and the resulting award." Claimant has the burden to show that his knee injury was probably caused by his work; possible cause is not enough. *Burt v. John Deere Waterloo Works*, 247 Iowa 691, 73 N.W.2d 732 (1956); *Ford v. Goode Produce Co.*, 240 Iowa 1219, 38 N.W.2d 158 (1949); and *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). The matter of causal relationship between the injury and the disability is within the realm of experts. *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 101 N.W.2d 167 (1960). Claimant's testimony of an incident along with expert testimony of a possibility is sufficient. *Bradshaw, supra.*

Peter D. Wirtz, M.D., a qualified orthopedic surgeon, examined claimant and concluded that the incident of December 1978 was "resolved" (report, 12-10-80) by January 3, 1979 when Dr. Flapan released claimant. Claimant's brief, excellently argued, points out that Dr. Wirtz's examination lasted only 15 minutes and that his opinion would be of less weight for that reason. Normally, that might be the case; however, Dr. Wirtz's opinion in this case is accepted over that of Dr. Laughlin (who causally relates the injury to the disability) because Dr. Wirtz's opinion takes into account Dr. Flapan's examination and his interpretation of the arthrogram. The flaw in claimant's argument is that it states Dr. Flapan was wrong and Dr. Laughlin was right because Dr. Laughlin found a torn lateral meniscus at the time of the surgery in June of 1979. However, it should be remembered that Dr. Laughlin's initial diagnosis was that of a torn medial meniscus.

Thus, at the time of the accident in December of 1978, there is only one piece of evidence which shows a tear of the lateral meniscus, that of the radiologist. On the other hand, the treating physician, Dr. Flapan, also read the same arthrogram as the radiologist and came up with a different diagnosis; further, the subjective and objective examinations by Dr. Flapan also showed a defect in the medial meniscus, not the lateral meniscus.

Given the information that Dr. Wirtz had, one can see why he concluded claimant's knee injury was temporary and was resolved by January 3, 1979. What Dr. Flapan would say in testimony is, of course, unknown because only his reports are a part of the record.

Findings of Fact

1. Claimant hurt his left knee on December 6, 1978. (Claimant exhibit 3, Flapan report 12-18-78; Tr. 7)

2. Claimant returned to work December 7, 1978. (Tr. 7)

3. Claimant's knee popped out on April 4, 1979 while in the employee's parking lot. (Tr. 10)

4. Claimant's left knee popped out and he fell to the ground on or about Memorial Day, 1979. (Tr. 11)

5. The initial injury of December 1978 and the injuries of March [sic] and April 1979 and the injury while jogging on May 28, 1979 were aggravating factors. (Claimant exhibit 3, Laughlin report 12-11-79)

6. The injury of December 6, 1978 was "resolved" by January 3, 1979. (Claimant exhibit 3, Wirtz report 12-10-80)

7. On February 4, 1980, claimant again hurt his left knee when a sow forced him into a corner. (Claimant exhibit 3, N. W. Hoover, M.D., report 2-27-80)

8. On March 4, 1980, claimant had surgery for chondromalacia of the left patella. (Claimant exhibit 3, Hoover report 3-4-80)

Conclusions of Law

On December 6, 1978, claimant sustained an injury which arose out of and in the course of his employment when he twisted his left knee at work.

The injury to the left knee was specifically in the area of the medial meniscus and no permanent disability and did not necessitate surgery.

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

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 18th day of November, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RONALD D. BIGGS,

Claimant,

vs.

CHARLES DONNER, d/b/a DONNER TRUCKING, FORT DODGE,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals and defendants cross-appeal from a proposed arbitration decision in which the deputy industrial commissioner determined a permanent partial disability rating of five percent of the claimant's lower left extremity as a result of an injury arising out of and in the course of employment on January 30, 1980.

The record consists of the testimony of claimant; claimant's exhibits 1, 2 and 3; defendants' exhibits A, B, C, D, E, F, and G, which is a deposition of the claimant; and the depositions of Tim Spiker, Earl J. Bennett, Jr., James E. Bussing, Jr., Billy BoJack, Paul L. Stitt, M.D., and Stephen Taylor, M.D.; as well as the appeal briefs of the claimant and defendants.

Review of the Evidence

Claimant, who had been in the employ of the defendant employer since July 17, 1979 as a semi-truck driver, was involved in a motor vehicle accident with a farm tractor while in the course of this employment on January 30, 1980. (Transcript, pages 7-9.) The accident occurred when the claimant was on a return trip after delivering a load of sheet rock for the defendant employer. (Transcript, pages 8-9.) As described by the claimant:

> I was westbound on U.S. 175 coming over a little bit of a knoll, and there was a tractor right on the other side of that knoll. And due to the fact that it was slick, I went to go around him and I started to jackknife. When I was trying to straighten back out, I clipped the back of the tractor. (Transcript, page 9.)

Claimant testified that both knees and his left calf were injured upon striking the dashboard. (Transcript, page 10.) Claimant sought medical treatment for his knees and calf a few days later because they were all "bruised and black and blue." (Transcript, page 11.) During the next eight months the claimant was examined by three physicians which culminated by the claimant undergoing an arthroscopic partial meniscectomy. (Taylor deposition, pages 6-7.)

At the time of his injury the claimant was living with his second wife and her two children. (Transcript, page 67.) Apparently the claimant is not under a legal obligation to support his step-children. (Transcript, page 69) From a previous marriage the claimant has three natural children for whom he has not regularly provided financial support since 1972, however, his parental rights to these children have not been terminated. (Transcript, pages 28, 58.) Apparently he is under a court order to provide child support. (Transcript, page 28.)

Claimant stated he has not held any other work experience besides driving a truck prior to the motor vehicle accident. (Biggs deposition, page 5.) Claimant has not attended any college or trade schools and after high school he worked as a mechanic and wrecker driver, then gained over-the-road experience as a semi-truck driver, and during the off-season he would haul grain. (Biggs deposition, pages 4-5.)

At the hearing the claimant admitted he had been employed from April to July 1980 and that he falsified his answers in this regard to defendants' interrogatories and defendants' attorney's deposition questioning. (Transcript, pages 13-14, 48.) Specifically, claimant's answers to interrogatories filed June 6, 1980, having been properly submitted into evidence show that he failed to list employment with and receipt of wages from a Mr. BoJack. (Transcript, page 48.) In a later deposition held November 11, 1980, the claimant repeatedly denied having been employed since the date of the motor vehicle accident and implied he had been in dire search of employment. (Biggs deposition, pages 12, 15, 17-18, 19.) At his deposition the claimant contended that negotiable checks he received from BoJack during April through July, which totaled $2,610.16, constituted a loan arrangement. (Biggs deposition, page 21.)

Claimant stated that since the motor vehicle accident his financial problems has been the cause of a divorce and his personal bankruptcy. (Transcript, page 14.)

Claimant said he falsified his answer to the defendants' attorney regarding his employment because:

> . . . I thought maybe it would hurt my case seeing as to the fact that it was not heavy work, and I wanted to borrow some money from the guy. And he said if I did this, he would. And I'd been out of work for a long time, and I needed money. I had some bills. (Transcript, page 14.)

Claimant contended that he was employed by BoJack for three months and one week on a part-time basis since they worked whenever BoJack felt like doing so. (Transcript, pages 14-15.)

Claimant described BoJack's business as an insulation dealer and stated the only work function he performed was to pour ground up paper used as insulation into a blower. (Transcript, pages 12, 13, 16.) He said he wore a protective four-inch piece of foam wrapped around his knees. (Transcript, page 16.) Claimant implied that as a favor he helped his friend BoJack place a roof on a house after a hail storm. (Transcript, pages 16-17.)

Claimant testified that he stopped working with BoJack when the pain in his leg became unbearable, about two weeks before his arthroscopic operation on August 20, 1980. (Transcript, pages 15, 17.)

Billy BoJack testified by way of deposition that he was a general contractor in the residential siding and insulation business. (BoJack deposition, page 3.) He said he and claimant had been life-long friends and the work relationship with the claimant, starting either at the end of March or early part of April, was based upon a 30 to 35 percent profit percentile while the claimant was undergoing training to become an applicator of siding. (BoJack deposition, pages 5, 6, 9.) BoJack stated he only gave one or two checks to the claimant as personal loans for a maximum of $25.00. (BoJack deposition, page 9.)

BoJack said claimant worked a 40-60 hour work week, including traveling time and that he never observed the claimant fall or twist his knee. (BoJack deposition, pages 14-15, 20.) BoJack testified that while the claimant was associated with his business, he gave the claimant ten different work assignments which consisted of four or five insulation jobs, four siding jobs and one roofing job. (BoJack deposition, page 17.) He said he and the claimant would often work side by side and that the claimant was able to perform each of the work assignments. (BoJack deposition, page 8.) BoJack testified the claimant favored his knee when they were on a roofing job and that the claimant once placed a foam pad beneath an ace bandage for protection while on a roofing job, however, BoJack could not directly recall whether the claimant utilized any protective wrappings on other jobs. (BoJack deposition, page 12.) BoJack stated the claimant was receiving unemployment compensation while he was receiving wages from his business. (BoJack deposition, page 19.)

Three co-workers under the employ of BoJack also testified by way of deposition. Earl J. Bennett, Jr., stated he observed the claimant favoring one leg on claimant's first day of work, and he would wrap his knee with an ace bandage. (Bennett deposition, pages 4-5, 6) Also, Bennett said he and claimant would take turns in climbing ladders to drill holes into the side of houses, however, Bennett was usually on the ladder because he knew claimant's knee bothered him. (Bennett deposition, page 12.)

James E. Bussing, Jr., stated he worked with the claimant on four or five insulation jobs, that the claimant climbed ladders with no problems and he never saw the claimant wrap his knee with foam rubber. (Bussing deposition, pages 4, 5, 7.)

Tim Spiker stated the claimant climbed ladders and drilled holes, and that he never observed the claimant wearing any foam pad around his knee. (Spiker deposition, pages 5, 7.) Each co-worker testified they did not observe the claimant fall or twist his knee. (Bennett deposition, page 5; Bussing deposition, page 10; and Spiker deposition, page 4.)

Ciaimant initially sought treatment for his injuries from Roy M. Hutchinson, M.D. (Transcript, page 10.) According to Dr. Hutchinson, the claimant's first examination was on February 6, 1980; on this date, Dr. Hutchinson reported the claimant had "slight swelling of both knees." (Claimant's exhibit 2, Hutchinson report of 5/23/80.) Two days later claimant returned and was found to have pain in his knees and "fluid in the pre-patellar area but x-rays revealed no fracture." (Claimant's exhibit 2, Hutchinson report of 5/23/80.) On the next examination, February 15, 1980, the claimant had no complaint of his right knee but his left leg and fibula were painful. (Claimant's exhibit 2, Hutchinson report of 5/23/80.)

Dr. Hutchinson reported the claimant was released to work on February 28, 1980, however, the claimant returned on April 7, 1980 and was found to still have "pain side of his knee [sic]" (Claimant's exhibit 2, Hutchinson report of 5/23/80.) An arthrogram was taken of claimant's right knee and Dr. Hutchinson referred claimant to Paul L. Stitt, M.D., for consultation. (Claimant's exhibit 2, Hutchinson report of 5/23/80.)

The right knee arthrogram found "tears of posterior horn of medical meniscus and possible tear of the posterior aspect of the lateral meniscus." (Claimant's exhibit 2, hospital record of 4/4/80.)

Dr. Stitt described his medical practice as a general practice with a sub-specialty of trauma. (Stitt deposition, page 3.) He first examined the claimant on April 8, 1980 and reported the claimant said his right knee locked up on March 13, 1980 which lasted between five to ten seconds, however, the claimant has not had any recurrent locking since that one episode. (Claimant's exhibit 2, Stitt report of 7/22/80.)

Dr. Stitt's examination of claimant's right knee included checking for increased amount of fluid above the patella and any crepitation or false motion when the knee was "wedged medially and laterally and front and back to see if there had been any torn ligaments." (Stitt deposition, page 5.)

Dr. Stitt's examination showed a normal gait with some increased joint fluid in the right knee, "but there was no instability of the knee and he was ambulating well." (Claimant's exhibit 2, Stitt report of 7/22/80.)

Claimant returned to Dr. Stitt on July 25, 1980 and informed this physician that his knee was still bothering him and that it would swell at night. (Claimant's exhibit 2, Stitt report of 9/12/80.) Dr. Stitt found claimant's "knee to be quite stable and he was ambulating well," however, "because of the continued complaints, the abscence of positive physical findings, and inappropriate history," Dr. Stitt referred claimant to Steven G. Taylor, M.D., an orthopedic specialist. (Claimant's exhibit 2, Stitt report of 9/12/80.)

Dr. Taylor's initial examination took place on August 14, 1980 and revealed "rather diffuse tenderness of the knee, particularly along the lateral joint line, posteriorly" with no evidence of instability. (Claimant's exhibit 2, Taylor report of 9/23/80.) Because of the persistance of claimant's symptoms and lateral joint line pain, Dr. Taylor performed an arthroscopic procedure on the claimant's right knee on August 20, 1980 which revealed "a bucket handle type tear of the lateral meniscus" (Taylor deposition, page 6), and "considerable degenerative changes of the lateral femoral condyle and lateral tibia plateau" (Taylor deposition, page 8). At this time, Dr. Taylor performed an arthroscopic partial lateral meniscectomy, which is a removal of the torn portion of the lateral meniscus. (Taylor deposition, pages 6-7.)

On deposition, Dr. Stitt suggested that claimant's torn cartilage could have occurred in a motor vehicle accident,

although such injuries usually occur in athletic situations. (Stitt deposition, page 23.) Dr. Stitt did not have any knowledge of the claimant's work activities (Stitt deposition, page 10), however, based upon his observations of the claimant he stated the claimant would have had a painful knee at the time of his examinations if he would have pushed a brake pedal down for several hours. (Stitt deposition, page 17.) Dr. Stitt stated a person could have "a torn knee cartilage that is lying in place and if it isn't pulling out into the joint" causing the knee to lock, and if a type of work does not cause "a lot of stress on the knee, they can get along pretty fine for awhile." (Stitt deposition, page 22.)

In Dr. Stitt's opinion, the findings revealed by Dr. Taylor through the arthroscopic procedure were consistent with the findings of the arthrogram. (Stitt deposition, page 21.) Dr. Stitt believes that a normal healing period from an arthroscopic examination would entail three to four weeks for the actual tissue to heal and a rehabilitation period of two to three months in which a person would be able to do very light work activities. (Stitt deposition, pages 12, 17, 24.) However, Dr. Stitt suggested it is possible for the healing period to be longer. (Stitt deposition, pages 17-18.) Based upon his treatment of similar injuries, it is Dr. Stitt's opinion that the claimant will have a five percent permanent partial disability of his lower right extremity. (Stitt deposition, page 13.)

Dr. Taylor stated that the cartilage injuries can occur in automobile accidents. (Taylor deposition, page 21.) Although the premise for recommending the arthroscopy was partially based upon the subjective medical history given by the claimant, Dr. Taylor stated the findings from the operation were consistent with claimant's stated medical history. (Taylor deposition, pages 10, 21-22.) Dr. Taylor believes that claimant's complaints of enduring pain was the result of the arthritic and degenerative changes within the knee joint and his episode of a knee lock was the result of his torn meniscal cartilage. (Taylor deposition, page 22.)

Dr. Taylor connected the claimant's arthritic condition as occurring as the result of claimant's torn cartilage because such degenerative conditions are involved with either a torn cartilage or a joint fracture and claimant's x-rays did not suggest any prior fracture. (Taylor deposition, page 19.) He stated claimant's arthritic condition would have taken a minimum of six to eight months to develop and that it probably took longer. (Taylor deposition, page 9.)

Dr. Taylor testified that to the best of his knowledge meniscal cartilage tears do not heal and if they cause significant problems surgical removal is the only treatment. (Taylor deposition, page 22.) Dr. Taylor stated that the normal healing period from an arthroscopic procedure varies considerably according to the patient's age and general activity level, and that young athletic individuals usually return to nearly normal activities within two to three weeks while middle-age persons take longer. (Taylor deposition, page 12.) He suggested persons with short duration of symptoms are likely to recover faster because of less weakness in the muscles. (Taylor deposition, page 12.)

Following the claimant's surgery on August 20, 1980, Dr. Taylor examined the claimant on September 2, 1980 and found the claimant to have "a large effusion or swelling within the joint" which represented "somewhat delayed progress." (Taylor deposition, page 13.) In a letter to the claimant's attorney dated November 25, 1980, Dr. Taylor stated that the claimant was "continuing to make slow but definite progress with his right knee" and the claimant's "progress has been delayed by persistent effusion which occurs occasionally after a meniscectomy." (Claimant's exhibit 2, Taylor report of 11/25/80.)

On December 2, 1980, the claimant's leg was found by Dr. Taylor to have a slight lump, very small effusion and a normal range of motion. (Taylor deposition, page 14.) He informed the claimant on this date that he had progressed satisfactorily to the point that he was able to return to work (Taylor deposition, page 15), and on deposition he stated the claimant at this time was able to drive a truck. (Taylor deposition, page 23.)

It is Dr. Taylor's opinion that the claimant will have a five percent permanent partial disability of his right lower extremity because, although he has essentially regained normal motion in his knee, the claimant has lost part of his cartilage and will experience some future problems with his right knee due to his degenerative changes. (Taylor deposition, page 25.)

Proposed Decision

The deputy determined that the claimant has a five percent permanent partial disability of his left (right) lower extremity as a result of the January 30, 1980 motor vehicle accident, and that the claimant did not prove that he missed work due to the injury until his August 20, 1980 operation nor did the claimant prove that he did not return back to work as early as September 15, 1980; therefore, the deputy held the claimant was only entitled to healing period benefits from August 20, 1980 to September 15, 1980. Furthermore, the deputy found the claimant failed to prove he was entitled to any exemption based on children.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 30, 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).

If a claimant contends he has industrial disability he has the burden of proving his injury results in an ailment extending beyond the scheduled loss. *Kellogg v. Shute and Lewis Coal Co.*, 256 Iowa 1257, 130 N.W.2d 667 (1964).

An employee who has suffered a permanent partial disability is entitled to compensation for a healing period beginning on the dates of the injury and until the worker has returned to work or competent medical evidence indicates that recuperation has been accomplished. Code of Iowa, section 85.34 (1981). Recuperation occurs when it is medi-

cally indicated that no further improvement is anticipated or the employees is capable of returning to substantially similar employment. Iowa Industrial Commissioner Rule 500—8.3(85).

Analysis

The first issue on appeal is whether the medical testimony and claimant's statements establish the requisite causal connection between the claimant's injury and the functional disability found by the deputy. The defendants argue that such evidence cannot be relied upon because it is based upon a subjective medical history provided by a claimant with questionable veracity. The defendants contend the claimant misconstrued or omitted material facts regarding his work activity, thus the physicians did not have accurate information to analyze the claimant's condition and establish causal connections. Furthermore, the defendants argue that the causal connection only exists through the claimant's testimony and the commissioner cannot rely on any statements by the claimant in light of the record he established prior to the hearing.

The record establishes that the medical opinions estimating a five percent functional disability of the lower right extremity is supported by medical findings notwithstanding the allegation of omitted material facts by the claimant to his physicians.

The defendants must have misread the medical findings of Dr. Taylor. Dr. Taylor connected claimant's arthritic condition of his right lateral femoral condyle and lateral tibia plateau as the result of his torn knee cartilage. In Dr. Taylor's judgment this arthritic condition started to develop at a minimum of six to eight months prior to the arthroscopic procedure, which would be approximately the date of claimant's motor vehicle accident which may have caused the torn cartilage. In addition to Dr. Taylor's opinion, Dr. Stitt believes that the right knee arthrogram findings, taken April 4, 1980, is consistent with the findings of the arthroscopic operation.

Claimant stated that he did not experience any knee problems before his accident. (Transcript, page 11.) The commissioner in consideration of the entire record finds no contradictory evidence to discredit this statement despite the allegations that the claimant's entire testimony is untrustworthy.

Based upon the record, it is probable that the claimant's injury was caused by his motor vehicle accident while in the employ of the defendant rather than in the employ of BoJack. The medical testimony establishes that the claimant's torn lateral meniscus occurred at the time of the accident and based upon Dr. Stitt's opinion that a person could have a torn cartilage and yet may function normally for awhile if the work activity is not stressful in the knee, indicates the claimant could have functioned in the work activities described by the testimony of BoJack and his co-workers.

Claimant's contention that he is entitled to a five percent industrial disability rating in addition to the award of five percent functional permanent partial disability of his lower right extremity can be readily dismissed for lack of any justification in the record.

Claimant argues that he is a man of limited education and his injury will keep him from holding employment he would otherwise be doing. However, the claimant has failed to meet the requisite burden of proof that his injury has resulted in an ailment extending beyond his scheduled loss. There is virtually no showing of any after effects that has resulted in permanent impairment to the body as a whole, thus there is no basis to claimant's suggested industrial disability, it is Dr. Taylor's opinion that the claimant was recuperated to resume his truck driving activities on December 2, 1980.

Claimant has not proven by a preponderance of the evidence that he is entitled to any compensation for a healing period from the date of his employment injury until he accepted employment in April 1980. The claimant failed to demonstrate that the injury he sustained in the motor vehicle accident was the reason for his termination of employment and the medical evidence does not support a finding that the injury caused an inability to maintain normal work activities.

The report from Dr. Hutchinson which indicated that the claimant was released to work on February 28, 1980 must be given little weight because it is clear from the state unemployment job search record submitted as an answer to an interrogatory that the claimant supposedly sought employment as early as February 2, 1980. As inferred by Dr. Stitt's opinion that a person could have a torn cartilage yet function normally for awhile, it is evidently possible that the claimant was capable of an employment activity after his motor vehicle accident.

Claimant contends he stopped working for BoJack two weeks before his August 20, 1980 operation because the pain in his knee was unbearable, however, this is unsupported by any medical evidence. Dr. Stitt found the claimant's knee to be quite stable and he was ambulating well on July 25, 1980, and Dr. Taylor found lateral joint pain with no evidence of instability on August 14, 1980. It cannot be said that the findings of Dr. Taylor indicate by a preponderance of the evidence that claimant was unable to commence work activities before his arthroscopic procedure on August 20, 1980.

The weight of the evidence does not support a finding that the claimant was only entitled to two to three weeks of healing period compensation after his arthroscopic surgery. The medical testimony establishes that the normal recovery period from such an operation would be two to three weeks for a young athlete and possibly longer for the claimant who is not. Dr. Taylor discovered delayed progress in claimant's recovery on September 2, 1980 and reported on November 25, 1980 that the claimant was making a slow but definite progress due to persistent effusion. The first medical determination that the claimant had recuperated to the degree of capability of returning to substantially similar work activities of driving a truck was made by Dr. Taylor upon examination of the claimant on December 2, 1980.

The claimant argues that the deputy was being punitive in disallowing healing period benefits in response to the claimant's admitted falsehoods. The deputy, as the trier of fact, is placed under a duty to consider the credibility of all testimony and in this case there is ample room in contradiction of facts between the testimony of the claimant, BoJack and

claimant's co-workers that the deputy seriously questioned the claimant's veracity. The deputy was proper in relying in part upon his expertise as a trier of fact.

Nevertheless, the medical testimony outweighs any consideration of claimant's credibility regarding his recuperation from his surgical procedure. It is determined that the claimant is entitled to healing period compensation from August 20, 1980 to December 2, 1980.

Claimant testified he was paid on a percentage system on a weekly basis which provided an average of $200.00 per week. Section 85.36(6) provides that the basis of gross weekly earnings of an employee who is paid "by the output of the employee" shall be computed by dividing by thirteen the earnings the employee earned for the period of thirteen consecutive calendar weeks immediately preceding the injury. On the basis of defendants' exhibit D, the applicable thirteen week period is represented by payments received by the claimant from November 16, 1979 to February 1, 1980. The gross wages received by the claimant during the period (less a salary advancement of $20.00 received on January 29, 1980) totals $2,616.85. Thus, the claimant's gross weekly earnings for computation of his compensable rate, pursuant to section 85.36, is $201.30.

Claimant contends that his non-adopted step-children, who were living with him at the time of his injury, should be considered as dependents for the calculation of his compensable rate. This argument will not be considered because a reading of the statutory provisions of workers' compensation act indicates that the claimant is entitled to a compensable rate which includes a dependency of his three natural children.

The weekly benefit amount payable to an employee for any one week as compensation for a permanent partial disability or a healing period "shall be upon the basis of eighty percent of the employee's weekly spendable earnings." Iowa Code section 85.37. "Spendable weekly earnings" is the amount remaining after payroll taxes are deducted from gross weekly earnings. Iowa Code section 85.61(11). "Payroll taxes" are defined in section 85.61(10)(a) of the Iowa Code as:

> An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code of 1954, and regulations pursuant thereto, as amended to July 1, 1976, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age *to which the employee is entitled* on the date on which he was injured, and (Emphasis supplied.)

The phrase "to which the employee is entitled" must be construed as if all conditions are favorable to the claimant in his economic and personal circumstances on the date on which he was injured.

Therefore, based upon the statutory language, claimant's natural children must be considered as dependents in calculation of his compensable rate because the claimant was entitled to claim such children as actual dependents on the date of his injury.

Claimant was married on the date of injury, thus he is entitled to five exemptions. As previously determined, claimant's gross weekly earnings were $201.30. Based upon this figure, his compensable weekly rate is $135.37.

Claimant contends that he is entitled to an additional reimbursement of $50.78 for two pharmacy expenses and $127.85 for two hospital bills. It is evident that the claimant has failed to causally connect these expenditures to treatment of his compensable injury. On the face of one pharmacy bill there appears a physician's name not involved in this case. The other pharmacy expense submitted was a bare receipt not attached to any billing statement. The hospital expenses are for emergency room treatment; these billing statements are dated August 26, 1980 and November 1, 1980. There is no support in the record to causally connect these hospital expenses.

Findings of Fact

1. Claimant sustained a work-related injury on January 30, 1980 when his semi-truck was involved in a motor vehicle accident. (Transcript, pages 7-9.)

2. Claimant, at the time of his deposition, was a 33 year old man with a high school education who has not held any other work experience besides truck driving and mechanics prior to his injury. (Biggs deposition, page 5.)

3. At the time of his injury the claimant was living with his second wife and her two children and was under a legal obligation to support his three natural children who were not living with the claimant. (Transcript, pages 28, 58, 67, 69.)

4. Claimant, as a result of this accident, underwent an arthroscopic examination on his right knee. On August 20, 1980 a partial lateral meniscectomy was performed. (Taylor deposition, pages 6-7.)

5. At the time of the claimant's arthroscopic procedure, the claimant was found to have a tear in his right lateral meniscus. (Taylor deposition, pages 6, 9, 19.)

6. Claimant was suffering from a degenerative condition of his right lateral femoral condyle and lateral tibia plateau as a result of his torn right lateral meniscus. (Taylor deposition, pages 8, 9, 19.)

7. Claimant's degenerative condition may result in future problems with his right knee. (Taylor deposition, page 25.)

8. Claimant held employment from approximately April 1, 1980 to August 1, 1980. (BoJack deposition, page 5; transcript, pages 15, 17.)

9. Claimant experienced a slower than normal recovery from his arthroscopic operation. (Taylor deposition, page 13; claimant's exhibit 2, report of 11/25/80.)

10. Claimant was informed by his treating physician on December 2, 1980 that his condition progressed to the point that he was able to return to work. (Taylor deposition, pages 14-15, 23.)

11. Claimant's gross weekly earnings for computation of his compensable rate, pursuant to section 85.36(6), is $201.30.

Conclusions of Law

1. Claimant failed to prove by a preponderance of the evidence that he was entitled to any healing period benefits from the date of his injury until he accepted employment in April 1980.

2. Claimant had a healing period after his operation from August 20, 1980 to December 2, 1980 when it was established that he could return to substantially similar employment.

3. Claimant is entitled to have his weekly benefit rate based upon the status of being married with five exemptions.

4. Claimant's rate of compensation is $135.37.

5. Claimant has a five percent permanent partial disability of his lower right extremity.

THEREFORE, defendants are to pay unto the claimant fifteen (15) weeks of healing period benefits at a rate of one hundred thirty-five and 37/100 dollars ($135.37.) per week and eleven (11) weeks of permanent partial disability benefits at a rate of one hundred thirty-five and 37/100 dollars ($135.37) per week.

Defendants are to reimburse claimant for the following medical expenses:

Trinity Regional Hospital	$ 258.00
Paul L. Stitt, M.D.	27.00
Roy M. Hutchinson, M.D.	56.00
Associated Anesthesiologists	336.00
Iowa Methodist Medical Center	1,484.83
Stephen Taylor, M.D.	893.00
K-Mart	89.59
Williams Drug Store	16.99

Defendants are to reimburse claimant one hundred ninety-nine and 39/100 dollars ($199.39) for mileage and motel room.

Defendants are to pay the costs of this action.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Iowa Code section 85.30.

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

* * *

Signed and filed this 22nd day of April, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RONALD E. BIRMINGHAM,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Appeal Decision

Claimant appeals from a consolidated arbitration, review-reopening and second injury fund proposed decision. The sole issue presented on appeal is the finding of industrial disability of twenty percent. The finding that the arbitration proceeding was barred was not appealed and therefore file number 542078 is not under consideration.

The record on appeal consists of a first report of injury filed October 3, 1977, a memorandum of agreement filed October 3, 1977, a form 5 filed March 8, 1978, a petition filed June 13, 1979 and amendment filed February 21, 1980 together with various responsive pleadings. Also included is the transcript of the hearing before the deputy industrial commissioner together with claimant's exhibits 1-13 and defendants' exhibit 1. A document listed as claimant's exhibit 14 is contained in the file but was not offered into evidence and is therefore not a part of the record (transcript, page 101). Also a part of the record is claimant's brief on appeal. No appeal briefs were filed by any defendants.

Claimant does not question the findings of fact in the decision of the deputy but contends that the deputy erred as a matter of law in concluding that claimant sustained a twenty percent industrial disability to the body as a whole. Claimant contends "that if there is a functional loss to each arm of 30% and a loss of earnings that the other factors (of industrial disability) would require the finding as a matter of law that the industrial disability be substantially greater than 20%."

There is a common misconception that a finding of industrial disability to the body as a whole must necessarily be in excess of a rating of permanent impairment found by a medical evaluator. Such is not the case as impairment and disability are not identical terms. Disability can in fact be less than the degree of impairment because in the first instance we are referring to loss of earning capacity and in the later reference is to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a loss of

function per se will result in an industrial disability. Consider the loss of a fifth toe which although an anatomical loss would only under most unique circumstances result in industrial disability.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc.

Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. And, furthermore, these other factors are **not** added to the percentage evaluation of functional impairment found to exist to arrive at the degree of industrial disability. The degree of functional impairment is only one of the factors to be considered in arriving at the overall degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

The deputy found and it is hereby found as finding of fact that the claimant was 38 years old, married and the father of two minor children. Claimant did not complete high school but received a GED while in the service. He also received training as a truck mechanic in the Army. Upon discharge from the service, he returned to Des Moines and went to work for Marquette Cement Company where he ran a hand truck. He remained at Marquette for three years and then became employed by Delavan Manufacturing as a light machine operator. He was layed off at Delavan after three years of employment and subsequently began working for Penn-Dixie at their local cement plant where he remained for one year. Claimant commenced his employment relationship with the defendant, Firestone Tire and Rubber Company, on April 19, 1971. Claimant's exhibit 2 is a compilation of the various jobs and departments where claimant worked during his career at Firestone. That list reflects that he has performed for example, duties as utility man, power trucker and tire builder. The claimant stated that the job of building tires required an extensive amount of lifting and use of both hands and arms and that he built tires from 1976 through 1978.

John T. Bakody, M.D., the treating and evaluating physician did not personally attach a percentage figure to the extent of impairment to the right or left arm. He indicated he would not have any quarrel with the figure of 25 to 30 percent impairment to the right and left arms. This physician is of the opinion that in terms of functional impairment claimant has lost his strength and does not feel he could be a tire builder. The physician testified that as a general practice he does not attach numerical ratings to physical disabilities. Claimant was released by Dr. Bakody to return to work on February 6, 1978. This release is for light duty work and the claimant returned to work repairing green tires. On August 11, 1978 the claimant was released by Dr. Bakody to return to his regular work duties. Between February and August 1978 the claimant performed light duty work for the defendant-employer. In August 1978 the claimant bid into the tuber department as he was of the opinion that he could no longer do the job of a tire builder because of pain in his wrists. The job of a tuber appears to be less strenuous.

Claimant testified that there was a wage difference of $15 a day between the tire building department and the tuber department and this is based on the fact that tire building is a piece work job and the position he now holds is simply day rate pay. Claimant was involved in piece work as a tire builder prior to his wrist injuries and would be paid on that basis if he worked in that department today. A utility person is paid on a flat rate. Claimant is presently paid approximately $4.07 per hour as a booker, which is a non-piece work job. If claimant were a tire builder today, he could make between $95 and $96 per day but someone in that department could make less depending upon production. The $95 or $96 a day that the average tire builder earns includes "GWI" and "COLA" which stand for general wage increase and cost of living allocation and the figures are based on an eight hour day which equals approximately $12 per hour. The $4.07 per hour that a booker earns did not include the "GWI" or the "COLA". These two items amount to an additional $4.07 per hour bringing the booker's pay rate to $10.80 an hour as compared to $12 for the tire builder. This is a difference of $9.60 per day or a reduction of 10 percent.

Under this state of the record this commissioner has no quarrel with the findings of the deputy that as a result of claimant's combined injuries he has sustained a permanent partial industrial disability to the body as a whole of twenty percent.

WHEREFORE, it is found and held that the proposed decision of the deputy as to degree of permanent partial industrial disability to the body as a whole is affirmed and adopted as the final agency determination.

THEREFORE, the claimant shall take nothing further from this appeal.

Costs of this appeal are taxed to claimant.

* * *

Signed and filed this 10th day of July, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

CLARENCE A. BLEVINS,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed August 5, 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 arbitration decision.

The record on appeal consists of the transcript; two depositions by Warren N. Verdeck, M.D., taken April 9, 1981 and May 7, 1981 (hereinafter respectively referred to as Verdeck depositions I & II); the deposition of Albert Coates, M.D.; a deposition of Owen Julius; a deposition of John R. Walker, M.D.; and defendant's exhibit A.

The result of this final agency decision will be identical to that of the hearing deputy; however the findings of fact and conclusions of law will be those of the undersigned.

The evidence shows no particular incident which brought about claimant's disability, which concerns his low back. Rather, the evidence showed a life time of hard work and a subsequent alleged inability to continue that work.

Claimant states that the hearing deputy:

(1) Totally rejected the uncontroverted medical evidence in the record with respect to causation or aggravation of a preexisting condition connecting claimant's employment with his present disability.

(2) Illegally and erroneously and without supporting reasoning, refusing to consider the claim as an Occupation Disease under Chapter 85A.

(3) Illegally and erroneously and in violation of both the Iowa and United States Constitution, ruling that the notice requirement of Section 85.23 was not complied with by the claimant.

(4) Finding that the employer could not have actual knowledge of claimant's history.

(5) Making any finding at all on the question of notice under Section 85.23, due to the finding of no causal connection between claimant's employment and his disability.

(6) Evidencing such prejudice against the claimant that, upon remand, the hearing should be held anew before another deputy commissioner.

Issues 3, 4, 5 and 6 may be dealt with briefly. First, with respect to the issue notice, the hearing deputy's remarks were in the nature of *obiter dictum*; there was no holding that claimant failed to give notice or that the employer had no knowledge of an injury. The same circumstance applies here: Since claimant did not carry the burden of proof to show an injury or occupational disease, no finding on notice need be made.

With respect to the issue of bias of the hearing deputy, claimant's brief contains no enlightening support for the accusation and states: "Of course, in this record there is no direct evidence of bias..." (p. 24). There simply being no evidence of bias, claimant's point of appeal cannot be ruled upon with favor.

Iowa's interpretation of the term "personal injury" is most liberal. For example, in the *Almquist* case the court defines a personal injury as meaning "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." *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 732 N.W. 35 (1934).

The court states on page 731:

> The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, *even though such natural change may come about because the life has been devoted to labor and hard work*. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body. (Emphasis added.)

The court further states at page 732:

> 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, an injury may be an aggravation of a preexisting condition. See *Almquist, supra; Yeager v. Firestone Tire & Rubber Company.*, 253 Iowa 369, 112 N.W.2d 299 (1961) and cases cited.

Applying this law to the facts contained in the record, it is clear that claimant has not proved a personal injury arising out of and in the course of the employment. The incidents

which he does mention are vague both as to time and place and certainly show no need for medical care at the time. Of course, no special incident is required under the law. Even so, there has to be a difference between work connected personal injury and natural wear and tear to the human body.

Similarly, claimant's condition does not fit that of an occupational disease as defined in §85A.8:

> 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 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.

There is no showing that claimant's degenerative back disease has any direct causal connection with the employment or that it is incidental to claimant's activities. On the other hand, degenerative back disease, which in this deputy's experience occurs among people who do light work as well as heavy work, is a malady to which claimant is exposed outside of his employment. Therefore, the back condition is not an occupational disease.

Findings of Fact

1. Claimant was age 58 at the time of the hearing. (Transcript, page 23.)

2. Claimant went to work on a farm after completing the eighth grade. (Transcript, page 8.)

3. Claimant worked for the employer 27½ years. (Transcript, page 7.)

4. The vast majority of his work time with the employer was as a truck driver, which involved some heavy lifting and hauling. (Transcript, pages 10-12.)

5. Claimant's disability is in his low back and legs. (Transcript, page 23.)

6. Claimant has extensive degenerative disc disease, particularly at L4/5, and spinal stenosis. (Verdeck depo. I, 4; Coates depo. exhibit 1; Coates depo. 5-7; Walker depo. 7.)

7. Claimant's back disability is caused by generalized degenerative arthritis which may occur whether claimant ever worked or not. (Coates 11-13; Verdeck II, 9.)

8. Claimant's disability is also caused by many years of heavy work. (Tr. 26-27; Verdeck II, 11; Walker 3, 10; Coates 10, 12.)

Conclusions of Law

Claimant did not sustain an injury arising out of and in the course of his employment with Wilson Foods Corporation as claimed.

Claimant did not sustain an occupational disease while employed with Wilson Foods Corporation as claimed.

No conclusion is made as to whether claimant gave notice under §85.23.

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

Costs of this action are taxed against defendants.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

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

NORLAN J. BLUMER,

Claimant,

vs.

METZ BAKING COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling on Appeal

Defendants have appealed from a declaratory ruling of a deputy filed August 21, 1981, wherein it was found that the Iowa Industrial Commissioner has proper jurisdiction to determine the extent, if any, of claimant's rights to benefits under section 85.27, Code of Iowa.

Defendants filed a petition for declaratory ruling on July 7, 1981 setting forth the background of claimant's appeal in this present action. The facts leading to claimant's petition for declaratory judgment are without dispute and are as follows:

1. Claimant on or about July 5, 1974, filed a petition for review-reopening, claiming he became totally disabled on January 21, 1974, due to a back injury occurring on May 1, 1973, while working for employer; also, on March 31, 1975, he filed a petition for arbitration, alleging that on November 27, 1974, he did injure and/or reinjure and/or aggravate his preexisting back ailment while working for the employer.

2. After the issues were joined, a hearing on both applications resulted in a decision for claimant on the review-reopening claim, as well as the arbitration claim on May 14, 1976.

3. The employer-insurance carrier filed petition for judical review of the review-reopening decision in the Iowa District Court of Woodbury County and an appeal to the industrial commissioner of the arbitration decision.

4. The appeal of the arbitration decision was dismissed by ruling of the industrial commissioner and the employer-insurance carrier promptly filed a petition for judicial review of that ruling in the Iowa District Court of Woodbury County.

5. Both petitions for judicial review were pending before said district court; and, pursuant to an agreement between the parties to settle said dispute, a lump sum payment was made to the claimant of $32,000.00, which sum was approved by said district court; and said district court promptly on December 22, 1977, ruled against the claimant and vacated both decisions of the deputy commissioner.

6. No appeal was made to the Iowa Supreme Court.

7. On or about December 1, 1980, the claimant filed a second review-reopening petition seeking review and reopening of the review-reopening decision made on May 14, 1976.

8. The employer-insurance carrier did on or about January 19, 1981, file answer and in said answer, affirmatively alleged that the review-reopening decision of May 14, 1976, was set aside by the Woodbury County Iowa District Court and, therefore, has no longer a judicial standing; also, that because the review-reopening decision of May 14, 1976, was set aside by the Woodbury County Iowa District Court on December 22, 1977, the statutory time had run for filing appeal and/or filing a motion to set aside said ruling and, therefore, it is final and binding on the parties.

The settlement agreement contains the following critical language:

> IT IS FURTHER MUTUALLY AGREED that settlement herein is not and shall not be considered payment of compensation either for temporary total disability or permanent partial disability or healing period or for any other benefits under the Iowa Workmen's Compensation Act (but Claimant may base his claim for future medical, hospital and related expenses or treatment afforded herein, if any he have, as provided by the existing Iowa Workmen's Compensation Act under section 85.27, Code of Iowa).

Defendants, on appeal, assert that the exercise of jurisdiction by this agency over claimant's second review-reopening action is contrary to the express language set out in the settlement stipulation and as made part of the district court's order. Defendants point specifically to the language: "settlement herein is not and should not be considered payment... for any other benefits under the Iowa Workmen's Compensation Act...."

Although the petition filed December 1, 1980 does not clearly show the issue to be heard, the pre-hearing order of August 4, 1981 lists only section 85.27 benefits as the issue of the case. Thus, the above language is important to the outcome of this ruling.

The issue is, considering the language of the settlement, does the industrial commissioner have jurisdiction to determine the extent, if any, of claimant's entitlement under section 85.27. The instrument signed by the parties states claimant may have section 85.27 benefits "as provided by the existing Iowa Workmen's Compensation Act under 85.27, Code of Iowa."

The settlement agreement does not say that future actions under section 85.27, Code of Iowa, are to be adjudicated by the Iowa District Court. It cannot then be inferred that the parties agreed to have the district court decide any disputes over future claims.

This agency is charged with the administration of Iowa Workers' Compensation Law. There is nothing in the settlement application and order signed by the district court to remove that jurisdiction. Nor is the exercise of jurisdiction in this matter a denial of the right of the district court to exercise jurisdiction in the future pursuant to section 17A.19, Code of Iowa.

Claimant's original petition in review-reopening, filed December 1, 1980, asserts continuing medical expenses since the decision of May 14, 1976 compensable under section 85.27, Code of Iowa. It is necessary for this agency to decide if medical expenses sought are reasonable and causally related to claimant's industrial injury. Claimant therefore brings issues which have not yet been determined under Iowa Workers' Compensation Law. To say that the district court intended to assert original jurisdiction over all future benefits, which claimant might bring Iowa Workers' Compensation Law as it relates to the injury of November 27, 1974, is to impose a burden with which it is not charged under Iowa law.

WHEREFORE, it is found:

That the findings of fact and conclusions of law of the deputy's ruling of August 21, 1981 are adopted as the final ruling of this agency.

That the industrial commissioner has jurisdiction to determine the extent, if any, of claimant's rights to benefits under section 85.27.

THEREFORE, this case will be heard on the issue of whether such benefits are payable as a result of the subject injury.

* * *

Signed and filed this 16th day of November, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

NORLAN J. BLUMER,

Claimant,

vs.

**HOWARD PUBLICATIONS/
METZ BAKING COMPANY,**

Employers,

and

**FIREMAN'S FUND INSURANCE COMPANY/
LIBERTY MUTUAL INSURANCE CO.,**

Insurance Carrier,
Defendants.

Appeal Decision

Defendant employer, Metz Baking Company (hereinafter Metz), and its insurer, Liberty Mutual Insurance Company (hereinafter Liberty), have appealed from a decision regarding application for benefits under section 85.27, Code of Iowa, in which it was determined that Metz and defendant employer Howard Publications (hereinafter Howard) should bear the cost equally of claimant's treatment at the Nebraska Pain Management Clinic. Howard and its insurance carrier, Fireman's Fund Insurance Company (hereinafter Fireman's Fund), filed a resistance to the appeal, requesting that the deputy's proposed decision be affirmed. However, after the date Howard and Fireman's Fund filed the appeal resistance, they entered into a compromise special case settlement with claimant which was approved by the undersigned. This settlement in no way affects claimant's claims against Metz and Liberty.

The factual history of the case leading to claimant's petition for section 85.27 benefits is lengthy and is set forth as follows:

1. Claimant, on or about July 5, 1974, filed a petition for review-reopening claiming he became totally disabled on January 21, 1974, due to a back injury occurring on May 1, 1973, while working for Metz; also, on March 31, 1975, he filed a petition for arbitration, alleging that on November 27, 1974, he did injure, reinjure or aggravate his preexisting back ailment while working for the same employer.

2. After the issues were joined, a hearing on both applications resulted in a decision for claimant on the review-reopening claim as well as the arbitration claim on May 14, 1976.

3. Metz and Liberty filed a petition for judicial review of the review-reopening decision in the Iowa District Court of Woodbury County and an appeal to the industrial commissioner of the arbitration decision.

4. The appeal of the arbitration decision was dismissed by ruling of the industrial commissioner and Metz and Liberty promptly filed a petition for judicial review of that ruling in the Iowa District Court of Woodbury County.

5. Both petitions for judicial review were pending before the district court; and, pursuant to an agreement between the parties to settle said dispute, a lump sum payment was made to the claimant of $32,000.00, which sum was approved by the district court; and the district court promptly on December 22, 1977, vacated the relief given claimant in both decisions of the deputy commissioner in order to effectuate the settlement agreement.

6. No appeal was made to the Iowa Supreme Court.

7. On or about December 1, 1980, the claimant filed a second review-reopening petition seeking review and reopening of the review-reopening decision made on May 14, 1976.

8. Metz and Liberty, on or about January 19, 1981, filed an answer in which they affirmatively alleged that the review-reopening decision of May 14, 1976, was set aside by the Woodbury County Iowa District Court and, therefore, no longer has judicial standing; also, that because the review-reopening decision of May 14, 1976, was set aside by the Woodbury County Iowa District Court on December 22, 1977, the statutory time had run for filing appeal or filing a motion to set aside the ruling and, therefore, it is final and binding on the parties.

The settlement agreement contains the following critical language:

> IT IS FURTHER MUTUALLY AGREED that settlement herein is not and shall not be considered payment of compensation either for temporary total disability or permanent partial disability or healing period or for any other benefits under the Iowa Workmen's Compensation Act (but Claimant may base his claim for future medical, hospital and related expenses or treatment afforded herein, if any he have, as provided by the existing Iowa Workmen's Compensation Act under 85.27, Code of Iowa).

9. On July 7, 1981, Metz and Liberty filed a petition for declaratory ruling. In a ruling filed August 21, 1981, the deputy concluded that the Iowa Industrial Commissioner has proper jurisdiction to determine the extent, if any, of claimant's rights to benefits under section 85.27, Code of Iowa. This decision was affirmed on appeal in a decision filed November 16, 1981.

10. On July 13, 1981, claimant amended his petition naming Metz and Liberty as defendants, requesting alter-

nate care under section 85.27; on July 13, 1981, claimant filed a petition naming Howard and Fireman's Fund as defendants, requesting 85.27 benefits for an April 9, 1979 injury sustained while employed at Howard.

The record on appeal consists of the testimony of claimant, Norlan J. Blumer; Tom Archer; claimant's exhibits 1 through 39; and briefs of all parties.

The issues on appeal, as stated by defendants Metz and Liberty, are:

1. Is apportionment of medical benefits between employer and their respective carriers permitted under the Iowa law, and, if so;

2. Should it be based on the causative contribution of each employer and its respective carrier when this can be ascertained with reasonable certainty based on the evidence in the record;

3. Should Metz and its carrier be liable to claimant for any §85.27 benefits to be furnished by Dr. Skultety and his organization; and, if so, to what extent under the record.

Metz and Liberty enumerate several grounds as the basis for their appeal. They contend that the deputy erred when he "failed to note the impelling testimony of the Claimant as to his percentage of pain in relation to his body and to consider this in arriving at his decision."

They also contend that the district court " reversed and vacated" this agency's finding that claimant sustained an injury which arose out of and in the course of claimant's employment with Metz. The district court in two orders filed November 22, 1977, merely vacated "the relief granted Interested Party Claimant in said Workmen's Compensation Review-Reopening [and Arbitration] decision" in order to effectuate the Settlement Agreement. The Settlement Agreement itself, while denying that it is payment of compensation for temporary total or permanent partial disability or healing period, specifically provides under which section of the Iowa Workers' Compensation Act claimant may base his claim for future medical expenses.

It has previously been determined in a ruling on appeal filed November 16, 1981, that this agency has jurisdiction to determine the extent, if any, of claimant's rights to benefits under section 85.27. Section 85.27 provides in part that "[t]he employer, for all injuries compensable under this chapter... shall furnish reasonable surgical, medical... services and supplies..."

Claimant is requesting medical treatment at the University of Nebraska Medical Center's Pain Management Center so that he can learn to deal with his constant pain. F. Miles Skultety, M.D., Professor and Chairman of the University of Nebraska's Department of Neurosurgery, in a letter dated June 10, 1981, indicated that he feels "that there is no other mode of treatment open to this man and we would be most happy to work with him assuming financial clearance is obtained." In view of Dr. Skultety's opinion as well as the medical evidence submitted, it is concluded that the services offered by the Nebraska Pain Management Clinic are reasonably calculated to treat the continuing pain claimant is suffering.

Claimant testified that he has suffered neck and upper back pain since his initial injury in May 1973, and low back pain since his April 9, 1979 injury, with left leg pain commencing approximately four months following his lower back surgery. (Transcript, pages 17-18.) Claimant also stated that he continues to experience numbness in his fingers and that he has difficulty sitting or standing for long periods due to the pain. (Transcript, pages 18-19.) Claimant additionally has trouble sleeping since he suffers from leg cramps. (Transcript, page 19.) Claimant's activities are limited as a result of the pain he suffers. (Transcript, page 18.)

Although there is no medical evidence which specifies what percentage of claimant's pain is attributable to each area of his body, claimant himself testified that taking the pain as a whole, ten to fifteen percent of his pain relates to his upper back and neck, whereas eighty-five to ninety percent of his discomfort is in his lower back. (Transcript, page 19.) Since the apportionment of pain is almost entirely subjective, claimant's testimony concerning his pain is given substantial weight.

Although the physical result of claimant's three injuries is pain in nearly every part of his body, the record supports the conclusion that only ten to fifteen percent of claimant's pain is attributable to the injuries he sustained while working at Metz.

Therefore, it is determined that Metz and Liberty are responsible for payment of pain clinic costs and expenses in proportion to the amount of pain claimant suffers in his neck and upper back. Claimant's estimation was that ten to fifteen percent of his pain is located in the upper back and neck area. Averaging these two figures results in a total of twelve and one-half percent. Based upon this average figure, Metz and Liberty are responsible for twelve and one-half percent of the cost and expenses incurred by claimant in conjunction with his treatment at the Nebraska Pain Management Clinic.

Under the same analysis, Howard and Fireman's Fund would be responsible for eighty-seven and one-half percent of the costs and expenses incurred by claimant while undergoing treatment and rehabilitation for his pain. However, between the time these defendants filed their resistance to the appeal and the filing of this decision, they have entered into a settlement agreement with claimant in which Howard and Fireman's Fund agreed pursuant to an order filed January 13, 1982, to pay claimant $50,000 in return for claimant's assumption of liability "for and to pay for any and all benefits provided for under Chapters 85, 85A, and 86 of the Code of Iowa, all as such settlement and satisfaction." Howard and Fireman's Fund therefore, have no further obligation to claimant.

Furthermore, the order approving the settlement of Howard and Fireman's Fund specifically recognized that the settlement agreement in no manner affected claimant's workers' compensation claims against Metz and Liberty.

The decision in this case is being filed some weeks later than originally contemplated due to delay in the receipt by this office of the transcript of the hearing. While it is recog-

nized that the transcript was to be forwarded along with the appeal brief; it is also noted that the brief of Metz and Liberty was to be submitted by December 14, 1981. However, after a unilateral request for an extension of filing time was sought by Metz and Liberty four days after the filing deadline, the appeal brief was finally sent along with the transcript, on January 12, 1982. Although the extension of filing time was never granted, receipt of the transcript was necessary for full consideration of the issues. As a result, the late appeal brief was accepted, which in turn necessitated notification of claimant so that he could file a reply brief.

Metz and Liberty were ordered by the deputy to file a first report of injury. They contend that the injuries were not proven and that, as such, no report of injury is required. A first report of injury is not an admission of liability; it is a requirement of the law which must be complied with in all cases where an employee alleges an injury resulting in sufficient disability. *See* Iowa Code section 86.11.

Findings of Fact

1. Claimant suffered two upper back injuries while employed by Metz, the first on May 1, 1973, and the second on November 27, 1974.

2. Claimant underwent surgery for the injuries in December of 1975.

3. In April 1979, claimant injured his lower back while in the employ of Howard.

4. Claimant underwent lower back surgery in June 1979.

5. Claimant subsequently began to experience problems with his arms, hand and left leg.

6. Claimant has not been employed since April 1979.

7. Claimant has suffered continuous pain in his upper neck and shoulders since the first two injuries, and low back pain since the third injury.

8. Claimant entered into a settlement agreement with Metz and Liberty in which the availability of future section 85.27 benefits remained open.

9. Claimant entered into an approved settlement agreement with Howard and Fireman's Fund in which these defendants were relieved of any liability.

10. Approximately ten to fifteen percent of claimant's pain is located in his shoulders and upper neck and approximately eighty-five to ninety percent is located in his lower back.

11. Twelve and one-half percent of claimant's pain is attributable to injuries he received while employed by Metz.

Conclusions of Law

1. That the services of the University of Nebraska Medical Center's Pain Management Clinic are encompassed under Iowa Code section 85.27 and are reasonably calculated to treat the pain that claimant is experiencing.

2. That Metz and Liberty are responsible for only those costs and expenses of treatment at the pain clinic which are attributable to the pain suffered by claimant as a result of injuries he sustained while employed at Metz.

3. Howard and Fireman's Fund have no further obligation to claimant with the respect to the injury he suffered while in the employ of Howard.

THEREFORE, it is ordered:

That Metz Baking Company and Liberty Mutual Insurance Company shall be responsible for payment of twelve and one-half percent (12½%) of the costs and expenses incurred by claimant for treatment at the Nebraska Pain Management Clinic.

That Metz Baking Company and Liberty Mutual Insurance Company immediately file a first report of injury.

* * *

Signed and filed this 26th day of February, 1982.

ROBERT C. LANDESS
Industrial Commissioner

HARLEY DEAN BOARDMAN,

Claimant,

vs.

THE CONLON CONSTRUCTION COMPANY,

Employer,

and

NORTHWESTERN NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

BE IT REMEMBERED that on the date below it has been brought to the attention of the undersigned that in his recent decision he failed to provide for and order payment of claimant's incurred medical expenses.

THEREFORE, IT IS ORDERED:

That the defendants pay the claimant the following medical expenses which he has incurred as necessary to treat the industrial injury in question, subject to the provisions of Section 85.38, Code of Iowa.

Dodge Street Internists, P.C.	$ 625.00
Windsor Family Practice Clinic, P.C.	217.00

Santa Rosa Radiology Medical Group	45.00
Stephen P. Sheerin, M.D.	103.00
N. H. Anton, G. W. Bisbee, Inc.	17.00
Stanford W. Ascherman, M.D.	45.00
Xavier Hospital	2,643.25
Windsor Medical Offices (Barry A. Smith)	32.00
Mercy Hospital	1,214.87
Xavier Hospital	101.05
Mercy Hospital	85.00
Mercy Hospital	2,342.20
	$ 7,470.37

* * *

Signed and filed this 26th day of March, 1982.

HELMUT MUELLER
Deputy Industrial Commissioner

HARLEY DEAN BOARDMAN,

Claimant,

vs.

CONLON CONSTRUCTION COMPANY,

Employer,

and

NORTHWESTERN NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Harley Dean Boardman, the claimant, against Conlon Construction Company, his employer, and Northwestern National Insurance Company, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred April 26, 1978. This matter was heard in Dubuque, Iowa on October 2, 1981 and upon the filing of the last evidentiary deposition on December 31, 1981, the record was closed.

A transcript of the proceedings has been provided wherein Harley Dean Boardman, Helen Boardman, Steven Conlon, Paul Hirsch, James Weber and Ross A. Madden, M.D., testified. Defendants' exhibits 1 through 3, being photographs, and defendants' exhibits 4 and 5, being blueprints, were admitted. The evidentiary depositions of Eunice Elias and Ernest O. Theilen, M.D., were introduced together with claimant's exhibits 1 through 16, being medical reports, medical bills and tax returns.

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

Claimant, aged 48, married with one dependent, and a journeyman carpenter began his duties for the defendant in mid April 1978. (Transcript, p. 29, l. 24.)

The union hiring hall in Dubuque sent the claimant to the defendant to assist in the completion of a general repair job at the John Deere Dubuque Works. On April 26, 1978, claimant was admitted to Xavier Hospital in Dubuque, Iowa with complaints of chest pain of several hours duration. Claimant's work activities prior to the onset of chest pains consisted of installing a lean to the roof at a foundry. (Defendants' exhibits 1 through 3; transcript, p. 35, l. 1.) In order to protect the sheet metal roof from crane damage, 200-pound three by twelve green oak planks were bolted over the roof surface. (Transcript, p. 108, l. 13.) Claimant described the Skil saw he used to cut the rough timbers to length as having a seven point five-inch blade and the three-fourth inch drill necessary to create the required bolt holes. Claimant also described the 20 to 25-pound metal cutting arbor blade saw (transcript, p. 39; p. 110, l. 22) and his use thereof in an overhead position necessitating limiting his use to a 15 to 30-minute time span (transcript, p. 40; transcript, p. 70, l. 19.) Claimant began to experience chest pains and was hospitalized that day.

The issue, in light of defendants' refusal to consider the diagnosed myocardial infarction as being caused by claimant's work activity, is whether or not claimant's evidence supports his request for an award.

Claimant called Ernest O. Theilen, M.D., director of the Coronary-Care Unit of the University of Iowa College of Medicine, who after reviewing the transcript of proceedings and all of the medical records, testified that the claimant's isometric activity in operating the metal cutting saw overhead raised his blood pressure very sharply (deposition, p. 14, l. 1.) and further expressed the following medical opinion (deposition, p. 19, l. 7.):

> I do have an opinion. First of all, I think there's no question but what this man had preexisting coronary artery disease. I think it is probable that he was not clinically significant up to the date of his infarct and if he had any symptoms they were minimal and irrelevant in terms of the question at hand. I furthermore believe that it is probable that the unusual physical activities in which he was engaged in on this particular day that these activities were a precipitating factor in his acute myocardial infarction.

Dr. Ross H. Madden, an internist called by the defendants, after reviewing the records, expressed the following medical opinion (transcript, l. 131, l. 21.):

> In reviewing the information, it would appear to me that Mr. Boardman in my opinion had been having chest symptoms or throat symptoms that were compatible with angina, and angina is a descriptive term for pain that is brought on by ischemia of the heart. That ischemia is a consequence of arteriosclerosis or hardening of the arteries that takes many years to develop.

As I have mentioned earlier, angina can be precipitated by many, many activities. Heart attacks occur at any time. Death from arteriosclerotic vascular disease is the leading cause of death in the United States. It strikes people from all walks of life regardless of jobs, levels of activity, and it is my opinion that the occupation was not the cause of the heart attack.

In light of Dr. Theilen's position of prominence in the medical profession, his opinion as to causation is given the greater weight in this decision.

On the issue of work induced heart attacks, the supreme court in *Sondag v. Ferris Hardware*, 220 N.W.2d 903, stated at page 906 as follows:

> [4] It has long been legally recognized that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable. The industrial commissioner so held under facts strikingly similar to those in this case in Rogers v. Lake View Concrete Prod. Co., et al, 29th Biennial Report Iowa Industrial Commissioner, p. 36; see also Miller v. H. S. Holtze Construction Co., et al, 30th Biennial Report Iowa Industrial Commissioner, p. 27. This concept has found application in the following representative cases from other jurisdictions: Aetna Casualty & Surety Company v. Johnson, 278 F.2d 200 (6 Cir. 1960); Southern Stevedoring Co. v. Henderson, 175 F.2d 863 (5 Cir. 1949); Dwyer v. Ford Motor Co., 36 N.J.487, 178 A.2d 161 (1962); Kaufman v. Jewish Memorial Hospital, 18 A.D.2d 726, 234 N.Y.S.2d 456 (1962). See also Jones v. Industrial Commission, supra; Oklahoma Steel Castings Company v. Wilson, supra; Shivers V. Biloxi-Gulfport Daily Herald, supra; 1A Larson's Workmen's Compensation Law §38.64(c), p. 7-145 ("The most obvious relevance of this element [continuing exertion after symptoms] is in showing causal connection between the obligations of the employment and the final injury; for if the workman, for some reason, feels impelled to continue with his duties when, but for these duties, he could and would have gone somewhere to lie down at once, the causal contribution of the employment to the aggravation of the condition is clear.").

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 26, 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 applying the foregoing legal principles to the case at hand, it is concluded that claimant has borne his burden of proof.

It was agreed by all of the medical experts that the claimant was suffering from arthrosclerosis. Dr. Theilen was clear in saying that prior to April 26, 1978 claimant was capable of heavy work. (Deposition, p. 31., l. 1.) Under vigorous cross-examination the following questions and answers were given (deposition, p. 46, ll. 10 to 25.):

A. This is from the diagnosis of symptomatic coronary artery disease. No, the disease has obviously been present a long time before symptoms develop.

Q. And it was present in this particular case to a significant degree, wasn't it?

A. Oh, yes.

Q. He was going to have a heart attack at some point in time in his life?

A. I can't say that. There are some individuals who go lifelong, even though they have — It's like everything else. You have a bell shaped curve, if you will. There is a distribution curve in terms of occurrence of these events so those individuals with the onset of symptoms will infarct quickly or maybe the infarct will be the first symptom. There are those individuals who have symptoms for a number of years and then will have an infarct. And there are others that have severe coronary disease and never infarct. So, when I cannot say that myocardial infarction is an inevitability, it is not. Again, it's entirely possible that the person can go lifelong with coronary artery narrowing without infarction.

Dr. Theilen also testified as follows (deposition, pp. 52 and 53.):

> I think we would say in any patient given this history I would have to say that there is a significant probability that what I would consider to be a very personal experience having tried it, not with a saw but another context that that type of physical activity is a very strong isometric stimulus which could have very well been a stimulating factor at that particular time, that is, I guess. The other side of the question or the other statement that one could make is if you know that that man had significant coronary artery disease and even if you knew that he was symptomatic, it would be very, very imprudent for that man to be doing that particular kind of work, and in fact, if we know that, we strongly advise him not to do something of that sort because of precisely what happened to this man. That type of physical exertion and activity could, and in fact medically probably did cause — Potent isometrics stimuli are very dangerous in anyone who has significant coronary artery narrowing.

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 under consideration and having given the greater weight to the opinion of Dr. Theilen, it is found that claimant's preexisting coronary artery disease was not disabling prior to the onset of the heart attack.

Based upon the medical information provided by claimant's attending physician. C. E. Sinnard, M.D., (claimant's exhibit 2), it is concluded that claimant's healing period ended September 1, 1978.

It is further clear that the claimant has sustained an industrial disability which is defined in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 593, 258 N.W. 899 (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, Id.*, 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 principles to the matter at hand, it is concluded that claimant has sustained an industrial disability of fifty (50) percent of the body as a whole.

Eunice Elias, an employment counselor for Job Services of Iowa for 24 years, testified that in her opinion claimant sustained a 50 percent likelihood of being able to secure an employment position within his limited capabilities. (Deposition, p. 12, 1. 7.)

Claimant, age 48, has been receiving social security disability payments, apparently on an uncontested basis.

Dr. Theilen concluded in his testimony as follows (deposition, p. 41, 1. 2.):

> First of all, I think it is accepted that this man had coronary artery disease. That's a given. Second, I think there is a significant probability that what I interpret as an unusual amount of physical effort on the day of the infarct, effort that had a very strong isometric component was a precipitating factor in his myocardial infarction. That isn't to say that other times of efforts under certain circumstances could have precipitated that. But I think that unusual form of effort might have well been the contributing factor to infarct. Point one. Point two, I believe that on the basis of coronary and geography, on the basis of treadmill testing that's reasonably well established that he has persistent disability which I believe is related to the complete occlusion of the right coronary artery which has deprived the left coronary system of some of the blood flow that it had prior to the occlusion of the right coronary artery. I would further estimate on the basis of the exercise testing and on the basis of the best objective evidence that we can come up with that he has approximately 50 percent disability from my standpoint in terms of the sort of activity that he customarily engaged in.

This claimant appears to lack appropriate motivation in light of his current unemployed status, when taken together with his continuing receipt of social security disability benefits.

It was stipulated that claimant's weekly gross wages were $390. With three deductions claimant's rate of weekly entitlement is $232.07.

WHEREFORE, after having seen and heard 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 on April 26, 1978 claimant sustained a myocardial infarction while engaged in heavy isometric type labor for the defendant employer.

2. That claimant was suffering from a preexisting arteriosclerotic vascular disease.

3. That said myocardial infarction was caused by and connected to claimant's strenuous work activity.

4. That claimant's preexisting condition did not render him disabled in any way nor limit claimant's activities prior to April 26, 1978.

5. That as a result of the aforementioned industrial injury, claimant was unable to perform any acts of gainful employment from April 27, 1978 to September 1, 1978, or a period of eighteen point two hundred eighty-six (18.286) weeks.

6. That the weekly rate of entitlement for the aforementioned healing period is two hundred thirty-two and 07/100 dollars ($232.07).

7. That as a result of the industrial injury in question, claimant has sustained an industrial disability of fifty (50) percent of the body as a whole.

8. That claimant's weekly entitlement for his permanent partial disability is two hundred twenty-seven dollars ($227.00).

THEREFORE, IT IS ORDERED:

That the defendants pay the claimant a healing period of eighteen point two hundred eighty-six (18.286) weeks at a

weekly rate of two hundred thirty-two and 07/100 dollars ($232.07) together with statutory interest from the date due.

It is further ordered that beginning on September 2, 1978 defendants pay the claimant a period of two hundred fifty (250) weeks of permanent partial disability at the weekly rate of two hundred twenty-seven dollars ($227) together with statutory interest from the date due.

That accrued benefits are payable in a lump sum.

That costs as provided in Iowa Industrial Commissioner Rule 500—4.33 are charged to the defendants and shall include an expert witness fee of one hundred fifty dollars ($150) payable to Ernest O. Theilen, M.D., and fifty dollars ($50) payable to Eunice Elias as contemplated by Section 622.72, Code of Iowa.

That defendants are ordered to file a final report within twenty (20) days of the last payment.

* * *

Signed and filed this 18th day of March, 1982.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

ROBERT E. BOYCE,

Claimant,

vs.

CONSUMERS SUPPLY DISTRIBUTING COMPANY,

Employer,

and

AETNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed May 21, 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 decision wherein he was awarded certain benefits but denied further benefits for healing period and certain expenses under §85.27.

On appeal the record consists of the transcript, the deposition of claimant, claimant's exhibits A and B, defendants' exhibits 1, 2, 4, 5, 6, 8, 10, and 17, and joint exhibits AA and BB.

The result will be the same as that reached by the hearing deputy.

Claimant injured his back on July 10, 1978 while at work. He did not return to work and was treated by several doctors for a low back injury. Claimant contends that his healing period should be longer than awarded and that he should be paid certain expenses, mentioned above. The statements of issues on appeal, as required by rule 500—4.28(2), are stated in claimant's brief: "1. Deputy Commissioner should have sustained Claimant's motion to reopen the record to determine when the healing period ended. 2. That all medical expenses incurred by the Claimant in the treatment of his injury should have been allowed in total and charged against Employer-Insurance Carrier."

With respect to the matter of the healing period, the transcript states:

> THE COMMISSIONER: Okay. Time off work, I assume, is in issue. Time off work because of the — Mr. Deck, is that at issue?
>
> MR. DECK [Claimant's attorney]: An issue, yes.
>
> THE COMMISSIONER: Oh, all right. As I understand it, the issues to be heard today are whether, one, there is a causal relationship between the injury and the disability, and whether the claimant is entitled to benefits for healing and permanent partial disability; and also the applicability of Section 85.27, which deals with authorized medical care.
>
> MR. DECK: I don't know about healing, because that's been paid, I think. But anyway, I think the issue mainly is the matter of how much permanent disability has resulted from the injury.
>
> THE COMMISSIONER: All right. You may proceed. (Tr., 4-5.)

Claimant thus did not offer any proof as to the extent of the healing period. After the hearing, claimant filed a motion to reopen the record stating in part as follows:

> 1. That at the time of the hearing, the Deputy Commissioner inquired as to whether or not there was a dispute as to the healing and/or temporary disability in regard to this review-reopening proceeding; that Claimant's attorney advised that there did not appear to be a dispute; that the reason for Claimant's attorney's statement to this effect was on the belief that the Carrier was accepting the disability rating of Dr. Margules as rendered in his report of August 13, 1979 (an exhibit in the proceeding), and was paying temporary total and/or healing period through that date.

In his decision, the hearing deputy refused to allow the motion, terming the claimant's action as a stipulation as to the payment of healing period. Although the language quoted from the transcript may not amount to a stipulation, it is clear that claimant did not present evidence as to the healing period, even after the hearing deputy suggested that such should be an issue (and was stated to be an issue in the pre-hearing order). At any rate, claimant did not present evidence on the issue. One would agree, then, with the hearing deputy that the record should remain closed to further evidence on the issue of healing period.

Section 85.27, the fourth unnumbered paragraph, states 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, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately.

Claimant must show that the treatment sought was either of an emergency nature or was authorized.

As discussed below, the hearing deputy did allow payment for certain emergency measures. The letter of November 6, 1978 from the insurance company to claimant's attorney outlines the limits of claimant's authority to be treated. Nevertheless, claimant incurred certain expenses for treatment, principally, by Horst G. Blume, M.D.

It is claimant's testimony (Tr., 35, 36, 52) that Walter W. Eckman, M.D., referred claimant back to Dr. Blume, and that, later, Maurice P. Margules, M.D., did the same thing. However one reaches the inference that the doctors' reports are clearer than the claimant's understanding. That is, it is not logical that Dr. Eckman would say (in his report of November 28, 1978), "I therefore do not think that it would be in his best interest to undergo a prolonged period of recurring medical treatments" and then proceed to refer claimant back to Dr. Blume. Likewise, Dr. Margules in his report of March 28, 1979 said that he had "no specific treatment to offer." Again, one infers, that at the very least, Dr. Margules would have specifically mentioned it if he recommended claimant return to Dr. Blume's care. In light of the foregoing, one can only conclude that any treatment outside the confines of the letter of March 28, 1979, except for the examination by Dr. Margules, was unauthorized.

There were certain undisputed findings and conclusions by the hearing deputy, and these findings and conclusions are adopted here. Claimant's rating for industrial disability is 30% of the body as a whole, or 150 weeks. The proper rate of weekly compensation is $161.70. Certain medical and hospital expenses incurred in October and November 1978 were found to be of an emergency nature and are therefore compensable.

Findings of Fact

1. Claimant was hurt at work on July 10, 1978. (Tr., 23.)

2. He was first treated by Dr. Cunningham. (Tr., 26.)

3. He was instructed by the insurance company by letter dated October 2, 1978, because of which he commenced treatment with Dr. Blenderman. (Tr., 26, 29; defendants' exhibit 2.)

4. Claimant has never requested to see another doctor. (Tr., 29.)

5. Claimant was examined by Dr. Blenderman on October 24, 1978. (Tr., 29.)

6. Dr. Blenderman did not treat claimant. (Tr., 30.)

7. Claimant consulted an attorney who telephoned Brandi Steffes at the insurance company, but no treatment resulted from that conversation. (Tr., 31-32.)

8. Claimant re-consulted Dr. Cunningham who hospitalized claimant from October 28 to November 4, 1978. (Tr., 32.)

9. Dr. Blume acted as consultant during that hospitalization. (Tr., 32.)

10. Claimant was instructed by the insurance company to see Dr. Eckman if he did not exercise his choice to select from a list of other physicians. (Tr., 33; defendants' exhibit 4, letter of November 6, 1978.)

11. Claimant was examined by Dr. Eckman on November 28, 1978. (Tr., 34; exhibit BB, report of October 26, 1978.)

12. At the insistance of the insurance company, claimant was examined by Dr. Margules of Council Bluffs. (Tr., 35-36; exhibit BB, report of March 28, 1979.)

13. Claimant was hospitalized by Dr. Blume, given a myelogram, and "nerve blocks." (Tr., 36-37.)

14. Claimant then returned on August 11, 1979 to Dr. Margules for an examination. (Tr., 37; exhibit BB, report of August 13, 1979.)

15. Claimant was treated intermittently by Dr. Blume from October 28, 1978 to March 28, 1979. (Exhibit AA.)

16. Claimant was treated by Dr. Jan Kakolewski in July and August 1978 and on July 18, 1979. (Exhibit AA.)

17. After the letter of November 6, 1978 from the insurance company to claimant's attorney, claimant was authorized to be examined and treated only by Dr. Eckman, Dr. Margules, and Dr. Blenderman.

Conclusions of Law

On July 10, 1978, claimant sustained an injury which arose out of and in the course of his employment.

Claimant is not entitled to any further healing period disability.

Claimant's disability to the body as a whole as a result of his loss of earning capacity is thirty percent (30%) for industrial purposes.

After November 6, 1978, claimant was authorized only to be examined and treated by Dr. Eckman or Dr. Margules or by Dr. Blenderman.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of one hundred fifty (150) weeks at the rate of one hundred sixty-one and 70/100 dollars ($161.70) per week for the permanent disability, to commence at the end of the healing period, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay the following medical and hospital expenses:

Horst G. Blume, M.D.	$ 185.00
Jan Kakolewski, M.D.	331.00
Cecil G. Cunningham, D.O.	150.00
St. Luke's Medical Center	1,409.70

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

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

Costs are taxed to defendants.

* * *

Signed and filed at Des Moines, Iowa this 22nd day of September, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

PHYLLIS BRAY,

Claimant,

vs.

QUALITY PRODUCTS, INC.,

Employer,

and

HAWKEYE SECURITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed and defendants have cross-appealed from a proposed arbitration and review-reopening decision filed August 5, 1981 wherein claimant was awarded 30 percent permanent partial industrial disability, healing period benefits, plus medical expenses for a shoulder injury occurring on April 20, 1980. Claimant was denied additional compensation benefits relating to a cervical injury for failure to prove a causal connection between his alleged disability and the injury which occurred on April 20, 1980.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Lawrence Bray, Lowell Smith, Lee Keith, Darlene Ferch, Jim Wagner and Dale Mitchell; claimant's exhibits A through Z, A-1 through P-1; duplicates of claimant's exhibit A and C; defendants' exhibits 1 through 4; the depositions of Herbert Gude, M.D., John A. Grant, M.D., Michael Kitchell, M.D., Sun Hwan Chi, M.D., and John Walker, M.D.; a bill from Midwest Pain Control Center, Inc.; and the briefs and exceptions of all parties on appeal.

The well prepared appeal briefs of the parties point out the extensive and complex nature of the medical evidence in this matter. It is without dispute that the injury of April 20, 1980 arose out of and in the course of claimant's employment.

The primary dispute on appeal is whether the injury of April 20, 1980, is causally related to claimant's alleged impairment in the cervical area. The deputy's decision copiously cites medical evidence in the record in an effort to detail the extent and cause of claimant's complaints. A review of the medical evidence as to the cervical injury is necessitated.

Claimant relies heavily upon the assessments of John Walker, M.D. Dr. Walker, an orthopedic surgeon, first examined claimant's cervical area on August 18, 1980. Dr. Walker subsequently surgically excised two cervical discs in the C5-C6, C6-C7 area. Dr. Walker opined that claimant's pain and discomfort in her shoulder and cervical area, including headache pain, was due to a simultaneous injury occurring on April 20, 1980. (Walker deposition, page 30.)

Defendants, in their brief on appeal, place great emphasis upon the opinions of John A. Grant, M.D., and Michael Kitchell, M.D. Defendants use these opinions to raise two different theories as to the cause of claimant's cervical complaints.

Claimant testified to having suffered a stroke in 1971 which temporarily paralyzed her left side. Defendants point to the opinions of Drs. Grant and Kitchell in contending claimant may now be suffering from a series of recent minor strokes rather than the direct injury occurring on April 20, 1980. Defendants go on to explain that claimant's cervical disc protrusion corrected by surgery was caused by a preexisting degenerative disease in the cervical spine.

Dr. Kitchell, a neurologist, performed a neurological examination of the claimant which included a physical examination, an electroencephalogram, and a computerized tomographic brain scan. A review of Dr. Kitchell's testimony in deposition shows that his examination was directed toward finding neurological abnormalities in claimant's brain caused by prior strokes. Dr. Kitchell concluded that the neurologic abnormalities he found were not caused by a physical injury to the arm or shoulder (Kitchell deposition, page 11), but more likely related to a recent series of minor strokes. (Kitchell deposition, page 13.) However, Dr. Kitchell's examination and testing of claimant was never directed at the cervical area itself.

Dr. Grant, an orthopedic surgeon, examined the claimant and could not express an opinion as to whether claimant's cervical complaints could be attributed to a cervical disc protrusion. Dr. Grant admitted, however, that his examination was limited to the shoulder. (Grant deposition, page 11.) Dr. Grant further stated that any conclusions as the causes of neurological abnormalities were out of his area of expertise and were arrived at through Dr. Kitchell's findings.

Claimant seeks to counter defendants' "stroke theory" through the testimony of Sun Hwan Chi, M.D. Dr. Chi, a diagnostic radiologist, reviewed the reports of Drs. Grant and Kitchell, and testified regarding a computerized tomography performed on the claimant. From this review, Dr. Chi concluded that claimant had not received any recent strokes and that her symptoms were more compatible with cervical disc problems. Dr. Chi's assessments were made without the benefits of a history or clinical examination.

Herbert Gude, M.D., claimant's family physician, examined claimant after the injury of April 20, 1980. Dr. Gude noted that claimant had a history of hypertension, had suffered a stroke in 1971 and a cerebral contusion in 1973. Dr. Gude related most of claimant's problems to the incident involving the shoulder injury of April 20, 1980. Dr. Gude did not specifically examine claimant's cervical area and referred claimant for further examination.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 20, 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).

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and the claimant's employment. For an award to be sustained, the causal connection must be not only possible, but fairly probable. *Nellis v. Quealy*, 237 Iowa 507, 21 N.W.2d 587 (1946). Questions of causal connection are essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital, supra.* The evidence must be based on more than mere speculation, conjecture and surmise. *Burt v. John Deere Waterloo Tractor Works, supra.* The opinions of experts need not be couched in definite, positive, or unequivocal language. *Dickinson v. Mailliard*, 175 N.W.2d 588 (Iowa 1970). An expert's opinion based on an incomplete history is not necessarily binding on the commissioner but must be weighed with other facts and circumstances. *Musselman v. Central Telephone Company*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967). Expert medical evidence must be considered with other evidence introduced bearing on causal connection. *Rose v. John Deere Ottumwa Works*, 247 Iowa 910, 76 N.W.2d 756 (1956).

Claimant and defendants discuss at length the issue of whether a stroke could have caused claimant's difficulties in the cervical area. Defendants have thus far succeeded in the creation of a false issue. The task that faces the claimant is to present sufficient evidence to show that difficulties in the cervical area were caused by the injury of April 20, 1980 and not whether a stroke was less likely to be responsible.

The testimony of Dr. Walker constitutes the only medical evidence in the record to evaluate the causal connection between claimant's cervical complaints and the injury of April 20, 1980 based directly on clinical examination of the cervical area. It is noteworthy that it was Dr. Walker who performed surgery on claimant's cervical spine and monitored claimant's recuperation from this surgery. Dr. Walker concludes that claimant's cervical injury was caused by the incident of April 20, 1980. This conclusion is bolstered by the testimony of Dr. Chi.

While the foundation for Dr. Walker's opinions may arguably be open to scrutiny, the fact that he was claimant's surgeon and that a full examination was made of claimant's cervical area serves to establish a basis on which to find a causal relationship between the cervical injury and the incident of April 20, 1980. While the testimony of Drs. Grant and Kitchell are based upon extensive examination of the claimant, their opinions are not based upon direct examination of the cervical area. Testimony as to examinations of the brain and shoulder fail to rebut medical evidence with regard to examination and treatment of the cervical spine. See *McDowell v. Town of Clarksville*, 241 N.W.2d 904 (Iowa 1976). Inasmuch as the testimony of Dr. Walker is not directly refuted, it is concluded that sufficient evidence of causal relationship exists between the disability alleged by the claimant and the injury of April 20, 1980.

Findings of Fact

1. That claimant sustained an injury arising out of and in the course of her employment on April 20, 1980.

2. The claimant's cervical difficulties were due to the injury of April 20, 1980.

WHEREFORE, it is found that claimant has sustained her burden of proof that a causal relationship exists between her cervical condition and an injury sustained on April 20, 1980 arising out of and in the course of her employment.

THEREFORE, the proposed decision filed August 5, 1981 is hereby reversed and this matter remanded to the hearing deputy in order to determine expenses attributable to the cervical injuries and the healing period and extent of industrial disability attributable to the combination of the cervical and shoulder injuries.

. . .

Signed and filed this 13th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RICHARD D. BREVIK,

Claimant,

vs.

HORNE CONSTRUCTION COMPANY,

Employer,

and

ALLIED MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

INTRODUCTION

This is a proceeding in review-reopening brought by Richard D. Brevik, the claimant, against his employer, Horne Construction Company, and the insurance carrier, Allied Mutual Insurance Company, to recover additional benefits under the Iowa Workmen's Compensation Act as a result of an injury he sustained on August 28, 1972.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Buena Vista County Courthouse in Storm Lake, Iowa on April 27, 1982. The record was considered fully submitted on May 11, 1982.

An examination of the industrial commissioner's file indicates that a first report of injury was filed September 20, 1972. A memorandum of agreement was filed September 22, 1972 and reflects an applicable compensation rate of $63.00 per week. An initial review-reopening proceeding was commenced in February 1977. This proceeding culminated in an agreement for settlement which was approved on September 12, 1977. Under the terms of the agreement for settlement, the claimant received workers' compensation benefits for a permanent disability of 22.5 percent for industrial purposes. The agreement as well as a subsequent form 5 filed with the commissioner reflects that the claimant has been compensated to the extent of 27.5 percent industrial disability based upon the injury of August 28, 1972.

The record in this case consists of the testimony of the claimant, Judy Brevik and Robert Brevik and claimant's exhibits 1, 3, 4, 5, 6, 7 and 8. Defendants' objection to the report of Dr. Johnson as contained in exhibit 4 is sustained. That report was not exchanged prior to the time of hearing.

Issues

The issues to be resolved are whether the claimant has sustained a change in condition since the approval of the agreement of settlement and, if so, whether or not these changes are causally related to the work injury of August 28, 1972. The extent of his disability is also an issue.

Review of the Evidence

At the commencement of hearing the parties stipulated that the applicable rate in the event of an award is $63.00 per week. It was also stipulated that the medical charges are fair and reasonable and that the claimant was off work while in the hospital. The dates in question are reflected in the exhibits.

Claimant, Richard Brevik, testified generally to the facts of the 1972 work injury. He confirmed the execution of the agreement for settlement in 1977. He related that he sees his treating physician, Dr. Van Demark, M.D., approximately every three months. Claimant was hospitalized five days in February 1980 at the direction of Dr. Van Demark's partner, Mr. Johnson. The hospitalization was for continuing complaints of back pain.

Mr. Brevik stated that in his opinion, his back causes more pain now then at the time of the agreement. Long periods of sitting and standing cause increased discomfort. He remains on a 50-pound weight lifting restriction and, according to his physician, has been advised to seek light work if he can. He is now a setup man for McQuagh Perfex Company, and in 1977 held a job as a welding man for that company. He described the welding job as being a heavier form of work.

On cross-examination he revealed that after the injury in question, he returned to work for the defendant. However, because of an apprehension about heights, he changed jobs and began working for McQuagh Perfex Company. He has held a variety of jobs for McQuagh including a machine subassembler, welding man and setup man. Job changes at McQuagh are based on a bidding process and claimant utilized this procedure to advance at McQuagh. Although claimant changed positions at his present employer, since the agreement for settlement, this change has not resulted in a palpable loss of wages. He earns the same now as he did in his prior job.

The claimant's wife, Judy Brevik, testified on his behalf. She described the claimant as being less physically active today then he was two years ago and that he registers more complaints.

Robert Brevik, the claimant's brother, also testified on his behalf and indicates that over the last two years the claimant, in his opinion, has become more physically limited. He also complains of continuing pain. On cross-examination he indicated however, that it is hard to say that he complains more than he did prior to 1977.

On rebuttal, the claimant indicated that he was off work for three weeks as a result of the February 1980 hospitalization.

Robert Eugene Van Demark, M.D., testified by deposition that his last examination of the claimant occurred on February 7, 1982. He confirmed that in March 1977 he expressed the professional opinion that the claimant had been disabled to the extent of 25 percent of the body as a whole. When asked whether the claimant has had a change in condition since that date, the physician indicated that no change had occurred. His opinion as to the extent of disability remains the same. The claimant's condition is described as being chronic in nature; that is, sometimes better and sometimes worse, depending on how much stress is placed on him and how much bending is required. The physician also confirmed that there has been no particular change in history

since 1977 and that the complaints remain essentially the same today. With respect to limitations, this physician testified that the claimant should avoid heavy lifting and bending over and stooping. The physician also recommended that claimant avoid lifting over fifty pounds. In terms of the medical explanation for the cause of the claimant's present complaints, the physician indicated that these are the "residuals of a compression fracture of the first and second lumbar and a protruded right L-4 and 5 disk."

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 28, 1972 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 increase in industrial disability may occur without a change in physical condition, a change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under section 85.26(2) and 86.14(2). See *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980). See also *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348.

On a review-reopening hearing before the deputy commissioner claimant has the burden of establishing by a preponderance of the evidence that he suffered an impairment or lessening of earning capacity as a proximate result of his original injury, subsequent to the date of the award or agreement for compensation under review, which entitles him to additional compensation. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 457 (Iowa 1969).

Analysis

The claimant's treating physician, Dr. Van Demark, expressed the opinion that the claimant has not experienced a change in physical condition since the date of the agreement for settlement. Although the claimant complains of an increase in pain from an objective medical standpoint, there has not, according to the expert, been an increase in physical impairment.

The claimant, who has changed jobs internally since the agreement for settlement, testified that he has not had a decrease in compensation. He has, in fact, been able to bid into the new position. Thus, he has not had a palpable loss of earning as outlined in the aforecited *McSpadden* and *Blacksmith* cases.

The record does establish, however, that the claimant was hospitalized for the period February 4, 1980 through February 9, 1980 at the McKennan Hospital in South Dakota. This hospital according to the medical records and other data in the file, was at the direction of either Dr. Van Demark or his associate, Dr. Johnson. The cause of the hospitalization was the claimant's complaint of continuing back pain.

The claimant testified that he was off three weeks as a result of this hospitalization, and this testimony is uncontroverted. The claimant is found to be credible in his testimony.

The medical records indicate that the hospitalization was causally related to the claimant's back situation which, according to the testimony, had its inception in the incident of August 28, 1972.

It, therefore, appears from the record that the claimant was in a healing period under §85.34(1), Code of Iowa 1972, for a three week period commencing February 4, 1980. This is healing period as opposed to temporary total disability because the initial injury caused permanent partial disability.

Findings of Fact

That the claimant has not experienced a change in his physical condition between the date of approval of the agreement for settlement and the date of hearing in this case.

That the claimant was hospitalized on February 4, 1980 through February 9, 1980 and, as a result, was off work a total of three weeks.

That this period of time off work was causally related to the work injury of August 28, 1972.

That the claimant was in a healing period during this three (3) week period.

Conclusions of Law

That the claimant was in a healing period for a three (3) week period commencing February 4, 1980 as a result of the work related incident.

That the claimant has failed to sustain his burden of proof and has not established any change in condition since the date of the execution of the agreement for settlement.

Order

THEREFORE, IT IS ORDERED:

That the defendants shall pay the claimant healing period benefits for a period of three (3) weeks at the stipulated rate of sixty-three dollars ($63.00) per week.

That interest shall accrue pursuant to Section 85.30.

That the costs of this action are taxed to the defendants pursuant to Industrial Commissioner Rule 500—4.33.

That defendants shall pay unto claimant the following medical expenses:

McKennan Hospital	$ 1,024.00
Medical X-ray Center, P.C.	25.50

That the defendants are given credit for all medical bills previously paid. Defendants recite in their brief that several bills submitted at the hearing have in fact been paid by them.

That all accrued benefits shall be paid to claimant in a lump sum.

That defendants shall file a final report upon payment of this award.

. . .

Signed and filed this 21st day of May, 1982.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

WILLIAM BUCKHOLTZ,

Claimant,

vs.

IOWA MEAT PROCESSORS,

Employer,

and

NORTHWEST NATIONAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Ruling

Now on this day the matter of claimant's application for adjudication of law point and defendants' response thereto comes on for determination.

On February 10, 1982, claimant filed an application in review-reopening. That petition shows earnings of $9.52 an hour for weekly earnings of $525 and states the dispute as: "Company have [sic] no credit for overtime hours in computing compensation rate and company paid compensation for only 9 days with 10 owing." The same hourly rate is shown on the first report of injury; however, the total weekly wage is listed at $342.72. Defendant's answer admits the hourly wage as $9.52; however, it denies the total earnings of $525. There is also a denial as to the matter in dispute.

On March 3, 1982, claimant filed an application for adjudication of law point. That application states "[t]hat the only issue in the case is the manner of computing average wages by the insurance carrier." Other allegations are also made in the application. On March 10, 1982 defendants filed a response to that application denying the allegation in the claimant's application with the exception of one paragraph and further alleging that "there are material facts in dispute as to the basis of compensation to be used in computing or determining the claimant's weekly earnings under Section 85.36 of the Code of Iowa to arrive at the applicable weekly rate of compensation for temporary total, healing period, or permanent partial disability, in the event it is found the claimant is entitled to some or all of said benefits, and for this reason the issue sought to be determined by separate adjudication of law should be submitted to a hearing on the merits...."

Industrial Commissioner's Rule 500—4.35 provides for the application of the Iowa Rules of Civil Procedure in contested case proceedings before the commissioner unless those rules are obviously inapplicable or in conflict with chapters 85, 85A, 85B, 86, 87 or 17A or the commissioner's rules. Iowa Rule of Civil Procedure 105 is applicable in this matter and provides:

> The Court may in its discretion, and must on application of either party, made after issues joined and before trail, separately hear and determine any points of law raised in any pleadings which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the points so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interloculatory for purpose of appeal.

The opinions of the Iowa Supreme Court have stated consistently that "[a]n evidentiary hearing is not contemplated by rule 105, R.C.P. It is a vehicle for pretrial hearing and determination only of uncontroverted pleaded issues raising points of law and not for resolving factual disputes." *Norland v. Mason City*, 199 N.W.2d 316, 318 (Iowa 1972); *Rasmussen v. Nebraska National Life Insurance Co.*, 170 N.W.2d 370, 373 (Iowa 1969). Opinions are also in accord in stating that "[n]o evidence may be taken to support or resist the motion and no facts outside the pleadings may be considered." *IMT Insurance Co. v. Myer*, 283 N.W.2d 316, 318 (Iowa 1979); *Woodburn v. Northwestern Bell Co.*, 275 N.W.2d 403, 406 (Iowa 1979). The decision in *Reynolds v. Nowtny*, 213 N.W.2d 648, 651 (Iowa 1973) makes it clear that it is pleadings only which are considered. It states: "Perhaps we should mention the parties advert to the 'record' in this case, apparently referring to professional statements of plaintiffs' original counsel and an affidavit of the sheriff. However, the 'record' can consist only of the pleadings." The tenor of a 105 motion is set out in the opinion in *Anderson Construction Co. v. National Bank of Des Moines*, 262 N.W.2d 563, 566 (Iowa 1978) which says: "But parties seeking a favorable ruling on rule 105 motions not infrequently assert that the necessary facts are undisputed, when the pleadings show they are not undisputed. The ruling then should not be on the merits of the motion on the basis of the hypothetical facts, but rather to deny the motion as inappropriate for one of undisputed facts essential to disposition of the law points."

On reviewing the pleadings in this matter the undersigned finds the facts are not undisputed. Therefore claimant's motion must be denied.

THEREFORE, it is ordered:

That claimant's application for adjudication of law point is hereby denied.

* * *

Signed and filed this 23rd day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

EDNA BURCH,

Claimant,

vs.

ROBERT OHNMACHT,

Employer,
Defendant.

Declaratory Ruling

On June 1, 1981, claimant filed her petition for declaratory ruling:

1.

That the Petitioner is Edna C. Burch whose address is 1111 West Valley Street, Shenandoah, Iowa.

2.

That the factual situation surrounding this Petition is as follows:

a. The Claimant's spouse, Roland Burch, was killed out of and in the course of his employment with the above employer on or about February 6, 1978.

b. That the Claimant has been awarded a weekly benefit on account of the death of Roland Burch of $128.81 per week.

c. That the Claimant was age 58 at the time of the work related death.

d. That the decedent and the Claimant had one minor daughter at the time of decendent's death who has now attained age 20 and who is employed on a full-time basis.

e. That all weekly benefits owed to the Claimant from and after February 6, 1978 to the present are paid in full.

3.

That the rules, statutes or orders applicable to the question presented herein are as follows:

a. Sections 85.45 and 85.47, Code of Iowa, 1981;

b. Iowa Administrative Procedure Act, 500—6.2 through 6.5, including tables of life expectancy and remarriage probability as well as 5% discount table;

c. Other decisions, orders and documents in file number 16884, office of the Iowa Industrial Commissioner.

4.

That the Petitioner requests a ruling on the following question:

a. Whether upon appoval of a full commutation of all remaining benefits for the above claimant and in using the table of life expectancy and remarriage probability the employer would be allowed credit for weekly benefits paid to the date of commutation.

b. Whether if credit is allowable to the employer the claimant should be allowed to base her rate upon the life expectancy and remarriage probability table amount corresponding to a Petition filed within the first anniversary after the date of death of decedent.

5.

That the Claimant suggests to the Commissioner that the employer should not be allowed credit for amounts of weekly compensation paid to the date any commutation is ordered. That it is the belief of the Claimant that the table of life expectancy and remarriage probability is intended to be prospective in application, as in use of the table persons are required to compute the commuted benefit based upon weeks corresponding to future probabilities. That this arrangement is distinguishable from a commutation of benefits for injury to an unscheduled member where a specific number of weeks of compensation is payable. That any commutation for this Claimant would be based only upon the remainder of her life expectancy and remarriage probability and that past benefits paid would have no relevancy to the remainder of benefits payable and that therefore no credit should be allowed.

Since this is a declaratory ruling, the facts stated above are hereby adopted as the findings of fact in this ruling. In the usual case, a certain number of weeks is owed from the date of injury or from the end of the healing period. Determination of the remainder of weeks owed in the future is a simple matter of subtracting the amounts paid from the total entitlement. Thus, if a claimant were entitled to 10 weeks healing period and 50 weeks permanent partial disability, and had been paid correctly to date a total of 25 weeks, his future entitlement would be 35 weeks. However, in a case such as the present one, the future entitlement is determined from a table, not computed from the overall total entitlement basis. The future entitlement, obviously, changes from year to year when a table is used.

Credit is allowed in that claimant cannot recover more than once for the same compensation period. Claimant is right, however, then the amount owed in the future should be computed according to the life expectancy and remarriage probability table. *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964). In the instant case, the

employee was killed on February 6, 1978. The fourth year since the injury began February 6, 1981. To find the expected duration of life and remarriage in weeks, one locates in *first column* the surviving spouse's age *at the time of the death* and goes across to the column headed "Through 4th anniversary" to find the number of weeks future entitlement. Since claimant was 58 at the time of the employee's death the future remainder is 932.12 weeks.

Conclusions of Law

1. That the commuted benefits can be determined by use of the table in IAC Rule 500—6.3(3).

2. That the appropriate factor for use in this case at the time of the original hearing was for age 58 through the fourth anniversary or 932.12 weeks.

3. That presumably benefits have continued on a weekly basis and if so the number of weeks of benefits paid since February 6, 1981 (date of the third anniversary of decedent's demise) should be multiplied by .702115 and deducted from 932.12 to arrive at the present expected duration of life expectancy and remarriage. [The factor of .702115 is the difference between the expected duration for "through the fourth anniversary" (932.12) and "through the fifth anniversary" (895.61) or 36.51 divided by 52.]

That if benefits have not been continued then interest shall be paid according to Code section 85.30 on any past due amounts.

4. That the number of weeks of expectancy be converted to present value by use of the table in IAC Rule 500—6.3(2).

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

EVELYN BURKE,

Claimant,

vs.

JANE LAMB MEMORIAL HOSPITAL,

Employer,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 16, 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. Also, claimant filed a "cross-appeal".

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1-11, inclusive; defendants' exhibits A, B, and C (exhibit A was a deposition of Elizabeth Boysen and exhibit B was a deposition of Jay Paul Ginther, M.D.).

The result reached in this final agency decision will be identical to that reached by the hearing deputy. The findings of fact of the hearing deputy have been revised.

On appeal, the employer and insurance carrier claim that a non-work related automobile accident constituted an intervening cause subsequent to the original injury, thereby disqualifying claimant from further compensation benefits and that claimant's emotional problems are the cause of her disability and are not connected to the injury. Also on appeal, claimant contends that her problems are physical, not mental, as found by the hearing deputy.

The overall problem in the case is that claimant sustained a cervical injury in April of 1980 which should have resolved itself rather soon; however, by the time of the review-reopening hearing in September of 1981, claimant was still having problems. The hearing deputy's summary of the evidence and recitation of authority is more than adequate and need not be repeated. Briefly, claimant hurt her neck at work on April 4, 1980, had another episode in May 1980, and was again injured in a non-work related automobile accident in September of 1980. The record sufficiently shows that the work incidents were the precipitating factors behind her cervical problems and that the automobile accident was only one acute episode.

The remarkable feature of claimant's progress, or lack of it, is that her symptoms, which should have abated, have not ceased. Although the record shows a possibility that some of her problem is occasioned by a desire for a secondary gain, the presence of her objective symptoms shows a physical dimension to her condition. She has a physical disorder which has been heightened by her emotions, something in the nature of a psychosomatic syndrome. The physical problem should have been resolved in a short time, but claimant's emotional or psychological processes operated to prevent recovery. Of course, since Drs. Ginther and Grey M. Woodman traced the origin of claimant's problems to the injury, the causal factor is established. On the whole, one has no problems with the hearing deputy's conclusion that claimant's current inability to work stems from her psychological state.

Findings of Fact

1. That on April 4, 1980, claimant was at the hospital helping to restrain a patient when she strained muscles in her shoulder and neck.

2. That claimant attempted a return to work which was unsuccessful.

3. That on May 7, 1980 claimant returned to light duty.

4. That in the week following May 7, 1980 she injured her neck and lower back while repositioning a patient at work. (Claimant's exhibit 2; Tr., pp. 17-18; Ginther, 7.)

5. That claimant has not returned to work since that time.

6. That claimant resigned her position with defendant employer to move to Mississippi.

7. That claimant has been treated by various modalities and seen by a number of physicians.

8. That claimant is thirty-one years of age.

9. That claimant has a high school diploma, a license in practical nursing, training as a fingerprint technician, and several community college courses.

10. That claimant has work experience as a waitress, fingerprint technician, motel receptionist, hostess/cashier, and nurse.

11. That claimant was involved in an automobile accident on or about September 23, 1980. (Ginther, 13-15; Tr. 38)

12. Claimant's condition which resulted from the injury was a chronic cervical strain. (Ginther, 29)

13. Claimant's condition is one which only rarely becomes permanent. (Ginther, 30)

14. Claimant is capable of returning to work from a physical standpoint. (Claimant's exhibit 5)

15. Claimant is affected by psychological factors. (Claimant's exhibit 6)

16. Claimant's emotional problems are related to her industrial injury. (Claimant's exhibits 6, 7)

There was no appeal from the amount of the weekly compensation rate used by the deputy.

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of her employment on April 4, 1980 causing continuing temporary total disability.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of one hundred ten and 91/100 dollars ($110.91) per week for a temporary total disability until such time as that disability is ended, accrued payments to be made in a lump sum together with statutory interest and credit for prior weekly benefits theretofore made.

Costs are taxed against defendants.

Defendants are ordered to file a final report upon completion of payments.

* * *

Signed and filed at Des Moines, Iowa this 10th day of February, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

LEONARD BURMEISTER,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant has appealed from a proposed review-reopening decision in which it was determined that claimant was thirty-five percent industrially disabled and that claimant was entitled to a weekly rate of compensation of $132.11.

The record on appeal consists of the testimony of the claimant; claimant's witnesses Richard M. Rosendahl and Ray Sullivan; claimant's wife, Doris Burmeister; claimant's exhibit 1, the payroll of the claimant from July 17, 1976 through October 9, 1976; claimant's exhibit 2, and abstract of the testimony of C. R. Wilson, M.D.; claimant's exhibit 3, a list of charges incurred by claimant from the Fort Dodge Medical Center; defendant's exhibit 1, a May 2, 1979 letter from S. V. Nair, M.D. with accompanying laboratory data; defendant's exhibits 2 through 6, which are claimant's tax records from 1976 to 1980 respectively; and the depositions of George H. Bedell, M.D., and Paul Steinhauer, D.O.

This case has a long history. Claimant filed a petition for arbitration on December 30, 1976, alleging he contracted acute tracheobronchitis as the result of his employment at the Iowa Beef Processors plant in Fort Dodge, Iowa. On February 2, 1978, a deputy industrial commissioner found the claimant sustained a permanent industrial injury arising out of and in the course of his employment activities when he inhaled droplets of sodium hydroxide which caused caustic damage to his lungs. (Arbitration decision, page 8.) On appeal by the employer, the commissioner modified the deputy's decision by holding that while there was evidence that the claimant may be incapacitated for a prolonged period, the evidence was insufficient to support a finding that permanency would result and awarded the claimant temporary total disability benefits. (Appeal decision, page 2.)

On April 6, 1979, defendant petitioned for judical review by the district court. Thereafter, on May 15, 1979, defendant filed a review-reopening petition seeking a determination that claimant's temporary disability had ended. Claimant's motion to stay the review-reopening petition pending resolution of defendant's appeal was granted.

On October 31, 1979, the district court ruled that there was substantial evidence in the record to support the commissioner's decision. Defendant's appeal to the Iowa Supreme Court on November 8, 1979, was transferred to the court of appeals which affirmed the district court's decision. Defendant's application to the supreme court for further review was denied on January 30, 1981.

The review-reopening proceedings were reactivated and a hearing was held on June 15, 1981. At the hearing the defendant made a general objection to any question of pemanency. The deputy considered permanency and determined the claimant sustained a 35 percent industrial disability.

The issues on appeal are:

(1) Whether the deputy erred in finding a 35 percent industrial disability? The claimant argues his condition should have been reevaluated at a 100 percent industrial disability rating. On the other hand the defendant contends that permanent disability was not a matter for determination because the sole purpose of the review-reopening hearing brought by the defendant was to determine the length of claimant's temporary disability.

(2) Whether the commissioner, in determination of a claimant's disability rating, should take into consideration a disability rating received by a fellow employee who sustained the same type of industrial injury under similar environmental conditions?

(3) Whether the deputy erred in computation of claimant's weekly compensation rate?

Claimant, at the time of his injury was 54 years old, and 59 years old at the time of the review-reopening hearing. (Transcript, page 8.) He has a high school education, however, he has not received any specialized training in any occupation except for unskilled factory labor and farming. (Transcript, pages 14-15.) Claimant began working for the defendant starting in 1961 at age 40 and was employed for 15 years until his injury. (Transcript, page 14.) The claimant continued his seasonal farming activities on his 211 acre farm while employed by the defendant. (Transcript, pages 14, 28.) He started farming this land in 1947. (Transcript, page 10.) Claimant has not held any other employment, other than a job in a gypsum plant during a dry farming season in 1956. (Transcript, page 14.)

The claimant's first position in the defendant's plant was cleaning the kill floor. (Transcript, page 15.) Claimant then sought and obtained a job on the morning shift packaging offal products, such as hearts, livers and tongues. (Transcript, page 15.) He obtained this position because the job started at 4:00 a.m., thereby he was able to commence his daily farming activites in the afternoon. (Transcript, page 15.) When this morning shift was terminated, he was transferred to the "box shop" where he used a stapling machine to construct packaging boxes for the offal products. (Transcript, pages 15, 43.) Claimant stated he worked full time at the defendant's plant and would alternate between the morning shift and night shift in order to continue his farming. (Transcript, pages 44-45.)

The "box shop" is located next to the "trolley washers" wherein the trolleys were washed, sterilized and oiled. (Transcript, pages 16-17.) The trolleys are large hooks attached to wheels that are used in a conveyor system to carry the carcasses throughout the processing plant from the kill floor to the loading dock. (Transcript, page 17.) Chemicals agitated within extremely hot water are used in the trolley wash process. (Transcript, page 17.) Evidence was introduced on arbitration to show that a stronger than normal chemical was mistakenly used in this process in October of 1976. (Arbitration decision; claimant's exhibit 2.)

On a morning in October 1976, claimant went into the "box shop" and found the floor wet and felt a "terrific burning" sensation in his throat and chest area. (Transcript, pages 9, 18.) When the claimant went outside of the plant in the fresh air he would feel better, but he continued to work for 13 days and every day his condition seemed to become more serious. (Transcript, page 9.) He eventually collapsed and was hospitalized. (Transcript, page 9.) Claimant has not held any outside employment besides farming since his injury. (Transcript, pages 9-10.)

Claimant testified his condition has remained the same since 1977. (Transcript, page 13.) However, he stated he still has shortness of breath whenever he walks, and pain in his chest (transcript, page 18), also, breathing cold air is very painful, he has often lost his voice and his injury caused a tonal change in his voice. (Transcript, pages 18-19.) Although the claimant is still able to prepare his farm ground for planting and plant his own crops (transcript, page 36), he contended his condition has lessened his ability to perform his farming activities. For example after his injury: he now needs help to fill his tractor planter boxes which entails carrying 60 pound bags of seed (transcript, pages 20-21); he now hires labor to do all of his harvesting and combining (transcript, page 23); on windy and humid days he is unable to farm regular hours (transcript, page 24); diesel fumes bother him within the machine shed where he starts his tractor (transcript, page 24); he is unable to shovel seed beans (transcript, page 24); and neighbors now must assist him in repairing his machinery and placing wheels on his tractor (transcript, page 25).

Claimant now hires the local elevator to do the chemical spraying on his fields because being in close proximity to the chemicals causes him breathing problems and making him feel "faint right away." (Transcript, pages 23, 37-38.) According to the claimant it is not customary for local farmers to hire the elevator service to do commercial chemical spraying. (Transcript, page 38.) Claimant also testified that automobile fumes have bothered him since 1976 (transcript, page 44); and he fell ill for four days after he used a chemical spray on dandelion weeds (transcript, page 46).

After his injury in October 1976, the claimant's son finished the picking of the corn, plowing, discing and cutting of stalks. (Transcript, pages 36-37.) In 1977, his son did all of the plowing and was not monetarily compensated. (Transcript, page 31.) Claimant did not report these services on his 1976 or 1977 federal income tax return form. (Defendant's exhibits 2 and 3.) Now, none of the claimant's children are available to help him with his farming activities. (Transcript, pages 61-62.)

Doris Burmeister, the claimant's spouse of 37 years, testified their life has "slowed down" since her husband's injury. (Transcript, page 62.) She testified the claimant, before his injury, was an active man who would not get tired even though he worked full-time hours at the defendant's plant while farming in season and maintaining an active social life. (Transcript, page 63.) Now, according to his spouse, the claimant walks very slow, "falls asleep and rests quite often," and cannot bike ride beyond one-half mile. (Transcript, page 65.) Also he gets pale and gasps when subjected to automobile exhaust fumes and often rides in the back seat of an automobile to avoid such fumes (transcript, pages 66-67), and makes a noise which is not snoring when he sleeps (transcript, page 65). She said the claimant must now ask his neighbors for help with his farm work which hurts his pride. (Transcript, page 67.) Claimant's spouse said they took the recommendation of Dr. Bedell to lead a normal life, e.g., dancing activities, however, the claimant is unable to do so. (Transcript, page 66.)

Richard M. Rosendahl, a fellow farmer and life-time friend of the claimant testified that claimant was a strong individual before his injury who played baseball and danced fast. (Transcript, pages 48-50.) Rosendahl's farm borders the claimant's farm and he has observed the claimant now takes "twice as long at least" to do his farm work and he "doesn't put the hours in in a day that he used to by far." (Transcript, page 50.) Rosendahl has "sprayed some fence rows for him" and at one time did chemical spraying for the claimant. (Transcript, pages 49-50.)

Dr. Rosendahl described the time when he helped the claimant place the heavy rear wheels on his tractor; a task which Rosendahl alone has performed for his own tractor several times, however, the claimant "didn't seem like he had the strength to bust" the bolts loose and "couldn't get his breath" when he attempted to tighten the bolts. (Transcript, page 51.) According to Rosendahl, the claimant and he have frequently played golf, but the claimant cannot play as fast as he could before his injury, and they no longer attempt it on hot windy days due to claimant's condition. (Transcript, page 52.) Rosendahl testified that in cold weather either he or claimant's spouse will drive an automobile up to the door for the claimant to quickly enter the car "because the cold weather bothers him very bad." (Transcript, page 53.)

Ray P. Sullivan, a retired farmer and claimant's friend for over twenty years was the final lay witness. (Transcript, page 55.) Sullivan stated he has also sprayed chemicals for the claimant (transcript, page 56), that the claimant now obtains help from his neighbors for strenuous farming activities and he has never been paid for any assistance given to the claimant (transcript, page 59). Sullivan illustrated an occurrence when he saw the claimant sitting in the middle of a field next to his planter; he said he knew the claimant wasn't sitting there because "he didn't need to hurry," so Sullivan rushed out to help the claimant who was "completely bushed out." (Transcript, pages 57-58.) As an example of claimant's difficulty with normal activities, Sullivan said he often walks with the claimant after supper and the claimant begins to slow down his walking pace after a distance of one-half block. (Transcript, page 60.)

Claimant's injury was initially treated by his personal physician, C. R. Wilson, M.D. (Transcript, page 11.) Paul Steinhauer, D.O., assumed Dr. Wilson's practice and first examined claimant on November 28, 1977. (Steinhauer desposition, pages 4-5.)

Dr. Steinhauer initially examined claimant on November 28, 1977, at which time claimant gave a history of contact with caustic material. (Steinhauer deposition, page 5.) Based upon his medical training and his experience as a respiratory therapist, Dr. Steinhauer concluded that claimant suffers from chemical bronchitis, which he characterizes as a permanent condition likely to become progressively worse. (Steinhauer deposition, pages 10, 30.) According to Dr. Steinhauer, a person who has chronic bronchitis is much more prone to infection and further irritation of the lung and, as a result, will have further deterioration of the capacities of the lung. The deterioration can be slower if an individual limits his exposure to fumes or irritants. (Steinhauer deposition, pages 11-12.) According to Dr. Steinhauer, a person with bronchitis has a diminished ability to perform exerting labor. (Steinhauer deposition, page 12.)

Dr. Steinhauer recommended that claimant stay active so that he would be less likely to develop heart and circulation problems due to his lung condition. (Steinhauer deposition, page 12.) Dr. Steinhauer was reluctant to prescribe medication, being of the opinion that elimination of fumes and irritants from claimant's environment was a more effective method of treatment. (Steinhauer deposition, page 20.) In addition to chemicals and fumes, humidity, change of temperature and dust aggravate bronchitis. (Steinhauer deposition, page 22.)

Steinhauer described his treatment of claimant as having an "up and down course." Accordingly, on occasion claimant would have "very minimally increased bronchial sounds." On only one occasion did Dr. Steinhauer examine claimant and find his lungs relatively clear. Dr. Steinhauer stated that:

> The majority of the times it's been minimally increased or sometimes drastically increased, and he's had what appears to be the problem more with the right side of his lung than on the left where it's quite frequently that I've heard quite increased amount of bronchial sounds on the right side of his lung.

Dr. Steinhauer was of the opinion that claimant could be gainfully employed "with the understanding by the employer that it is necessary for him to be able to work at his own pace and also with the elimination of any possibility of him coming in contact with fumes." (Steinhauer deposition, page 21.)

Dr. Steinhauer observed the claimant on the golf course without the claimant's knowledge and testified that he saw the claimant stop frequently and rest at times when the other golfers would not do so. (Steinhauer deposition, page 14.) Steinhauer last examined the claimant on June 2, 1981, shortly after his exposure to dandelion weed spray and testified the claimant had definite increase in bronchial sounds with shortness of breath. (Steinhauer deposition, page 20.)

Claimant was also examined by two pulmonary function experts: George N. Bedell, M.D., an internist specializing in

pulmonary disease at the Department of Internal Medicine at the University of Iowa, and S. V. Nair, M.D., of the Regional Chest Center, Pulmonary Division at the University of Nebraska Medical Center.

Dr. Bedell, although not board certified, is a specialist in internal medicine with an emphasis in lung disease. Dr. Steinhauer referred claimant to Dr. Bedell who examined claimant on April 19, 1979. A battery of tests administered to claimant resulted in only two test results indicating a below normal reading. (Bedell deposition, pages 10-13.) The maximal mid-expiratory flow test produced a result which was slightly below normal and the pO2 test resulted in a reading of 72, with a normal reading being 80-100. (Bedell deposition, pages 10-11.) A low pO2 result indicates that claimant was not "getting quite as much oxygen into his arterial blood as a perfectly normal person would." (Bedell deposition, page 11.) Dr. Bedell acknowledged that the pO2 reading might indicate a slightly damaged lung, but he further stated that "most people with a pO2 of 72 would be able to do practically everything normally." (Bedell deposition, page 11.) The results of the pCO2 and pH tests were slightly abnormal, but Dr. Bedell attributed this to overbreathing.

All other tests results were within a normal range. Dr. Bedell stated that "with the exception of the mild low pO2, though, there was really no evidence of residual damage to the lung..." (Bedell deposition, page 13.) Dr. Bedell recommended that claimant return to work, although he felt that, for psychological reasons, claimant would not want to return to work with defendant employer. (Bedell deposition, pages 14-16.)

Dr. Nair examined claimant on November 29, 1976 and reported his findings in a report dated May 2, 1979. He had previously examined claimant on November 29, 1976. Dr. Nair felt that claimant suffers from "chronic bronchitis and mild chronic air flow obstruction" and that there was "mild determiration in the air flow obstruction" as compared to the 1976 examination results. Dr. Nair stated that he believed claimant's lung disease was stable at the time of the second examination, but that "[w]e may see further deterioration in the air flow obstruction in the course of the next several years which could be related to the natural course of chronic bronchitis."

Dr. Steinhauer compared the results of the above examination and specifically pointed out a "substantial difference" between the expiratory flow rates. (Steinhauer deposition, page 19.) Dr. Nair, in May 1979, found claimant's expiratory flow to be 26 percent of the predicted normal (defendant's exhibit 1), while approximately one month earlier Dr. Bedell's test showed a 70 percentile of the predicted normal, (Bedell deposition, page 10). (Steinhauer deposition, page 19.) Dr. Steinhauer stated these different test results "goes along with my diagnosis in that some days [the claimant] is not as compromised respiratory-wise as he is on other days," and that these results would be very comparable on a normal patient not experiencing a respiratory problem but not in the claimant's case. (Steinhauer deposition, page 19.) Dr. Steinhauer suggested that the claimant may have had an exposure to some type of fume or a viral infection that could have caused a compromising of his pulmonary function test by Dr. Nair. (Steinhauer deposition, page 19.)

Dr. Steinhauer disagreed with Dr. Nair's opinion that the claimant's degree of pulmonary function impairment is not sufficient to cause any significant disability; he testified: "Due to my observations of the patient in the office and outside of the office, I do feel that his condition is significant enough to cause him problems with the normal lifestyle that a man his age and otherwise physical conditioning should allow." (Steinhauer deposition, page 29.) Furthermore, Dr. Steinhauer would agree with Dr. Nair's opinion that the claimant's lung disease is stable at the present time, only if Dr. Nair was referring to claimant's "ability to perform on different days." (Steinhauer deposition, page 31.)

Defendant contends that the deputy erred in finding that claimant was entitled to any permanent partial disability. In support of this contention, defendant makes two arguments. The first is that the sole purpose of the review-reopening was to determine the length of claimant's temporary disability, and the second is that defendant meets the requirements for issue preclusion.

Defendant filed the review-reopening petition seeking a determination of claimant's temporary disability. Claimant's answer asserted permanent disability. Although it is true that on appeal from the arbitration decision the commissioner awarded only temporary total compensation benefits, a decision which was affirmed by the district court and the court of appeals, no permanency was found simply because the evidence was insufficient to establish permanency at that time.

The deputy commissioner, in the review-reopening decision, thoroughly analyzed the case law concerning review-reopening decisions. To fully repeat the analysis would merely be redundant, since the law concerning review-reopenings is well settled. However, to briefly reiterate, a claimant may recover additional compensation on a showing of a change of condition or a condition which, although existing at the time of a previous award, was "unknown and could not have been discovered by the exercise of reasonable diligence" at the time of the prior award or settlement. *Gosek v. Garmer & Stile Co.*, 158 N.W.2d 731, 735 (Iowa 1968). When a claimant's condition resulting from an injury progressively worsens beyond what was anticipated, or fails to improve to the extent anticipated, the commissioner would have been unable to evaluate claimant's condition at the time of the arbitration and a review-reopening will be appropriate. *Meyer v. Holiday Inn*, 277 N.W.2d 24 (Iowa Ct. App. 1978).

Dr. Nair examined claimant before the arbitration proceeding as well as before the review-reopening and noted that there was mild deterioration in claimant's air flow obstruction since the 1976 examination. Dr. Nair also reported that, although claimant's lung disease was stable when he was examined in 1979, there could be further deterioration related to the natural course of chronic bronchitis.

Dr. Steinhauer concluded that claimant's chemical bronchitis was both permanent and progressive. Since Dr. Steinhauer has routinely treated claimant, has had experience in the field of respiratory therapy and has observed claimant's activities both in and out of his office, greater weight is given to his testimony. Dr. Steinhauer was of the opinion that

claimant could return to work as long as he could pace himself and avoid all chemical irritation.

Dr. Bedell recognized that some minor residual damage to claimant's lungs did exist, but he stated that, even under these conditions, a person could function at a normal level. He felt claimant could return to work, although not at Iowa Beef.

The commissioner's appeal decision filed March 30, 1979 acknowledged insufficient evidence to determine permanency. The evidence before the commissioner at that time indicated that claimant's symptoms were diminishing and that Dr. Nair acknowledged a slow resolution. D. G. Bach, M.D., believed claimant capable of returning to work at any time, whereas Dr. Wilson felt claimant was unable to do anything and thought claimant would suffer from permanent irreversible lung changes. Clearly there is substantial evidence to establish that claimant's condition failed to resolve itself after the arbitration hearing and that claimant has established a change in condition which entitles him to a review of his disability.

As noted previously, defendant presents an argument that has met the requirements of issue preclusion and that, as a result, claimant is entitled to only temporary disability compensation. Defendant, however, also stated that the theory of issue preclusion was inapplicable to a workers' compensation case.

The deputy correctly determined that the requirements for issue preclusion were not satisfied. As stated by the Iowa Supreme Court in *Schneberger v. United States Fidelity & Guar. Co.*, 213 N.W.2d 913, 917 (1973), the four requirements that must be established to bar further litigation on a specific issue:

(1) The issue concluded must be identical.

(2) The issue must have been raised and litigated in 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.

The defendant specifically failed to satisfy the first and fourth requirements. The defendant filed a review-reopening petition to determine claimant's temporary disability, however the claimant's answer asserted permanent disability, thus the issues were not identical. The fourth requirement was not satisfied because, as the deputy determined, although the issue of permanency was material and relevant, it was not essential to the arbitration decision or to whether the injury arose out of and in the course of employment.

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, qualification, 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 finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different that the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Claimant argues that the deputy erred in finding only thirty-five percent industrial disability and notes that his younger co-worker, in a companion case, was awarded industrial disability of fifty percent. Although claimant's co-worker and claimant each sustained a job-related injury after being exposed to the same work environment, the facts of each case differ past that point. The factors taken into consideration in determining industrial disability are analyzed in conjunction with the unique facts of each separate case. The determination of degree of industrial disability in one case is not utilized as a guideline in other cases. Each case has a unique set of facts and a determination of the degree of industrial disability is based upon those facts.

Although some restrictions were imposed, Drs. Steinhauer and Bedell stated that claimant was able to return to work. Claimant has continued to actively engage in his farming activites, and manages to keep physically active.

Additionally, there is no evidence which indicates that claimant has sought a job within his limitations. Taking all factors into consideration, it is determined that claimant has sustained a thirty-five percent industrial disability.

The final issue on appeal is whether the deputy erred in computation of claimant's weekly compensation rate. The claimant contends he had a "guaranteed" 40-hour work week and his regularly scheduled two-week day shift and two-week night shift pay differential should be not excluded from calculation of his compensation rate.

Iowa Code section 85.36 provides in part:

> *Basis of computation.* The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar.
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> * * *
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> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings, *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. (Emphasis supplied.)

The payroll records indicate that during a portion of the thirteen week period, claimant earned both overtime wages and a shift differential. Shift differential pay is considered premium pay, and as such, must be excluded from the weekly earnings computation. In addition, for purposes of computing rate, any overtime hours are figured at the straight time rate which in this case is $5.61 per hour.

Consequently claimant's earnings, based upon the submitted payroll records, are as follows:

October 9, 1976	$ 168.30
October 2, 1976	207.57
September 25, 1976	224.40
September 18, 1976	224.40
September 11, 1976	224.40
September 4, 1976	179.52
August 28, 1976	224.40
August 21, 1976	224.40
August 14, 1976	168.30
August 7, 1976	224.40
July 31, 1976	224.40
July 24, 1976	224.40
July 17, 1976	168.30

The above figures total earnings of $2,678.19 over the thirteen week period prior to claimant's injury. That amount divided by thirteen equals $206.71. Gross weekly wages of $206.71 for a married person entitled to two exemptions result in a weekly rate of compensation of $132.11.

Certain matters were not disputed and will be retained as a part of this decision. These matters are the healing period and medical bills.

Findings of Fact

1. Claimant was 59 years of age at the time of the review-reopening hearing and 54 at the time he was injured at work.

2. Claimant suffers from chemical bronchitis which arose out of and in the course of his employment with defendant.

3. Claimant has not returned to work for defendant.

4. Claimant has been married for 36 years and no longer has any dependent children.

5. Claimant has a high school education, however he has not received any specialized training in any occupation except for unskilled factory labor and farming.

6. Claimant owned and operated a 211 acre farm on a part-time basis while he was employed by the defendant for 15 years on a full-time basis; he began working for the defendant at the age of 40.

7. Claimant experiences chest pain and irritation when he is exposed to chemical or exhaust fumes, temperature extremes, humidity and dust.

8. A mild deterioration in claimant's air flow obstruction was found in a 1979 examination as compared to his post-injury 1976 examination.

9. Claimant has not been employed besides farming since his injury.

10. Claimant's chronic bronchitis has lessened his ability to perform his farming activities.

11. Claimant is capable of returning to work with limitations on his pace and exposure to fumes.

12. Claimant's gross weekly wages for workers' compensation purposes is $206.71.

Conclusions of Law

1. Claimant, as a result of his injury, is 35 percent permanent partially industrially disabled.

2. The proper rate of weekly compensation is $132.11.

3. Claimant's healing period ended on November 28, 1977.

THEREFORE, it is ordered:

That defendant shall pay unto claimant healing period benefits from October 11, 1976 through November 28, 1977 at a rate of one hundred thirty-two and 11/100 dollars ($132.11).

That defendant shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability at a rate of one hundred thirty-two and 11/100 dollars ($132.11) per week commencing November 29, 1977.

That defendant is entitled to credit for amounts previously paid.

That defendant shall pay amounts due and owing in a lump sum.

That defendant shall pay unto claimant the following medical expense: Paul F. Steinhauer, D.O., $180.50.

That defendant shall pay interest pursuant to Iowa Code section 85.30.

That defendant shall pay costs pursuant to Industrial Commissioner Rule 500—4.33.

That defendant shall file a final report within twenty (20) days of the last payment made pursuant to this award.

* * *

Signed and filed this 1st day of April, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

CHARLES D. CASE,

Claimant,

vs.

IDEAL MANUFACTURING COMPANY,

Employer,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Insurance Carrier,
Defendants.

Appeal Decision

Statement of the Case

Claimant appeals from a proposed arbitration decision filed December 8, 1981 wherein claimant was denied compensation benefits. The above captioned matter addresses three separate injuries allegedly occurring on March 5, 1979, May 22, 1979, and July 23, 1979. The three cases arising therefrom were consolidated for hearing and are considered separately from four companion cases covering injuries from August 27, 1976 through November 6, 1978.

The parties on appeal have stipulated that the insurer provided coverage to defendant employer from December 31, 1978 to January 1, 1980. The parties have further stipulated that claimant's weekly rate of compensation is $170.22 and that the medical expenses incurred are reasonable.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Jerry Subbert, Douglas C. Squibb, Joyce Ann Case, Richard C. Jorgensen, and Edward B. Jenkins; claimant's exhibits 1 through 9 inclusive; defendants' exhibits A through G inclusive; the deposition of David W. Decker, M.D., with accompanying exhibits 1 through 6 and A; the deposition of John L. Beattie, M.D., with accompanying exhibits 1 through 13 and A and B; and the briefs of all parties on appeal.

Issues

The issue on appeal is whether there exists a causal relationship between the alleged injuries of March 5, 1979; May 22, 1979; and July 23, 1979 and the disability complained of on which claimant bases his claim.

Review of Evidence

At the time of the hearing, claimant was 40 years old and married with three children by his wife's previous marriage. Claimant attended school through the tenth grade at which time a severe hunting accident brought an end to his regular education. (Transcript, page 15.) The hunting accident in question occurred in 1956. (Transcript, page 15.) A shell accidentally discharged from a rifle and struck claimant in the back causing paralysis from the T7 level down. (Transcript, pages 15-16.) Claimant was sent to the University of Iowa Hospitals in Iowa City for treatment and surgery and stayed there through 1960. (Transcript, page 16.) During the four and one-half year period claimant was at the University of Iowa Hospitals, he underwent a series of operations which culminated in 1959 with the amputation of both of his legs at the hip level. (Transcript, pages 16-17.) While claimant was being treated at the University of Iowa Hospitals, he obtained a General Equivalency Degree (G.E.D.) through the University of Iowa. (Transcript, page 18.)

After claimant's legs were amputated in 1959, he started to wear, at the direction of his doctors, a body brace covering the lower portion of his trunk. (Transcript, page 19.) The purpose of the brace is to support him and keep him upright, particularly when he is in his wheelchair, and also to distribute over the entire lower portion of his body the pressure which would otherwise be solely on his stumps. (Transcript, page 21.) Claimant has worn such a brace on a continuous basis since the early 1960s. (Transcript, page 20.)

Claimant was given a steel, leather, and sheepskin brace which troubled him and placed most of his weight on his ribs. He testified that he was helping a friend with a cement floor in 1962. After three or four days of work, he heard a series of pops and passed out. Subsequently, he recalls swelling, the splitting open of his side, and the development of abscesses beneath the skin. He was left with some scarring on his upper rib cage. (Transcript, page 19.) Doctors at Iowa City decided the weight should not be on his ribs and attempted to distribute it with a brace of fiberglass and sheepskin specially built in Michigan. Claimant remembered outgrowing this brace and obtaining another. He said that he can control the tightness of the brace.

After claimant was discharged from the University of Iowa Hospitals, he attended a rehabilitation school in Des Moines. (Transcript, page 18.) In 1965, claimant started work as a welder at American Trampoline (now AMF) in Jefferson and worked there steadily through 1967. (Transcript, pages 21-23.) Claimant's welding work at American Trampoline involved constant lifting and stretching. (Transcript, page 21.) During the two years claimant worked at American Trampoline, he regularly worked 40 hours per week and did not miss any significant amount of time from work due to illness or injury. (Transcript, page 22.) After two years, claimant left the employ of American Trampoline because they moved into a new building which was virtually impossible for him to enter either in or out of his wheelchair. (Transcript, page 22.)

Several days after leaving American Trampoline, claimant obtained employment as a welder at Parker Industries in Jefferson. (Transcript, page 23.) Parker Industries manufactures feed wagons, and claimant's job involved welding the ends to the feed wagons. (Transcript, page 23.) In doing his work at Parker Industries, claimant had to do consistent heavy lifting. (Transcript, page 24.) After working at Parker Industries for approximately one year, claimant and his first wife who was from the Dubuque area decided to move to Dubuque. (Transcript, page 24.)

After moving to Dubuque, claimant obtained employment as a welder at Dubuque Snow Blowers. (Transcript, page 25.) Claimant's welding work at Dubuque Snow Blowers involved building the chutes that blow the snow out of the machine and heavy lifting was required in doing that job. (Transcript, page 25.) Claimant regularly worked 40 hours per week in his job at Dubuque Snow Blowers and did not miss any significant amount of time from work due to illness or injury while employed there. (Transcript, page 25.) Claimant wore his fiberglass brace while employed at Dubuque Snow Blowers. He was required to do heavy lifting in his work. (Transcript, page 25.) After being employed at Dubuque Snow Blowers for approximately one year, claimant was laid off. (Transcript, pages 25-26.)

Claimant's next job was with Uthal Electronics which is located in Guttenberg, Iowa. (Transcript, page 26.) His job at Uthal Electronics involved inspection of parts, and no specialized training or education was required for the job. (Transcript, pages 26-27.) Claimant worked at Uthal Electronics for approximately two years. (Transcript, page 27.)

Claimant was next employed at Char-Du in Brooklyn, Iowa. (Transcript, page 27.) Claimant's work at Char-Du involved the construction of scoreboards. (Transcript, page 28.) In 1974, claimant learned that there was an opeing with the defendant employer which would pay more money than he was earning at Char-Du, so he left Char-Du and began work for defendant employer in July of 1974. (Transcript, page 29.)

At the time claimant started work for defendant employer, he had two scars on the trunk of his body. (Transcript, pages 31-32.) One scar was located on the upper rib cage area on the right side of his body, and the other scar was located on the upper rib cage area of the left side of his body. (Transcript, page 32.) Those scars had developed in the early 1960s as a result of his first brace — the steel and leather brace — which had been built for him at the University of Iowa. (Transcript, page 32.)

When claimant started work for defendant employer in 1974, he was assigned to small parts welding. In 1976, his work was changed to assembling hog troughs. This job involved the use of a three pound hammer, lifting, pulling and stretching. (Transcript, page 33.) Claimant testified that the heavy parts welding to which he was assigned in his employment in 1976 differed from the lifting which he had been required to do in his previous employments in that he was restricted to lifting with one arm rather than two arms. (Transcript, page 36.) In doing the one-armed lifting, claimant used his right arm because he is right-handed. (Transcript, pages 36-37.)

Claimant further testified that within several months after the change in duties he began to experience pain underneath his arm pit on his right side. (Transcript, page 35).

Claimant sought treatment from his family physician, David W. Decker, M.D. Dr. Decker additionally padded claimant's brace and advised him to stay out of his brace and soak his side to aid in healing. (Transcript, page 39.)

Upon his return to work, claimant was assigned to small parts welding. Claimant testified that this assignment required some seventy-five pulling operations with his right arm each hour. (Transcript, page 41.) Claimant further stated that small parts necessitated the gathering of parts from a bin. Claimant estimated that he had to refill the bucket as often as once an hour and sometimes to an excess of 150 pounds.

Claimant was eventually returned to heavy parts welding. Claimant asserted that upon his return to heavy parts welding, he expressed concern to defendant employer that he was not capable of performing required tasks. Claimant asserted that defendant employer refused to move him. (Transcript, page 43.)

Claimant testified that as a result of his employment, he suffered three separate breakdowns in February, August and November 1978. (Transcript, pages 42-43.) Each breakdown was on claimant's right side between the waist and armpit as was the breakdown on August 27, 1976. Each episode was followed by a period of healing during which he stayed home and out of his brace. (Transcript, page 44.)

Claimant testified that he suffered breakdown episodes again in March, May and July of 1979. (Transcript, page 47.) Claimant asserts that these breakdowns occurred under similar circumstances as those suffered previously, but that the last breakdowns occurred more easily and resulted in larger ulcerations. (Transcript, page 47.)

Jerry Subbert, production welder for defendant employer, testified that he had worked with claimant since 1974. He opined that claimant may have had difficulty performing his job tasks because of the movement required (Transcript, page 72), but denied that the job was "heavy". Mr. Subbert stated that he was aware of claimant's efforts to secure a transfer, but understood such a transfer to be impossible because of the lack of openings and union restrictions. (Transcript, page 80.)

Douglas C. Squibb testified that he had been employed by defendant employer for 19 years and has been lead welder for the past three years. Mr. Squibb testified that he was

made aware of problems that claimant was having with his right side by his own observations and by the claimant himself.

Mr. Squibb stated that he recalled claimant's efforts to secure a job transfer. Mr. Squibb testified that he spoke to Dick Jorgensen, Glenn Jones and Ed Jenkins, supervisors for defendant employer, about such a transfer. (Transcript, pages 97-98.) Such a transfer was opposed, according to Mr. Squibb, because small parts jobs necessitated that the worker stand while claimant's job could be performed seated. (Transcript, page 105.) Mr. Squibb also acknowledged that union regulations worked against such a transfer. However, defendant employer did, according to Mr. Squibb, attempt to keep claimant on light duty jobs to meet restrictions imposed by claimant's doctor. (Transcript, page 125.) Also, claimant was provided with a specially built table, parts were often brought to him, and he was allowed to drink coffee in his welding booth unlike other employees. (Transcript, page 126.)

Richard Jorgensen, general forman for defendant employer, testified that he has known claimant since 1974. Mr. Jorgensen testified that he first learned of problems claimant was experiencing on his right side in 1976. He asserted that claimant attributed his problems to a broken cast. (Transcript, page 246.) Mr. Jorgensen stated that it was his responsibility to collect reports of injuries and restrictions and that no accident reports or medical restrictions were submitted as of claimant's return to work in August of 1978.

Mr. Jorgensen stated that claimant was granted a leave of absence in 1978. While defendant employer usually granted a leave of absence for health reasons, Mr. Jorgensen stated that claimant's was granted so that claimant could go to school in anticipation of opening a clothing store. Claimant was guaranteed a job upon his return to work according to Mr. Jorgensen. (Transcript, pages 247-248.) As to other accommodations granted, Mr. Jorgensen testified that claimant was provided with a specially built work bench, a special platform to hold parts baskets, enlarged doorways at claimant's request, and special parking access. Mr. Jorgensen further stated that claimant's jobs were assigned to him to meet his capabilities and parts were often brought to him by other workers assigned to do so. (Transcript, pages 248-249.)

Edward Jenkins, claimant's direct supervisor after 1978, testified that attempts were made to assign claimant to jobs that he could do or wished to try. Mr. Jenkins testified that when claimant complained of soreness, he would be taken off the job. Individuals were assigned to get parts for him and attempts were made to give claimant tasks that met weight lifting restrictions. (Transcript, page 280.) Mr. Jenkins further testified that claimant never approached him about a transfer to another department. (Transcript, page 280.)

According to Mr. Jenkins, claimant was terminated on July 21, 1979 for leaving the plant without notification. Plant rules apparently dictate termination for such action. (Transcript, page 281.)

As previously noted, claimant testified at hearing to first experiencing pain and tenderness on his right side soon after his transfer from small parts welding in 1976.

Dr. Decker first examined claimant's right side on August 27, 1976. On that date, the doctor found claimant had tenderness and erythema over his right rib cage which was caused by pressure by the brace claimant wore to provide him with stability and to enable him to maintain his upright position. The doctor was told by claimant that he was injured by lifting at work. (Decker, page 8.) Claimant's brace was repadded. X-rays of the right ribs showed no evidence of fracture. The doctor's notes appeared to indicate claimant was getting a new brace.

Dr. Decker did not see claimant again until March 3, 1977. An examination on that date revealed a large decubitus ulcer on the right side. (Decker, page 10.) This ulceration remained unchanged as of an examination on March 9, 1977. (Decker, page 11.)

A decubitus ulcer, described by the doctor as a large breakdown of skin caused by the pressure of the brace, developed in March of 1977 which claimant again asserted developed after heavy lifting. Dr. Decker recommended his discontinuance of the use of the brace, topical treatment of soaks and antibiotics, and remaining off work. A note was sent to defendant employer to that effect. On examination on May 10, 1977, an upper ulcer was essentially healed and lower ulcers were smaller and healing slowly. The doctor recommended claimant remain off work. (Decker, pages 12-13.)

Dr. Decker indicated that claimant remained off work until August 25, 1977. However, claimant's problems during the period related to a fall, headaches and neck difficulties rather than to his right side. (Decker, page 14.)

Dr. Decker did not see claimant again for his side until February of 1978. Claimant told Dr. Decker that his right side was breaking down again, but that healing would take place if he remained out of his brace. (Decker, page 14.) As to the cause of this breakdown, Dr. Decker testified:

> The breakdowns are caused by the increased pressure of the brace against the skin. And it was my feeling at that time that any activity which increased either the length of time that he was required to be in the brace or activities involving lifting or increased pressure in that brace would continue to be detrimental to him. (Decker, page 15.)

Dr. Decker was then asked, "In addition to the lifting increasing the pressure associated with the brace, does stretching and reaching also have the possibility of increasing the pressure or possibly causing irritation of the sides?" He responded, "Yes, that's true also." (Decker, page 15.) He later said that gaining "a lot of weight" would also increase the possibility of ulceration. Dr. Decker anticipated that time out of the brace would decrease factors causing the ulcerations. (Decker, page 16.) By May 8, 1978 claimant's ulcers had healed. Rehabilitation was again discussed. On June 14, 1978 claimant developed an abscess on the buttocks and in the scrotal area which the doctor attributed to pressure. Dr. Decker distinguished abscess from ulcer by saying that an ulcer is a hole in the skin while an abscess is a collection of pus under the skin. Claimant was seen on July 19, 1978. He had been refitted for a new brace when he returned on September 7, 1978, and he had an abrasion on his side

which was treated with antibiotics and topically. Arrangements were made for adjustment of the brace and claimant was instructed to remain out of it. Healing was not taking place by September 25, 1978. (Decker, page 18). Medication was changed and claimant was again told to stay out of the brace. Apparently, claimant was not seen by Dr. Decker again until May of 1979. (Decker, page 19.)

On May 17, 1979 Dr. Decker found another ulcer on claimant's right side. He treated it topically and recommended return to light work. On May 29, 1979 examination revealed, "a large superficial denuded area on his right side and then the smaller previous ulcers remained unchanged. He also had a small ulcer on his left stump." (Decker, page 21.) Dr. Decker suggested staying out of the brace and discontinuing work. That suggestion remained the operative plan on June 14, 1979 as claimant had apparently been wearing his brace. By June 28, 1979 the ulceration had healed and a return to light production was proposed with a five pound weight restriction which was increased to ten pounds at the claimant's request. The weight restriction was to decrease pressure between the claimant's side and his brace. Dr. Decker received a call from claimant on July 25, 1979 to tell him that he had stopped working as his side had become red and swollen but had not broken down. On September 8, 1980 claimant was provided with a prescription for a new brace. (Decker, pages 20-26.)

Dr. Decker testified that he again saw claimant on September 7, 1980. According to Dr. Decker, claimant reported developing another ulceration two months previously after changing tires on his jeep. (Decker, page 28.)

Dr. Decker examined claimant at the request of defendants' counsel on February 2, 1981. Old healed scarring of the right side was found. Claimant reported being able to wear his brace five to six hours a day for two to three days, but exceeding these limitations resulted in soreness and on one occasion, an ulcer. The doctor wrote that "in the interim between July of 1979 and the present time, I can see no change in his examination or change in his disability status." (Decker, exhibit 5.)

Dr. Decker testified that several days of sustained pressure from the brace are required to initiate the ulceration process. (Decker, page 30.) Dr. Decker explained that ulcerations are "caused by a lack of oxygen to the skin and depending on how long that piece of skin is under pressure or without oxygen then determines whether it actually ulcerates or just becomes red and sore." (Decker, pages 29-30.) Dr. Decker indicated that merely stopping any activity which causes pressure would be insufficient to promote healing, but that claimant must stay out of his brace. (Decker, page 53.)

Dr. Decker indicated that the preexistence of scar tissue on claimant's right side might make him more prone to pressure ulceration. Dr. Decker stated that scar tissue is not as durable as normal skin and therefore breaks down easier. (Decker, page 33.)

As to the cause of claimant's ulceration difficulties, Dr. Decker responded to the following hypothetical question:

Q. If the record in this case were to show, Doctor, that Mr. Case had developed ulcerations on his right side during a period he was doing heavy lifting and if the record were to further show Mr. Case was able to heal those ulcers while wearing his brace but not working, would you have an opinion based on a reasonable degree of medical certainty as to what specifically had caused those breakdowns or ulcerations of his right side?

A. I would presume under those circumstances and we would have to imply that the lifting contributes to development of the ulcer.

Q. Have the repeated breakdowns of Mr. Case's right side left the skin and tissue on his right side in such a condition it's now easier for that skin to break down say than it was in '76 or say 1975?

A. Possibly minimally. He has a bit more scarring than he had at that time and the scar tissue is not as durable as normal skin so I would say yes, minimally. (Decker, pages 31-32.)

On cross-examination Dr. Decker's opinion became even more qualified.

Q. Is the ulceration in 1980 causally related to the ulceration in 1979?

A. Not necessarily. They're basically both caused by the same pathologic process. (Decker, pages 45-46.)

As to claimant's ability to work, Dr. Decker testified:

A. Again, he has repeatedly demonstrated that anything that involves increasing the pressure or prolongation of the time interval results in breakdown. My feeling is still the same today as it was previously that these conditions still exist.

Q. Do you have any opinions as to how those conditions affect his ability to work and hold a job?

A. My feeling is the same as when we recommended that he discontinue it, that I think it would be very difficult without rehabilitation training for him to hold his previous industrial position.

Q. Do you foresee any improvement in Mr. Case's side which would enable him to hold an industrial position?

A. No, sir, I don't.

Q. Is there any treatment or remedy or device that you're aware of which would alleviate the condition of Mr. Case's right side and make it possible for him to hold an industrial job?

A. No, not that I'm aware of. (Decker, page 29.)

Dr. Decker later attempted to clarify the question of claimant's impairment.

A. In terms of — I would say that he was at that time in a

similar position, that his ability to hold a job depends on a very limited spectrum of jobs. Under certain circumstances, he could function in a job but that depends on the job.

Q. So prior to beginning work for Ideal Manufacturing, do you think his functional impairment was nearly 100 percent, if I understand you correctly?

A. That's correct.

Q. What causes that functional impairment?

A. The previous bilateral amputation and cord injury that he had sustained many, many years back.

John L. Beattie, M.D., first saw claimant on October 21, 1980. His testimony relates to claimant's condition at that time and subsequently. On physical examination he found a supra pubic cystostomy, scarring on both sides and particularly on the right, overdeveloped upper extremities, paralysis below the chest line, disarticulation of the left hip, and an amputation on the right. An ulceration was seen on the right flank which the doctor described as an ulcer due to irritation rather than to pressure. However, he said an element of both might be present. The doctor was unsure how long the ulcer had been there and he did not know how long it would remain. The doctor believed both that claimant's brace was too tight and that claimant was eating too much. He advised getting a new brace.

Examination of claimant's back further revealed the presence of a scar from laminectomy surgery. (Beattie, page 14.)

On May 4, 1981 claimant was again examined by Dr. Beattie who found the ulcerated area had healed. Claimant's blood pressure was 160/90 and he was placed on a "mild" diuretic which the doctor thought "might get the fluid out of that side so the flesh wouldn't be hitting as hard against the side of the thing and it would be a little more pliable and he wouldn't have so much irritation." (Beattie, page 22.) The doctor proposed that the hypertension might have something to do with claimant's skin recently breaking down. (Beattie, page 22.)

After his second examination Dr. Beattie changed his opinion about claimant. He said:

> It was my opinion when I examined Charles on October 21, 1980, and I will read it as follows. "It is my opinion that Mr. Case cannot be involved in any activities which entail heavy lifting. The basic medical problem present is that he has anesthesia in the area of the ulcer and he feels no pain or discomfort when the area is being aggravated or irritated. He has lost the most important protective mechanism that the body has, i.e., pain." At that time I said I was certain, "He will be able to handle any type of light production job which is available to him, including welding. I have also warned Mr. Case of the fact that these chronically ulcerated areas, if continually irritated, at times can break down and form malignant skin ulcers, i.e., squamous cell carcinomas.
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> After seeing him yesterday I might say that I was very happy that this ulcerated area had filled in. I wouldn't have believed it, frankly, but it has. Then he tells me about his activity of several days prior and he has already started getting some irritation in that area. I can see if he got himself in any activities that I previously outlined I think he would again have more problems. I think he would be better off using his hands and his brains and not getting himself into any kind of activities that would require him to handle any light production job. I think he is disabled. (Beattie, pages 23-24.)

Regarding claimant's scars the doctor was questioned as to whether the scars would tend to become easier to break down or to irritate as they occurred and reoccurred. He replied:

> As we get older our ability to heal diminishes. So I think that as the years progress he is going to have more trouble healing these problems if they again develop. My advice to him is not to get himself into situations where he will get enough irritation to develop another ulcer... (Beattie, page 25.)

Later Dr. Beattie was asked:

Q. You have indicated that it is a progressive or degenerative thing that once it happens it is more likely to happen again. Once it happens twice it is more likely to happen a third time and go down the road. So by the time you reach the end of however many times it has broken down those ones at the end are the ones that have made it more and more likely for it to break down rather than those that happened at the very start?

A. I guess it is a possibility. (Beattie, pages 56-57.)

However, later on cross-examination:

Q. Referring to this recent injury which you observed yesterday can you say to a reasonable degree of medical certainty that had he not had a breakdown of the skin in 1976 that he would not have had a breakdown yesterday?

A. No, I can't. (Beattie, page 66.)

Dr. Beattie stated that anything which causes friction or pressure would lead to claimant's problem. Movement could occur on the job or as the result of something in his personal life. (Beattie, page 36.)

Like Dr. Decker, Dr. Beattie still felt that claimant's present disabilities all revert back to the gunshot wound. Dr. Beattie testified: "In my opinion he was permanently and totally disabled before he ever started at any of these things and that is due to the amputation of his legs and his paraplegia and resulting amputations." (Beattie, page 70.)

Applicable Law

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 27, 1981 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 supreme court of Iowa in *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934) at 731-32, ____, discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury. * * * The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
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> 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. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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 opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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. Fisher Inc., supra.* See also *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

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. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 908, 76 N.W.2d 756, ____ (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812, ____ (1962).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). See also *Auxier v. Woodward State Hosp. Sch.*, 266 N.W.2d 139 (Iowa 1978); *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731 (Iowa 1968); *Barz v. Oler*, 257 Iowa 508, 133 N.W.2d 704 (1965); *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); *Ziegler v. U.S. Gympsum Co.*, 252 Iowa 613, 106 N.W.2d 591 (1961).

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. *Ziegler v. U.S. Gypsum*, 252 Iowa 613, 620, 106 N.W.2d 591 (1961), and cases cited.

Analysis

Claimant brings this action in arbitration for the breakdowns of March, May and July of 1979. Claimant contends that each breakdown was due to repeated heavy lifting required in his employment and that each resulting ulceration made subsequent breakdowns more likely. Claimant further contends that as the result of seven different employment related breakdown episodes, he now suffers a permanent weakening of skin tissue on his right flank which prohibits him from engaging in acts of gainful employment.

Medical and lay testimony within the record on appeal establishes the fact that claimant's condition was contributed to by lifting required in his employment. Further, when ulcerations occurred, he was required to remain at home out of his brace so that the ulcerations could heal. This made it impossible to work during the period.

However, the medical evidence shows that when claimant remained out of his brace, his side would heal. Medical evidence in the record does not establish to what extent claimant's employment tasks were responsible in precipitating the ulcerations. Nor does the medical evidence establish that the results of prior episodes made subsequent breakdowns more likely.

Two things are to be remembered. First, claimant is paralyzed from the chest down. Therefore, he has no feeling to alert him as to when the brace is causing pressure or irritation on his skin. Second, the nature of the brace worn by claimant must be considered. The brace places claimant's weight upon his rib cage enabling him to remain upright. Claimant has worn a brace since the early 1960s. The brace restricts the oxygen to claimant's skin and itself places pres-

sure on the skin depending upon claimant's weight and every movement.

The testimony of Drs. Decker and Beattie constitute only vague generalizations about the extent of claimant's disability and the seven different breakdown episodes spanning a period from August of 1976 to July of 1979.

Dr. Beattie creates only a possibility that one breakdown makes subsequent breakdowns more likely and opines that any activity carried out by the claimant while wearing the brace causes irritation leading to a breakdown and ulceration. (Beattie, page 36.)

Dr. Decker states he would presume that claimant's ulcerations were contributed to by heavy lifting required in his employment but that any activity carried on in the brace would cause irritation on the right flank leading to ulceration.

Claimant's burden of establishing a causal relationship between the episodes in question and his disabilities complained of is not aided by the vague and often contradictory medical evidence. Moreover, the periods of difficulty testified to by claimant do not always coincide with treatment records as to determine causation.

While claimant has failed to establish any permanent disability as the result of the three breakdowns in 1979, claimant has nonetheless suffered a temporary disability as the result of breakdowns precipitated in part by tasks required in his employment. Defendants' exhibit E and claimant's exhibit 1 are of assistance in determining when claimant was unable to work in 1979 due to his injuries as in the testimony of Dr. Decker.

In the decision filed December 8, 1981, the deputy found the claimant was not entitled to compensation for an alleged injury occurring on July 23, 1979. Testimony at hearing indicates that claimant's employment was terminated on July 21, 1979 after claimant left work without permission. Insofar as claimant was terminated before the date of the injury as alleged by claimant's petition in arbitration, the deputy was correct in denying benefits for the period after July 21, 1979.

Claimant's determination to work despite his severe handicaps is praiseworthy. He is certainly courageous and admirable. Unfortunately, no award can be made by this agency for those qualities. As the opinion of the Iowa Supreme Court in *Bulman v. Sanitary Farms Dairies*, 247 Iowa 488, 494, 73 N.W.2d 27, (1956) states:

> We are cognizant of the fact that the compensation law is for the benefit of workers and is to be liberally administered to that end. But it must be administered by the application of logical and consistent rules or formulas notwithstanding its benevolent purpose. It cannot be made to depend on the whim or sympathetic sentiment of the current administrator or presiding judge. We apprehend every member of this court is sympathetic to claimant in the instant case. But the compensation statute is not a charity. It is a humanitarian law to be administered, not by sympathy, but by logical rules, evolved from the determination of many cases under literally countless factual variations. Compensation is to be paid by the employer (or his insurer) as a matter of contract, not as a gratuity. It is payable only when the facts show the injury is within the contract — that it "arose out of and in the course of the contracted employment."

Findings of Fact

1. That claimant had a hunting accident in 1956 which resulted in paralysis below the chest.

2. That both of claimant's lower extremities were amputated at the hip joints in 1959.

3. That claimant has worn a series of braces since the early 1960s which place claimant's weight on his rib cage enabling him to remain upright.

4. Claimant suffered his first episode of swelling and abscesses on his right side in 1962.

5. Claimant was gainfully employed since 1965 doing a variety of welding jobs requiring lifting and stretching.

6. Claimant began employment as a welder in a small parts welding job in 1974.

7. That claimant was transferred in 1976 to a job assembling hog troughs which required lifting and stretching.

8. That on August 27, 1976, claimant sought treatment for an ulceration on his right flank.

9. That claimant suffered breakdowns on his right flank on February 15, 1978, August 23, 1978 and November 6, 1978.

10. That claimant's right flank has undergone three additional breakdowns occurring on March 5, 1979, May 22, 1979, and July 23, 1979.

11. That claimant suffered another breakdown on his right flank in July of 1980.

12. That as a result of three breakdowns in 1979, claimant suffered no permanent functional impairment.

13. That as a result of the three aforementioned episodes in 1979, claimant was off work from March 5, 1979 through April 30, 1979 and from May 22, 1979 to July 10, 1979.

14. That claimant's employment was terminated on July 21, 1979 due to his misconduct.

Conclusions of Law

That claimant sustained injuries which in part arose out of and in the course of his employment on March 5, 1979 and May 22, 1979.

That claimant's weekly rate of compensation is one hundred seventy and 22/100 dollars ($170.22).

That claimant is entitled to reasonable medical expenses necessitated by the injuries of March 5, 1979 and May 22, 1979 pursuant to Iowa Code section 85.27.

the Application for Review-Reopening and for the reason that the distance from Milford, Iowa to Portland, Oregon is considerable and the difficulty in scheduling such a deposition with Dr. David L. Noall will cause unnecessary delay of an early determination of the Claimant's Application for Review-Reopening.

WHEREFORE, Plaintiff/Claimant respectfully requests a declaratory ruling that the medical reports attached to the notice of intent to offer filed herein on October 5, 1981 be admissible at the trial of the Application for Review-Reopening in this matter.

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ant's exhibit C being the deposition of James E. Dolan, M.D.), defendants' exhibit 3; the depositions of Marvin Dubansky, M.D., (including Dubansky deposition exhibits A, B and C), and James E. Dolan, M.D., (including Dolan deposition exhibits 1 through 5); a report from Dr. Dubansky dated March 16, 1979; and the appeal briefs of both parties including the cross-appeal brief of claimant.

The issue on appeal, as determined by the district court's remand decision, is the extent of claimant's disability.

Claimant is presently 69 years old and is married. In approximately 1962 claimant injured his left knee while working as a truck driver for defendant employer. On October 21, 1976, claimant was in the process of weighing his truck when he slipped, fell and hit the calf of his right leg on a rock. When claimant's condition failed to improve with conservative treatment, he was hospitalized and vein stripping surgery was performed by R. W. Hoffman, M.D. At the

Conclusions of Law

1. Claimant sustained an injury which arose out of and in the course of his employment on October 21, 1976.

2. This injury was restricted to claimant's right lower extremity.

3. Said injury caused permanent partial disability to the right lower extremity of ten percent (10%), thereby entitling claimant to permanent partial disability for a period of twenty-two (22) weeks.

4. The bill of Dr. Dolan was shown to be fair and necessary.

5. The Northwest Community Hospital bill was shown to be fair and reasonable.

THEREFORE, it is ordered:

That defendants pay compensation benefits to claimant for a period of twenty-two (22) weeks at the rate of one hundred seven and 59/100 dollars ($107.59), accrued payments to be made in a lump sum together with statutory interest.

That defendants pay two hundred eighteen dollars ($218.00) for the Dolan bill less a credit for amounts paid specifically on the Dolan bill.

That defendants pay two thousand two hundred sixty-one and 40/100 dollars ($2,261.40) for the Northwest Community Hospital bill less a credit for amounts previously paid.

That costs of this action are taxed against defendants.

That defendants file a final report upon the conclusion of payments.

* * *

Signed and filed this 19th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

CHESTER CAYLOR,

Claimant,

vs.

LUCAS COUNTY,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Rehearing Decision

Defendants filed an application for rehearing on January 21, 1982 requesting that the testimony of Marvin Dubansky, M.D., concerning his rating of claimant's impairement be considered. A motion to strike and dismiss the rehearing was filed by claimant on February 9, 1982.

Pursuant to Iowa Administrative Procedure Act section 17A.16(2), "[a]ny party may file an application for rehearing, stating the specific grounds therefor and the relief sought, within twenty days after the issuance of any final decision by the agency in a contested case." Defendants complied with the requirements of section 17A.16 and a rehearing ruling was filed on February 1, 1982 which granted the application for rehearing "solely for the purpose of considering the testimony of Dr. Dubansky concerning his rating of claimant's physical impairment."

In response to a question concerning whether he had an opportunity to rate claimant's limitation, Dr. Dubansky stated "[u]sing the Guide to Physical Impairment by the AMA, this would amount to about seven percent impairment of the extremity." (Dubansky deposition, pages 10-11.) Taking Dr. Dubansky's seven percent permanent partial disability into consideration and averaging this with the twelve and one-half percent average figure based upon Dr. Dolan's findings, a total permanent partial disability of ten percent of the extremity is found.

The sentence on page 4 of the appeal decision filed January 19, 1982 which begins "With the exception. . ." is inconsistent with the above evidence and should be omitted. Likewise, "Finding of Fact" No. 14 is inconsistent with the record and should be omitted and in its place the following "Finding of Fact" No. 14 should be substituted:

14. Dr. Dubansky rated claimant's lower right extremity impairment at seven percent (7%).

In addition, on page 4 of the appeal decision the following information should be inserted after phrase "According to the Guides,": *upon which Dr. Dubansky based his rating.*

All other portions of the January 19, 1982 appeal decision, including the "Findings of Fact" and "Conclusions of Law" will remain unchanged.

THEREFORE, it is ordered:

That the appeal decision filed on January 19, 1982 be modified to reflect the additions and deletions discussed above.

* * *

Signed and filed this 26th day of February, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

JACINTA CERDA,

Claimant,

vs.

OSCAR MAYER & COMPANY,

Employer,

Self-Insured,

Defendant,

Appeal Decision

Statement of the Case

Claimant appeals from a proposed review-reopening decision filed January 25, 1982 wherein claimant was denied further compensation benefits. Claimant seeks further compensation benefits for an alleged injury arising out of and in the course of her employment. The date of July 31, 1978 was used in the petition but no injury was sustained on that date. It is noted that in the prior arbitration decision filed February 22, 1980, modified by a ruling filed March 25, 1980, claimant was awarded 20 4/7 weeks temporary total disability for injuries in January, April and October 1978. It is this decision that is the subject of the petition for review-reopening.

In a notice of appeal filed February 9, 1982, claimant requested leave to take additional evidence. No further explanation as to what evidence is desired or why it should be allowed was proffered and therefore such request is not considered.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant and Vernon Keller; claimant's exhibit A, the deposition of F. Dale Wilson, M.D.; claimant's exhibit B, the deposition of J. R. Lee, M.D.; claimant's exhibits C through F, medical reports; claimant's exhibit G, medical bill; defendant's exhibit 1, attendance record; and the briefs of both parties on appeal. The parties have further stipulated that the record in this matter includes all data of every nature and description contained in the prior arbitration proceeding including all medical data contained in that record and the transcript of the hearing.

Issues

The issue on appeal is whether the disability which claimant alleges is causally related to an injury arising out of and in the course of her employment.

Review of the Evidence

The parties stipulated claimant's weekly rate of compensation to be $182.59. All medical bills have been paid with the exception of one which was stipulated as reasonable in amount only.

Claimant was age 41, married with four children at the time of hearing. Claimant testified that she began working for defendant in 1970. In January 1978 claimant was working in defendant's department 3. Job tasks included the periodic lifting of boxes weighing up to 75 pounds. Claimant would do this type of work two to three hours per day before rotating to another job in her immediate area. Apparently, claimant had voluntarily transferred to that job from another department. (1979 Tr., p. 18.)

Claimant testified that on January 4, 1978 she began experiencing pain in her lower back. She informed defendant of her problem, but did not state the cause of her pain. (1979 Tr., p. 23.) Claimant stated that on or about February 7, 1978 she fell at work while reaching for a pallet. She suffered pulled muscles in the groin and hip for which she received treatment. Claimant testified that in the fall she landed in the same area of her back where the pain had been experienced previously. (1979 Tr., p. 24.)

Claimant again complained of back pain to defendant on March 16, 1978; March 28, 1978; and May 11, 1978. (1979 Tr., p. 25.) She testified that she received heat treatment and pain medication. Claimant's exhibit 2 from the arbitration action are records of defendant's plant nurse. Those records no not indicate any complaint of back pain on March 28, 1978. Those records show that heat treatment was administered only on March 16, 1978. Further, there is no mention of any medication given or prescribed for claimant on the above dates.

Claimant indicated that she first consulted Darwin Leighton, D.C., in May 1978 and that Dr. Leighton treated her back condition for two and one-half months. Claimant, however, later indicated that Dr. Leighton had been claimant's family doctor for several years and had previously treated her for back pain.

In a report of July 30, 1976, Dr. Leighton writes: "Mrs. Cerda has been under my care for lower back sprain; fifth lumbar-sacral [sic] articulation strain & sprain; muscular distortion; gluteal nerve involvement; and right leg spasm. According to my examination, she is able to return to full-time work on Monday, August 2, 1976." (Arbitration, employer's exhibit 4.)

Attendance and first aid records of defendant detail spotty attendance by claimant and back complaints as early as May 1975. (Arb., emp. ex. 3.)

Claimant further testified at the arbitration hearing that she did not notify defendant that her back condition might be work related until July 1978. She also stated that much of the medical expense she had incurred since 1978 was for a kidney disorder. (1979 Tr., p. 37.)

In the arbitration proceeding, claimant was awarded 20 4/7 weeks of temporary total disability plus medical expenses. Claimant now asserts that her back condition has deteriorated and that she is entitled to an award of permanent partial industrial disability.

As previously noted, claimant consulted Dr. Leighton for her back pain in 1978. In a report of May 12, 1978 to defendant, Dr. Leighton characterizes claimant's problem as a "lumbo-sacro [sic] articulation sprain, muscular spasm lower back." Dr. Leighton specifies the injury as nonoccupa-

tional. (Arb. emp. ex. B.) A report of June 12, 1978 details similar findings. (Arb. emp. ex. B.)

In a report dated July 31, 1978, Dr. Leighton writes: "Mrs. Jacinta Cerda suffered from Lumbo-sacral articulation sprain and strain to lower back, continued muscular spasms and distortion of pelvis. This was caused by lifting and twisting on the job. This could have started on the job by slipping, or over lifting on the work she was doing." (Arb. claimant's ex. 5 and 8.)

At no point does Dr. Leighton opine that claimant suffers any permanent functional impairment.

Claimant was also examined in 1978 by J. H. Sunderbruch, M.D., an orthopedic specialist. In his report of September 22, 1978 Dr. Sunderbruch states, in part:

> She gave a history of having been off work since May of 1978, and having seen a chiropractor who had told her that she was not able to return to work doing this heavy job. She states that she had never had back trouble before, and had been working at Oscars for some eight years. She also states that she has been lifting 75 pound boxes of meat, and first thought that her difficulty with her back was due to urinary difficulties. She was studied by a urologist and that proved to be negative. When she went to the chiropractor, he elicited that this was due to her work.
>
> On physical examination I find that she is completely negative for any abnormalities as far as musculature or function is concerned. She did elicit a meager amount of tenderness in her back with some leg raising on the right, but this was very meager. She could carry out all functions and had no limitation of motion. The x-ray reports did demonstrate some congenital abnormalities and read this way:
>
> > "Examination of the lumbar spine shows degenerative changes to the L5,S1 segment involving narrowing of the interspace, eburnation, sclerosis and spurring at this level. Impression: Abnormal lumbar spine showing definite degenerative changes of L5,S1 interspace. There is evidently some type of a pars defect on the right of L5, or some congenital variation in development, since a lucent line is seen on the right; although it is only seen on the AP view and not seen on the obliques — which is very peculiar. Questionable pars inter articularis defect on the right." (Arb. cl. ex. 9.)

Claimant was also examined by Steven R. Jarrett, M.D., and orthopedic specialist, at the request of the defendant. In his report of October 19, 1978, Dr. Jarrett notes:

> EXAMINATION: On examination she held her back very tightly. There was no spasm noted. She indicated no pain to palpation of the low back. She would barely forward flex or extend or lateral flex at all; this was all voluntary. It should be noted, however, that in getting on and off the examining table and other testing procedures, she moved her back very easily. Muscle strength in both lower extremitie [sic] was normal. She could toe and heel walk without difficulty. Knee and ankle jerks were 2 and symmetrical. Sensation was normal in both legs. There was no Babinski signs. Straight leg raising was negative bilaterally. Review of x-rays reveals essentially normal lumbosacral spine. I did not get a good look at the lumbosacral inner space and this may be somewhat narrowed. It is difficult to tell on the films that were sent to our office.
>
> IMPRESSION: Status post lumbosacral strain.
>
> RECOMMENDATIONS: I feel that this woman has been given some mis-information. She certainly does not have "degenerating back". I feel that she needs to be on a physical reconditioning program that is rather vigorous. I do not feel she will be left with any permanent disability. As far as lifting 75 lb. weights, that in itself, may not be appropriate, only because she is a female and despire [sic] the ERA there are some things that women cannot do as well as men. Other than that, I feel that she can be working in any capacity. (Arb. cl. ex. 4.)

With the filing of her petition in review-reopening, claimant has been introduced to a legion of doctors. As of the hearing on November 19, 1981, defendants have paid for all but one of claimant's examinations and treatments.

F. Dale Wilson, M.D., examined claimant on June 12, 1981 at the request of claimant's counsel. This lasted approximately one-half hour to one hour. Claimant has not seen Dr. Wilson since. (1981 Tr., p. 39.)

In his report of June 17, 1981, Dr. Wilson reported that upon examination claimant was experiencing discomfort, but no functional limitation on movement. Dr. Wilson concluded that claimant was suffering from a degenerative disease of the L5,S1 disc space. (Review-reopening, cl. ex. E.)

In his deposition Dr. Wilson again reported that claimant suffered no objective functional impairment, but gave claimant a permanent disability rating of five percent subjective pain symptoms. Upon direct examination by claimant's counsel, Dr. Wilson testified:

> Q. Well, really what I would like to limit it to is just your physical observations of her x-ray. The fact that there is a narrowing at one level as opposed to narrowing at several levels, does that indicate to you — is that consistent with a problem that might have developed as a result of heavy lifting?
>
> A. Yes. (Wilson depo., p. 14.)

However, Dr. Wilson later testified:

> Q. Were you able to find out her strength prior to 1978?
>
> A. No.
>
> Q. Did you discuss that with her?
>
> A. No, because that's too problematical. I wouldn't be able to get a hold of it particularly. Now, I arrived at these answers indirectly about what she can lift, what

she can't lift, what she was doing at work. I have some record about that, when she changed her weight lifting load and what happened. That's the only way I can arrive at that estimate.

Q. Do you have some idea what a normal weight limitation would be in someone with Mrs. Cerda's physical features?

A. Yes. She seems to be a pretty sturdy-built gal there. If she didn't have some trouble with her back, she could throw 50, 70, 75 pounds around pretty well — not a hundred pounds. It takes a female person of unusual structure to throw a hundred pounds.

Q. You believe a person of her size and physical characteristics could throw 50 or 75 pounds around without much difficulty for some time period?

A. Yes. (Wilson depo., pp. 25-26.)

Dr. Wilson characterized claimant's lower back condition as osteoarthritis. The doctor testified that preexisting injuries could bring about an osteoarthritic condition, but he did not state whether this was the cause of claimant's condition. Dr. Wilson testified:

Q. Could you have been able to tell whether Mrs. Cerda had any specific type of trauma at work had it not been a part of the patient's history?

A. If there had been some compression of the vertebra, such as we see with fractures, or if there had been some variation in the arches, which happens with fractures, I could have told.

Q. But you did not observe those in this situtation?

A. They were not present.

Q. So absent her patient history you could not have told whether trauma had caused her condition or whether it was a degenerative-type change?

A. Correct?

Q. The problems that you observed could be as a result of the general aging process?

A. Probably. (Wilson, pp. 27-28.)

Robert W. Milas, M.D., a neurologist, examined claimant on August 10, 1981. In his letter of August 11, 1981 to J. R. Lee, M.D., Dr. Milas wrote:

> General examination is quite unremarkable.
>
> Neurological examination reveals cranial nerves II to XII to be intact. Carotid pulses are palpable. There are no audible bruits. The patient's strength, deep tendon reflexes and cerebellar function are intact. The Hoffmann is absent bilaterally. Plantar responses are flexor bilaterally. Light touch, pin prick, vibration and position sense are intact. The patient is able to maintain her stance with eyes opened and closed. Gait and tandem gait are normal. The patient is able to walk on her toes and heels quite easily. Lumbar motion appears to be unrestricted. Straight leg raising is easily accomplished to 90 degrees bilaterally. (RR cl. ex. F.)

Dr. J. R. Lee, an orthopedic surgeon, examined claimant on March 10, 1981. In his report of March 25, 1981, Dr. Lee states:

> X-RAY: Lumbosacral spine:
> Moderately severe narrowing of disc and degenerative changes in the lumbar spine.
>
> DIAGNOSIS:
> 1. Lumbosacral Spine Osteoarthritis.
>
> MANAGEMENT:
> The patient was advised to take Indocin 50 mg, once twice a day when symptomatic. She was advised to stay on 25 pound weight restriction at work.
>
> CONCLUSION:
> On the basis of history, physical findings, and x-ray study, I believe that this patient was the above diagnosis. I believe that the osteoarthritis in the lumbar spine is a pre-existing condition. (RR cl. ex. D.)

In his deposition, Dr. Lee again assessed the cause of claimant's complaints:

A. I find she has arthritis in the lumbar spine, mainly localized between L-4, 5, level and between L-5, S-1 level.

Q. Doctor, within a reasonable degree of medical certainty, could you describe this osteoarthritic condition to be of a mild nature, or a severe nature?

A. If you have a one to ten scale, I would say about five.

Q. Do you foresee this condition to be worsening as Mrs. Cerda continues to grow older?

A. Oh, a slow progress, a degenerated change in the long run. Let's say fifteen, twenty years. (Lee depo., p. 5.)

Dr. Lee opined that claimant's arthritic condition predated claimant's alleged injuries. (Lee depo., p. 18.) As to whether claimant's injury could have been contributed to by an employment related trauma, Dr. Lee indicated only that it was a possibility. (Lee depo., p. 24.) Regarding the lifting requirements which she worked in, Dr. Lee again indicated that it was only a possibility that such conditions were a factor in bringing about her condition.

Dr. Lee was unable to state that claimant's condition was caused or contributed to by anything else other than arthritis.

Finally, claimant was a participant in an "Industrial Injury Clinic" at the Franciscan Hospital Rehabilitation Center in Rock Island, Illinois. While there, claimant was examined by Frank I. Russo, M.D. In his report of January 9, 1981, Dr.

Russo describes an unremarkable examination with claimant experiencing normal movement and flexation. Dr. Russo concludes:

> IMPRESSION: Chronic low back pain with evidence of mild degenerative arthritis involving the lumbar spine, some secondary deconditioning of the low back musculature and evidence on psychological profile of some secondary gain motivating this woman's behavior.
>
> RECOMMENDATIONS: At the present time, I do feel that this woman needs to continue to be on a reconditioning program and on an oral anti-inflammatory agent for a significant period of time. There does appear to be some mild degenerative changes in her lumbar spine which would probably preclude this woman from returning to very heavy sorts of labor and in fact I think a 20-30 pound weight lifting restriction on this woman is appropriate. However, I do not see significant disease either on x-ray or on the basis of her physical findings to preclude this woman from carrying out the job activities which she has been carrying out most recently and feel that this woman has significant motivational problems whether unconscious or conscious because of some benefits which are accrued to her because of her pain, specifically some improvements in her family situation with additional help at home reinforcing her pain behavior and the capabilities of using her pain behavior at times to manipulate certain aspects of her job. It is the feeling of our psychologist that this woman was not going to have a complete alleviation of her pain until such time as the secondary pain reinforcing stimuli were elevated to that her behavior could be modified, however, I did not feel there was any appropriate way to carry this out. In the mean time, I did encourage this woman to continue the exercise program which we outlined for her as well as continuing to take her Clinoril for at least a month. This could then be continued by her family physician. On the basis of her physical findings, I do not see any reason why she couldn't carry out a job within the restrictions outlined above with regards to avoiding heavy lifting of more than 30 pounds on a frequent basis. (RR cl. ex. C)

While a patient in the hospital's clinic, claimant was given a psychological evaluation by Thomas P. Dhanens, Ph.D. Through Dr. Russo's report, Dr. Dhanens states conclusions arrived at through his examination of the claimant. He states:

> In summary, Jacinta Cerda seems to be deriving secondary gain from her pain complaints. Within her family, she is being rewarded for feeling bad and punished for feeling good. On the job, also, she may be using her pain complaints as leverage in dealing with her superiors. The patient gives a vague, inconsistent picture of symptoms. She seems to be actually in mild distress. However, I do not believe she will "let go" of her symptomatic complaints so long as she is in the situation she is in now. There is no reason to believe that reinforcement contingencies at home or work will be changed. It appears the patient has not been motivated to follow through consistently with an exercise program. She tends to project responsibility onto others and take a passive approach herself. I believe she should be handled in a firm manner, and, ideally, reinforced consistently for following through with an exercise program. Outside structure and encouragement will be necessary, rather than relying upon self-motivation and self-discipline. (RR cl. ex. C.)

Vernon Keller, safety manager for the plant where claimant was employed, testified at the hearing of November 19, 1981. Mr. Keller testified that the defendant has paid the medical bills related to this matter for all physicians that she has consulted, except Dr. Lee. (1981 Tr., pp. 45-46.) He also stated that claimant has been paid $5,383.73 in sick leave benefits since October 1978. (1981 Tr., p. 44.) Mr. Keller also testified that at no time has a medical report, except that of Dr. Wilson, been furnished which would lead defendant to believe that it owed the claimant further compensation benefits.

Additionally, claimant testified at the last hearing that she stopped working in August 1981 without advance notice and has not worked since. (1981 Tr., p. 37.) She also admitted that her sick leave benefits had run out three weeks before the November 19, 1981 hearing.

Applicable Law

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

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

A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. *Burt v. John Deere Waterloo Tractor Works, supra.*

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 insufficient — a probability is necessary to generate a question of fact or to sustain an award. *Burt v. John Deere Waterloo Tractor Works, supra.* However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. *Burt v. John Deere Waterloo Tractor Works, supra.* The Iowa Supreme Court in *Becker v. D & E Distributing*, 247 N.W. 2d 727 (Iowa 1976), spelled out the Iowa law on this problem with great clarity. Briefly summarized, the court

indicated that an expert witness may testify to the possibility, the probability or the actuality of the causal connection between claimant's employment and his injury. If the 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.

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 opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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. supra.* See also *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

When a worker sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he or she must prove one of two things: (a) that the disability for which he or she 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 (Iowa 1971).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 908, 76 N.W.2d 756, ____, (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812, ____, (1962).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). See also *Auxier v. Woodward State Hosp. Sch.*, 266 N.W.2d 139 (Iowa 1978); *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731 (Iowa 1968); *Barz v. Oler*, 257 Iowa 508, 133 N.W.2d 704 (1965); *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963); *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961); *Ziegler v. U.S. Gypsum Co.*, 252 Iowa 613, 106 N.W.2d 591 (1961).

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. *Olson v. Goodyear Service Stores, supra; Yeager v. Firestone Tire & Rubber, Co., supra; Ziegler v. U.S. Gypsum Co., supra.* See also *Barz v. Oler, supra; Almquist v. Shenandoah Nurseries, supra.*

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. *Ziegler v. United States Gypsum Co., supra.*

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. *Yeager v. Firestone Tire & Rubber Co., supra*; 100 C.S.J. Workmen's Compensation §555(17)a.

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. *Ziegler v. U.S. Gypsum, supra.*

In *Almquist, supra*, at 732, the court 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.

Analysis

Claimant's brief on appeal concedes the fact that she has suffered no new injuries as the result of her previous injury for which she received temporary total disability benefits.

In the arbitration decision filed February 22, 1980, no finding of permanent disability was made. Nor did medical evidence of permanent functional impairment exist for the deputy to find permanency. Claimant, therefore, has the burden of proving either that her condition has worsened since the arbitration decision, or that she has failed to improve as anticipated.

As to any alleged failure to improve, the record fails to disclose a disability for which there was any expectation of improvement. The medical evidence upon which the arbitration decision of February 22, 1981 was founded indicated that claimant had suffered a lumbosacral muscular strain. Claimant was found to be without functional limitation and was released for work.

Rather, claimant contends that her condition has worsened and that she now suffers permanent impairment. Despite her contentions, there is yet to be any medical evidence introduced which find the claimant to be capable of anything less than normal functional performance at the time of November 19, 1981 hearing. Even Dr. Wilson found claimant's pain to be totally subjective in nature.

Despite the opinion of Dr. Jarrett, the findings of Drs. Sunderbruch, Lee, Russo, Milas and Wilson all indicated that claimant is undergoing a gradual degeneration; the result of osteoarthritis of the lumbar spine. The great weight of medical evidence contained in the record on appeal indicates that it is this osteoarthritic degeneration that is responsible for claimant's increased subjective complaints.

Claimant's brief on appeal relies heavily upon the statements of Drs. Lee and Wilson that an injury could possibly

aggravate a preexisting osteoarthritic condition. Claimant also asserts that the deputy's decision of January 25, 1981 misapplies. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965) as to require the injury of July 31, 1978 to be the sole cause of her disability. Such an inference is not justified.

The court in *Ziegler v. U.S. Gypsum Co., supra*, held that a work connected injury which more than slightly aggravates a preexisting condition is compensable. However, claimant still has the burden of proof that her alleged injuries are causally related to the aggravation and that the resulting aggravation was material.

When Dr. Lee was asked if the cold conditions claimant worked under as well as the heavy lifting required in her job were a factor in her disability, the doctor refused to go further than to state it was a possibility. (Lee depo., pp. 7-8.)

Dr. Wilson testified at one point that x-rays of claimant's spine revealed a narrowing of disc space consistent with the results of heavy lifting. (Wilson depo., p. 14.) However, Dr. Wilson later concedes that claimant's problems were probably the result of the "aging process" meaning degenerative osteoarthritis. (Wilson depo., p. 28.)

It is also noteworthy that the reports of Drs. Milas and Russo referred to claimant's history of employment injury. Yet, neither physician chooses to find that an employment related injury has contributed to her present disability. Moreover, the report of Dr. Dhanens must be considered in conjunction with the other medical evidence contained in the record on appeal for purposes of assessing the cause of claimant's present complaints.

It is clear that any employment related lifting or stretching would cause claimant's arthritic pain to flare up. Likewise, any exertion off the job would exacerbate the pain of claimant's preexisting arthritic condition.

The record clearly indicates that exertions by claimant caused only temporary aggravations of her contition. As in *Almquist, supra*, claimant's condition is attributable to the building up and the tearing down of the human body. Because of arthritic degeneration, exertions by the claimant, whether on or off the job, tended to exacerbate her symptoms. Nonetheless, medical evidence shows that the employment related exertions did not contribute to her permanency anymore than activities of daily living.

While it is unfortunate that the onset of osteoarthritis should impair the claimant's ability to work, the medical evidence fails to establish that an employment related injury has materially aggravated this condition. The defendant has already provided substantial amounts to the assistance of claimant. Defendant should not be held to pay further for the effects of an aging process which afflicts all of mankind.

Findings of Fact

1. That claimant had a history of back complaints prior to 1978.

2. That on January 4, 1978, claimant first reported to defendant that she was suffering lower back pain.

3. That claimant fell on February 7, 1978 suffering pulled muscles.

4. That claimant suffers from degenerative osteoarthritis in the lumbosacral spine.

5. That claimant's osteoarthritis is the cause of claimant's disability for which she bases her claim.

6. That claimant's condition is not caused nor permanently aggravated by any employment related injury.

7. That defendant has paid claimant five thousand three hundred eighty-three and 73/100 dollars ($5,383.73) in sick leave pay since October 1978.

8. That defendant has paid all the medical bills related to this matter for all physicians that she has consulted, with the exception of Dr. J. R. Lee.

9. That the medical expenses of Dr. J. R. Lee were reasonably necessary in the treatment of the temporary injury arising out of and in the course of claimant's employment.

Conclusions of Law

That claimant has failed in her burden to prove by a preponderance of the evidence that the alleged disabilities on which she now bases her claim are causally related to any injury arising out of and in the course of her employment.

That claimant is not entitled to an award of permanent partial disability.

That defendants are liable for the amounts sought by Dr. J. R. Lee for the treatment of claimant pursuant to Iowa Code section 85.27.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision filed January 25, 1981 are proper.

THEREFORE, it is ordered:

That the claimant shall take nothing further from these proceedings.

That the defendant shall pay unto claimant the following medical expense: Dr. Lee, $295.00.

That the costs of this appeal are taxed to the claimant pursuant to Industrial Commissioner Rule 500—4.33.

That defendant shall file a final report upon payment of this award.

* * *

Signed and filed this 18th day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

THOMAS G. CHAMBERS,

Claimant,

vs.

RICHMAN AUTO PARTS,

Employer,

and

COMMERCIAL UNION INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a proposed review-reopening decision filed August 28, 1981 wherein claimant was awarded temporary total disability plus related medical expenses for an injury arising out of and in the course of his employment on June 12, 1978.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant and David Goodwin; defendants' exhibits 1 through 24; the depositions of Charles L. Pigneri, D.O., and John A. Aita, M.D.; and the appeal briefs of all parties.

Claimant's brief on appeal presents two issues for separate determination; whether there is a causal relationship between the injury of June 12, 1978 and the alleged disabilities upon which claimant bases his claim, and whether defendant employer terminated claimant as the result of his injury.

As noted above, claimant sustained an injury arising out of and in the course of his employment with defendant employer on June 12, 1978 when, while standing on a ladder, claimant reached above his head and grabbed a five gallon can of paint thinner and felt a snap in his back. Claimant testified at hearing that he reported the incident to defendant employer immediately and saw Charles L. Pigneri, D.O., the following day. Dr. Pigneri hospitalized claimant for four days where he received therapy and was placed under traction. Claimant testified that after being released from the hospital he returned to work for approximately a week. (Transcript, pages 8-9.)

Claimant testified that he continued to have pain in his lower back and was hospitalized again for a period of four to five days under the care of Behrouz Rassekh, M.D. (Transcript, page 11.)

Dr. Pigneri also referred claimant to Harold A. Ladwig, M.D., who hospitalized claimant a third time for approximately five days. Claimant was prescribed an electronic stimulator and back braces to relieve his lower back pain. (Transcript, page 12.)

Dr. Pigneri next referred claimant to Ronald K. Miller, M.D., and to the University of Iowa Hospitals in Iowa City. (Transcript, page 14.)

Claimant testified that he again returned to work in November of 1979 for four or five weeks. Claimant continued to complain about pain and was referred by Dr. Pigneri to John A. Aita, M.D., who hospitalized claimant a fourth time for a week. (Transcript, page 16.) Claimant testified that he has not been hospitalized since.

Claimant asserts that his back pain persists. Claimant indicated that sitting causes his back to "tighten up" and that he has to have it "popped" back into place repeatedly. Claimant also complains of headaches, muscle spasms of the upper dorsal area, a burning sensation on the left side of his face, and numbness in the fingers.

In the decision of August 28, 1981, the deputy found that claimant suffered no permanent disability as a result of the injury of June 12, 1978 and that claimant's remaining complaints are due to psychosomatic problem. The deputy further found that claimant had psychological problems prior to June 12, 1978 and that claimant suffered no permanent psychological impairment as the result of his injury. Claimant's brief on appeal asserts that the injury of June 12, 1978 brought about a psychogenic reaction resulting in permanent disability.

Dr. Charles Pigneri was claimant's family physician prior to June 12, 1978. Dr. Pigneri treated claimant for a cervical injury occurring in 1969. (Transcript, page 21.)

Dr. Pigneri testified that he saw claimant on June 13, 1978 and admitted him to Cass County Memorial Hospital. Dr. Pigneri diagnosed claimant as having sustained an acute strain of the lumbar spine. (Pigneri deposition, page 6.) During his first hospitalization, Dr. Pigneri treated claimant conservatively with traction, muscle relaxers, hot packs and ultrasound. Dr. Pigneri stated that on discharge from hospitalization, claimant was instructed not to return to work and to continue conservative treatment. Claimant saw Dr. Pigneri on some fourteen occasions from June 28, 1978 until September 26, 1978. (Pigneri deposition, pages 10-11.) Dr. Pigneri testified that claimant's condition has greatly improved as of September 26, 1978 and that a work release was given for claimant to work on a part-time basis as of October 2, 1978. Claimant returned to Dr. Pigneri thereafter complaining of back pain, a burning sensation in his face on the left, and muscle spasms in his upper dorsal area.

In a period from August to November of 1978, Dr. Pigneri referred claimant to Behrouz Rassekh, M.D., a neurologist; Harold A. Ladwig, M.D., a neurologist; Edward M. Schima, M.D., a neurologist; Ronald K. Miller, M.D., an orthopedic surgeon; and Robert J. Klein, M.D., an orthopedic surgeon. (Pigneri deposition, pages 13-15.) Dr Pigneri testified:

A. For the amount of pain he was having, I could not find a reason why he was having so much pain for the amount of — why he was having so much pain for the amount of apparent injury.

* * *

Q. So as late as December of 1979 almost everyone had concluded there were very few physical findings; is that right?

A. That's correct.

Q. And you had concluded that also?

A. That's right.

Q. And —

A. The latter part of '79 basically he was seen for mostly problems for his psychosomatic type of things. Mood depression, et cetera. (Pigneri deposition, pages 27-28.)

Dr. Pigneri agreed that as late as December of 1979, almost everyone had concluded that there were very few physical findings on which to explain claimant's pain. In another effort to determine etiology, Dr. Pigneri also referred claimant to University of Iowa Hospitals and John A. Aita, M.D. Dr. Pigneri testified that claimant had improved in 1980, but that claimant was still complaining of pain much more than the injury justified. Dr. Pigneri rated claimant's permanent partial disability 15 to 20 percent. (Pigneri deposition, page 31.) Dr. Pigneri did not specify whether this was a functional rating of the body as a whole, nor did he specify what functional impairment was attributable solely to the injury of June 12, 1978.

In a report dated August 2, 1978, Behrouz Rassekh, M.D., indicated he saw claimant on August 1, 1978 and that claimant's neurological examination was normal. (Defendants' exhibit 2.) In a report dated September 6, 1978 Dr. Rassekh advised claimant to increase his activity and released claimant to return to work on September 11, 1978. (Defendants' exhibit 4.) In his report of October 6, 1978, Dr. Rassekh opined, "I do not believe that he will have any permanent disability since we did not find any cause for most of his symptoms." (Defendants' exhibit 5.)

Edward M. Schima, M.D., examined claimant on October 31, 1978. In this report of November 3, 1978, Dr. Schima states:

> CLINICAL IMPRESSION:
> 1. Lumbar strain.
> 2. Psycho physiological reaction.
>
> COMMENT: The story is curious and it is somewhat to relate the initial symptoms of back pain which occurred while the patient was lifting and the subsequent course with progressive burning extending up the hips and then up the entire left side of the body to involve the arm and even the face. This is not easily explained by any single anatomic lesion. One might initially wonder about a cervical lesion or even something in the posterior fossa but the neurological examination today is completely normal. The burning, dysasthetic character to his symptoms would raise the question of a peripheral neuropathy but there are no reflex asymmetries or distal motor or sensory impairment to support this. I am frankly at a loss to explain the entire picture. (Defendants' exhibit 6.)

Dr. Schima performed a neurological examination upon the claimant. As to the finding of "psychophysiological reaction," Dr. Schima does not discuss claimant's psychological condition prior to June 12, 1978 or explain the rationale behind this conclusion.

In his report of January 2, 1979, Harold A. Ladwig, M.D., discussed the result of his examination of claimant:

> This thirty-five year old, married, white male was admitted to the hospital because of severe pain in the lower back area associated with the feeling that his feet were on fire. His initial symptoms started after the patient had noted the abrupt onset of severe pain in the lower back area when he was lifting something standing on a ladder. It was felt that the patient had sustained a lumbar strain. In addition to this there was evidence of psychological overlay. The patient previously had a myelogram performed which was entirely normal.

Dr. Ladwig, like his associate Dr. Schima, makes a final diagnosis of psychogenic overlay. (Defendants' exibit 8.) As with Dr. Schima, Dr. Ladwig does not discuss claimant's prior psychological condition or the rationale for the diagnosis.

Robert J. Klein, M.D., saw claimant during the hospitalization of November 1978. In his report of May 10, 1979, Dr. Kelin writes:

> PAST HISTORY:
>
> The patient denied any previous history of injury to his neck or back. He had had no symptoms in these areas prior to the incident at work, in June of 1978.
>
> PHYSICAL EXAMINATION:
>
> The examination of the cervical spine revealed no consistent areas of tenderness. There was full range of motion without discomfort.
>
> The examination of the dorsolumbar spine revealed inconsistent areas of tenderness over the spinous processes primarily in the low dorsal area. There was full range of motion of the dorsolumbar spine without discomfort.
>
> With the patient supine, straight leg raising at 45 degrees bilaterally elicited the response, by the patient, that he noted a burning pain in the low back. Further stretch, however, did not increase the discomfort. The Lasegue's and Patrick's tests were negative.
>
> Neurological examination of the upper and lower limbs was negative.
>
> X-rays of the cervical spine, taken at Archbishop Bergan Mercy Hospital on November 17, 1978, were normal.
>
> X-rays of the lumbar spine was normal, except for a few drops of pantopaque from a previous myelogram.
>
> DIAGNOSIS:
>
> Chronic lumbar strain.
> (Defendants' exhibit 12.)

In his report of December 12, 1978, Ronald K. Miller, M.D., stated that claimant was cheerful and free of any noticeable

pain or limitations. Dr. Miller could find nothing to account for claimant's symptoms. (Defendents' exhibit 7.)

In a report of October 12, 1979, Martin Murphy, M.D., a neurologist with the University of Iowa Hospitals, indicated that claimant's physical examination was unremarkable. (Defendants' exhibit 13.)

Michael T. O'Neil, M.D., examined claimant during the hospitalization of November 1979. In a consultation record dated November 17, 1979, Dr. O'Neil states:

> X-rays of the lumbosacral spine were reviewed and are normal.
>
> I agree that this man's symptoms far outweigh his objective physical findings. The history of burning sensations in the hands, right leg and face are not consistent with any musculoskeletal injury. I don't feel that he has chronic myositis or ligamentus strain. I would not favor a repeat myelogram (already had one which wa [sic] probably also not indicated and I don't feel that the indications for it are worth the risks and complications of the procedure. I do agree that a psych consultant may be helpful. I find no orthopedic abnormality. Will see again upon request. (Defendants' exhibit 15.)

Richard Wikoff, Ph.D., conducted a psychological examination of claimant during the hospitalization of November 27, 1979. In this consultation record dated November 27, 1979, Dr. Wikoff states: "Mr. Chambers is functioning intellectually within the average range. There are no indications from this evaluation of any psychological problems due to organicity. There are no indications of any serious functional problems, although there is a suggestion of a tendency towards somatization during periods of stress." (Defendants' exhibit 16.)

William R. Hamsa, Jr., M.D., examined claimant in February of 1979. In his report of August 11, 1980, Dr. Hamsa writes:

> Clinical examination showed a muscular, 35-year old male who was five-foot ten and a-half inches tall and weighed 192 pounds. Pain was localized in the low lumbar area and left buttock. Range of motion of the lumbar spine was 75 percent normal in all directions. Patient walked easily on tip-toes and heels. Negative Trendelenburg of each hip. Normal range of motion of the hips, knees and ankles. No significant straight leg raising limitation. Reflexes, knee and ankle areas, hypoactive but seemed to be equal. No gross motor weakness in feet. Peripheral vascular status was intact. No particular tenderness in gluteal mass or about trochanters of either hip.

X-rays were not indicated at this time, as patient had had multiple studies in the past, all of which he had been told were normal.

Orthopedic impression was recurrent low back pain of undetermined origin, possibly early degenerative disc disease and/or nonspecific neuritis, back and left lower extremity.

> I really didn't have much to suggest for the patient. He had very few physical findings. He was carrying out his employment. He had supports and corsets and braces that he did not wish to wear. I thought he was more or less going to have to put up with this and get along as best he could. He had had a myelogram, body scan as well as other special studies and all of these had been found to be normal. Certainly over a period of time, (12 to 18 months) if still symptomatic, recheck of some of these studies would be indicated. (Defendants' exhibit 20.)

As of November 1979, Dr. Pigneri was still unable to determine the etiology of claimant's pain. Dr. Pigneri therefore referred claimant to John A. Aita, M.D. In his deposition, Dr. Aita testified that he practices neurology and psychiatry.

Dr. Aita first saw claimant on November 15, 1979. Dr. Aita took claimant's history and noted that a neurological examination by his son in addition to the reports of other physicians had failed to reveal any objective causes of claimant's pain. (Aita deposition, page 8.)

Dr. Aita conducted a psychiatric examination and further had claimant tested by a psychologist. Dr. Aita testified that the Wexler Adult Intelligence Scale, the Bender-Gestalt, the Minnesota Multifasic Personality Inventory and the Rorschach Test were administered to claimant. (Aita deposition, page 10.) Dr. Aita testified as to results of psychiatric testing:

A. That showed to quote here "a profile typical of persons who are well-functioning hysterics, a tendency toward somatization during periods of stress."

Now, somatization means that these are people who with emotional stress develop what we call psychosomatic symptoms, physical-like symptoms under stress due to spasm or hypersensitivity of a nervous system. They develop physical-like symptoms, but the symptoms are due to the emotions.

Q. In other words, they don't have any organic determination?

A. That's correct. (Aita deposition, page 11.)

Dr. Aita indicated that he saw claimant regularly through March 10, 1980. Dr. Aita stated that he recommended claimant undergo extensive psychological treatment in an open ward setting, but that claimant refused preferring to see Dr. Aita only when claimant felt it necessary thereafter. Dr. Aita has not seen claimant since. (Aita deposition, page 15.)

Dr. Aita made the following observations as to claimant's psychological profile:

A. Yes. I interviewed him and talked to him a number of times and came up with some conclusions.

Q. And what did you find as a diagnosis, if any?

A. I felt that he had — he was concealing a depressed mood to us, and there was a lot of nervous tension that was bottled up causing pains and that along with the

psychologic tests I too agreed that he tended to be kind of a hysterical individual.

Q. And in that regard this nervousness, this was because of the type of psychological and physical makeup?

A. Yes.

Q. So that was something that was part of him all the time?

A. Yes.

Q. Now —

A. I might go ahead and say that I had the feeling he's a very nervous and high-strung person. He is too intense. He gets frantic very easily. He works himself too hard. He's very temperamental.

This is the impression I had of this fellow though he tried to paint me an opposite picture, that he was a very serene, easy-going guy, and clinically, I had the feeling he was anything but that.

Q. In other words, from — outwardly without getting into the questions and the testing he would appear as cool so to speak?

A. Yes, that's right.

Q. And — but inwardly you're saying this is what you found?

A. Yes.
(Aita deposition, pages 12-13.)

Dr. Aita noted that as of March 10, 1979 the claimant related that he was active, had side jobs, and participated in recreational activity. Dr. Aita also noted that at a December 10, 1979 consultation, claimant related working on a car some six or seven hours that day. (Aita deposition, page 18.)

In a letter of December 13, 1979, Dr. Aita states:

> This is in reply to your letter of December 12, 1979, requesting an estimation of partial permanent disability on Mr. Thomas Chambers of Carson, Iowa. To date I see no reason to consider any permanent disability on this patient. The problem appears to be mostly functional or psychophysiologic. He should recover without any permanent disability.

Dr. Anita continues:

> P.S. I should add that the patient has *temporary partial disability* although it is entirely subjective in nature. However even patients with neurotic or psychosomatic difficulties must be considered disabled. I would put this partial disability at about 20%. How long this partial disability remains is going to depend on whether Mr. Chambers will cooperate for and respond to psychotherapy as well as vocational rehabilitation.

In his deposition of December 14, 1980, Dr. Aita again states that claimant suffers no permanent impairment. (Aita deposition, page 19.) Dr. Aita indicated that the only thing keeping claimant from returning to work was his psychosomatic problem. (Aita deposition, page 16.)

As to a causal relationship between the injury of June 12, 1978 and his psychological impairment, Dr. Aita testifies:

> Yes. I mean in other words, you've got an emotionally loaded person, a nervous, high-strung person, who is just almost waiting for something to fuse this off, and actually an injury can do this. We see this very frequently where somebody is a very nervous, high-strung person gets into an injury that would produce some temporary symptoms, and this just blows up the whole thing.
> (Aita deposition, page 22.)

Dr. Aita does not establish causation more firmly elsewhere than to claimant's attorney's question whether causation could have been present. In fact, Dr. Aita indicates that claimant's psychological difficulties existed prior to June 12, 1977. (Transcript, page 12.)

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 12, 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 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 (1963). 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 Co.*, 253 Iowa 369, 375, 112 N.W.2d 299 (1961), the court quotes with approval from C.J.S.: "Causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability or death."

The record on appeal contains uncontradicted evidence that claimant suffers from a psychosomatic problem. Drs. Pigneri, Schima, Ladwig and Klien all find the existence of a psychogenic overlay as a result of the injury of June 12, 1978. However, none of their reports explain the basis of their findings, nor discuss the extent to which claimant's preexisting psychological condition was aggravated by the injury of June 12, 1978.

The testimony and reports of Dr. Aita detail the extent of claimant's psychological difficulties. His findings are corroborated by the findings of Dr. Wikoff. Testimony in the record also indicates that persons associated with claimant prior to his injury of June 12, 1978 knew claimant to possess the same behavior found by Drs. Wikoff and Aita. (Transcript, page 71; Aita deposition, page 17.) The opinions of Dr. Aita must be given the greater weight because of his expertise and the support of his conclusions by the record.

While Dr. Aita indicated that claimant's psychosomatic problems could have been related to the incident of June 12, 1978, Dr. Aita did not find that such a relationship was probable. The fact that a causal relationship might be probable does not meet claimant's burden of proof. The findings of Dr. Aita indicate that claimant's psychosomatic problems are related to his personality makeup rather than to the incident of June 12, 1978. (Aita deposition, page 12.) But the mere fact that claimant suffers a disability does not establish that the disability is causally related to an industrial injury.

The medical evidence contained in the record, as well as testimony at hearing, clearly indicate that claimant suffered from a preexisting psychological condition. (Aita deposition, page 12.) The fact that such a condition was not diagnosed until after claimant underwent treatment for the injury of June 12, 1978 does not necessarily establish that the problem was triggered nor even aggravated by that injury. Testimony in the record indicates that persons associated with claimant recognized his behavior problems prior to June 12, 1978. (Transcript, page 71; Aita deposition, page 17.) But if claimant chose to disbelieve that he had a psychological problem after consultation with Dr. Aita, he surely would not have recognized it before the injury of June 12, 1978. Moreover, the record indicates that there was no real opportunity to professionally take notice of claimant's psychological problem until after claimant underwent extensive examination to determine the etiology of his complaints.

The record then establishes that claimant's psychological problems predated the injury of June 12, 1978. The testimony of Dr. Aita further establishes that if this preexisting psychological problem was aggravated at all by the injury of June 12, 1978, that aggravation was of a temporary and insignificant nature given the magnitude of claimant's preexisting psychological problems. (Aita deposition, page 27.) See *Langford v. Kellar Excavating and Grading, Inc.*, 191 N.W.2d 667, 669 (Iowa 1971).

A full review of the record on appeal therefore establishes that not only was the physical impairment caused by the injury of June 12, 1978 of a temporary nature (defendants' exhibit 4) but that if claimant's psychological problems were aggravated by the injury of June 12, 1978, that aggravation was temporary and slight.

In the second portion of their brief on appeal, claimant asserts that he was discharged by defendant employer as a result of the injury of June 12, 1978. Claimant testified that he was fired because he could not move as fast an the employer wanted him to move after he returned to work. (Transcript, page 28.) Claimant asserts that he therefore suffered a loss due to a reduction of earning capacity as a result of being discharged.

Claimant further states in his brief:

> Therefore, claimant asked the Industrial Commissioner to determine the extent of his industrial disability. *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181, 192 (Iowa 1980.)
>
> Claimant maintains that the testimony of his employer and the conduct of the employer after his accident clearly shows that as a result of his industrial accident, which aggravated his preexisting latent emotional condition caused increased industrial disability on the part of said claimant and he is not barred from recovery by failing to prove an increased functional disability. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348, 354, (Iowa 1980).

Testimony of David Goodman, claimant's employer, created a dispute as to whether claimant was discharged or chose to resign. Mr. Goodman testified:

> Q. Now, was there work for Tom Chambers when he left in March of '79? Did you offer to let him keep working on as a commissioned salesman?
>
> A. Yes. We found the amount of business he was creating out in the field was slowly diminishing. In fact, we were having more of his sales on a particular paint line that he was supposed to represent into the body shops that the so-called do it yourself was picking up more walking into the store than Tom was creating outside of the store. I told him that in that case, that we'll have to discontinue his salary and put him strictly on a commission basis just on the amount of sales he created outside of the store.
>
> Q. And you felt that if he would talk up the paint, there wouldn't be any difficulty in him making his salary?
>
> A. That's right. If he adhered to calling on his accounts.
>
> Q. But he chose to quit?
>
> A. Right.
> (Transcript, pages 71-72.)

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 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.

Mr. Goodman's testimony indicates that the decision to place claimant on a commission basis was related to changing business condition rather than to the injury of June 12, 1978.

Findings of Fact

1. That claimant sustained an admitted injury arising out of and in the course of his employment with defendant employer on June 12, 1978.

2. That as a result of the injury of June 12, 1978, claimant was unable to work for 15 weeks from June 13, 1978 to October 1, 1978 (transcript, page 9); from November 17, 1978 to November 26, 1978 (transcript, page 12); and from November 13, 1979 to November 21, 1979 (transcript, page 15).

3. That claimant has no permanent physical impairment as a result of the injury of June 12, 1978. (Defendants' exhibit 4.)

4. That claimant suffers from a psychological impairment which predates June 12, 1978. (Aita deposition, page 12.)

5. That medical expenses incurred since November 21, 1979 are not related to claimant's injury.

6. That claimant was paid a salary of one hundred fifty and 00/100 dollars ($150.00) per week plus an allowance for expenses. (Transcript, page 23.)

7. That claimant has four dependents.

8. That claimant voluntarily resigned from employment with defendant employer. (Transcript, page 72.)

Conclusions of Law

That claimant had failed to meet his burden of proof that he suffers permanent partial disability as a result of the injury on June 12, 1978.

That claimant has failed to meet his burden of proof that a preexisting psychiatric condition was materially and permanently aggravated by the injury on June 12, 1978.

That claimant is entitled to temporary total disability benefits for the period he missed work at the rate of one hundred three and 66/100 dollars ($103.66) per week.

That medical expenses incurred after November 21, 1979 are not related to the injury of June 12, 1978.

That claimant is not entitled to a finding of permanent disability as a result of any actions of defendant employer.

WHEREFORE, the above findings of fact and conclusions of law are made.

THEREFORE, defendants are ordered to pay unto claimant seventeen and four-sevenths (17 4/7) weeks temporary total disability benefits at a rate of one hundred three and 66/100 dollars ($103.66) per week.

Defendants are to be given credit for any temporary total disability benefits previously paid.

Defendants are to pay the medical expenses for each of claimant's hospitalizations.

Defendants do not have to pay for claimant's medical bills since his last hospitalization which ended on November 21, 1979.

Defendants are to pay the costs of this action.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Iowa Code section 85.30.

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

* * *

Signed and filed this 19th day of February, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

PAUL W. CHEWNING,

Claimant,

vs.

MORSE CHAIN RUBBER DIVISION,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants' appeal from a proposed review-reopening decision filed August 26, 1981 wherein claimant was awarded 60 percent permanent disability plus healing period benefits and interest for an admitted industrial injury occurring on June 29, 1979.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant; claimant's exhibits 1 through 5; defendants' exhibits A through O; and the briefs of all parties on appeal.

In his decision of August 26, 1981, the deputy found claimant's permanent industrial disability to be 45 percent based upon the criteria generally taken into consideration prior to 1980. The deputy goes on to find that failure on the part of the defendants to relocate claimant in another job justified an industrial disability rating of 60 percent pursuant to *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980). *McSpadden v. Big Ben Coal Company*, 288 N.W.2d 181 (Iowa 1980).

The issues on appeal are the applicability of *Blacksmith, supra*, and *McSpadden, supra*, and the correctness of the additional award.

On appeal, the facts are essentially without dispute. Claimant injured his lower back on June 29, 1979. Claimant saw defendant employer's plant physician, B. J. Williamson, M.D. Dr. Williamson placed claimant on light duty July 2, 1979. Claimant, being dissatisfied with care afforded by Dr. Williamson, was referred by defendant employer to Dale E. May, D.C. Claimant testified that Dr. May advised him not to work. Because of defendant employer's refusal to allow claimant to lay off work, Dr. May resigned from the case and defendant employer referred claimant to Frank T. Brenner, M.D. Dr. Brenner hospitalized claimant on July 24, 1979 for approximately a week. Dr. Brenner returned claimant to light duty on August 13, 1979 with a lifting restriction of 25 pounds. (Defendants' exhibit D.) On September 4, 1979 claimant suffered a recurrence of back and leg pain and was off work until September 18, 1979. On November 7, 1979 claimant again aggravated his injury and was off work until Dr. Brenner released him for full work duties on November 26, 1979. Claimant worked until December 10, 1979. (Transcript, page 12.)

Dr. Brenner concluded that a myelogram and possible surgery were in order and referred claimant to Julio del Castillo, M.D. In late January 1980, claimant was hospitalized by Dr. del Castillo who performed a laminectomy at the L3,4 and L4,5 levels as well as an electromyographic study. Dr. del Castillo concluded that claimant suffers a 25 percent functional impairment to the body as a whole as a result of the injury of June 29, 1979. (Claimant's exhibit 1.)

In a November 11, 1980 letter to defendant-employer, Dr. del Castillo wrote:

> Mr. Chewning in my opinion will not benefit any further from any additional surgery. I think that his present degree of disability is to be considered as permanent and in my opinion, he is permanently disabled for lifting any more than 25 lbs., for repeated backbendings, for pushing or pulling heavy objections [sic] and also from a job that requires his sitting without changing positions for many hours at a time. (Claimant's exhibit 1.)

Defendant employer wrote back to Dr. del Castillo on November 17, 1980 describing the tasks required for a light duty job indicating that a position was open which fits claimant's restrictions. Dr. del Castillo responded in a letter of December 2, 1980:

> Thank you for the description of the jobs. The job as described by you would be acceptable except for the following points:
>
> The weight lifting limit should be 25 lbs. The backbendings are acceptable providing they are not very frequent. I would consider anything that entails bending the back more than once every five minutes as frequent.

Claimant has not worked since December 10, 1979, but testified at hearing that he desires to return to his job for defendant employer as a "hand trimmer." Claimant testified that he felt himself capable of performing such work.

Defendants' brief on appeal asserts that upon receipt of the above restrictions outlined by Dr. del Castillo, defendant employer and claimant entered into negotiations on the amount of job modification necessary to accommodate claimant's restrictions. Defendants' brief further asserts that before defendant employer and claimant could come to a "meeting of the minds", claimant had been off work for one year and defendant employer was compelled to discharge claimant.

The record is silent as to the nature and extent of these alleged negotiations. Nor is there explanation why defendant employer was unable to arrive at a satisfactory arrangement after a year had passed. This serves to indicate that modification was impractical or impossible and that defendant employer had no job to meet claimant's physical restrictions.

Defendants assert that this discharge was required by an existing bargaining agreement between defendant-employer and Local Union No. 932, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO. In a letter to claimant dated December 8, 1980, defendant-employer states:

> According to the terms of our labor agreement contained in Article XX, Section 4.h., failure to work, for any reason, for a period of one (1) year requires a termination in seniority. Pursuant with the above Article, this letter is to inform you that your employment with the Morse Rubber Division of Borg Warner Corporation is terminated because of absence in excess of one (1) year beginning on December 8, 1980.

Defendants' primary argument on appeal is that they should not be penalized for the termination of the claimant if their labor agreement requires such termination.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 29, 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).

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).

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighed value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore become necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Defendants repeatedly point to their labor agreement and stress that the reason for claimant's termination was that he was off work for a year. The reason that claimant was off work for a year after December 10, 1979 is because defendant employer failed to make job modifications which would have allowed claimant to continue working. Defendants argue that good faith efforts were made to arrive at an agreement with claimant as to whether the job of trimmer could be modified to fit the claimant's restriction. The fact that such modification was not accomplished after a year indicates that defendant employer was unable to place claimant in any alternative job.

If indeed the terms of the union contract are the reason for claimant's termination, it is also because of the injury and the limitations imposed upon claimant, and the lack of timely job modifications on the part of defendant employer to meet those limitations that claimant was terminated. Defendants' argument that claimant's termination was because of the union contract overlooks the fact that it was the injury which put the terms of the contract into operation. Therefore, claimant was ultimately terminated because of his injury and defendant employer's inability to find alternative work for claimant within his limitations.

Defendants contend that unless claimant is discharged, they are being asked to waive provisions of the union contract for a single employee. Defendants assert that making such an exception would subject them to grievance complaints.

The obligations imposed under workers' compensation law does not require defendants to waive provisions of a labor agreement for anyone. But if the physical limitations of the claimant because of the injury cause the claimant to be unemployable with his present employer the degree of industrial disability can be affected. Such an effect is contemplated by the court in light of *Blacksmith, supra*, and *McSpadden, supra*.

Defendants attempt to distinguish the facts in the present matter from those of *Blacksmith* and *McSpadden* by contending that the court has never dealt directly with a discharge due to non-physical reasons. In *Blacksmith*, claimant's status was reduced by his employer due to licensing disqualification under federal regulations. This disqualification was due to the injury. The court held that the injury therefore resulted in reduced earning capacity meriting a change in industrial disability. In the present matter, claimant was discharged for failure to work. Claimant could not work because defendant employer could not find an alternative job to meet physical limitations resulting from the injury. Therefore, claimant's reduced earning capacity resulted from discharge as a result of his injury.

Finally, defendants' brief on appeal asserts: "To add one-third more industrial disability because the employer follows the terms of the union-employer Agreement, at the least places undue emphasis on the termination." *Blacksmith, supra*, and *McSpadden, supra*, places an affirmative duty upon the employer to find suitable alternative work for industrially injured employees. Such a duty is consistent with the humanitarian intent of workers' compensation law in mitigating the reduction of income resulting from an injury. The deputy's finding of additional disability is not due to the termination of the claimant by defendant employer, but the failure to provide alternative work to accommodate claimant's disabilities. In that defendant employer has been unable to justify this failure to meet their obligation as set out by the supreme court, the deputy's findings are reasonable and proper.

Findings of Fact

1. That claimant sustained an injury on June 29, 1979 arising out of and in the course of his employment.

2. That claimant has a functional impairment of twenty-five percent (25%) of the body as a whole as a result of the injury on June 29, 1979. (Claimant's exhibit 1.)

3. That claimant attained maximum recuperation from

the above injury on December 2, 1980. (Claimant's exhibit 1.)

4. That as a result of the forementioned injury, claimant was off work from July 25, 1979 through August 12, 1979 (defendants' exhibit D); from September 5, 1979 through September 18, 1979 (transcript, page 12); from November 6, 1979 through November 26, 1979; and from December 10, 1979 through December 2, 1980.

5. That claimant is 33 years old at hearing with a G.E.D. and limited work experience. (Transcript, page 19.)

6. That claimant has been unable to find suitable employment since December 10, 1979. (Transcript, pages 29-30.)

7. That defendant employer has failed to provide claimant with any sort of employment. (Claimant's exhibit 3.)

8. That claimant's weekly rate of compensation is one hundred forty-eight and 78/100 dollars ($148.78).

Conclusions of Law

That claimant is entitled to healing period benefits from July 25, 1979 through August 12, 1979; September 5, 1979 through September 18, 1979; November 6, 1979 through November 26, 1979; and from December 10, 1979 through December 2, 1980.

That as a result of the injury of June 29, 1979, claimant suffers a sixty percent (60%) permanent partial industrial disability.

That claimant is entitled to permanent partial industrial disability as a result of defendant employer's failure to find claimant alternative employment.

WHEREFORE, the findings of fact and conclusions of law of the deputy's decision filed August 26, 1981 are proper.

THEREFORE, it is ordered that the defendants pay the claimant a healing period for the following days missed from gainful employment: July 25, 1979 through August 12, 1979; September 5, 1979 through September 18, 1979; and from December 10, 1979 through December 2, 1980 at the stipulated weekly rate of one hundred forty-eight and 78/100 dollars ($148.78).

Credit is to be taken by the defendants for those amounts previously paid.

It is further ordered that the defendants pay the claimant a permanent partial industrial disability for a three hundred (300) week period beginning on December 3, 1980 at the weekly rate of one hundred forty-eight and 78/100 dollars ($148.78) until paid.

Accrued benefits are payable in a lump sum together with interest in accordance with section 85.30, Code of Iowa.

Costs are charged to the defendants in accordance with Iowa Industrial Commissioner Rule 500—4.33.

Defendants are directed to file a final report within twenty (20) days from the date this award is paid.

* * *

Signed and filed this 27th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ALAN D. COOPER,

Claimant,

vs.

ROCKWELL-GOSS,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Alan D. Cooper, claimant, against Rockwell-Goss, self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of his employment on June 3, 1980. It came on for hearing on February 17, 1982 at the juvenile court facility in Cedar Rapids, Iowa. It was considered fully submitted at that time.

A First Report of Injury was received by the industrial commissioner on November 10, 1980.

The parties stipulated that the proper rate in the event of an award is $211.39, that claimant has no permanency, and that claimant was off work from June 4 to July 13, 1980.

The record in this matter consists of the testimony of claimant, of Thomas K. Davis, of Al Gremm, and of Alfred J. Smith and claimant's exhibit 1 a memorandum dated October 8, 1980. Claimant submitted a citation of *Winey vs. International Harvester*, (Appeal Decision filed January 7, 1980). Defendant submitted a brief.

The parties are to be complimented on the thoroughness of the presentation of this case. Evidence was presented on virtually every factor ever considered in the various appellate opinions examined by the undersigned.

Issues

The sole issue in this matter is whether or not claimant's injury arose out of and in the course of his employment.

Statement of the Case

Alan D. Cooper, 30 year old claimant, who has been employed by defendant for six years, is presently a machinist — a job he bid to about a year ago. He testified that he became aware of the information of the softball team when

he saw a paper or sign-up sheet posted on the bulletin board inside the door at work. Claimant had been involved with a similar team when he worked for Iowa Manufacturing. He elected to sign-up and saw a notice of the first practice posted on the same board. He listed other teams in the league as Iowa Manufacturing, Cherry Burrell, and Lefebure, He stated that to be eligible for the industrial league one had to be employed with a company. Games were held in public parks. League standings and team scores were published by the Cedar Rapids paper. Trophies won by the team were displayed in the employee lunchroom at the plant, a non public area.

Claimant reported that at first the team was in the B Industrial League. Later a change was made to the A League. Changes were also made in the name of the company appearing on the uniform from Goss to Rockwell-Goss and in the color of the uniforms from white to blue and gray. Players were responsible for the cleaning of their own uniforms. Claimant testified to receiving notice on company stationery in 1980 from Al Gremm to return his uniform. Claimant recounted the company's providing uniforms, bats, and balls while individual team members supplied gloves, and shoes and their own transportation to and from games.

He recalled his injury on the evening of June 3, 1980 thusly: He was playing in a game against Lefebure at Harley Steele Stadium in Ellis Park, a public recreational area. He hit the ball. He was rounding second and running to third. He twisted his knee. He was treated by Dr. Pilcher for what he thought was a slightly torn cartilage. He saw the doctor three times and accumulated 27 miles of travel. He acknowledged that he applied for and received accident and sickness benefits in the amount of $135 per week and that all his medical expenses had been paid.

Claimant recalled a conversation he had at a grievance meeting with a Roger Norton, who claimant understood was personnel manager for defendant, regarding baseball injuries involving a Brian Handel.

Claimant admitted that the team had not practiced on company property, that no time off was given in which to play games, that he was not hired to play softball, that no benefits accrued to him because he was a team member, that no supervisor had either suggested or told him to sign-up, that no coaching was provided by the company, that no team meetings were held on company property, that there was no rule prohibiting the discussion of softball on company property and that no solicitation for money for the team were made at the plant. He asserted that the players encouraged other employees to come to the game and support the team.

Claimant recollected that prior to 1980 the team had engaged in some fund raising by selling beer to the players after the game. He remembered some discussion regarding playing a team of Rockwell employees from Rockford, but no game ever took place.

While he did not claim the team benefited the company by selling its product, he expressed the opinion that the team builds morale.

Thomas K. Davis, personnel manager, testified in both claimant's and defendant's cases. He stated that he had been involved in personnel work since 1953 and that he is cognizant of what constitutes a healthy work environment. Davis said that the company's relationship with the softball activities in 1980 took the form of a financial contribution made to allow the employees to participate in a community sponsored activity. He stated that he was the person who decided to provide the money from a fund budgeted for such purposes.

Davis expressed the company's philosophy which is to fulfill its business obligation to support community activities for the promotion of the welfare of all. The community obligation is coupled with the morale building such action provides. He agreed productivity of workers is related to morale. Davis characterized the benefit of having the company name on the uniforms as "miniscule" as he thought it unlikely any purchaser of the very expensive and highly specialized equipment made by the company would see the team. He asserted that the company exercises no control over the team, that players were given no special privileges, that there was no encouragement provided by the company to employees to attend or to participate in games, that no solicitations relating to the team were permitted on company property, that there was no tracking of employees to see who played and that no one in mangement had participated in setting rule or regulations for the league.

Davis testified regarding three other matters — the bulletin board, Brian Handel injury, and the Al Gremm memo. He classified the bulletin board as a community board which could be used by employees for a number of reasonable things. He disclosed that a search of the record showed Handel was paid accident sickness benefit for his softball injury; however, he had received workers' compensation for another claim. He claimed that he had not seen the Gremm memo, which he said was not authorized, before the day of the hearing. He believed the personnel department could take action against an employee who used company stationery without authorization.

Allan D. Gremm, who is presently a quality assurance engineer and who had been an industrial engineer and machinist, testified to playing softball for a number of years. He stated that he was "stuck with" dealing with the company to get money for the entry fee and equipment. He said it was his practice to turn in a speedy memo listing what was needed. A check was issued to him personally. He deposited the money in a bank account and paid for the equipment which the team members determined was needed as it was purchased. He provided the company with verification of what the money was used for. He said that no accounting is made to the company for the equipment which he keeps during the off season and that the company made no inspection of the equipment. However, he testified the equipment was both the company's and the team's.

Gremm said that the players furnish their own gloves and shoes as well as any specialized equipment they might want. Players also provided their own transportation. He, too, testified that team members were not given time off work for team activities nor did they receive any special benefits for participating in the team. No practices were held on company property. He admitted that there might be some discussion with other employees during working time. He

stated that management took no part in meetings sponsored by the Cedar Rapids Recreational Commission. He said that the league is responsible for the rule that only employees can play on teams. The league and commission scheduled the games and set them for play in public places. He responded "no" when he was asked whether or not invitations were given to management to attend either games or social functions. The witness listed two advantages to the company from having the team — morale of the players is boosted and a trophy is placed by him in the trophy case. He agreed that the trophy is presented to the team. He denied requests to the team by the company for promotion.

Regarding uniforms, which consist of a shirt, pants, belt, stockings, jacket and cap, Gremm said that he and two other players had selected new uniforms without conferring with the company and turned in the cost. It was the witness's opinion that the team had the best looking uniforms in the league which he said was a source of pride for the players. The witness stated that there was sometimes trouble getting uniforms returned by the players.

In an attempt to aid in that process, Gremm sent out a memo on a company letterhead which said "It is two months since softball season ended! This is the third and final notice to return softball uniforms. If I do not receive them by October 10th the matter will be turned over to the personnel department." That memo also contained a P.S. which said, "We would like to have the company sponsor us next year; and it is our responsibility to return their equipment." He admitted that he was neither in a position to bring disciplinary sanctions nor had he discussed the memo or the use of the company letterhead with anyone in the company other than the team manager.

Alfred J. Smith of the Cedar Rapids Recreation Department testified that advertisements are run in the local paper to advise persons of various leagues available. The department sets fees, organizes leagues, determines the number of games to be played, assigns the fields, and hires the umpires. Lay representatives from the leagues and sometimes some others form a board to establish rules which are printed. Some public money is invested in the softball activities. The philosophy behind the league is to promote physical fitness and to give adults who work all day an opportunity to participate. Standings and the scores are kept by the individual field directors and then turned into the paper for publication.

Eligibility rules are set by the commission. The 1980 rule for participating in the industrial league was that one must be a full or part-time employee to be in the league. Smith said that there was no direct contact between the league and the companies. Industry had no voice in how activities were conducted. Smith claimed that uniforms in the industrial league are optional; but if they were worn all must be the same. For a number of teams shirt and hats suffice.

Defendant's response to claimant's motion for sanctions indicates that the company contributed $969.23 to the softball team for an entry fee, equipment, and uniforms in the year of 1980.

Findings of Fact

WHEREFORE, IT IS FOUND:

That claimant became aware a softball team was being formed when he saw a notice posted on the bulletin board at work.

That claimant voluntarily signed up for the team.

That notice of the first practice was posted on the board.

That the team was a part of an industrial league formed by the Cedar Rapids Recreation Department which advertised various leagues, set fees, determined the number of games to be played, assigned the fields, and hired umpires.

That league rules are established by a board.

That under 1980 rules, one had to be an employee to participate in the industrial league.

That league games were played on public fields.

That scores and standings were published in the local paper.

That defendant employer had no voice in the conduct of the league and exercised no control over the team.

That defendant employer contributed $969.23 to the team in 1980 to cover fees, equipment, and uniforms.

That defendant employer's philosophy is to support community activities for the benefit of all.

That funds for the baseball team came from monies established for community service type projects.

That defendant employer manufactures highly specialized expensive equipment.

That players wore uniforms bearing the company name.

That players furnished their own gloves, shoes, and specialized equipment.

That the team members determined what equipment was needed.

That trophies won by the team were displayed in the employee lunchroom.

That claimant twisted his knee while playing in a game.

That employees were given no time off or other special benefits for playing on the team.

That no team activities were held on company property.

Applicable Law and Conclusions of Law

In order to receive compensation for an injury, an employee must establish the injury arose out of and in the course of his employment. Both conditions must exist. *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402, 411, 68 N.W.2d 63, 68 (1955).

The problem herein concerns whether or not claimant is in the course of his employment. In the course of relates to time, place, and circumstances of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee may be performing duties while he is fulfilling those duties or engaged in something incidental thereto. *McClure v. Union County, et al*, 188 N.W.2d 283, 287 (Iowa 1971). Iowa Code section 85.61(6) provides: "The words 'personal injury arising out of and in the course of 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...."

The Iowa Supreme Court said many years ago in *Bushing v. Iowa Railway and Light Co.*, 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929) that:

> An 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 performing his duties, and while he is fulfilling those duties or engaged in something incidental thereto. [Citations omitted.] 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 an act totally foreign to his usual work. [Citations omitted.] 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.

In support of his position, claimant cites the case *Winey v. International Harvester*, (Appeal Decision filed January 7, 1980). In an arbitration decision affirmed by the commissioner on appeal, the deputy industrial commissioner found claimant in the course of his employment at the time of his development of symptoms during a softball game. The team had been formed by the employees and was made up primarily of employees. Solicitation of contributions was allowed by the employer on company premises. The employer acknowledged the team was intended to promote goodwill among employees. The employer contributed money for shirts, hats, and equipment and for an entry fee. Shirts carried the employer's name. Practices were allowed on the employer's facilities. Defendant's brief distinguishes *Winey*.

Defendant's brief also makes reference to 1A Larson, *Workmen's Compensation Law* Section 22.00. That section at 5-71 states:

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

Larson notes at 5—106 that awards and denials in relation to "company teams" vary with the "mix" of facts. Factors to be examined are whether the injury occurred on or off the premises or in or out of the working hours, employer initiative, amount of employer's contribution and money or equipment, and employer benefit.

Although the Iowa Supreme Court has not been confronted with a case involving a "company team," the supreme court in our neighboring jurisdiction, Illinois, has taken up the matter several times. A review of that line of cases is helpful here.

In *Jewel Tea Co., Inc. v. Industrial Commission*, 6 Ill.2d 304, 128 N.E.2d 699 (1955), claimant was injured while playing in an intracompany league after working hours and off company premises. The league was made up of the company's employees who were awarded trophies at a special function. The teams were named after the district managers who appointed manager captains who then selected the players from the employees. Equipment and tee-shirts bearing the company name were furnished. Games were held in public places. Company personnel took part in the formation of rules. Teams were discouraged from joining the industrial league. Information was distributed through the company newspaper and radio station. Claimant decided to take part in the league when he was called by the district manager. The court in awarding compensation saw some advertising or goodwill benefit to the company and relied on the large degree of employer's support and encouragement as well as the company's urging claimant to participate.

Five years later in *Hendren v. Industrial Commission*, 19 Ill.2d 44, 166 N.E.2d 76 (1960), an award of compensation was made to the employee who participated in an industrial softball league. The company gave workers time off from the nightshift, bought tickets to the league banquet, and displayed trophies in the shop. The vice-president of the corporation attended all games. Although the primary issue on appeal was the arising out of issue, the court apparently agreed claimant was in the course of his employment.

In *Keystone Steel and Wire Company v. Industrial Commission*, 238 N.E.2d 593 (Illinois 1968), claimant was injured as he played in an intradepartmental softball game which was an activity sponsored by a corporation run by company employees with funds from employee canteens located throughout the plant. Information was published in a company newspaper. Foremen allowed shift trades so that workers could play softball. Games were played on a company diamond and the company safety director acted as advisor to the employee association. The court at 594 looked to the fact that the activity was "solely for the recreational and personal diversion of the employees, without any substantial business advantage to the company. Whatever improvement may have resulted in morale or employee-employer relations is far too tenuous to provide a basis for saying the injury was sustained either out of or in the course of employment." In making its ruling the court did not overlook the company's involvement, but rather said at 594, "to hold that such gratuitous contributions entail liability without fault for injuries at play penalizes the mere providing of benefits and almost certainly tend to discourage it."

The next major case was *Illinois Bell Telephone Co. v. Industrial Commission*, 61 Ill.2d, 139, 334 N.E.2d 136 (1975) which involved an intracompany softball league with the company paying the cost of operating the league including equipment, trophies, and a banquet. Games were played in public parks and were covered by the company newspaper. Meetings took place on company property with an employee

committee providing direction. The claimant joined the team with a resulting loss of overtime pay after some repeated conversations with a district superintendent. In finding claimant's injury compensable, the court looked to the fact that there was actual or inferred pressure on the employee to participate.

The most recent Illinois case is *Gourley v. Industrial Commission*, 84 Ill.2d 303, 418 N.E.2d 734 (1981). An industrial league was formed by local businesses. The company furnished the uniforms which bore the company name, some equipment, gym rental and an entry fee from a community relations fund. Notices about the team were placed on a bulletin board. Employees were neither paid for playing nor given time off. Management personnel attended games. When the league championship was won, the players were taken out for dinner and drinks and a trophy was placed in the company cafeteria. In finding the case not compensable, the court pointed out that the activity did not take place on the premises; that the activity was not an incident of employment; that there was no compulsion from the employer for claimant to participate; that the company's products were sold to industrial users and that there was a lack of direct substantial benefit to the company.

Applying the Larson analysis to the facts here presented results in the following mix: Claimant's injury occurred off the employer's premises and after working hours. The employer exercised no initiative in promoting the league. The employer contributed an entry fee and money for equipment. The employer benefited from improved morale and perhaps to some degree from advertising.

The question is narrowed to whether or not the employer derived a "substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life" and from advertising. Larson at 5—110-11 discusses benefits thusly:

> Of course, if the employer's real purpose in sponsoring and promoting the team is advertising, that alone is adequate to mark it as work-connected. But if the advertising value is incidental, flowing, for example, from the mere presence of the company name on the player's jerseys, this may not be enough, even when combined with evidence of some employer subsidy.

Larson also discusses at 5-116, "the intangible value of increased worker efficiency and morale" and describes the problem therein is that benefits "result from every game the employee plays whether connected with his work or not." He suggests, "arbitrary time and space limitations must circumscribe the area within which the 'benefit' establishes work-connection" and goes on to express the majority view that "morale and efficiency benefits are not alone enough to bring recreation within the course of employment."

In *Jackson v. Cowden Manufacturing Co.*, 578 S.W.2d 259 (1978), the Kentucky Court of Appeals dealt with employer benefit. The claimant therein played basketball in an industrial league sponsored by the park and recreation department. Players had to be employees. An entrance fee was paid by the company which permitted meetings in the cafeteria. Although the company name was not on the uniform at the time of claimant's injury, the court examined that factor as there was evidence it would appear later in the season. The company name was published with league standings. The court determined that the company was not sponsoring the team for sales promotion or improvement of its image and found, citing Larson, that the advertising benefit to the company was not significant. Larson was also cited at 264 for the proposition that "increased employee morale and efficiency is not alone enough to bring a recreational activity within the course of employment." See generally, *City Counsel of Atlanta v. Nebils*, 149 Ga.App. 688, 655 S.E.2d 140 (1979) (possible benefit of an increased worker productivity through physical fitness considered.) Contra, *Columbia Gas v. Sommer*, 44 Ohio App.2d 69, 335 N.E.2d 743 (1974) (basketball team formed to improve employer-employee relations after a strike); *Complitana v. Steel & Alloy Tank Company*, 34 N.J.300, 168 A.2d 809 (1961) (better employer-employee relations).

The evidence herein indicates that the employer's intent in funding the team was to promote the general welfare of the community. The personnel director indicated advertising benefit would be "miniscule" as it was unlikely potential buyers would be at industrial league games. Some indirect benefit might accrue to the company from having its name before the public. There was testimony to establish that the morale of the players at least was lifted by the team; however, that improvement does not go beyond the intangible. A *substantial, direct* benefit cannot be found.

THEREFORE, IT IS CONCLUDED that claimant's injury while playing softball did not occur in the course of his employment.

Order

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That defendants pay costs pursuant to Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 16th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

LANE L. CROSSON,

Claimant,

vs.

FORMAN FORD AND COMPANY,

Employer,

and

IOWA NATIONAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,

Defendants.

Appeal Decision

By order of the industrial commissioner filed September 18, 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 the results of a review-reopening decision.

The record on appeal consists of the transcript; the deposition of John T. Bakody, M.D.; and defendants' exhibits 1, 2, 3, 4 and 5.

The result of this final agency decision will be the same as that of the hearing deputy in his proposed agency decision. The findings of fact and conclusions of law, however, are those of the undersigned deputy industrial commissioner.

Claimant strained his back quite severly on April 26, 1977 in a lifting incident. As result of that incident, he has had two low-back surgeries. Claimant has not worked since the injury.

The issue is stated by claimant in his brief: "Whether the deputy industrial commissioner considered all of the relevant criteria in determining claimant's industrial disability."

Industrial disability, which is loss of earning capacity, includes considerations of age, education, qualifications, experience and inability, because of the injury, to engage in employment for which one is fitted. It also includes considerations of functional impairment and, in some cases, an employer's refusal to give work to an injured claimant and claimant's inability to find work after bona fine attempts to do so. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980); also see, e.g., *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963); and *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980). Claimant's brief contains some elaboration upon the concepts of industrial disability. For example, he brings experience into three parts: before the injury, after the injury, and after rehabilitation. Such an analysis is helpful and has been considered in this case.

Claimant was hurt and hurt badly enough to require two surgeries. His industrial disability, therefore, may be classified as serious. On the one hand, there are claimant's permanent partial impairment (including pain), overweight, and lack of confidence that he can work. On the other hand, there are claimant's positive attributes; at age 51, he was not too old to be rehabilitated, he has a high school education and long work experience as well as a high rehabilitation potential. Thus, considering the elements of industrial disability, claimant has a reduced earning capacity but the reduction is not permanent and total.

Findings of Fact

1. On April 26, 1977, claimant sustained a work injury to his low back. (John T. Bakody, M.D., depo. 5; Tr. 12)

2. Claimant was age 51 at the time of the hearing. (Tr. 3)

3. Claimant is 5 feet 8 inches tall and weighs 220 pounds. (Defendants' exhibit 1, I-2. Tr. 26)

4. Claimant is a high school graduate. (Tr. 3)

5. Claimant worked as a laborer at John Deere 1947-1950. (Tr. 4) Claimant learned to be a glazer and worked thereas until his injury. (Tr. 5-6)

6. Claimant was actually employed by Forman Ford and Company from 1968. (Tr. 6)

7. As a result of his injury and subsequent surgeries, claimant has pain in his low back and right leg. (Tr. 17-18)

8. On September 14, 1977, claimant had a lumbar laminectomy which was necessitated by his work injury. (Bakody 8-9)

9. On December 6, 1978, claimant had further surgery which reopened the previous incision, freed up adhesions from scar, and opened the foramen. (Bakody 19)

10. Claimant is unable because of his injury to do work which requires heavy lifting. (Defendants' exhibit 1, II-1)

11. Claimant has permanent partial impairment to the body as a whole of 15%. (Defendants' exhibit 1, III-2)

12. As a result of the injury, claimant has a chronic low back syndrome and a depressive reaction which is in part related to the injury. (Defendants' exhibit 1, IX-1)

13. Claimant's condition of overweight contributes to his permanent partial impairment. (Defendants' exhibit 1, II-2)

14. Claimant has made no effort to find work since his injury. (Tr. 21)

15. Claimant has talked and interviewed with the vocational rehabilitation agency on three occasions. (Tr. 21)

16. Claimant has strong vocational training potential. (Defendants' exhibit 1, VI-2)

Conclusions of Law

Claimant sustained an injury on April 26, 1977 which arose out of and in the course of his employment.

As a result of said injury, claimant has industrial disability of thirty-five percent (35%) of the body as a whole.

There were certain matters not contested on appeal such as the rate and the length of the healing period. The order below will be the same as that of the hearing deputy with respect to those matters.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from April 26, 1977 until June 5, 1979 for the healing period at the rate of one hundred seventy-four dollars ($174) per week, accrued payments to be made in a lump sum together with statutory interest, less a credit for those amounts heretofore paid, and to pay weekly compensation benefits unto claimant for a period of one hundred seventy-five (175) weeks for the permanent disability at the rate of one hundred sixty dollars ($160) per week, accrued payments payments to be made in a lump sum together with statutory interest, less a credit for those amounts heretofore paid.

Costs are charged to the defendants and shall include an expert witness fee of one hundred fifty dollars ($150) payable to John T. Bakody, M.D., in accordance with the provisions of §622.72.

Defendants are ordered to file a final report within twenty (20) days from the date this decision becomes final.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

HOWELL DAMERON,

Claimant,

vs.

NEUMANN BROTHERS, INC.,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a commutation decision approving claimant's application for full commutation.

The record on appeal consists of the testimony of claimant, Don Mears and Wayne Newkirk; claimant's exhibits A, B, C and E; the deposition of Paul From, M.D.; the arbitration decision of March 10, 1981; and the appeal briefs of both parties on appeal.

Concisely put, the issue on appeal is whether the deputy's decision is supported by substantial evidence and whether that decision is contrary to law.

An arbitration decision filed March 10, 1981 found that claimant was permanently and totally disabled as the result of an injury sustained arising out of and in the course of his employment on October 24, 1978. The decision set claimant's weekly rate of compensation at $222.50. No appeal was filed and the deputy's decision became the final decision of the agency bv operation of law.

The record reveals that claimant was 63 years old at the time of application for commutation. Claimant is presently divorced with seven children; none dependent. He is currently residing with Bertha Griffin.

Claimant's monthly income consists of Social Security benefits of $464, pension benefits of $214, and workers' compensation benefits of $890. Ms. Griffin receives $238 per month in Social Security benefits for a total household income of $1,128 per month. Claimant estimated his monthly expenses at $838 which includes voluntary payments of $220 per month to his ex-wife and two childen which she has adopted.

Claimant testified that he frequently borrows money at 25 percent interest despite his income and has never used bank or savings and loan accounts. The record establishes that claimant has a third grade education. He has conducted his past financial affairs only on a cash basis.

Claimant's brief states that if future compensation were commuted to a lump sum, the claimant's recovery after deducting attorney fees and expenses would be approximately $100,000. Claimant reasons that if the entire $100,000. were invested at approximately 12 percent interest, claimant would net an additional $12,000 per year compounded every six months. Claimant's brief states that he has agreed to a voluntary conservatorship with the Iowa Des Moines National Bank. Beyond this, claimant has not offered a specific investment plan.

The record also established that claimant intends to apply a commuted award towards the payment of debts and anticipated purchases totaling $30,500. With these expenditures, the net amount then available for investment would be reduced to $69,500.

Finally, claimant testified that commutation would enable him to establish an estate for the support of his ex-wife after his death. Claimant contends that given the above, he is in "dire need" of the interest that would result from a commutation.

The supreme court in *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or prersons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In *Diamond* the court looked to the circumstances of the

case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *Id.* at 929, 129 N.W.2d at ____. A reasonableness test was applied by the court in *Diamond* to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Professor Arthur Larson's philosophy on granting commutation is much more restrictive than that of the Iowa Supreme Court in 1964. He warns that:

> In some jurisdictions the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings.... The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will be best served by a lump-sum award. The beginning point of the justifiability of the lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice. *Larson, Treatise on the Law of Workmen's Compensation,* §82.70.

Professor Larson indicates that experience has shown that a claimant is often under pressure to seek a lump-sum payment, and once the payment is received it is soon dissipated.

Additionally, Iowa's first industrial commissioner, in the first *Biennial Report of the Workmen's Compensation Service* (1916) at page 12, pointed out that, although in exceptional cases commutation promotes personal welfare, weekly payments should be regarded as a general rule better adapted to the real needs of compensation service since large lump sums are often unwisely used by beneficiaries.

Despite the rational reasoning in support of the more restrictive views on commutation of compensation benefits, the *Diamond* guidelines still prevail in Iowa. Relying on *Diamond* and claimant's substantial monetary resources, excluding weekly compensation benefits, this commissioner would not be hard pressed to conclude that a lump-sum payment would not be in the best interest of claimant, notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.

Although workers' compensation benefits differ from the benefits claimant is receiving from Social Security they are philosophically for the same purpose, i.e., periodic payments to partially replace lost earnings. In this economic era few would not jump at the chance to have future earnings paid to them in advance so they could invest them in a lump-sum and live off the earned income. The difference in the workers' compensation law is that it provides a vehicle, commutation, for doing just that.

$100,000 or even $69,500 invested at today's prevailing interest rates would yield a commensurate amount to that which the claimant is now receiving in workers' compensation benefits without invading the corpus. It is archaic that the discount rate for commutations is still at five percent. Nevertheless, it is the law, and, as this agency is a creature of statute it must be guided by the statute, and decisions of the supreme court which interpret the statutes and define the authority of the agency.

Lump-sum awards in this and most other cases gives workers' compensation the appearance of damages in a tort action. Workers' compensation was implemented to replace tort damage cases. Until action is taken either by the courts or legislature this agency is duty bound to follow the current authority. As previously mentioned it would be incredible for this agency to say that this commutation would not be in claimant's best interests. This contemplates, of course, that the lump sum will be managed by the voluntary conservatorship claimant contemplates and not a lump sum given directly to the claimant to do with as he pleases.

Iowa Industrial Commissioner Rule 500—6.2 sets out prerequisite for commutation to be granted. While *Diamond, supra,* points out that these prerequisites may be more easily satisfied by one who is permanently and totally disabled, substantial evidence is still necessary. Review of the record reveals substantial evidence to support the requirements of Rule 500—6.2. Given the additional fact that commutation would enable the claimant to pursue a more profitable program of investment, this agency would be hard pressed to say that commutation would not be in the best interests of the claimant as contemplated by section 85.45, Code of Iowa.

If claimant's attorneys want to be paid at this time, claimant should not be penalized because of early payment. In *Larson v. Haag Drug Company,* Commutation Decision, filed September 19, 1980, this agency provided that a claimant's attorney fees are subject to the same discount as the claimant's award for the same amount of money.

Findings of Fact

1. Claimant was employed by defendant employer on October 24, 1978 at which time he sustained an injury arising out of and in the course of his employment. Because of said injury, he is permanently and totally disabled (see arbitration decision filed March 10, 1981). The rate of compensation is $222.50.

2. That the evidence submitted by the parties shows to the undersigned, through the expert witnesses called, that claimant's net recovery after the deduction of attorney fees would approximate $100,000.

3. That the evidence indicates that the weekly recovery after fees pursuant to the previous award, would amount to $148.32 per week.

4. That the economic plan discussed would yield commensurate benefits to what claimant is presently receiving with a corpus remaining intact.

5. That claimant's future medical benefits do not appear to be great.

6. That the period during which compensation is payable can be definitely determined by Iowa Industrial Commissioner Rule 500—6.3(1).

7. That the commutation should be granted subject to the existence of the conservatorship to manage the assets.

Conclusions of Law

That commutation is in the best interest of the claimant.

That the number of weeks of expectancy may be converted to present value by Iowa Industrial Commissioner Rule 500—6.3(2).

That the claimant is entitled to be paid $131,058.98 in full commutation (in addition to the weekly compensation not paid).

That claimant's attorney fees are subject to the same discount as the claimant.

WHEREFORE, it is found:

That the granting of full commutation is in the best interests of the claimant.

THEREFORE, it is ordered:

Claimant's application for full commutation is hereby approved subject to the computations under Iowa Industrial Commissioner Rule 500—6.3(2).

Payment is not to be made until the conservatorship is established.

Claimant is to file the conservatorship papers with this agency together with the investment plan.

Claimant's attorney fees are to be discounted on the same basis as claimant's commuted award.

Cost of the proceeding are taxed to the defendants.

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

* * *

Signed and filed this 9th day of November, 1981.

ROBERT C. LANDESS
Industrial Commissioner

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

LUELLA DART, SURVIVING SPOUSE OF BERNARD DART,

Claimant,

vs.

SHELLER-GLOBE CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Introduction

Defendant appeals from an order entered by a deputy industrial commissioner which overruled its special appearance asserting a lack of subject matter jurisdiction due to expiration of the prescribed limitation period found in section 85.26(1) of the Code of Iowa (1981).

Pursuant to authority granted in Iowa Code section 86.8(1) and section 17A.3(1)(b), the commissioner adopted the Iowa Rules of Civil Procedure to govern the contested case proceedings before the industrial commissioner unless the provisions of such rules are "in conflict with the agency rules, chapters 85, 85A, 86, 87 and 17A, or obviously inapplicable to the industrial commissioner." 500—4.35 I.A.C.

The special appearance device to contest subject matter jurisdiction is provided by Iowa Rule of Civil Procedure 66:

> *Special appearance.* 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.

For reasons to be set forth, it is found that the subject matter jurisdiction of the industrial commissioner is not defeated by an untimely filed claim. Thus, it is held under Industrial Commissioner Rule 500—4.35 that the use of a special appearance to contest lack of jurisdiction of the industrial commissioner over an untimely filed claim is inappropriate.

Statement of the Case

Claimant filed a petition for arbitration on March 8, 1982 alleging her deceased spouse suffered a fatal work related injury to his respiratory organs and function resulting from inhalation of talc dust during his employment with defendant. Decedent was terminated from employment in July 1979. His death occurred on July 18, 1981. The original petition alleged an injury date of July 1979, which is seemingly eight months beyond the prescribed period in section 85.26(1).

Defendant filed a special appearance contesting the jurisdiction of the industrial commissioner over the subject matter. The claimant sought leave to amend her petition to change the alleged injury date from July 1979 to April 1981

to come within the prescribed period. In her resistance to the special appearance, the claimant contended the "injury in this case is not a single incident or trauma; the theory is that a progressively disabling condition became disabling in April of 1981 although the last exposure to the talc dust was in July 1979." The deputy overruled the special appearance "on the issue of the claimant's amended petition."

The defendant's appeal brief recites the issue on appeal is whether the cause is barred by the two year statute of limitations in section 85.26(1), the Code, as shown by the face of the petition which was filed on or about March 5, 1982 but alleges an injury that could not have been later than July of 1979, the last day of employment alleged. Claimant's brief states the issue of whether the allegations in her "petition and amendment presents questions of fact to be decided by the Commissioner on the evidence presented in hearing."

Analysis

The legislature, through enactment of the workers' compensation laws, removed the jurisdiction of an employee's right to a cause of action and remedy against an employer for injuries arising out of and in the course of employment from the general original jurisdiction of the district courts and placed it exclusively with the industrial commissioner. *Jansen v. Harmon,* 164 N.W.2d 323, 326 (Iowa 1969); *Groves v. Donohue,* 254 Iowa 412, 419, 118 N.W.2d 65, 69 (1962).

The legislature, having the power to create the right to such a cause of action under the statutes, affixed conditions under which the right is to be enforced. *Otis v. Parrott,* 233 Iowa 1039, 1045, 8 N.W.2d 708, 712 (1943). The legislature conditioned the enforcement of this right to commencement of proceedings within a period of two years by enactment of section 1386, Code of 1924 [currently section 85.26(1)]. Prior to this provision there was no limitations applicable to claims arising under the workers' compensation statutes. Other conditions include an employer-employee relationship, plus an injury arising both out of and in the course of employment. Section 85.3(1) (original version at Acts of 35th G.A., 1913 ch. 147, §1).

Commencement of original proceedings within two years under section 85.26(1) is not a limitation upon the jurisdiction of the commissioner, rather it is a limitation upon the right of interested parties to receive compensation benefits and a compliance with this condition is essential. *Mousel v. Bituminous Material & Supply Co.,* 169 N.W.2d 763 (Iowa 1969); *Secrest v. Galloway Co.,* 239 Iowa 168, 174, 30 N.W.2d 793, 796 (1948).

Section 85.26(1) does not affect the remedy of an injured employee to seek relief from an employer, rather it is a condition on the right of enforcement. In *Secrest v. Galloway Co., supra,* the Iowa Supreme Court construed section 1386, Code of 1936 [currently section 85.26(1)], as a "special statutory limitation" rather than a general statute of limitations which bars enforcement of a claim beyond a specified period of time. *Secrest, supra,* concerned the retroactivity of the 1945 amendment reducing the limitations period to commence a review-reopening period from five to three years. In *Secrest* the court explained:

Strictly speaking, a statute of limitation affects the remedy, not the right. A general limitation statute is defined in 34 Am. Jur., Limitation of Actions, section 3, to be "* * * the action of the state in determining that after the lapse of a specified time, a claim shall not be enforceable in a judicial proceeding." 37 C.J., Limitation of Actions, section 5, states:

> "A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether."
>
> Under the statement in the Otis case, supra, [233 Iowa 1039, 1046, 8 N.W.2d 708, 712 (1943) reversed on grounds, 298 N.W.2d 256, 261] and in accord with the other pronouncements of this court section 1386 is a special statutory limitation rather than a general one. However, under our rules of a liberal and broad interpretation of the act, the result is the same, regardless of name. 239 Iowa at 173, 30 N.W.2d at 796.

Cf.: *Arnold v. Lang,* 259 N.W.2d 749 (Iowa 1977) (citing *Secrest* for distinguishing a special statutory limitation from a pure statute of limitations in a case involving the Dram Shop Act.)

The Iowa Supreme Court in *Mousel v. Bituminous Material & Supply Co., supra* at 768, noted that the *Secrest v. Galloway* opinion disapproved of a view taken in *Tischer v. City of Council Bluffs,* 231 Iowa 1134, 1149, 3 N.W.2d 166, 174 that section 85.26 is also a limitation upon the jurisdiction of the commissioner.

In *Mousel, supra,* the Iowa Supreme Court found that a claimant delayed for an unreasonable time to consult a medical doctor for treatment of his injury and held he was not permitted to toll the running of the period of limitations in section 85.26. The claimant's situation in *Mousel* presented a factual question wherein the court considered the person's knowledge of his medical problem, the apparent likelihood it was related to his former employment activities, the reason for delay of seeking treatment, and the progressive worsening of his condition. The Iowa Supreme Court in a later decision explained that the claimant's situation in *Mousel* did not present factual circumstances for application of the discovery rule. *Orr v. Lewis Central School District,* 298 N.W.2d 256, 259 (Iowa 1980).

The court in *Mousel* also held that due to the nature of the special limitation that section 85.26 imposes on the right of recovery as opposed to the remedy under compensation statutes, it is not necessary for a defendant to plead the two year period of limitations as a special defense. 169 N.W.2d at 768. In *Mousel,* the court turned to 100 C.J.S. Workmen's Compensation §468(2) (1958) to substantially restate a rule as they have done: "Further, it is held that the requirement as to the time within which a claim for compensation must be made or filed is a matter going to the right to compensation,

and being a condition on the right* * * rather than on the remedy* * * it must be strictly complied with." *Mousel,* 169 N.W.2d at 768.

As interpreted by the Iowa Supreme Court in *Secrest, supra,* and *Mousel, supra,* section 85.26 is a limitation on the right to recovery and does not affect the remedy of benefits under the workers' compensation statutes. Thus, a timely filed claim is not "jurisdictional," i.e., a condition precedent for consideration by the industrial commissioner. The jurisdiction over an injured employee's cause of action lies first within the province of the industrial commissioner. The commissioner obtained this jurisdiction by virtue of the legislative removal of such jurisdiction from the district courts and conferring it upon this administrative agency.

The commissioner must decide whether a claimant has satisfied the legislative requisite conditions for entitlement to compensation benefits, which includes whether or not the conditions of section 85.26(1) have been satisfied.

When a claim is filed beyond the prescribed period of time, the claimant has presumptively lost the right to receive compensation benefits. Since the subject matter of the industrial commissioner is not defeated by an untimely filed claim, it is the duty of the commissioner to determine whether there is any factual evidence to provide a reason to overcome or excuse the apparent lateness of the claim.

If a claimant is unable to bring forth a justifiable reason for lateness, the special limitation condition will be activated to deny the right to receive compensation under the workers' compensation laws.

The special appearance is overruled based upon the foregoing analysis and not merely because an amendment was filed attempting to change the date of injury. The use of a special appearance to contest the subject matter jurisdiction of this agency on the basis of an untimely filed claim is held to be inapplicable under Industrial Commissioner Rule 500—4.35.

For further support that the special appearance is not a proper vehicle for raising the statute of limitation see *Pride v. Peterson,* 173 N.W.2d 549, 554 (Iowa 1970) in which the court stated, "[w]e conclude the bar of limitations is primarily an affirmative defense to be specially asserted in a separate division of the responsive pleading to the claim for relief."

Order

THEREFORE, it is ordered:

That the order filed March 22, 1982 overruling defendants' special appearance is sustained.

That defendants are to answer or otherwise plead within twenty (20) days of the filing of this decision.

That this case be returned to the regular docket.

* * *

Signed and filed this 18th day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

RAY DAVES,
by Mrs. Patricia Daves,
Surviving Spouse, Successor
In Interest and Representative
of RAY DAVES,

Claimant,

vs.

L. E. CARLSON SCRAP IRON AND METAL COMPANY, INC.,

Employer,

and

AETNA CASUALTY INSURANCE CO.,

Insurance Carrier,

and

THE SECOND INJURY FUND OF IOWA,

Defendants.

Review-Reopening Decision

Introduction

This is a proceeding in review-reopening brought by Ray Daves, et al., the claimant, against his employer L. E. Carlson Scrap Iron and Metal Company, and the insurance carrier, Aetna Casualty Insurance Company, and The Second Injury Fund of Iowa, defendants, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on April 6, 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 December 15, 1981. The record was considered fully submitted on January 28, 1982.

An examination of the industrial commissioner's file reflects that a first report of injury and memorandum of agreement were filed with respect to an injury occurring on April 6, 1979 which is the basis of this cause of action. That injury was to claimant's left arm. The file also reflects that on April 4, 1980 an application for partial commutation was approved by Deputy Industrial Commissioner Barry Moranville. That application for partial commutation covered a permanency rating of "AT LEAST 76.5% OF THE LEFT ARM."A total of 159 weeks from the first part of the remaining period was commuted and paid to Mr. Daves in a lump sum.

At the time of hearing, the parties agreed that this was a bifurcated proceeding and that the decision in this portion of the case should deal exclusively with the issue raised under Section 85.31(4), Code of Iowa. The parties stipulated as follows: That the claimant received a left arm

injury on April 6, 1979 which both arose out of and in the course of his employment; that the claimant died on June 13, 1980 of a cerebral thrombosis; that the applicable rate in the event of an award is $58.65; that there is no medical testimony establishing a causal relationship between the death of the claimant and the left arm injury for which liability has been admitted; that on the date of the claimant's death, there were no compensation payments accrued and not paid to the claimant based on the employment-related injury.

The record in this case consists of the testimony of the claimant; claimant's exhibits 1 and 2; defendants' exhibit A; answers to interrogatories filed December 15, 1981 are considered part of the record as are all petitions filed by the claimant or his counsel.

Findings of Fact

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

It has been stipulated by and between the parties, and it is therefore found that on April 6, 1979 the claimant sustained an injury to his left arm which both arose out of and in the course of his employment with this defendant. The applicable rate with respect to that injury is $58.65. An application for partial commutation was granted on April 4, 1980 under the terms of which 159 weeks of benefits were commuted off the first part of the remaining period. The extent of disability as set out in the partial commutation application was "AT LEAST 76.5% OF THE LEFT ARM." Claimant died on June 13, 1980 and there is no medical evidence in this record establishing a causal relationship between the work-related incident of April 1979 and the claimant's death in June 1980. At the time of claimant's death, there were no compensation payments accrued and not paid to the claimant.

The claimant's widow, Patricia E. Daves, was his spouse on April 6, 1979 as well as on the date of his death. She testified at length concerning the claimant's left arm disability as a result of the April 1979 incident. She also indicated that the claimant was involved in an accident in 1967 which caused a severe left leg injury resulting in amputation of that member. She testified at length concerning his inabilities after the second injury to work and his efforts to find a job. Claimant's proceeding against the Second Injury Fund of Iowa was filed April 21, 1980, some two months prior to his death. This petition was subsequently amended on September 25, 1980.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 6, 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).

Section 85.31(4) provides: "Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate."

Analysis

In the present case, it is of no consequence whether the claimant, i.e., Patricia Daves, brought or sustained the alleged cause of action. In either capacity, she has not sustained her burden of proof and has not sustained a causal relationship between the April 1979 left arm injury and the claimant's subsequent death. As the commissioner noted in *Lundeen v. Quad City Construction Co.*, Appeal Decision, filed June 4, 1980: "A fair interpretation of Iowa Code section 85.31(4) of the date of a claimant's non-related death will abate along with any further liability on the part of the employer."

The claimant raises several constitutional challenges to section 85.31(4) and 85.64 and 85.65. The industrial commissioner does not have the power to declare an act of the legislature unconstitutional. Therefore, no ruling will be made with respect to those issues raised.

The claimant argues that the statutory construction relating to workers' compensation statutes must receive a broad and liberal interpretation to comply with the spirit of compensation law. This familiar argument is true as it relates to statutes. The phrase "broad and liberal interpretation," however, does not apply to the underlying facts.

It appears from the record that the claimant, via the partial commutation, received compensation benefits for a period substantially beyond a time when they could have been terminated under 85.31(4) due to Mr. Daves' death. It is determined under section 85.31(4) no additional liability for this injury rests with the defendant employer. The liability of the Second Injury Fund of Iowa is also terminated under the provisions of section 85.31(4). Additionally, any benefits which might arguably be due claimant from the fund were, as of the date of his death, unliquidated. As Deputy Industrial Commissioner Moranville pointed out in the *Vanni* case, "the workers' compensation law has no provision in it for the surviving spouse or estate to bring an action for an unliquidated number of weekly benefit payments."

Conclusions of Law

That the claimant was an employee of the defendant on April 6, 1979.

That the claimant failed to sustain her burden of proof and has not established a causal relationship between the work injury of April 6, 1979 and Mr. Daves' subsequent death.

That section 85.31(4), Code of Iowa, provides: "Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any

cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate."

That there were no accrued and unpaid compensation benefits due claimant from either the defendant employer or the Second Injury Fund of Iowa.

THEREFORE, it is ordered:

That the claimant shall take nothing further from these proceedings.

Costs of this action are taxed to the defendant, L. E. Carlson Scrap Iron and Metal Company, Inc.

* * *

Signed and filed this 22nd day of February, 1982.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

BERNITA DEAVER,

Claimant,

vs.

CITY OF DES MOINES, IOWA,

Employer,
Self-Insured,
Defendant.

Decision on Remand

Introduction

This cause is on remand from the District Court of Polk County. The court stated the commissioner "seemed to have disregarded the medical opinion testimony of Dr. Hurwitz and Dr. From as to the causal connection between the alleged injury and petitioner's employment." (Decision on Petition for Judicial Review, p. 2.)

On remand the commissioner has been directed "to further consider the evidence of Dr. From and Dr. Hurwitz and all other testimony about the conditions of petitioner's work activities on March 7, 1977, and if he rejects that testimony, to explain the reason or reasons for such rejection." (Decision on Petition for Judicial Review, p. 2)

Review of the Case

Claimant was employed as a parking meter checker for the City of Des Moines for eight years and allegedly suffered a heart injury arising out of and in the course of her employment on March 4, 1977. Claimant attempted to show existence of work related physical and mental stress. Official weather reports were submitted in an attempt to show that March 4, 1977 was an extremely cold day. Claimant described stressful encounters with irritated motorists who received parking ordinance citations and described one specific incident occurring during the mornings of March 4, 1977. (Appeal Decision p. 2)

Claimant has smoked approximately one pack of cigarettes a day off and on since 1955 and had been smoking for several months preceding March 4, 1977. During her employment years as a parking meter checker, claimant always came home very tired after working; in 1975 she had irregularity of heart beat; in the fall of 1976 a physician recommended she lay off from work for one month due to complete exhaustion; and in early 1977 claimant may have experienced heart problems when she came home tired and sometimes felt "light pains in her left arm." (Appeal Decision, p. 8)

Claimant has an extensive family history of heart problems. Specifically, two siblings died from myocardial infarctions, three other siblings suffered myocardial infarctions, and both parents have had congestive heart failure as well as myocardial infarctions. (Appeal Decision, p. 7)

In addition to examination by Dr. Hurwitz and Dr. From, claimant's condition was evaluated by Robert Kreamer, D.O. Dr. Kreamer's final diagnosis was chest pain of unknown etiology. (Appeal Decision, p. 2)

The medical testimony of Dr. Hurwitz is evaluated on page 5 of the appeal decision as follows:

> The claimant then cites a report from Dr. Hurwitz dated August 3, 1977. The deputy did not mention this report specifically in the arbitration decision. Claimant in her brief quotes the following part of the August 3 report:
>
> There are several questions which go unanswered. Specifically could her job and its ensuing pressures both physical and mental and her exposure to the harsh weather conditions of last winter, be a cause of heart trouble that arose in March, 1977 and its residuals. This truly is a difficult question to answer however, in a patient with coronary insufficiency or angina pectoris these conditions most assuredly would aggravate the patient's symptomatology.

Claimant contends that this statement establishes a causal connection between claimant's aggravated condition and her employment. However, it is difficult to determine from the report whether Dr. Hurwitz was specifically referring to claimant. Dr. Hurwitz uses the word "patient" in a general and hypothetical sense. Also further on in the report Dr. Hurwitz relates that claimant told him that the pain she was experiencing "was not brought on by emotion or exertion." It is impossible to tell from the August 3 report, or from any other report of Dr. Hurwitz in the record, what physical and mental pressures Dr. Hurwitz was considering in rendering his opinion. Also there is no showing as to

whether Dr. Hurwitz was making a judgment on the weather conditions from his general recollection or from official weather records and whether these included both on the job and off the job weather conditions. Further the doctor refers to "symptomatology" and not "disability." Therefore, the August 3, 1977 report of Dr. Hurwitz must be given little weight as it pertains to establishing causal connection. (Appeal Decision, p. 5)

The medical testimony of Dr. From is evaluated from page 5 to page 7 of the appeal decision. A summary of the discussion is presented. The claimant argued on appeal to the commissioner that Dr. From's deposition testimony taken August 16, 1978 erred in placing more evidentiary weight upon Dr. From's earlier medical report dated November 21, 1977 which stated, "I do not believe, on the basis of present evidence, that we can definitely state Mrs. Deaver (claimant) has had myocardial damange." The appeal decision considered the fact that Dr. From subsequently placed the claimant through a treadmill study and did not change his opinion on the amount of disability and made no mention of a causal connection. As discussed in the appeal decision, claimant's argument that Dr. From's testimony established a causal connection was based upon his response to a hypothetical question presented on deposition. Dr. From was questioned hypothetically:

Q. ...Now, with this history, all of which may not have been provided to you, would you have an opinion as to whether or not the stress — and by this I include the physical work on March 4 and the days before, coupled with the extreme cold and the argument with the motorist against whom she did not retaliate or argue back — does this bear some causal connection in causing her to have this pain in her chest and down her left arm?

A. Yes, I would think that that is probably connected.

On redirect examination by defendant's attorney, Dr. From responded similarly to the following question:

Q. In light of the additional information that Mr. Dahl has asked you to assume about Mrs. Deaver's activities, before she had this episode of pain, is there anything in that additional history, which taken together with your study of the reports, your examination of her, and your knowledge about her, would that enable you to state that she suffered an injury in the course of her work with the City?

A. I couldn't — if one says that pain is an injury, then she might have sustained something because she did have pain, which I would be certain, from my examination of Mrs. Deaver — and not only by that, but by the facts brought out by Mr. Dahl — that this would be her reaction to that particular train of events in the environment she was in... (Appeal Decision, p. 6-7)

Evidentiary evaluation of Dr From's opinion appears on page 7 of the appeal decision as follows:

Dr. From's change in opinion in his deposition seems to be based on additional history given by claimant's attorney in the hypothetical question rather than on any objective medical findings. In his November 21, 1977 report Dr. From made no mention of any incident which claimant might have encountered on the morning of March 4, 1977. Also no mention was made of weather conditions on March 4 in Des Moines. Dr. From was made aware of the ticket ripping incident and the weather conditions on March 4, 1977 in the hypothetical question. Also included in the hypothetical question were alleged facts or incidents for which there is no substantiation. For instance it was stated that claimant had to climb up on trucks in order to give tickets to truck drivers. However, there is no showing that claimant actually had to climb up on a truck on March 4, 1977. Also claimant's attorney stressed the severity of the weather but as mentioned above the weather on March 4, 1977 was not unusual for that time of year. Further it should be noted that Dr. From is referring to the occurrence of an episode of pain and not to a permanent disabling condition. Therefore, lesser weight must be given to Dr. From's opinion based on the hypothetical question posed in his deposition.

In consideration of Dr. Kreamer's diagnosis of chest pain of unknown etiology and Dr. Hurwitz's all inclusive statements with unclear factual premises, the appeal decision recites: "Since no causal connection is adequately established by the reports or testimony of Dr. From, the degree of disability or the nature of claimant's condition, whether angina pectoris, coronary insufficiency or some other type of heart impairment, is no longer relevant." (Appeal Decision, p. 7)

On appeal the commissioner applied the facts and credible testimony to the principle set forth in *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967). In *Musselman* the Iowa Supreme Court stated:

[A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. *Id.* at 359-360, 154 N.W.2d at 132.

The appeal decision stated, "[a]lthough the claimant experienced some symptoms of a heart injury at work there have been no showing of a direct causal connection between claimant's heart condition and an exertion in her employment." (Appeal Decision, p.8).

Applicable Law

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 weight to be given to expert testimony is for the finder of fact, and the provision of evidentiary weight will 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). The industrial commissioner is the ultimate fact finder as to whether a claimant has satisfied the causal connection condition for entitlement to compensation benefits. *See Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967). Expert opinions may be accepted or rejected, in whole or in part by the industrial commissioner. *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 906 (Iowa 1974). The commissioner is under a statutory duty to state reasons for rejecting uncontroverted medical testimony. *Id.* at 908.

When the causal connection between a myocardial infarction and employment activities becomes a fact question, the commissioner's fact finding decision must stand. *Holmes v. Bruce Motor Freight, Inc.*, 215 N.W.2d 296 (Iowa 1974) (where two medical doctors' opinions were contradictory as to whether a myocardial infarction arose in the course of employment, a factual question as to causal connection existed and the commissioner weighed the evidence and found the claimant had not tipped the scales of proof).

Analysis

Upon careful review of the evidence as a whole, it is concluded the appeal decision was correct in placing slight evidentiary weight upon the medical testimony of Dr. Hurwitz and Dr. From for establishment of the requisite causal connection.

Dr. Hurwitz's medical report is based upon unspecified factual premises. As reiterated in the appeal decision, Dr. Hurwitz used the word "patient" in a generic sense; and combined with his statement that claimant told him the pain she was experiencing "was not brought on by emotion or exertion", it is only logical that this expert was not specifically referring to the claimant. Dr. Hurwitz's testimony is extremely inclusive. He does not describe claimant's heart condition as relating to her work activities. Assuming Dr. Hurwitz was referring to the claimant, his testimony is contradicted by Dr. From who testified that the claimant described pain that is not typical of angina pectoris. (Appeal Decision, p. 3) Thus, the evidence of Dr. Hurwitz will remain questionable even if afforded greater evidentiary weight.

Dr. From's deposition opinion is based upon an ill-formed, hypothetical question which falls below credible evidentiary standards. The hypothetical question contains elements which are either conflicting with other evidence or are unsubstantiated. The assumption of extreme cold weather conditions on March 4, 1977 conflicts with the official weather records introduced into evidence. Claimant's alleged harassment by a parking meter violator remains unsubstantiated. In addition, assumption of claimant's work activity climbing upon trucks in order to attach parking tickets was presented within the hypothetical question without any showing that the cliamant actually performed such an activity on the alleged date of injury.

The contradictory testimony of Dr. Hurwitz and Dr. From is further rejected in light of Dr. Kreamer's final diagnosis of chest pain of unknown etiology.

Conclusion

Upon consideration of the case as a whole, no reason is found through the medical testimony, or otherwise, to alter the prior holding in the appeal decision.

THEREFORE ON REMAND, it is found:

The evidence fails to establish a compensable injury arose out of claimant's employment on or about March 4, 1977.

* * *

Signed and filed this 22nd day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LON E. DECKER,

Claimant,

vs.

HARTFORD AUTO SALES, INC.,

Employer,

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

Introduction

This is a proceeding in review-reopening brought by Lon E. Decker, claimant, against Hartford Auto Sales, Inc.,

employer, and St. Paul Fire & Marine Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on October 8, 1978. It came on for hearing on March 9, 1982 at the Iowa Industrial Commissioner's Office in Des Moines, Iowa. It was considered fully submitted with the filing of the deposition of G. Charles Roland, M.D., on April 4, 1982.

The industrial commissioner's file shows a first report of injury received on October 30, 1978. A memorandum of agreement was received on November 8, 1978. A form 2 received on February 10, 1981 shows the payment of $6,026.42 in medical expenses, sixty-four weeks and five days of healing period benefits and fifty weeks of permanent partial disability.

The parties agreed to a rate of $127.02.

The record in this matter consists of the testimony of claimant, Donald R. Rohde, Dave Winsor, and Marian Jacobs; claimant's exhibit 1, the deposition of Thomas B. Summers, M.D., with exhibits; claimant's exhibit 2, the deposition of Roger Marquardt with accompanying exhibits; defendants' exhibit A, records from claimant's hospitalizations; defendants' exhibit B, claimant's answers to interrogatories; the deposition of G. Charles Roland, M.D.; and the deposition of Irene Park. No briefs were submitted.

Issues

The issues in this matter are whether or not there is a causal connection between claimant's present disability and his injury of October 8, 1978; whether or not claimant is entitled to permanent partial disabiliity; and whether or not claimant is entitled to 85.27 benefits.

Statement of the Case

Sixty-three year old, married claimant left school in the tenth grade. After working on a farm he went to the service for five years. He attained the rank of sergeant in the field artillery. When he got out of the service, he rented a farm for four years before commencing a rock and lime hauling business which included doing his own mechanical work. For a while he used his truck to haul concrete for construction. Later he managed thirty to forty trucks for a construction company and did mechanical work. He was paid $185 and expenses. His next work at which he earned about $1,000 per month was selling used cars. When the car dealership went out of business, he managed a ready mix plant — a job including truck repair which paid $150 weekly with a commission on the concrete sold. Eventually he and a partner started a used car business in which they bought cars, did repairs, and sold the vehicles. That same partnership had a paving operation as well. Subsequently the partnership split with claimant getting the used car portion which he incorporated in 1975.

Claimant denied health problems prior to October 8, 1978 other than a bout of pleurisy, a broken arm, and gallstones.

Claimant recalled the circumstances of and surrounding his injury as follows: He was working on a car. A city employee came in with a tractor to which he wished to have a caution light attached. Claimant became overbalanced and slipped off the tractor fender. He fell on his back on the concrete floor and was unable to get up. He was taken to the doctor who took x-rays and wanted to hospitalize him. Claimant preferred to go home and remain in bed.

When he continued to have pain in his lower back and into his left leg, claimant saw two other doctors and underwent a myelogram. He was placed in a corset and given a weight restriction. He returned to the hospital and a second myelogram was done. He elected not to have surgery as he was guaranteed no relief. He saw Dr. Boulden who prescribed therapy. He enrolled in the YMCA back program, but he was unable to do all of the exercises.

He listed his present problems as persistent pain in his back and leg which is aggravated by stooping, an inability to bend, trouble reaching overhead without pain, and an incapacity for lifting. He estimated he can lift thirty pounds by going straight down. Pain is relieved by pills — Clinoril, Tylenol 3, and Bufferin — and the back corset. His current medical care is obtained at Veterans Hospital where he goes when he runs out of medication. His activities include "fooling around" with a Model A Ford and playing cards in town.

Claimant testified that he sold his garage building, his tools, and some cars after his injury. He kept the corporation, however. He claimed that he was stuck with twelve cars after the sale of his facility which he has been trying to liquidate. He listed four cars left over from 1978. He admitted that he buys a car now and then when he has a specific order from a customer. He denied doing any repair. His place of business is a small shop on which he pays neither rent nor electricity. He acknowledged a loss by the corporation each year.

Claimant stated his original plan was to work until he "couldn't go no further." He is collecting social security retirement benefits. He asserted he is still interested in selling cars; however, he has not applied for a job with any other car dealership. He denied being in the real estate business.

Claimant discussed his contact with an investigator sent by the insurance company thusly: The investigator called his home to inquire about a car and claimant agreed to meet him at the shop. When the investigator arrived claimant asked him how long he had worked for the insurance company. He told claimant he had inherited a large sum of money and wished to restore a car. When the car would not start, claimant first tried jumper cables. Later he got a battery from the shop which he said was loaded by someone else. As the car again failed to start, claimant told the investigator he did not feel like fooling with the car and called the service station. The investigator asked about a

dent underneath the car which claimant told him had occurred while the grass was being mowed. He understood the investigator would return for the car. The investigator then told him that he was interested in buying some property. Claimant had a lake lot which he sent the investigator to see on his own as he did not feel like going along.

Donald R. Rohde, a self-employed polygraph examiner who had worked for an investigation service, was assigned to claimant's case in mid September of 1981. He said that he and another man attempted to find claimant, but they were told he was out of town to purchase a vehicle. They asked if claimant was selling cars and were referred to an area where several vehicles were observed. A Jim Been told them that claimant was not very active and appeared to have a disability. Two days later Rohde returned and located claimant. He stated that claimant responded "yes" when he was asked if he was selling cars. Rhode observed no evidence of pain; however, he recalled claimant walked slowly and he reported claimant's stiff movement. No problems were observed in claimant's getting in and out of cars, climbing into the wrecker, or lifting the hood of the truck. He remembered claimant squatted to pick up the new battery. Claimant was bent under the hood. At one point the car's air filter was removed. The witness noticed a dent under the car and questioned claimant about it. He asserted that claimant got down on his hands and knees to look under the car. It was Rohde's recollection that claimant told him he, himself, had moved the car with another vehicle and chain when the denting occurred.

Regarding the lake front property the witness recalled claimant's telling him that he was not feeling well enough to show him the lot.

Dave Winsor, who once worked for the private investigator in this matter, observed claimant in November of 1979 and went to claimant's lot to look at cars. In the half hour he was on the lot he noted claimant's slow walk. He later returned and made similar observations. He did not recall tools in the garage area.

Winsor reported that claimant had a house for sale east of the car lot.

Winsor also recalled claimant's telling him he was not supposed to be working. He compared the list of vehicles on the lot in 1979 with those in 1981 and concluded that the list had changed.

Marian Jacobs, vocational consultant with a masters degree as a rehabilitation specialist, described the method for preparing a vocational disability report. Her steps include obtaining available medical reports, contacting doctors for more information if necessary, examining the work experience and education, talking with family members, evaluating residual skills and those acquired through avocations, visiting the work site, and talking with potential employers. Jacobs was questioned regarding an opinion given by another consultant. She acknowledged that there is more than one way to conduct a vocational evaluation.

Roger Marquardt, who has a masters degree in rehabilitation counseling, saw claimant on September 10, 1981, on referral from his attorney who provided medical and background information from the international rehabilitation association which was reviewed prior to the interview. The medical information used came from late summer or early fall of 1979 and the first part of 1980 and the deposition of Dr. Summers. Marquardt had not attempted to get additional medical information as he thought claimant's condition had stabilized and he knew claimant was not under treatment by a physician. Marquardt listed five factors with which he routinely deals: age, education, post-vocational experience and transferable skills, physical limitations, and motivation. He assessed claimant's functional capacity or exertional level at light to medium.

Claimant explained to deponent that he was attempting to sell some used cars to pay off a bank loan. Marquardt contacted five car dealerships in an attempt to ascertain what the general market might be and the income which a car salesperson could expect. He noted "[u]sed car sales very good, volume of cars low, commission only" and "[a]ll respects of mechanical work is [sic] up." He concluded, however, that there is not much demand for used car salespersons as the number of units being moved is down. He did not believe claimant's age would be a hindrance to him in selling cars and that his experience might actually aid him. Marquardt agreed with the statement that claimant's ability to earn a living as a car salesperson would be more a factor of the economic conditions and the availability of buyers rather than his physical status, and he determined that it would be best for claimant to go into car sales. Marquardt assumed from claimant's involvement with auto sales it would be easier for him to return to his own business than find new employment. He explained:

> In talking with Murray Motors, which is closely related type of business to Hartford Auto Sales, it was explained to me that if a [sic] individual has the personal capability of doing his own mechanic work, the financial rewards are higher if he can buy units, spend his own time and his own labor in repairing that unit and selling it for a profit, than buying a unit and selling it for a lower amount of money or buying a unit spending money to get it mechanically in shape and then selling it, because you don't have the cash outlay of having to repair the car. You can do it yourself. It was very strongly suggested to me that a person is going to make money if they can repair a car themselves before turning it.

* * *

A. My professional feelings are that Mr. Decker is able to return to work but he's going to be suffering a loss of earning capacity by doing so because he can't do the mechanic work that he did before, but he can still go to work.

The vocational expert asserted that claimant retains the skills necessary for a mechanic, but he has lost the physical ability to apply the skills. According to Marquardt, a mechanic would earn $17,000 to $20,000 per year and a salesperson would get $13,000 to $15,000 per year.

Michael McCormick, D.O., recounted that claimant was first seen in his clinic on October 8, 1978 after falling off a tractor fender. A fracture of the transverse process of the forth lumbar vertebra was documented. Dr. McCormick wrote that claimant was treated conservatively as an outpatient twice weekly and was seen in his office from time to time.

He admitted claimant to the hospital on February 2, 1979 with lumbar pain which radiated into his left lower extremity. A myelogram was done which was within normal limits. A CT scan showed hypertrophic changes at L4-L5 and L5-S1 bilaterally without significant nerve root encroachment. X-rays of the lumbar spine revealed spondylosis with calcified hilar nodes. Claimant was treated conservatively and discharged with Clinoril for his osteoarthritis and degenerative changes.

X-rays and myelography were repeated in December. X-rays of the lumbar spine showed an old compression fracture at T12 and narrowing of the disc space at L5-S1. Bilateral facet arthritis was seen at L5-S1. A myelogram was interpreted by the roentgenologist as normal. Electromyography was normal. Nerve conduction showed a delayed reflex perhaps indicative of left S1 radiculopathy and a prolonged peroneal F wave perhaps consistent with paroximal neuropathy or an L1 radiculopathy.

Orthopedic consultation was performed by Dr. Laughlin who did the myelogram which he construed as showing a herniated nucleus pulposus at L4-5 on the left. Dr. Laughlin recommended surgery and suggested claimant would be precluded from heavy lifting, frequent bending or stooping, or prolonged sitting or standing.

William R. Boulden, M.D., examined claimant and found him diffusely tender in the lower small back. Straight leg raising was negative. Deep tendon reflexes were equal and symmetrical. There was no motor weakness or sensory deficit. X-rays showed mild degenerative changes. The doctor's impression was musculo-skeletal irritation. He recommended antiinflammatories, physical therapy, and exercises.

In a letter dated January 8, 1980 Dr. Boulden wrote that claimant had completed the YMCA back program with a worsening of his symptoms. The doctor found straight leg raising and Lasegue's on the left to be positive. There was no neurological deficit. The doctor proposed a herniated disc or spinal stenosis. Claimant was rated at ten percent of the back and given a restriction from heavy lifting, bending, or stooping. During his participation in the YMCA back program, claimant's attitude was assessed at fair to good, his cooperation excellent, and his motivation good. The director found claimant severely limited by his pain "when the program was started."

Thomas W. Bower, L.P.T., reported the use of a TNS unit which did not make "any significant difference" in claimant's discomfort.

Irene J. Park, medical representative and rehabilitation nurse for defendant insurance carrier, described herself as a registered nurse with experience in rehabilitation, and described her job as visiting claimants and assisting them in their recovery to reach their maximum potential in both the medical and vocational areas. Her first visit with claimant occurred on October 22, 1979 after she had reviewed claimant's medical records. She found claimant dressed in work clothes and appearing "reasonably comfortable." During what she estimated to be about two hours, she discussed with claimant his educational and vocational background, his financial status, and his medical treatment. She assessed motivation and behavior patterns.

Park recommended that she contact Drs. Laughlin and Wirtz and that claimant participate in the YMCA back program.

She next saw claimant on September 27, 1979 at which time he told her that he could lift thirty or forty pounds and that he had always worked as a mechanic and salesperson. It was her opinion that claimant might be employed as a used car salesperson, farm equipment salesperson, or truck dispatcher. The nurse stated that it was too early at this point for her to make actual contacts because there was a letter from Dr. Boulden which required clarification.

Park made a third visit to claimant on November 1, 1979 at which time he continued to complain of pain in his low back and left leg. Claimant told her that he wished to return to work as he needed the money, but he was concerned about his ability to do mechanical work. Park decided to suggest claimant be seen at the Industrial Injury Clinic at Neenah, Wisconsin. She expressed the feeling that

> physically he would be employable within his limitations and restrictions. But it take [sic] more than physical. It takes probably an extreme amount of motivation if you have a chronic pain problem. And during the visits that I had with Dr. Decker [sic] I felt that his motivation was not sufficient at the time that I — at the time that I saw him to return to work even if and when he was declared medically stable which Doctor Boulden did say no further treatment would help, so apparently he was at least nearing medical stability.

Later she described claimant as "not the most motivated" person she had visited.

The witness claimed she had developed a number of contacts with employers, reviewed surveys done by job services, checked the daily want ads, and had discussions with other vocational experts. When claimant became medically stable, his case was transferred to a vocational specialist. In her view, claimant had management skills which could be transferred to other positions.

G. Charles Roland, M.D., orthopedic surgeon, had reviewed notes from Dr. Boulden, the claimant's medical

file, and some x-rays. He had not seen the myelograms. He testified to first having seen claimant on September 9, 1981 at which time claimant complained of low back pain extending into the left leg. On examination the doctor found an area of tenderness in the low back at S1, forward flexion of thirty degrees, extension ten degrees, left lateral bending of fifteen degrees, ankle reflexes at zero over zero, decreased sensation in the left posterior thigh and lateral calf region, hamstring weakness with knee flexion, and positive straight leg raising at eighty degrees on the right. X-rays showed "slight" narrowing at L5 and S1 and "slight" evidence of early degenerative arthritis. Dr. Roland's impression was chronic low back pain of uncertain etiology.

The claimant was seen again on December 30, 1981. Dr. Roland's findings were essentially the same with some improvement in forward flexion and a small decrease in lateral bending on the left. Applying the AMA Guides and based purely on the claimant's loss of motion, Dr. Roland rated claimant at eleven percent. He suggested claimant should avoid heavy physical work and restricted claimant's lifting to twenty-five to forty pounds. As possibilities for claimant's symptoms, the doctor proposed spinal stenosis or a disc problem. He also said it is possible claimant's symptoms and complaints are related to the incident of October 8, 1978.

Thomas B. Summers, M.D., board certified neurologist, saw claimant at the request of claimant's attorney and was provided with various medical records and x-rays. Claimant complained of almost constant pain. The doctor found neither loss of sensation nor reflex change which had been found by other examiners; however, he commented that such change might come and go. The doctor made a diagnosis of a ruptured disc between the fifth lumbar and first sacral vertebra on the left which he found compatible with the claimant's history, his examination, claimant's medical records, the electrical studies, the x-rays, and the myelogram. Dr. Summers stated claimant's condition related to his injury of October 8, 1978. He rated claimant's impairment at twenty-five percent of his body as a whole. He did not use medical guides to attain that rating. He advised claimant should avoid stooping and bending and lifting weights in excess of twenty to twenty-five pounds as such activities could exacerbate symptoms. Dr. Summers suggested sedentary work allowing for a change in position. He observed that leaning over a fender and under a hood would be aggravating and that if claimant were to engage in such activity, some aggravation of symptoms would result in a very short time. The doctor cautioned that claimant might be able to do something on one occasion and be unable to do a simpler task at another time. He believed claimant would be more apt to perform as a car salesperson than as a mechanic.

The neurologist said that successful surgery would reduce claimant's impairment with a ten to fifteen percent impairment remaining. He described the chances of a successful laminectomy as roughly fifty/fifty. The restrictions he placed on claimant would remain after surgery, but his weight limitation would be raised to fifty or seventy-five pounds.

The doctor agreed that claimant had minimal hypertrophic spur formation and that degenerative arthritis may be a progressive disease. He stated:

A. Well, most of us feel that the degeneration of the disc causes the space to narrow and this, in turn, causes the degenerative arthritis to form rather than the reverse.

Q. Okay. Are you saying that in all cases, degenerative arthritis is linked to a ruptured disc or a degenerative disc?

A. Degeneration of the disc, yes.

Q. Not necessarily a ruptured disc?

A. No the disc may degenerate and gradually become absorbed and it doesn't necessarily rupture or protrude but very often it does.

Q. That can occur more or less spontaneously; that doesn't need a trauma to induce that, isn't that correct?

A. It may occur spontaneously, that is correct.

Q. To have the arthritis, then, there was some evidence of degenerative disc disease, if I can get the sequence of events correctly?

A. Usually the disc starts to deteriorate and then because of the instability, irritation of bone develops and the spurs and other changes are referred to as degenerative arthritis.

Q. And that disease which affects both the disc and the vertebrae is progressive in nature, right?

A. It usually is.

Q. And again, that can occur without being preceded by any trauma?

A. That is correct.

As to the course of the degenerative process, Dr. Summers reported:

A. Very often the condition will advance to a certain stage and remain there and there again, it may continue to get worse and worse. It may progress to a certain point and remain stationary for a prolonged period of time only to recur. I don't think there's any one course that can be postulated.

The physician interpreted claimant's second myelogram as showing a complete block at L5-S1.

Findings of Fact

WHEREFORE, it is found:

That claimant is sixty-three years of age.
That claimant left school in the tenth grade.

That claimant has served in the military.

That claimant has had varied work experience in farming, trucking, mechanics, paving, and selling.

That prior to his injury claimant had a bout of pleurisy, a broken arm, and gallstones.

That on October 8, 1978 claimant was working in his garage mounting a caution light when he slipped and fell on his back on the concrete floor.

That claimant has elected not to have surgery.

That claimant has participated in the YMCA back program.

That claimant's current complaints include pain in his back and leg which is aggravated by stooping, an inability to bend, trouble reaching overhead, and an incapacity for lifting.

That claimant takes Clinoril, Tylenol 3 and Bufferin and uses a back brace.

That claimant has small shop and lot space where he continues to operate an automobile sales business.

That claimant has had some involvement with rental and lake property, but he is not in the real estate business.

That claimant has not applied for work with another car dealership.

That claimant retains some motivation to work in his car business.

That a vocational expert found the demand for used car salespersons depressed.

That claimant's actual earnings would be less if his business was selling cars only with no repair work.

That claimant has the skills of a mechanic, but he has lost the physical capacity to apply those skills.

That claimant has degenerative changes.

That claimant has had two myelograms.

That both Drs. Laughlin and Summers saw abnormalities in the myelograms, but the abnormalities were at different levels.

That claimant has a weight restriction.

That Dr. Boulden rated claimant's functional impairment at ten percent.

That Dr. Roland rated claimant's functional impairment at eleven percent.

That Dr. Summers rated claimant's impairment at twenty-five percent.

Applicable Law and Conclusions of Law

The first issue to be considered herein is whether or not there is a causal connection between claimant's present disability and his injury of October 8, 1978.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 8, 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, 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 opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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. Fisher Inc., supra*. See also *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967). Expert medical evidence must be considered with all other evidence introduced bearing on causal connection. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 76 N.W.2d 756 (1956).

The Iowa Supreme Court in *Becker v. D & D Distributing Co.*, 247 N.W.2d 727 (1976) indicated that an expert may testify to a possibility, a probability, or an actuality of causal connection between claimant's employment and his injury. If the testimony shows a probability or actuality of causal connection, this will suffice to raise a question of fact for the trier of fact. If the testimony reveals a possibility, it must be buttressed with evidence such as lay testimony regarding objective symptoms before and after the incident claimed to have resulted in the injury.

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. *Rose v. John Deere Ottumwa Works, supra*, 908, ____. If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812, ____ (1962).

Dr. Summers directly relates claimant's condition to his injury. Dr. Roland found a possible relationship. The claimant testified to no back problems prior to his injury date. Claimant does have some hypertrophic spur formation and degenerative arthritis. However, claimant carries his burden on this issue.

THEREFORE, IT IS CONCLUDED that claimant has proven by a preponderance that his current disability is causally related to his injury of October 8, 1978.

The next issue to be considered is claimant's entitlement to permanent partial disability.

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was 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, 1121, 125 N.W.2d 251, ____ (1963).

The industrial commissioner has stated many times:

> There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that industrial disability is proportionally related to a degree of impairment of bodily function.
>
> 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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of 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, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Defendants in this matter have presented a spirited defense. Claimant was visited by a rehabilitation nurse. Claimant was kept under surveillance. A vocational expert was employed to critique the evaluation performed by claimant's vocational expert.

Surveillance found the claimant engaged in some activity. The undersigned is not disturbed by the revelation that claimant was attempting to do some work. This claimant is not making claim for permanent and total disability. This is a proceeding in which we are attempting to determine claimant's reduction in earning capacity. The goal of workers' compensation is to return injured employees to work. That claimant is trying to do something is viewed as a positive factor rather than a negative one. The persons who observed claimant noted some difficulty in moving and claimant's restrictions were apparent in his conduct.

Claimant continues to complain of pain aggravated by stooping, an inability to bend, trouble reaching overhead, and an incapacity for lifting. Medical experts have restricted his weight lifting, stooping and bending. Claimant has elected not to have surgery as he is not sure it will do any good. Claimant has had two myelograms. Those tests have been variously interpreted as normal, as showing a defect at L4-5, and as revealing a problem at L5-S1. Claimant's refusal to have surgery to his back is reasonable. *See, Bruneau v. Insulation Services, Inc.,* 1 Iowa Industrial Commissioner Report 34 (1981); *Wachsman v. Mason City Tile & Marble Co.,* 32 Biennial Report of the Industrial Commissioner 165 (1975). *See also, Adams v. Happel & Sons, Inc.,* 34 Biennial Report of the Industrial Commissioner 11 (1979). Claimant's functional impairment has been assessed at ten percent, eleven percent, and twenty-five percent. Defendants have paid permanent partial disability for fifty weeks. After reviewing the Iowa case law, the findings set out above, and the factors considered in this portion of the decision, the undersigned has reached a determination of claimant's industrial disability.

Therefore, it is concluded that claimant is entitled to an additional one hundred weeks of permanent partial disability making his total industrial disability attributable to his injury of October 8, 1978 thirty percent.

At the outset of the hearing the parties were not sure as to whether or not any 85.27 expenses were outstanding. At the close of the hearing it appeared none were. No benefits are awarded.

Order

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant an additional one hundred (100) weeks of permanent partial disability at a rate of one hundred twenty-seven and 02/100 dollars ($127.02).

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500—4.33.

That defendants file a final report upon completion of payment.

* * *

Signed and filed this 30th day of April, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

RALPH DEROCHIE,

Claimant,

vs.

CITY OF SIOUX CITY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

C1aimant appeals from a proposed review-reopening decision filed November 30, 1981 wherein claimant was awarded permanent partial disability and healing period benefits plus related medical expenses.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant; defendant's exhibits 1 through 3; the report of G. A. Chicoine, D.C., dated May 19, 1981; and the briefs of both parties on appeal. The record on appeal also contains the deposition of Alan Pechacek, M.D., relevant to a companion action brought in Woodbury County District Court.

The parties have further entered into a stipulation filed February 20, 1981 which includes the following:

1. That the Claimant sustained a compensable injury in the course of his employment on September 8, 1978.

2. That at the time of his injury the Claimant was employed by his employer, the Respondent, at a gross bi-weekly rate of $419.93 or $209.97 gross per week.

3. That the Claimant has been off work the following dates:

September 1, 1978 through November 19, 1978
November 22, 1978
December 7, 1978 through December 10, 1978
December 27, 1978 through January 14, 1979
March 6, 1979 through March 7, 1979
March 15, 1979 through September 16, 1979
January 2, 1980 through January 3, 1980
March 7, 1980 to date

and the Employer has paid workers' compensation benefits at the rate of $132.82 per week for the above dates prior to December 1, 1980.

4. That the Claimant has incurred medical billings in the following amounts which have been paid by his Employer:

(a) Dr. Thomas Coriden	$ 155.00
(b) St. Joseph's Hospital	903.01
(c) Dr. L. E. Collins	21.00
(d) Dr. David Paulsrud	10.00
(e) Dr. Alan Pechacek	550.00
(f) St. Luke's Hospital	870.00
(g) Kieiser Surgical	545.51
(h) Siouxland Easter Seal Society	80.00
(i) Orthopedic Associates — Dr. Blenderman	10.00
(j) Ralph DeRochie Reimbursement for prescriptions	77.07
	$3,321.59

5. That it is stipulated and agreed that all medical billings are fair and reasonable charges for the work performed.

6. That it is stipulated and agreed that the following medical records and reports may be received and considered in evidence, and any defects in the foundation of said reports is expressly waived:

(a) Report of Dr. Thomas Coriden dated September 29, 1978
(b) Report of Dr. David Paulsrud dated January 22, 1979
(c) Report of Dr. L. E. Collins dated January 23, 1979
(d) Report of Dr. Alan Pechacek dated April 10, 1979
(e) Office records of Drs. Paulsrud and Pechacek — January 4, 1979 through December 1, 1980 (consisting of six pages)
(f) Hospital report of Dr. Pechacek dated July 16, 1979 (consisting of two pages)
(g) Hospital report of Dr. Pechacek dated July 17, 1979 (consisting of two pages)
(h) Hospital report of Dr. Pechacek dated August 1, 1979
(i) Medical report of Dr. Pechacek dated July 25, 1980
(j) Office records of Dr. Blenderman dated June 24, 1980 (consisting of three pages)
(k) Medical report of Dr. Blenderman dated June 25, 1980

The issues on appeal are the extent of claimant's permanent disability and whether claimant has reached maximum recuperation for the termination of healing period benefits.

Claimant, an employee in defendant's water meter department, suffered an admitted industrial injury on September 8, 1978. Claimant testified at hearing that he was in an apartment building on that date when his right leg went through a deteriorated floor board. Claimant stated that he had to be helped up by fellow workers present at the time. Claimant was able to drive his truck back to the shop and then home. Claimant testified, however, that he experienced pain and numbing throughout his right leg and hip and his lower back area. (Transcript, pages 13-15.)

Claimant was seen by Thomas L. Coriden, M.D., on September 11, 1978 and was placed in the hospital for x-rays and therapy. (Transcript, page 18.) At that time, claimant's right thigh was found to be bruised and the right knee stiff from swelling. In a report dated September 22, 1978, Dr. Coriden diagnosed a contusion and strain of the right knee and thigh.

Claimant testified that he returned to work on November

22, 1978 but had to go off work again on December 7, 1978 because of inability to climb stairs repeatedly as required to perform his job tasks. (Transcript, pages 19-20.) Claimant was then referred to David Paulsrud, M.D., who in turn, referred claimant to Alan Pechacek, M.D. (Transcript, page 20.)

Dr. Pechacek, an orthopedic surgeon, testified by way of deposition that he first examined claimant on March 16, 1979. Dr. Pechacek testified that on the basis of claimant's history, previous x-rays, and examination, he found claimant to be suffering from chronic pes anserinus tendonitis of the right knee. (Pechacek deposition, page 9.) Claimant was again taken off work and placed on a program of physical therapy and anti-inflammatory medications. (Pechacek deposition, pages 9-10.)

Dr. Pechacek saw claimant again on April 6, April 26, May 22 and June 12, 1979. During this period claimant received Novocaine, cortisone and anti-inflammatory medication. Dr. Pechacek noted decreased tenderness in the right knee and decided to reduce medication. (Pechacek deposition, page 14.)

Dr. Pechacek saw claimant again on June 26, 1979. Claimant described new complaints of pain relating specifically to the right kneecap. These complaints persisted as of July 10, 1979 leading Dr. Pechacek to discontinue medication and schedule an arthroscopy. (Pechacek deposition, pages 17-18.) On July 16, 1979 claimant related a burning sensation and stated that his knee felt as though it were filling with blood. (Pechacek deposition, page 20.) Claimant was hospitalized and the arthroscopy was performed on July 17, 1979. Dr. Pechacek indicated that the surgical examination failed to reveal any further etiology for claimant's complaints. (Pechacek deposition, page 18.)

Upon discharge, claimant's right knee was fitted with a splint and further exercises were prescribed. In an examination of August 3, 1979, claimant was found to be adjusting well to his knee splint. Dr. Pechacek indicated that claimant was gradually reducing use of the splint in December of 1979 with medication started again to relieve continuing pain in January of 1980. Claimant remained off work throughout the period. (Pechacek deposition, page 26.) Claimant was examined again on March 18 and March 31, 1980. Claimant's complaints of knee pain remained unchanged leading Dr. Pechacek to change medication. Claimant was prescribed Valium, again without success. (Pechacek deposition, page 27.)

Dr. Pechacek saw claimant again on April 18 and May 2, 1980. Because of the lack of improvement, Dr. Pechacek referred claimant to the Easter Seal Society for the fitting of a transcutaneous nerve stimulator. Dr. Pachacek felt that claimant had responded to this treatment sufficiently by an examination of May 15, 1980 that claimant could attempt a return to work.

Claimant testified at hearing that defendant would not accept the first work release, but allowed claimant to return to his old job after a second work release by Dr. Pechacek on June 3, 1980. Claimant further testified that he was able to work only a week because of pain in his right leg. Claimant stated that defendant never offered him light duty or alternative jobs. (Transcript, pages 30-33.)

Dr. Pechacek saw claimant on six occasions from June 3, 1980 until December 1, 1980. Dr. Pechacek stated that he never released claimant from treatment (Pechacek deposition, page 35) but the record fails to reveal any consultation after December 1, 1980.

Dr. Pechacek testified that as of December 1, 1980, his original diagnosis remained unchanged. Dr. Pechacek opined that claimant has sustained a permanent injury as the result of the fall on September 8, 1978. (Pechacek deposition, pages 36-37.) Dr. Pechacek indicated that he was unaware of claimant's complaints regarding his right hip. (Pechacek deposition, page 54.) In a report dated July 25, 1980, Dr. Pechacek rated claimant's functional impairment at six percent of the lower extremity. Dr. Pechacek conceded, however, that he was never able to find anything to which he could attribute claimant's complaints. (Pechacek deposition, page 41.)

Harold A. Ladwig, M.D., a neurologist, examined claimant on March 9, 1981. In a report dated March 16, 1981, Dr. Ladwig states:

> IMPRESSION: The patient's history is that of trauma to his right lower extremity. He does show evidence of some restriction of his right knee movement as indicated in the prior rating of this structure. The patient has a considerable emotional overlay. There are no findings of true involvement of the nervous system as the result of his accident. An early return to work is indicated. Unfortunately with the history of his period of a "prolonged recovery" such frequently becomes a liability to the employer. (Defendant's exhibit 1.)

Dr. Ladwig's report fails to contain a history of back or right hip pain.

Albert D. Blenderman, M.D., examined claimant on June 24, 1980. In his report of June 25, 1980, Dr. Blenderman writes:

> Treatment: It does not appear that surgery is the answer to this mans' [sic] problems and since he has already had physiotherapy and electric stimulation, I really have nothing further to offer. It would appear from the job description, that the patient is simply overusing the knee. This overuse causes irritation and swelling of the scar tissue in the region of his collateral ligament tear, with subsequent pain probably produced in the bursa underlying the medial collateral ligament.
>
> It is recommended, therefore, that he be changed to some other type of job while working for the City. He should be put on some type of job where he can be sitting a majority of the time, doing some type of desk work and where a minimum of walking will be required. If he is unable to transfer to some other type of city job, then I have suggested he report to Vocational Rehabilitation to see if they can help him get some other type of work or give him some retraining for a suitable type of job.

> Taking into consideration the apparent damage to this knee, I feel the patient has a 15 percent disability of the right lower extremity.

A report of G. A. Chicoine, D.C., dated May 19, 1981, is as follows:

> Mr. Derochie consulted us on March 26, 1981, and advised us that he had fallen through a hole in floor severely injuring his right leg. Two and and [sic] a half years later he is still not working and can hardly get around because of severe pain.
>
> Our examination revealed a misalignment of right femur, lumbosacral and sacroiliac articulation with bilateral weakness of psoas, fascia lata and glutenus medius muscles, right pectoralis, clavicular and left flexor muscles, ala Kendall & Kendall.
>
> Mr. Derochie was advised it would take many months to create a positive affect on him. We have seen him for a period of three weeks which is not long enough to produce much of a cure.
>
> Our prognosis is very guarded.

Claimant testified that as of the hearing, his right leg has not improved and he continues to have persisting pain. Claimant stated that his right leg prohibits him from working although he conceded that he has not sought employment since leaving work March 17, 1980. (Transcript, page 38.)

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 8, 1978 is the cause of the disability of 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 right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. *Soukup v. Shores*, 222 Iowa 272, 268 N.W. 598 (1936).

The plaintiff has the burden of showing that while the injury which was sustained was limited to a scheduled member, there resulted an ailment extending beyond the scheduled loss. *Kellogg v. Shute and Lewis Coal Co.*, 256 Iowa 1257, 130 N.W.2d 667 (1964).

An injury to a scheduled member entitles the claimant to weekly compensation for permanent disability as limited by the schedule; claimant is not entitled to industrial disability. *Barton v. Nevada Poultry*, 253 Iowa 285, 110 N.W.2d 660 (1960). *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 10 N.W.2d 569 (1943). *Soukup v. Shores Co., supra.*

The requirements for healing period benefits are set forth in Iowa Code section 85.34(1), which states in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable... the employer shall pay to the employee compensation for a healing period... beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The word "recuperation" has been interpreted in Industrial Commissioner Rule 500—8.3(85), which states: "Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first."

In the proposed decision filed November 30, 1981 the deputy assesses greater weight to Dr. Pechacek's determination that claimant suffered a permanent functional impairment of six percent to the lower extremity. Claimant asserts that his permanent disability should be assessed by the body as a whole rather than be limited to the right leg given claimant's complaints of hip and back pain.

The medical evidence contained in the record on appeal fails to make any reference to the existence of pain or limitation beyond claimant's right leg. The opinions of Dr. Pechacek that claimant's injury did not extend beyond the right leg are given greater weight due to the fact that he was claimant's treating physician. Compensation must then be determined under Iowa Code section 85.34(2)(o).

In his decision, the deputy also determined that claimant reached maximum recuperation as of July 25, 1980. Claimant asserts that because he was never discharged from treatment by Dr. Pechacek, he has not reached maximum recuperation and is entitled to continuing healing period benefits.

In that claimant argues for a greater permanent partial industrial disability rating, the contention that claimant's healing period continues is inconsistent.

Iowa Code section 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 compentent 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.

Moreover, Dr. Pechacek's determination that claimant's condition had stabilized is made unequivocal by the report of July 25, 1980 and by the fact that claimant apparently chose not to seek further treatment after December 1, 1980.

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 that 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.

Findings of Fact

1. That claimant sustained an injury arising out of and in the course of his employment on September 8, 1978.

2. That claimant reached maximum recuperation from his injury on July 26, 1980.

3. That as a result of the forementioned injury, claimant suffers a permanent functional impairment of six percent of the right lower extremity.

4. That defendant has paid claimant healing period benefits from September 8, 1978 until December 1, 1980.

Conclusions of Law

That as a result of an industrial injury sustained on September 8, 1978, claimant sustained a six percent permanent disability of the right lower extremity.

That claimant is entitled to permanent partial disability pursuant to Iowa Code section 85.34(2)(o).

That claimant is entitled to healing period benefits for the days that claimant missed work pursuant to the stipulation and ending on July 25, 1980.

That defendant is entitled to a credit for healing period benefits already paid. *Wilson Food Corporation v. Hollie Cherry*, ____ N.W.2d ____ (Iowa 1982).

WHEREFORE, the findings of fact and conclusions of law of the deputy in his proposed decision filed November 30, 1981 are proper.

THEREFORE, it is ordered that defendant pay unto claimant thirteen point two (13.2) weeks of permanent partial disability benefits at a rate of one hundred thirty-two and 82/100 dollars ($132.82).

Defendant is to be given credit for overpayment of healing period benefits.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Iowa Code section 85.30.

Defendant is to reimburse claimant for the medical expense of one hundred seventy-five and 00/100 dollars ($175.00) for services of Omaha Neurological Clinic and transportation expense of twenty-six and 13/100 dollars ($26.13). Defendant is not going to be required to pay any of the expenses of Dr. Chicoine because claimant failed to follow the requirements set out in Iowa Code section 85.27.

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

Costs of the action are taxed against defendant.

* * *

Signed and filed this 23rd day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court;
Remanded for Settlement.

DONNA DICKSON,

Claimant,

vs.

QUAD STATES CONSTRUCTION,

Employer,

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision filed March 27, 1981 wherein claimant was awarded healing period benefits, permanent partial industrial disability, and related expenses for continued medical treatment.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant; claimant's exhibits A, B and C; defendants' exhibits 2 through 33; the evidentiary deposition of John Albright, M.D.; and Albright deposition exhibit 1.

The facts of this case were condensed as follows in the deputy's decision of March 27, 1981.

Claimant, single, age 23, was employed by the defendant-employer as a field construction worker. On June 12, 1978 claimant was struck in the back of the right leg by a wheelborrow loaded with cement. (Transcript, page 6.) Claimant had sustained a prior right knee injury at age 16 while playing high school basketball. (Transcript, page 39.) The high school injury resulted in surgery during which "she had the cushions, the menisci taken out of her knee both in the inner and outer aspects of her knee, the medial and lateral side of the right knee." (Albright deposition, page 5, line 21.)

The injury of June 12, 1978 resulted in a complete tear of claimant's right anterior cruciate ligament. (Deposition, page 6, line 6.) (Defendants' exhibit 31.) The surgery was performed by Josef R. Martin, M.D., of Carroll, Iowa. (Defendants' exhibit 15, #14.) Claimant's post operative recovery did not go well in that she underwent various periods of hospitalization, excess knee fluids were asperated, and the use of a transcutaneous nerve stimulator was attempted. (Transcript, page 13, line 11; page 16, line 17.) Claimant has not yet found employment and is currently being tested by the Vocational Rehabilitation Department. (Transcript, page 34.)

Defendants expound two issues on appeal in their brief filed June 11, 1981. They are:

1. Did the deputy properly determine the extent of permanent disability of the claimant's leg?

2. Did the healing period extend to December 1980.

John Albright, M.D., an orthopedic surgeon and director of the Sports Medicine Service at the University of Iowa, has treated claimant's injury since November 29, 1979. In his deposition of January 30, 1981, Dr. Albright rated the permanent disability of claimant's knee at 50 percent. The deputy choose to give greater weight to Dr. Albright's assessments than to those of Josef Martin, M.D., or Joseph Gross, M.D. Dr. Gross examined claimant once on January 17, 1979. It was Dr. Martin who referred claimant to Dr. Albright on October 9, 1978 as a recognized expert on knee injuries.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 12, 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*, 326 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 main issue on appeal requiring determination is the length of claimant's healing period which is defined by Iowa Code section 85.34(1); Iowa Industrial Commissioner Rule 500—8.3:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.
>
> * * *
>
> A 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.

Defendants, in their brief of June 11, 1981, contended that the testimony of Dr. Albright indicates that claimant has reached maximum recuperation by November of 1979.

> "Do you believe she had made maximum recovery at the time you first saw her back in November of 1979?...
>
> * * *
>
> A. I'd have to answer that question in two parts. Yes and no.
>
> Her instability has not changed. She has reached maximum recovery from that part of her injury.
>
> The acute problem, the painful knee for which we saw her, she did receive benefit. And I would not medically say that she had received maximum benefit until after we had seen her the several times we did and would be as of the last visit that I would say that from that standpoint she had reached maximum benefit." (Albright deposition, pp. 34-35.)

Upon a full review of the record, the deputy's interpretation that claimant did not receive maximum recuperation until December of 1980 appears to be well founded. The expertise of Dr. Albright in his field and the fact that claimant's problems persisted through 1980 lend considerable support to the deputy's interpretation of the medical evidence.

In *Bodish v. Fischer, supra*, the court states:

> The commissioner being the fact finder, the rule announced in *Staley v. Fazel Bros. Co.*, 247 Iowa 644, 647, 75 N.W.2d 253, would be applicable. We said therein that the findings are to be broadly and liberally construed, rather than narrowly or technically. "In case of doubt or ambiguity they will be construed to uphold, rather than to defeat, the judgment."

In *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967) the court stated:

> The commissioner was not compelled to accept the opinion of any testifying medical expert. The fair inferences to be drawn from all the medical testimony, the histories related by claimant to the various doctors, and other evidence surrounding the alleged injury may well support a finding his back condition arose independently of any work related incident.

Defendants' brief of June 11, 1981 also takes issue with Dr. Albright's 50 percent functional impairment rating because it was not based upon A.M.A. guidelines. The A.M.A. guidelines are sanctioned, not required, by Iowa Industrial Commissioner Rule 500—2.4. Claimant's brief correctly points out that Rule 500—2.4 provides in part:

> Nothing in this rule shall be construed to prevent the presentation of other medical opinions or guides for the purpose of establishing that the degree of permanent impairment to which claimant would be entitled would be more or less than the entitlement indicated in the A.M.A. guide.

Given the fact Dr. Albright is a recognized expert in knee injuries, that he was the last treating physician of claimant, and claimant's testimony as to her continued difficulties, the deputy's determination that claimant's healing period extended until December 1, 1980, and that she suffers a 50 percent permanent partial industrial disability pursuant to Iowa Code section 85.34(2)(o) is supported by substantial evidence in the record on appeal.

Findings of Fact

1. That claimant was an employee of defendant-employer on June 12, 1978. (Defendant's answers to petition.)

2. That on June 12, 1978 claimant was injured while performing duties of her defendant-employer. (Hearing transcript, pages 6-7.)

3. That the injury of June 12, 1978 is the cause of claimant's permanent disability. (Defendants' exhibit 25; Albright deposition, page 8.)

4. That claimant reached maximum recuperation on December 1, 1980. (Albright deposition, pages 35-36.)

5. That as the result of the forementioned injury claimant has sustained a permanent functional impairment of 50 percent of the right lower extremity. (Albright deposition, page 13.)

6. That the weekly rate of compensation benefits is one hundred six and 78/100 dollars ($106.78). (Memorandum of agreement filed July 3, 1978.)

7. That the claimant has incurred unreimbursed mileage expenses of 5,874 miles for a total of $974.80. (Claimant's exhibits A, B and C.)

Conclusions of Law

1. That claimant suffered an injury which arose out of and in the course of her employment.

2. That as a result of the injury of June 12, 1978 claimant sustained a 50 percent permanent partial industrial disability as contemplated under Iowa Code section 85.34(2)(o).

3. That claimant is entitled pursuant to Iowa Code section 85.34(1) to healing period benefits beginning June 12, 1978 and ending on December 1, 1980.

4. That claimant is entitled pursuant to Iowa Code section 85.34(2)(o) to permanent partial industrial disability benefits commencing December 2, 1980.

WHEREFORE, it is found:

That the deputy's review-reopening decision filed March 27, 1981 is proper and is adopted as the final decision of this agency.

THEREFORE, it is ordered:

That the defendants pay the claimant a healing period beginning on June 12, 1978 and ending on December 1, 1980 at the agreed weekly rate of entitlement of one hundred six and 78/100 dollars ($106.78), together with statutory interest from the date due.

That commencing on December 2, 1980 defendants pay the claimant a period of permanent partial disability of a one hundred ten (110) week duration at the weekly rate of one hundred six and 78/100 dollars ($106.78), together with interest from the date due.

Defendants are to receive credit for those amounts previously paid.

Defendants are ordered to pay the claimant nine hundred seventy-four and 80/100 dollars ($974.80) in mileage expenses and to pay those reasonable medical and transportation expenses as required by the continuing treatment to be rendered by John Albright, M.D.

Defendants are further ordered to pay the costs of the evidentiary deposition of John Albright, M.D., together with an expert witness fee of one hundred fifty dollars ($150) to Dr. Albright as contemplated by section 622.72, Code of Iowa.

Defendants shall file a final report within twenty (20) days from the date that the terms and conditions of this decision become final.

* * *

Signed and filed this 24th day of July, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DAVID DINKEL,

Claimant,

vs.

DEPARTMENT OF PUBLIC DEFENSE,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 29, 1982 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 combination arbitration and review-reopening decision.

On appeal the record consists of the transcript; the depositions of Steven Zorn, M.D., Gordon L. Elliott, D.O., and Thomas B. Summers, M.D.; claimant's exhibits 2, 3, 4, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37; defendants' exhibits A, B, C, D and G; and claimant's answers to interrogatories.

The result of this final agency decision will be the same as that reached by the hearing deputy, albeit for different reasons.

Findings of Fact

1. Claimant was age 48 at the time of the hearing.

2. Claimant joined the Navy when he was 17 and received an honorable discharge. (Tr. 14-16)

3. Subsequent to being in the Navy, claimant was in the Air Force 1954-1961. (Tr. 20)

4. Claimant learned bookkeeping on his own and did work as such in a grocery store. (Tr. 18-20)

5. Claimant began work (for the second time) for the State of Iowa in March 1976. (Tr. 36)

6. Claimant began painting in building 65 (Camp Dodge) in the fall of 1976. (Tr. 42)

7. The paint operation with which claimant was involved was moved to building B-61 in about January 1979. (Tr. 36-38)

8. Claimant's supervisor had knowledge in February 1979 that claimant's work caused him some lung problems. (Tr. 50)

9. Claimant knew in November 1977 that the paint at work caused him a problem. (Tr. 195)

10. The spray painting work aggravated possible chronic bronchitis. (Claimant's exhibit 18)

11. Claimant fell at work and hurt his back on January 19, 1980. (Tr. 57, Claimant's exhibits 17 and 18)

12. Claimant began to lose time from work because of his back injury in March 1980. (Elliott depo., 23. Tr. 62, Claimant's exhibit 62, Defendants' exhibit B)

13. Claimant's respiratory problem also contributed to his losing work between March 1980 and March 1981. (Elliott 14, Claimant's exhibits 18 and 21)

14. Claimant has no permanent partial impairment from the back episode of January 19, 1980. (Defendants' exhibit B and Summers depo., 14)

15. Claimant has no permanent partial impairment from the paint fumes at work. (Zorn depo., 11)

16. Claimant was regularly treated by Dr. Elliott in 1980 and 1981. (Elliott 10-11, 15)

17. Claimant was able to return to work March 15, 1981 with (1) no heavy lifting as far as his back was concerned and (2) no spray painting. (Claimant's exhibit 26)

18. Claimant's low back injury of January 19, 1980 makes him more susceptible to low back problems. (Elliott 24)

19. Claimant should not spray paint in the future. (Elliott 22, Claimant's exhibit 26)

20. Claimant's work with spray paint has no relation to his cardiac disease. (Defendants' exhibit A [Zorn 4-20-81, 3-13-81], Zorn 10)

21. Claimant applied for work with the employer in the spring of 1981 but was not rehired. (Tr. 80, 131-132, Claimant's exhibit 5)

22. Claimant has sought work with other employers since the spring of 1981. (Tr. 81-82)

23. Claimant has sought vocational rehabilitation. (Tr. 83, 103-110)

24. Claimant worked a silk screen press for six days in June 1981. (Tr. 86)

25. Claimant applied for a position with the employer as a security guard but was unavailable on three occasions when State Officials tried to reach him to set up an interview.

Issues

The hearing deputy awarded healing period benefits for a period of one year between March 1980 and March 1981 and permanent partial disability to the body as a whole for industrial purposes of 25 percent, plus certain medical payments. That deputy ruled that claimant gave adequate notice of the effect of his work with paint upon his respiratory condition but made no specific finding that claimant sustained an injury because of the paint fumes. Defendants raise three issues in their brief and claimant raises two additional issues. All these issues involve the question of whether or not the claimant was given adequate notice of termination of his benefits in September of 1980, whether the employer had timely notice or knowledge of the lung injury, whether the deputy was correct in finding a temporary aggravation to his respiratory system due to exposure to paint at work, whether the 25 percent permanant partial disability award was correct, and whether the agency should hear the case when an attorney-client relationship existed between the attorney general and the agency. These issues will be discussed separately below.

Analysis

(1) Claimant complains that the employer did not give him "constitutional notice" of the termination of benefits on September 25, 1980. The case of *Auxier v. Woodward State Hosp. Schl.*, 266 N.W.2d 139 (Iowa 1978) requires notice of the following:

[1] the contemplated termination,

[2] that the termination of benefits was to occur at a specified time not less than 30 days after notice,

[3] the reason or reasons for the termination,

[4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,

[5] that the recipient had the right to petition for review-reopening under §86.34 [now 85.26(2)].

The employer's letter of August 25, 1980 was addressed to claimant and stated:

> The caption file has come to my attetion [sic] in the State Comptroller's Office pertaining to your work-related injury of January 19, 1980.
>
> A reveiw [sic] of the file, reveals lack of medical data to substantiate your continuing disability.
>
> This is to avise [sic] you that as of thirty (30) days from the date of this letter your Workers' Compensation benefits will be terminated. If there is medical data that has not been presented, please direct to our attenion [sic] immediately. If I may suggest, you are intitled [sic] to a hearing with the Industrial Commissioner' [sic] Office.
>
> If you have any questions on the above, please feel free to write or call.

The third paragraph states the fact and the time of termination, thus satisfying the first two requirements; the second paragraph gives the reason for termination (lack of medical data); the third paragraph also invites claimant to present evidence to the employer and says claimant has a right to a hearing, answering the last two requirements. One can only conclude from examining both *Auxier* and the employer's notice of termination of payments that the requirements of *Auxier* were met.

(2) The notice issue is the most difficult in the case. The applicable statutes state:

> §85.23 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.
>
> §85.24 No particular form of notice shall be required, but may be substantially as follows:
>
> . . .
>
> No variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employee, by name, received an injury in the, course of his employment on or about a specified time, at or near a certain place.

The discovery rule, which states that the time does not begin to run until claimant learns of the compensability of the injury, has been applied by our supreme court in *Jacques v. Farmers Lumber & Sup. Co.*, 242 Iowa 548, 47 N.W.2d 236 (1951) and *Robinson v. Department of Transp.*, 296 N.W.2d 809 (Iowa 1980). Also, as to claimant's obligation to give notice of injury, in *Robinson* the court states at page 812:

> Substantially the same statement of the discovery rule appears in 3 A. Larson, supra, §78.41 at 15-65 to 15—66: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work-connected, but positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability.

In the instant case, claimant is a person with a history of lung problems that do not appear to be related to his employment. As he worked during the years 1977-1980, however, he knew, as defendants point out, that painting bothered his lungs (Tr. 195, 147). But until he was actually disabled, he did not know of the possibly compensable character of the irritation to his lungs. (Dr. Elliott urged claimant to leave his work because of his heart and lungs but "never did say why." Tr. 191.) By March of 1980, of course, his back and lung conditions quite obviously were the cause of his inability to work.

Defendants argue that they did not have knowledge of the injury until November of 1980 (when the petition was filed) or even until the spring of 1981. (Brief, p. 3) Yet, claimant's exhibit 21 shows clearly that claimant's treating doctor wrote the office of the state comptroller on July 8, 1980, stating that claimant's "respiratory illness symptoms . . . were also compounded . . . by his type of employment, namely spray painting." It seems plain that such information is sufficient to constitute knowledge under the statute.

Moreover, claimant's exhibit 18, also a letter from Dr. Elliott, this one dated some two months earlier on April 30, 1980, was addressed to whom it may concern and also alluded to the spray painting causing a problem. Of course, there is no showing that defendants ever saw this letter. Yet the issue of notice/knowledge is an affirmative defense and defendants have the burden of proof. *DeLong v. Highway Commission*, 229 Iowa 700, 295 N.W. 91 (1940). Although claimant may not have given notice in an effective manner, defendants did have knowledge of the injury in July of 1980 and perhaps April of 1980, within a month of when claimant left work. One is unconvinced that defendants did not have knowledge within 90 days of when claimant knew or should have known of the compensable nature of the condition. For that reason, the affirmative defense fails.

(3) Claimant has the burden to show that the respiratory condition was an injury which arose out of and in the course of his employment. *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945), *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). A personal injury is an impairment to health which results from the employee's work. *Jacques, supra, Lindahl, supra,* and *Almquist, supra.* The record quite clearly shows that claimant has a predisposition to lung problems and that the

irritation from the spray painting at work reached the point where, combined with the back injury, claimant could not work for a period of a year. The record is equally clear that the insult to the lungs was only a temporary aggravation of the already existing condition. It is perhaps unusual that two wholly separate conditions, both arising in the work place, combined to create temporary disability, but that is what happened here.

(4) Claimant maintains he should have a running award; defendants argue that claimant is not entitled to any permanent partial disability. There is considerable evidence in the record that both the lung and back conditions were temporary and that claimant's inability to work extended from March 24, 1980 to March 15, 1981. This is the evidence of Dr. Elliott, the treating physician, whose opinion is adopted over that of Dr. Summers' as to disability because the former was the treating doctor. The bulk of the evidence shows no permanent partial impairment from the injury in the physical sense. Yet, all through the record it is Dr. Elliott's opinion that claimant cannot return to the painting job because his lungs and back could not stand the experience. This is the case of an employee with no permanent partial impairment who is precluded to some extent from getting a job because of his injuries.

An employer's refusal to give claimant work after an injury can justify an award for disability, as can a claimant's inability to find work because of the injury, despite bona fide attempts to do so. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). Further, industrial disability may be awarded when an employee is precluded from work because the employer believes the injury disqualifies the claimant from work. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980).

The record shows that claimant tried to find employment suited to his condition but failed; the evidence also shows that claimant applied for a job with the state but was unavailable for an interview, which shows some lack of effort on his part. The record does not show that the employer refused work to claimant, but it does show that the state has acted with a certain restraint.

This is a case, then, of a claimant with no permanent partial impairment from the injury who is entitled to industrial disability on account of a partial loss of earning capacity occasioned by the injury. On the question of the extent of claimant's permanent disability, claimant has the burden of proof. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). Claimant's disability is industrial, which is reduction of earning capacity and not just functional impairment. Such disability includes considerations of functional impairment, age, education and relative ability to do the same type of work as prior to the injury. *Olson, supra, Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). Considering claimant's age, education, and qualifications, along with the factors discussed above, claimant has a permanent partial disability to the body as a whole for industrial purposes of 25 percent.

(5) Finally, claimant questions whether "it is proper for the agency to hear this case and the attorney general to try it when an attorney-client relationship had existed between the agency and the attorney general." (Claimant's brief 7.) Since the statutes mandate that the industrial commissioner hear these cases, the industrial commissioner has no choice but to do so, proper or not. If the courts or the legislature detect any problem, one or the other will no doubt act.

* * *

There appeared to be no dispute over the weekly compensation rate of $172.50; nor was there any dispute over the medical bill of Dr. Elliott.

Conclusions of Law

Claimant sustained injuries arising out of and in the course of his employment on January 19, 1980 and in March of 1980.

Said injuries combined to result in temporary total disability from March 24, 1980 to March 15, 1981.

Said injuries combined to result in permanent partial disability to the body as a whole for industrial purposes of twenty-five percent (25%).

Defendants had knowledge of the possible compensability of the lung condition within ninety (90) days of when claimant knew or should have known of the probable compensability of the condition.

Defendants gave adequate notice of the suspension of weekly benefits in September 1980.

The statutes require the Iowa Industrial Commissioner to hear cases involving the State of Iowa as a party.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for the period March 24, 1980—March 15, 1981 at the rate of one hundred seventy-two and 50/100 dollars ($172.50) for the temporary disability, and to pay claimant weekly benefits for one hundred twenty-five (125) weeks at the same rate for the permanent partial disability, accrued payments to be made in a lump sum together with satutory interest, defendants to receive credit for all prior payments.

Defendants are further ordered to pay the bill of Gordon Elliott, D.O., in the amount of one hundred thirty-four dollars ($134).

Costs of this action are charged to defendants. The costs shall include an expert witness fee of one hundred fifty dollars ($150) payable to Gordon Elliott, D.O.

Defendants are ordered to file a final report upon the completion of payments.

* * *

Signed and filed at Des Moines, Iowa this 15th day of April, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

BARBARA J. DIRKS,

Claimant,

vs.

LIBBEY OWENS FORD COMPANY,

Employer,

and

KEMPER INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision filed October 28, 1981 wherein claimant was awarded permanent partial disability and healing period benefits plus related medical expenses.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Carol Willier and Brian Dirks; claimant's exhibits 1 through 19; the deposition of Lowell F. A. Peterson, M.D.; and the briefs of all parties on appeal.

Claimant, age 38 at the time of the hearing, married with three dependent children, sustained an injury arising out of and in the course of her employment on June 26, 1978. Claimant testified at the hearing that she was lifting a large plate glass window when she felt something "pop" in her back. When claimant was unable to work the following day, defendant employer referred her to Wayne E. Janda, M.D. Dr. Janda placed claimant on a program of physical therapy which continued until October of 1978. (Transcript, page 13.) Claimant continued to complain of pain causing Dr. Janda to prescribe a TENS unit. Claimant underwent a myelogram on October 19, 1978 and was hospitalized for three days thereafter. (Transcript, page 14.) Claimant was diagnosed to be suffering from a herniated nucleosis pulposis in the L-5,6 vertebra. (Exhibit 3.) Dr. Janda performed a laminectomy and excision October 27, 1978 with claimant being discharged from hospitalization on November 4, 1978. (Exhibit 3.)

Dr. Janda released claimant for work on January 8, 1979 with a lifting restriction of 25 pounds. Upon her return to work, defendant employer promoted claimant to an inspection job which apparently met claimant's physical restrictions. Claimant testified at hearing that she was able to perform this job only a few days because of pain. Dr. Janda subsequently started claimant on a program of physiotherapy.

Claimant testified that because of persistent pain, she consulted Robert A. Hayne, M.D., on June 18, 1979. Dr. Hayne, a neurosurgeon, performed a neurological examination on June 18, 1979 and again on October 19, 1979. In his report of October 30, 1979, Dr. Hayne writes:

> X-rays of the lumbosacral spine by Radiology P.C. on October 19, 1979, showed early degenerative arthritic changes involving the apophyseal articulations of the lower two lumbar segments.
>
> The diagnosis is possible persisting disc herniation that may be accounting for a part of her pain and in view of her x-rays showing degenerative changes, there may be instability of the low back region which may be attributing to her overall pain picture. If her symptoms persist, she should possibly have a repeat myelogram and be evaluated for consideration of stabilization of the low back.
>
> The permanent disability appears to be 16% of total. This is considering her symptoms which required a lumbar laminectomy and her persisting pain that precludes her from returning to work. (Exhibit 1.)

Claimant testified that Dr. Hayne recommended the application of a body cast to aid the recovery of the spinal area. Dr. Janda applied the body cast soon thereafter. Claimant testified that this cast and subsequent body cast were unsuccessful and had to be removed after a short time. (Transcript, pages 23-24.) Claimant testified that at this point, Dr. Janda contacted the Mayo Clinic in Rochester, Minnesota for the referral of claimant. (Transcript, page 25.)

Lowell F. A. Peterson, M.D., an orthopedic surgeon at the Mayo Clinic, saw claimant for the first time on January 2, 1980. Dr. Peterson testified by way of deposition that he examined claimant on January 2, 1980. On the basis of this examination, claimant's history and x-rays of claimant's spinal area, Dr. Peterson testified as to claimant's condition at that time:

> Q. What did the examination and your review of those x-rays reveal about her physical condition:?
>
> A. They revealed that Mrs. Dirks had a symptomatic spondylolisthesis of the fifth lumbar vertebra on the sixth.
>
> Q. Could you describe what spondylolisthesis is?
>
> A. Spondylolisthesis is the slipping of one vertebra on another as to slightly change its position. It may be to an extreme degree but it was not in the case of Mrs. Dirks.
>
> Q. How would you describe the degree in her?
>
> A. Mild.
>
> Q. Mild?
>
> A. The boney defect of a spondylolysis which was a complete defect bilaterally at the fifth lumbar level and that of course was a complete defect which would lead to the partial displacement in the position. (Peterson deposition, page 7.)

Dr. Peterson advised claimant to undergo a spinal fusion. An examination of February 27, 1980 revealed the same complaints of lower back pain. Claimant underwent a spinal fusion on March 13, 1980 with claimant being released from hospitalization on March 26, 1980. (Peterson deposition,

pages 9-10.) Dr. Peterson testified to restrictions placed on claimant after surgery:

A. She wasn't allowed any specific activities in the way of bending her back. Any lifting, stooping, twisting. She was not to drive the car. She was not to be up more than four to six hours a day. She was to have a mid-morning and mid-afternoon rest period and all of the rest of the time was to be spent lying down. She was to use a spinal postfusion garmet at all times that she was up. She was not to take Showers. She was advised against sexual activity. She was advised against climbing stairs except in the necessary travel about the house. And was basically a lady of leisure with the exception of taking care of herself.

Q. For what period of time were those conditions imposed?

A. Between six and twelve months after surgery. (Peterson deposition, pages 10-11.)

Dr. Peterson testified that claimant returned for follow-up examinations on July 3, 1980 and October 13, 1980. Dr. Peterson indicated that these examinations revealed that claimant's fusion was progressing well. (Peterson deposition, pages 11-12.) Claimant's restrictions remained, however, until her last examination on March 23, 1981. (Peterson deposition, page 18.)

Dr Peterson testified that the injury of June 26, 1978 was not the only cause for the spinal fusion surgery (Peterson deposition, page 21) but opined that the injury brought about the need for the surgical procedure. (Peterson deposition, pages 22-23.) Dr. Peterson also stated there was no evidence that claimant suffered from a back problem prior to June 26, 1978. (Peterson deposition, page 23.)

In letters of April 13 and May 11, 1981, Dr. Peterson gives claimant a functional impairment rating of 15 percent to the body as a whole. (Exhibits 6 and 7.)

A dispute exists in the record whether claimant aggravated her condition by shoveling snow on March 23, 1979. The transcript contains the following exchange between defendants' counsel and claimant:

Q. (Mr. Blackburn cont'd.) Well, let me ask you this, Doctor Janda has advised the company that you were off because—and your lawyer asked you about shoveling snow.

A. Yes. And I—

Q. And that was on March 23rd, 1979.

A. Uh-huh.

Q. Now, I wonder where he would have found that out if you didn't tell him.

A. Well, I suppose I did tell him. Maybe there was a misunderstanding. That's the only thing I can say because I wasn't shoveling snow. And like I said, the neighbors and my son did, but I was outside with my children that day.

Q. You say you suppose you did tell him?

A. When I called him, I said, "My back is bothering me." And so he said, "come in." And then he asked me what we had been doing that day, and I said, "We were outside shoveling snow, my kids and I."

Q. Okay.

A. And—

Q. You and your kids were outside shoveling snow that day on March 23rd, 1979?

A. Yes.
(Transcript, pages 45-46.)

If such an incident did occur, Dr. Peterson opined that it resulted in only a "temporary aggravation without any permanent effect on the long standing nature of the injury." (Peterson deposition, page 16.)

In the decision of October 28, the dupty found claimant to suffer a 25 percent permanent industrial disability. In their appeal brief, defendants assert such a finding is too high given the findings of functional impairment and the fact that claimant was promoted to a higher paying position which met with claimant's physical limitations.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 26, 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).

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 (1963). 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 Co.*, 253 Iowa 369, 375, 112 N.W.2d 299 (1961), the court quotes with approval from C.J.S: "Causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability or death."

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to

the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores, supra. Barton v. Nevada Poultry,* 253 Iowa 285, 110 N.W.2d 660 (1961).

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of 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, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

The record on appeal points out that claimant was promoted in January of 1979 to an inspection job. (Transcript, page 40.) This inspection job allowed claimant to either sit or stand, thus apparently meeting restrictions imposed by Dr. Janda. (Exhibit 3.) Dr. Peterson opined on September 4, 1981 that claimant should then be able to perform such employment tasks. (Peterson deposition, page 29.) It is also noted that the promotion to the inspection job involved a corresponding increase in wages. (Transcript, page 40.)

Defendants' brief on appeal makes much over the fact that claimant voluntarily left a higher paying position which met physical restrictions suggested by Dr. Janda. Claimant testified at hearing that despite her less demanding job tasks after the promotion, she was able to work only a short period of time because of recurring back pain. (Transcript, page 18.) The March 19, 1979 report of Dr. Janda takes note of this. (Exhibit 3.) Dr. Janda's referral of claimant to the Mayo Clinic and the testimony of Dr. Peterson illustrate the continuing severity of claimant's condition. The fact that she may have been capable of performing an inspection job for defendant employer as of April 13, 1981 does not establish that she was able to perform those tasks when she left employment with defendant employer.

The efforts of defendant employer to relocate claimant in suitable employment are praiseworthy. However, despite the efforts of defendant employer and claimant to continue employment after the injury of June 26, 1978, claimant terminated her employment in 1979 to follow her family to Blue Earth, Minnesota. Claimant testified that her family moved to Blue Earth because of a promotion transfer of her husband. (Transcript, pages 4-5.) Claimant therefore terminated her employment with defendant employer in 1979 for family reasons and long before Dr. Peterson released claimant from treatment.

In the decision of October 28, 1981, the deputy cites authority which states that the term "industrial disability" means a loss of earning capacity. Such has long been the test. See *Diederich v. Tri-City Railway Co.,* 219 Iowa 587, 258 N.W. 899 (1935). In *Olson, supra,* at 1120 the court stated:

> It is true the kind of disability with which the Compensation Act is concerned is industrial, not functional, disability. It is 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. *Martin v. Skelly Oil Co.,* 252 Iowa 128, 132, 133, 106 N.W.2d 95, 98; *Yeager v. Firestone Tire & Rubber Co., supra,* 253 Iowa 369, 375, 112 N.W.2d 299, 302; *Nicks v. Davenport Produce Co., supra,* 254 Iowa 130, 135, 115 N.W.2d 812, 815.

Moreover, the fact that actual earnings increase after an industrial injury does not mean that earning capacity remains unaffected. Professor Arthur Larson in 2 *The Law of Workmen's Compensation,* section 57.20 at 10-72 states:

> Degree of disability is calculated under most acts by comparing actual earnings before the injury with earning capacity after the injury.
>
> It is at once apparent that the two items in the comparison are not quite the same. Actual earnings are a relatively concrete quantity; rules for their measurement, for this purpose and for the general purpose of fixing claimant's benefit level, are set out in a later section. Earning capacity, however, is a more theoretical concept. It obviously does not mean actual earnings, since the legislature deliberately chose a different phrase for the post-injury earnings factor. Even under those statutes which compare, for example, "average monthly wages before the accident" with "the monthly wages he is able to earn thereafter," the test remains one of capacity. If the legislature had spoken of the wages "he has earned

> thereafter," or even the wages " he has been able to earn thereafter," the comparison of actual wage with actual wage would be indicated. But the concept of wages he "is able" to earn cannot mean definite actual wages alone, especially in the absence of a fixed period of time within which post-injury wages are to be taken as controlling.

The medical evidence establishes that claimant's remaining physical limitations restrict the types of activities that she can perform. (Exhibit 6.) Dr. Peterson did not release claimant from treatment until March of 1981. Claimant testified at hearing that although she had not yet actively sought re-employment since Dr. Peterson's restricted release, she would like to return to work. (Transcript, pages 32, 49.) Claimant further testified that she is a high school graduate with limited work experience in manual labor jobs only. (Transcript, page 32.) Claimant has no specialized office or technical training. The deputy's finding of 25 percent permanent industrial disability is therefore well supported by the record on appeal.

Defendants, in their brief on appeal, further contend that healing period benefits should not be awarded past March 23, 1979 when Dr. Janda released claimant for limited work activity. Defendants' contention relies heavily upon the testimony of Dr. Peterson as to what the limited release by Dr. Janda may have meant. It should be kept in mind that Dr. Peterson did not examine claimant until January 2, 1980. Moreover, Dr. Peterson himself did not assess the permanency of claimant's disability until March 23, 1981 following surgery necessitated by the injury of June 26, 1978. (Transcript, page 22.)

The requirements for healing period benefits are set forth in Iowa Code section 85.34(1), which states in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable... the employer shall pay to the employee compensation for a healing period... beginning on the date of the injury, and until he had returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The word "recuperation" has been interpreted in Industrial Commissioner Rule 500—8.3(85), which states: "Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first."

Defendants, in their brief on appeal, cite a recent ruling by the Iowa Court of Appeals in *Armstrong Tire & Rubber Co. v. Kubli,* Iowa Appl., 312 N.W.2d 60 (1981), where the court states:

> By the very meaning of the phrase, a person with a "permanent disability" can never return to the same physical condition he or she had prior to the injury. Thus, we believe that "recuperation" as used in this statute refers to that condition in which healing is complete and the extent of the disability can be determined.
>
> * * *
>
> Thus, the healing period generally terminates "at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury." *Winn,* 203 N.W. at 906.

Defendants' citation points to the fact that healing period cannot be determined until the extent of permanency can be determined.

Dr. Janda released claimant for restricted work activities starting January 8, 1979. Dr. Janda's report of March 19, 1979 details the difficulty claimant experienced upon her return to work. Dr. Janda concludes this report stating, "It should be determined whether Mrs. Dirks will be able to resume working before any ratable permanent disability can be determined." (Exhibit 3.) In a report of April 20, 1979, Dr. Janda takes claimant off work and declines to make any permanent impairment rating until October 27, 1979. (Exhibit 2.) These reports, claimant's inability to continue working, and the fact that Dr. Janda later referred claimant to the Mayo Clinic all illustrate that Dr. Janda had not intended the work release of March 8, 1979 to be a full and unrestricted release based upon a maximum recuperation by the claimant. The fact that claimant may have later been capable of limited work activity does not indicate that she was able to as of March 8, 1979. Therefore, Dr. Janda's work release of March 2, 1979 is not conclusive for determining the termination of claimant's healing period. See *Meyers v. Holiday Inn of Cedar Falls, Iowa,* Iowa Appl., 272 N.W.2d 24 (1978).

In a report of October 30, 1979, Dr. Hayne gives a permanent functional impairment rating of 16 percent. Dr. Hayne's rating is based upon two examinations which took place prior to claimant's second surgical intervention.

Dr. Peterson was claimant's principle treating physician from January 2, 1980 through March 23, 1981. Dr. Peterson performed a spinal fusion upon the claimant and placed her on stringent restrictions until March 23, 1981. In his letter report of April 16, 1980, Dr. Peterson declines to assess the extent of claimant's disability until claimant had recovered from the latest surgical procedure. Claimant's testimony and the medical evidence in the record illustrate clearly the claimant had not reached maximum recuperation as of March 12, 1979. The record also establishes that the treatment after March 12, 1979, including the spinal fusion surgery, was not of a continuing nature as suggested by defendants.

Dr. Peterson released claimant from treatment on March 23, 1981. The report of April 13, 1981 was Dr. Peterson's first attempt to rate claimant's permanent functional impairment. It is therefore concluded that claimant's healing period extends until March 23, 1981.

Findings of Fact

1. That claimant sustained an injury arising out of and in the course of her employment on June 26, 1978.

2. That as the result of the injury sustained on June 26, 1978, claimant suffers a permanent functional impairment of 15 percent to the body as a whole. (Exhibit 7.)

3. That claimant is a high school graduate with a limited employment history and no specialized training. (Transcript, page 32.)

4. That claimant left employment with defendant employer in early 1979 in order to move with her family to Blue Earth, Minnesota. (Transcript, pages 4-5.)

5. That as a result of the injury of June 26, 1978, claimant was unable to engage in acts of gainful employment from June 27, 1978 until March 18, 1979 (transcript, page 39) and from March 23, 1979 until March 23, 1981 (transcript, page 42).

6. That maximum recuperation for the injury of June 26, 1978 was not reached by claimant until March 23, 1981. (Exhibit 6.)

7. That claimant was paid weekly healing period benefits of $121.57 per week until March 6, 1979.

Conclusions of Law

That claimant sustained a 25 percent permanent industrial disability as the result of an industrial injury suffered on June 26, 1978.

That claimant is entitled to healing period benefits from June 27, 1978 until March 18, 1979, and from March 23, 1979 until March 23, 1981.

That defendants are entitled to a credit for healing period benefits already paid.

That claimant is entitled to medical expenses incurred as necessary to treat the injury of June 26, 1978.

WHEREFORE, the findings of fact and conclusions of law by the deputy in his decision filed October 28, 1981 are proper, they are adopted as the final decision of this agency.

THEREFORE, it is ordered:

That the defendants pay the claimant an additional weekly healing period beginning on March 23, 1979 and continuing until March 23, 1981 at the agreed rate of one hundred twenty-one and 57/100 dollars ($121.57), accrued benefits payable in lump sum together with statutory interest from the date due.

It is further ordered that defendants pay the claimant permanent partial disability for one hundred twenty-five (125) weeks beginning on March 23, 1981 until paid, together with interest from the date due, at the foregoing agreed weekly rate of benefits.

It is further ordered that the defendants pay the claimant the following medical expenses she has incurred as necessary to treat the industrial injury under review.

Robert Hayne	$ 77.00
Radiologists of M.C.	76.00
St. Joseph Mercy Hospital	760.85
Mayo Clinic	3,078.20
Independent Medical Surgical Group	30.00
St. Mary's Hospital	2,530.92
TOTAL	$ 6,552.97

Defendants are further ordered to pay the costs of these proceedings as contemplated by Industrial Commissioner Rule 500—4.33 together with an expert witness fee of one hundred fifty dollars ($150) payable to L. F. A. Peterson, M.D., as provided in section 622.72, Code of Iowa.

Defendants are further ordered to file a final report when due.

* * *

Signed and filed this 22nd day of February, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

STEPHEN A. DORAN,

Claimant,

vs.

RINGLAND-JOHNSON-CROWLEY CO.,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed arbitration decision in which he was denied benefits. The deputy concluded that claimant lacked credibility and that he had failed to prove that he received an injury which arose out of and in the course of his employment.

The record on appeal consists of the testimony of the claimant, Joan Ellen Doran and Janet Hogate; claimant's exhibits 1 and 2; defendants' exhibits A through G, exhibit E being the deposition of the claimant; and the appeal briefs of both parties.

The issues on appeal are whether the claimant proved by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment; if so, whether the resultant disability was causally connected thereto; and whether the deputy abused his discretion by denying claimant's request to take post-hearing depositions or give rebuttal testimony after the hearing was adjourned.

Claimant testified that he sustained an injury while working for defendant employer on August 10, 1979. (Transcript, page 7.) According to claimant, he was putting snap ties into concrete forms when he fell twenty to twenty-two feet and landed on his left hip and right arm. (Transcript, pages 16-17.) Claimant indicated that he laid on the ground for approximately fifteen minutes after which he was taken to the emergency room at Iowa Methodist Hospital. (Transcript, page 26.) Claimant testified that he was examined by a Dr. Lund who took x-rays and prescribed pain medication. (Transcript, pages 26-27.)

Claimant indicated that defendant employer sent him to a Dr. Dolan who examined him and prescribed medication. (Transcript, page 29.)

Claimant was unsure when he returned to work, but it apparently was within four weeks of the alleged accident. (Transcript, page 29.) Claimant indicated that, during the time he was off work and after he returned to work, he was undergoing physical therapy. (Transcript, page 30.)

According to claimant, the medication he was taking caused him to black out one day as he was bending over on a job site. (Transcript, page 31.) Claimant indicated that after that episode, Dr. Dolan referred him to a Dr. Reagan who advised him to stop working. (Transcript, page 32.)

Claimant stated that while under Dr. Reagan's care, he was hospitalized and the use of a TENS unit was prescribed. (Transcript, page 33.) Claimant was then referred to the University of Iowa Hospitals and Clinics in Iowa City and was seen by Thomas R. Lehmann, M.D. (Transcript, page 35.) Claimant indicated that the last time he saw Dr. Lehmann was in December of 1980. (Transcript, page 36.)

Claimant testified that he is incapable of holding a full time job and that he continues to experience pain in his back and has suffered from his leg giving way beneath him. (Transcript, page 36.)

On direct-examination claimant admitted to being untruthful when he was previously deposed. (Transcript, page 6.) Claimant stated that, although he had indicated in the deposition that he had engaged in no work since 1979, he had in fact insulated homes. Claimant was able to remember performing only three insulation jobs; however, the record supports a showing that he engaged in at least eight such jobs after September of 1979. (Transcript, page 7; defendants' exhibits B and C.) Claimant admitted that he had told some of his insulation customers that although he had two crews working, he was so busy he would be unable to get back to them for several weeks. (Transcript, page 47.) Claimant later stated that he felt justified in lying to customers since he "had to live." (Transcript, page 96.)

Claimant also admitted that he had been in an auto accident in August of 1977 and that, although the information was sought, he had not mentioned the back pain arising from that accident in his deposition or answers to interrogatories. (Transcript, page 68.)

Claimant testified that he was aware of the fact that defendants' attorney had requested that he bring his records pertaining to his insulation business to the hearing. When asked to produce those records, claimant stated "I didn't bring them." In response to the question about why he had not brought them, claimant testified "I forgot them. I don't have them. I don't know." (Transcript, page 69.)

When customers asked for references, claimant stated that he gave the name of Jerry Morrison, the owner of B. J. and I. Construction Company. Claimant indicated that he had "done a few jobs for him..." although he did not consider B. J. and I. Construction Company an employer of his for this reason, had not provided this information in his answers to interrogatories. (Transcript, pages 71-73.)

In a clinical note dated May 21, 1980, Dr. Lehmann sets forth claimant's history in which he states "[h]e worked for two weeks, and one day passed out while bending over in late September. *He has not worked since.*" (Emphasis added.) (Claimant's exhibit 1.) Dr. Lehmann also noted that, although claimant was placed on bedrest in the hospital he was found numerous times "up and about in his room bending and stooping."

Claimant's common law wife testified that she resides with claimant and that he is unable to do as much as he was able to before the alleged injury. She also stated that claimant moans in pain during the night. (Transcript, page 103.) On cross-examination, however, the witness admitted that she has maintained a separate apartment since August of 1980 and only spends the night with claimant a few days each week. (Transcript, page 107.)

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 10, 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 August 10, 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).

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 opinion of experts need not be couched indefinite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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. Fisher Inc., supra*. See also *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

With the exception of claimant's testimony, there was no evidence in the record directly pertaining to claimant's alleged work-related injury. Claimant offered no testimony of witnesses to the alleged accident. Emergency room records were not submitted. No reports from Drs. Dolan, Reagan or the physical therapist were submitted. The only reports offered were those of Dr. Lehmann who first

examined claimant approximately nine months after the alleged injury occurred. By claimant's own admission, the history he gave Dr. Lehmann was false in at least one respect, and, based upon claimant's failure to be truthful on numerous other occasions, there is no reason to believe the truth of the remainder of the history given to Dr. Lehmann.

Defendants successfully destroyed claimant's credibility. Only claimant testified concerning his alleged job-related injury and his veracity is clearly questionable. Claimant produced no evidence which would substantiate, independent of his own testimony, his allegation of injury. Therefore, claimant has failed to prove by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment.

Even if claimant had proven that he sustained an injury which arose out of and in the course of his employment; he still would not have been entitled to disability benefits. Since claimant gave Dr. Lehmann an inaccurate history, Dr. Lehmann's determination of causal relationship and extent of disability can be given no weight.

Claimant contends that the deputy abused his discretion by denying claimant's post-hearing request to take further depositions or to present rebuttal testimony. The decision whether to allow the taking of additional testimony is discretionary. *Polson v. Meredith Publishing Co.*, 213 N.W.2d 520, 526 (Iowa 1973). Industrial Commissioner Rule 500—4.31 provides in part:

> ...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 contested 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.

If claimant was seeking an additional post-hearing examination, he failed to comply with this rule.

Claimant relies upon Iowa Rule of Civil Procedure 192 as support for his request to take further testimony. Rule 192, however, allows a party to offer further testimony in order "to correct an evident oversight or mistake." The fact that claimant neglected to inform his attorney of certain facts is not an oversight or a mistake. It is simply another instance demonstrating claimant's pattern of telling falsehoods which pervades throughout this case.

Claimant was given the opportunity to present rebuttal evidence before the hearing was closed but offered none. The purpose of a hearing is not to enable a party to listen to the opposing party's evidence and objections so that he might gather and present additional evidence after the hearing to further support his position and eliminate the deficiencies in his case. This is precisely what claimant attempted to do; the deputy's denial of claimant's request was not an abuse of discretion.

Claimant also submitted a request for taking additional evidence on appeal. Industrial Commissioner Rule 4.28 states that "[t]he commissioner shall decide an appeal upon the record submitted to the deputy industrial commissioner unless the commissioner is satisfied that there exists additional material evidence, newly discovered, which could not with reasonable diligence be discovered and produced at the hearing." As noted previously, claimant was less than truthful at all stages in this proceeding. Had he been truthful, any pertinent evidence could have been presented at the hearing.

Findings of Fact

1. Claimant failed to tell the truth in his answers to interrogatories.

2. Claimant failed to tell the truth in his deposition.

3. Claimant failed to tell the truth about prior back injuries.

4. Claimant failed to tell the truth about working since his alleged injury.

5. Claimant's hearing testimony was vague and contradictory.

6. Claimant's credibility is completely destroyed.

7. Claimant was the only person testifying regarding the circumstances of his injury.

8. Claimant failed to give his doctor an accurate history.

Conclusions of Law

1. Claimant failed to prove that he received an injury arising out of and in the course of his employment.

2. Claimant failed to prove any disability causally connected to an injury or the extent of any disability.

THEREFORE, it is ordered:

That claimant take nothing from this action.
That claimant pay the costs of this action.

* * *

Signed and filed this 29th day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

LORI JO DRABEK,

Claimant,

vs.

MARTING MANUFACTURING,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

and

AETNA INSURANCE COMPANY,

Insurance Carriers,
Defendants.

Appeal Decision

By order of the industrial commissioner filed May 22, 1981 the undersigned deputy industrial commissioner has been appointed under the provisions §86.3 to issue the final agency decision on appeal in this matter. The employer and Liberty Mutual Insurance carrier appeal from an adverse arbitration decision.

The record is as stated in the hearing deputy's decision, namely the transcript consisting of the testimony of claimant, Kathi Murken, Beverly Wertz, James Nelson, and Mary Jones. Also a part of the record are defendant Aetna's exhibits A-H, inclusive, defendant Liberty Mutual's exhibits A-M, inclusive, and claimant's exhibits 1-14, inclusive.

The outcome of the hearing deputy's decision will be modified.

The basic issue is which of two insurance companies is liable for claimant's compensation payments. Claimant raises a pleading issue, claiming that defendant Liberty Mutual admitted an injury in its answer. Although the Liberty Mutual may be said to have admitted an injury to claimant on January 19, 1979, it did not admit that the injury was compensable. Anyhow, there is sufficient evidence in the record to show that claimant proved an injury of that date.

The employee claims injuries on January 19, 1979 and on May 7, 1979; at the time of the first injury, the Liberty Mutual had the workers' compensation coverage, and at the time of the second injury, the Aetna Insurance Company had the coverage. The record shows in several places that claimant injured her back on or about January 19, 1979 while emptying a barrel of trash and that she injured it again on May 7, 1979 when she stepped down from a forklift. There is some evidence that numbness began to appear in claimant's right leg before the May 7, 1979 injury and there is evidence that that injury was the first incident of leg numbness. Since this is a back injury case, the matter of leg numbness is important to establish the severity of the symptoms.

There is ample medical information, although there are no depositions.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 17, 1979 or May 7, 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).

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. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). *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).

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.* * * *

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.* * * *

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 (1963). 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, 112 N.W.2d 299 (1961), the court quotes with approval from C.J.S.:

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

DeShaw v. Engergy Manufacturing Company, 192 N.W.2d 777 (Iowa 1971) at page 780 states:

> 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. (emphasis in original)

Being guided mainly by *Yeager* and *DeShaw*, one must determine whether the first injury was the cause of the claimant's disability or the first injury was minor and the second injury was a major aggravation or both injuries were major contributors.

M. H. Petersen, D.C., reported on June 30, 1979 that he treated claimant on May 8, 1979. At that time, the history showed claimant hurt her back on January 19, 1979 and "kept working with pain until she could no longer take pain on 5-7-79." On September 26, 1979, Dr. Petersen amplified the history by stating that claimant did have some radiating pain in her right leg in "about mid-March." J. G. Lott, D.O., stated in a report that he treated claimant on May 23, 1979 and that the history showed both incidents: that claimant hurt herself lifting a barrel and "reinjured" her back on May 7, 1979.

Dr. Lott referred claimant to N. W. Hoover, M.D., a qualified orthopedic surgeon who treated claimant and did surgery on her low back. His reports should be examined in the order of their writing. On May 31, 1979, the history mentioned a forklift incident (Liberty exhibit G), but another report of that same date seems to indicate the problem came from the first incident, that of lifting the barrel (Liberty exhibit E). A report by Dr. Hoover of June 19, 1979 mentions the barrel incident, but a report of July 7, 1979 states that claimant received an injury in the course of employment on January 17, 1979, which would have been the barrel incident.

Then come two reports which amplify Dr. Hoover's opinion. The first is addressed to a claims adjuster at the Liberty Mutual and concludes:

> There is no question that this patient extruded a disc at the time of the injury in May. It is very likely that she first herniated the disc but minimally at the injury in January and, therefore, they are directly related.

That report was dated September 27, 1979. In a report of October 16, 1979 addressed to claimant's lawyer, Dr. Hoover states, in part:

> You will note that she sustained two separate injuries but both in the course of her employment for the same employer, as I understand it. She had a massive extrusion of lumbar disc, and I give you a copy of my hospital discharge summary for June 16, 1979, in which I describe the surgical procedure that was done...

In legal terms, of course, what Dr. Hoover describes is an injury and a subsequent aggravation. Each should be compensated to the extent that it contributes to claimant's disability. Applying the facts to that test, the clear answer seems to be that the injury and the subsequent aggravation equally contributed to the disability.

Findings of Fact

1. Claimant injured her back about January 19, 1979 while lifting a barrel at work. (Tr. 14, claimant exhibit 8, Liberty exhibit B, Atena exhibit B, Liberty exhibit K.)

2. Claimant hurt her back at work in May 7, 1979 when she stepped down from a forklift. (Tr. 19, claimant exhibit 8, Liberty exhibit B, Liberty exhibit I, Liberty exhibit G.)

3. In the January 19, 1979 work injury, she sustained a minimal intervertebral disc herniation at L4-5. (Liberty exhibit B.)

4. In the May 7, 1979 work injury, claimant extruded an intervertebral disc at L4-5. (Liberty exhibit B.)

5. Claimant had surgery for the extruded disc, an excision of the disc, June 11, 1979. (Liberty exhibit A, Liberty exhibit K.)

6. Claimant was age 20 at the time of the hearing. (Tr. 11.)

7. Claimant is a high school graduate. (Tr. 11.)

8. Claimant has worked in the past for Casey's General Store for three months in 1978. (Tr. 11.)

9. Claimant worked as a laborer for the employer. (Tr. 11-13.)

10. As a result of the two injuries, claimant has permanent partial impairment of fifteen percent (15%) of the whole person. (Claimant exhibit 7)

Conclusions of Law

Claimant sustained an injury arising out of and in the course of the employment for Marting Manufacturing Company on January 19, 1979.

Claimant sustained an injury arising out of and in the course of the employment for Marting Manufacturing Company on May 7, 1979.

Claimant's two injuries entitle her to industrial disability.

The compensable industrial disability was caused equally by the two injuries.

Claimant's industrial disability as a result of the two injuries is thirty-five percent (35%).

The healing period lasted from May 8, 1979 to September 10, 1979, a period of seventeen (17) weeks, six (6) days (stipulation, transcript, 24-25).

The compensable healing period was caused equally by the two injuries.

The agreed weekly compensation rate is seventy-one and 62/100 dollars ($71.62).

THEREFORE, defendants are ordered to pay weekly compensation benefits unto claimant for a period of seventeen and six-sevenths weeks (17 6/7) at the rate of seventy-one and 62/100 dollars ($71.62) per week for the healing period and to pay weekly compensation benefits at the same rate for one hundred seventy-five (175) weeks for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

The obligation of the Liberty Mutual Insurance Company and the Aetna Insurance Company to make these payments, as well as the payments and assessment of costs listed below, shall be shared equally.

It is further ordered that defendants pay the following medical and transportation expenses incurred by the claimant and necessary to treat the injury.

North Iowa Medical Center	$ 2,814.00
Dr. M. H. Petersen	119.00
Dr. James G. Lott	20.20
Surgical Associates	1,085.00
Radiologists of Mason City	113.00
Transportation	92.00

Costs of this action are taxed against defendants.

Defendants shall file a final report of payments within twenty (20) days from the date of last payment of weekly compensation.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court;
Remanded for Settlement.

JOSEPH W. DRISCOLL,
Claimant,

vs.

WILSON FOOD CORPORATION,

Employer,
Self-Insured,

and

SECOND INJURY FUND OF IOWA,

Defendants.

Decision on Second Injury Fund Benefits

The matter came on for hearing at the Juvenile Court Facility in Cedar Rapids, Iowa on May 28, 1981 and was fully submitted on June 25, 1981.

Immediately prior to the hearing, claimant and his employer entered into a settlement pursuant to section 85.35, Code of Iowa. The employer took no part in the hearing.

The record consists of the testimony of the claimant and Glen Millard; the deposition of David C. Naden, M.D. (and exhibits); claimant's exhibits 1, 2, 3 and 4; and defendant's exhibit A.

The issue is whether claimant is entitled to Second Injury Fund benefits and, if so, in what amount.

Findings of Fact

1. Claimant was employed by defendant-employer at all times pertinent hereto. He has been so employed since 1944. His duties have been delivery of meat products by truck both in the local and Chicago area. By necessity, claimant has had to lift meat, thereby using his shoulders.

2. Claimant has sustained a number of injuries over the years. He had surgery to both knees in 1960 and on the left knee in 1975. He had a back injury in the early 1960s. He injured his left knee in 1975 when his foot went through the the floor of a truck.

3. On August 29, 1977, claimant was driving his employer's truck and hit a curb in a parking lot in Des Moines and "jammed" his left arm and shoulder. Claimant continued to work, although he was hurt. He was then off about 5 days and took two weeks vacation. Claimant described the locus of his pain at the point of his body where the trunk and the arm meet. Because his left shoulder hurt, claimant started to use his right shoulder to a larger degree. His right shoulder started to have pains which were similar to those on the left (same locus). Claimant reported these symptoms to the plant nurse in March 1978.

4. On March 31, 1978, claimant was seen by John R. Huey, M.D., a Cedar Rapids orthopedist. Claimant had also been seen by Joseph F. Galles, M.D. Dr. Huey stated that x-rays of the left shoulder were negative for calcific deposit. He thought claimant had an adhesive capsulitis and generalized tendinitis. Claimant returned to work and was able to work until August 1978. Claimant testified that the pain he experienced at that time was akin to nails being driven into his shoulder. Claimant last worked on September 19, 1978 and has not worked since. Claimant continued to be treated by Dr. Huey and David C. Naden, M.D., an associate of Dr. Huey. Dr. Naden thought claimant had chronic tendinitis of the shoulder bilaterally.

5. Dr. Naden thought claimant's original injury was an acute shoulder strain that would have cleared up after six to eight weeks of conservative care. He additionally felt that the incident aggravated the preexisting condition. This is adopted as a finding herein.

6. Dr. Naden testified that claimant's disability was to the arms and apportioned 15 percent to each arm. He attributed 25 to 30 percent of the entire disability to the work. Dr. Naden's finding with regard to the locus of the injury is not adopted as a finding of fact. The greater weight of the evidence indicates that the injuries to the shoulders extend past the head of the humerus into the trunk of the body. Dr. Naden's testimony (Naden deposition, page 15, lines 24 and 25, page 16, lines 1 through 21) indicates that the locus of the pathology is "located all across the top of the head of the shoulder" and that "the rotator cuff goes all the way across the head." The tendons referred to in the rotator cuff extend to the glenoid cavity, and hence to the body as a whole.

Conclusions of Law

Section 85.64, Code of Iowa, states:

Limitation of benefits. If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting 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.

A careful reading of the above statute would indicate that where two successive injuries to the body as a whole are incurred, claimant would not be able to recover. As a condition precedent to recovery, he must first sustain a scheduled member loss. In *Anderson v. Second Injury Fund,* 262 N.W.2d 789 (Iowa 1978), the Court discusses the purpose of the Second Injury Fund statute. *Anderson* also involved two prior injuries to the trunk. These were not discussed by the Court, but were considered by the commissioner in his review of the deputy's decision. The commissioner determined that "another member" as used in section 85.64 did not include an injury to a portion of the trunk. Cf. Jackwig, *The Second Injury Fund of Iowa: How Complex Can a Simple Concept Become?,* 28 Drake Law Review 889, 891 (1979). Therefore, since both injuries extend beyond scheduled members as contemplated by the Second Injury Fund statute, claimant's cause of action against the Fund must fail. It is therefore irrelevant to determine whether claimant's second injury arose out of and in the course of employment.

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs of this action are taxed to defendant-Second Injury Fund.

* * *

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

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

WILLIAM S. DUFFIELD, II,

Claimant,

vs.

BRAND INSULATION, INC.,

Employer,

and

COMMERCIAL UNION ASSURANCE CO.,

Insurance Carrier,
Defendants.

Review-Reopening

This is a proceeding in review-reopening brought by William S. Duffield, II, claimant, against Brand Insulation, Inc., employer and Commercial Union Assurance, insurance carrier, for the recovery of further benefits as a result of an injury on February 8, 1978. A hearing was held before the undersigned on October 20, 1980. The case was considered fully submitted upon receipt of claimant's brief on November 21, 1980.

The record consists of the testimony of claimant; claimant's exhibits 1 through 4; and claimant's deposition.

Issues

The issues presented by the parties at the time of the hearing are the extent of healing period and permanent partial disabiliity benefits he is entitled to; and his rate of weekly compensation.

Facts

Claimant testified that he is an asbestos worker and in February of 1978 worked for defendant employer. On February 8, 1978 claimant received an injury arising out of and in the course of his employment with defendant employer when while insulating pipes a wire sprang up from the floor and punctured his eye. Claimant revealed that he was hospitalized and his eye was operated on. Claimant states he has double vision and has to wear a patch over his left eye because of that condition. Claimant stated he returned to work in March of 1980.

Claimant testified that it is his understanding that he has lost sight in his left eye, no longer has a lens in his left eye and has to wear the patch to stop the double vision. Since November of 1978 claimant has worn a patch over his left eye.

On cross-examination, claimant revealed he was fitted with a contact lens but everything is a blur because of the double vision. Claimant also testified that light hurts his left eye. In his deposition, claimant stated he has lost his depth perception.

Ted E. Hoff, M.D., who testified by way of deposition, stated he is an ophthalmologist and first saw claimant on February 8, 1978. Dr. Hoff stated:

> A. At that time, he was seen in our office on an emergency basis, at which time he gave a history that this afternoon at work he was hit in the left eye with a stainless steel wire and following the injury, the patient stated he had a lot of pain in the eye and decreased vision.
>
> Q. Did you treat him, then?
>
> A. Yes. He was examined in our office, at which time he was found to have a penetrating injury of the cornea which extended through the cornea, the iris and the anterior surface of the lens. This required surgical intervention and he was taken to surgery where this injury was surgically corrected.
>
> Q. What did you do there surgically to correct that problem?
>
> A. His cornea laceration was repaired at that time and the ruptured lens had to be removed in total.

Dr. Hoff revealed that after being fitted with a contact lens claimant complained of double vision. Dr. Hoff stated:

> Q. Then it is my understanding some place along the line this man was fitted with an eye patch.
>
> A. To eliminate the double vision, you just take away one eye and we could do this one of several ways. One, we would just have him not wear a contact lens which would give him such a blurred image with his left eye that he wouldn't have a disturbing double vision at that time or you could let him wear the contact lens and then wear an occluder over his right eye, which wouldn't be very feasible at this time but that would be another way it could be corrected or he could just wear a black patch over the operated eye, anything that would break up the binocularity so he wouldn't be using both eyes at one time would correct his double vision.

Dr. Hoff revealed that it is common for a person with claimant's condition to be more sensitive to light. Dr. Hoff opined claimant had sustained a 50 percent loss to his visual system even though he did not lose the use of either eye. Dr. Hoff disclosed he could not say claimant lost 100 percent use of either eye.

On cross-examination, Dr. Hoff revealed that after the injury claimant has 20/400 uncorrected vision. Dr. Hoff stated:

> Q. Now, Doctor, can you give me a percentage of visual efficiency loss which the injured eye has suffered as a result of the injury to it without correction and perhaps in helping you, I will hand you a chart that I have got, the Snellen reading chart and ask you whether you are familiar with that type of chart?
>
> A. Yes.
>
> His uncorrected vision in the left eye would give him a percent of visual efficiency loss of 96.7 percent, according to the table.
>
> . . .
>
> A. Without a contact lens, he would have lost 97.6 [sic] percent of his vision. But with a contact lens in place at 20/40 vision, he would only have lost 16.4 percent vision.

In a report dated June 5, 1978 Dr. Hoff indicated that he hoped claimant would be visually rehabilitated with his best

vision in 30 days. In his report of February 14, 1979 Dr. Hoff disclosed he released claimant to return to work on November 21, 1978.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 8, 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 Workers' Compensation Law in Iowa is a creation of the legislature and the Supreme Court has consistently held that the law should be interpreted for the benefit of the working man and, within reason, liberally construed. *Barton v. Nevada Poultry Company*, 253 Iowa 285, 110 N.W.2d 660, 663 (1961).

Analysis

Defendants contend that when determining the extent of permanent impairment to claimant's eye, this agency should consider the amount of sight claimant has with the use of a contact lens. Defendants argue that if claimant should lose his left eye in another accident, claimant would have double recovery. The evidence indicated claimant had perfect vision prior to his injury. If claimant's left eye is ever injured again in an industrrial accident he would only be entitled to recovery to the extent of the aggravation of his preexisting condition. In other words, claimant will not have a second recovery. As indicated previously, the law is construed in favor of claimant. The undersigned cannot comprehend that the legislation intended to restrict recovery of eye injuries to corrected vision. Therefore, the disability that claimant is entitled to is based on his uncorrected vision.

In their brief defendants state:

> Furthermore, the employer submits that the Industrial Commissioner should base his finding regarding the extent of the claimant's disability upon the expert testimony of claimant's physician, Dr. Hoff, who testified that claimant still has two good eyes and that the extent of the disability to claimant's injured eye is 50%, due to the loss of the binocular functions in the left eye.

Dr. Hoff does not say claimant has lost 50 percent of his left eye but opines that claimant has sustained a 50 percent loss of his visual system. Claimant's visual system is made up of both eyes.

It is clear that Dr. Hoff's determination regarding loss of function in his rating of 96.7 does not encompass claimant's loss of depth perception and double vision. The only evidence presented remains uncontradicted that claimant has worn a patch over his left eye since the injury. It is apparent to the undersigned that for all practical purposes claimant has lost the use of 50 percent of his visual system or in other words the loss of use of one eye.

Although Dr. Hoff opined claimant would reach maximum recuperation in July of 1978 it wasn't until November 14, 1978 that claimant was released to return to work. It seems apparent that claimant had reached maximum recovery by that date.

Claimant testified that he was making $12.52 an hour and worked 40 hours per week. Defendants in their answer to interrogatories also indicated claimant was being paid $12.52 per hour. It is apparent from the evidence presented that claimant is entitled to the maximum rate of compensation.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On February 8, 1978 claimant received an injury while working for defendant employer.

Finding 2. That prior to said injury, claimant's left eye had perfect vision.

Finding 3. That as a result of the injury, claimant has 20/400 uncorrected vision and 20/40 corrected vision in his left eye.

Finding 4. That as a result of his injury, claimant has worn a patch over his left eye to alleviate his double vision and sensitivity to light.

Finding 5. That claimant's uncorrected vision is a functional loss of ninety-six point seven (96.7%) percent of the vision of his left eye.

Finding 6. That because claimant needs to wear a patch over his left eye, he has lost use of fifty (50%) percent of his visual system.

Conclusion A. In determining claimant's disability, one uses claimant's uncorrected vision.

Conclusion B. As a result of his injury, claimant is entitled to one hundred (100%) percent recovery of his left eye.

Finding 7. Claimant reached maximum recuperation November 14, 1978.

Conclusion C. Claimant is entitled to healing period benefits from February 8, 1978 to November 14, 1978.

Finding 8. At the time of his injury, claimant was being paid twelve and 52/100 dollars ($12.52) an hour and worked forty (40) hours a week.

Conclusion D. Claimant is entitled to the maximum rate of compensation.

THEREFORE, Defendants are to pay unto claimant fourty (40) weeks of healing periods benefits at a rate of two hundred forty-seven and 00/100 dollars ($247.00) per week

and one hundred forty (140) weeks of permanent partial disability at a rate of two hundred twenty-eight and 00/100 dollars ($228.00) per week.

Defendants are to be given credit for all healing period benefits previously paid but only as against healing periods benefits and not permanent partial disability benefits.

Defendants are to reimburse claimant for his fare to Iowa City of one hundred eight and 00/100 dollars ($108.00).

Costs of the proceeding are taxed against defendants.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Code section 85.30.

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

* * *

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

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

FRED EASTMAN, JR.,

Claimant,

vs.

WESTWAY TRADING CORPORATION,

Employer,

and

GREAT AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed February 17, 1982 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.

The record consists of the transcript; the deposition of Maurice P. Margules, M.D.; joint exhibit A; claimant's exhibits 1, 2, 3, and 4; and defendants' exhibits A and B.

The result of this final agency decision will be the same as that reached by the hearing deputy. The findings of fact and conclusions of law are those of the undersigned deputy industrial commissioner.

Summary

Claimant was injured in a work-related incident in 1976 and was awarded 375 weeks of permanent partial disability in 1978. At the time of the hearing in April 1981, claimant had not worked since December, 1978, despite rehabilitation efforts. At the hearing, vocational experts testified as well as claimant. Also in the record was a deposition by Maurice Margules, a neurosurgeon and many medical reports.

Issues

Based on the record, the hearing deputy awarded benefits for permanent total disability under §85.34(3). On appeal, defendants state (1) that the hearing deputy did not rule on each proposed finding of fact by defendants; (2) that the hearing deputy did not find a change of condition; (3) that there was insufficient evidence for the award; (4) and that the hearing deputy should not have allowed certain testimony by a rehabilitation counselor.

Uncontested on appeal are the rate of $174 per week and the medical bill.

Applicable Law

Claimant has the burden of proof to show the extent of his disability. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). Further, he must show a "change of condition" from the previous hearing. *Henderson v. Iles*, 250 Iowa 787, 96 N.W.2d 321, 324 (1959). That change of condition does not necessarily have to be physical. *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980). See also *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731 (Iowa 1968). Claimant's disability is industrial, which includes considerations of functional impairment, age, education and relative ability to do the same type of work as prior to the injury. *Olson, supra*.

Analysis

Defendants insist in their well-argued brief that each of their proposed findings of fact made to the hearing deputy should be ruled upon. Those proposed findings are as follows:

1. Claimant, Fred Eastman, was awarded 75% industrial disability following a hearing before deputy industrial commissioner, Joseph M. Bauer, on December 6, 1978.

2. Claimant was, on December 6, 1978, and is today, not employed.

3. Between December 6, 1978 and the present time, claimant has been examined by Dr. Horst Blume of Sioux City, Iowa and Mr. Maurice Margules of Council Bluffs, Iowa, but has not been treated further by any medical doctor.

4. On December 6, 1978 claimant had, among others, the following occupational limitations:

(a) Inability to drive a vehicle;
(b) Severe restriction and movement of the cervical spine;
(c) A lifting limitation of approximately 10 pounds;
(d) Inability to move his head in quick movements;
(e) Inability to stand for long periods of time;

(f) Inability to walk for long periods of time;
(g) Less than "good" dexterity;
(h) No saleable skills;
(i) Rigidity of his spine.

5. Because of his condition on December 6, 1978, claimant was unemployed and the potential of his reemployment was poor. The severe limitation of motion from which he suffered disqualified him from many occupations including driving or clerical work.

6. At the present time, the limitation of motion of claimant's spine has, if anything, worsened.

7. Between December 6, 1978 and the present time, claimant has participated in two days of tests at a state rehabilitation center in Des Moines, but has undertaken no further rehabilitation.

8. Despite his physical limitations, claimant's past training, qualifications and experience have provided him with the following skills which he retains notwithstanding physical difficulties:

(a) Abilitity to understand instructions and underlying principles;
(b) Ability to reason and make judgments;
(c) Ability to visualize objects of two or three dimensions;
(d) Motor coordination;
(e) Ability to coordinate eyes and hands or fingers rapidly and accurately in making precise movements with speed;
(f) Ability to make a movement response accurately and quickly;
(g) Manual dexterity;
(h) Ability to move his hands easily and skillfully;
(i) Ability to work with his hands in placing and turning motions;
(j) Eye-hand-foot coordination;
(k) Ability to move the hand and foot coordinately with each other in accordance with visual stimuli;
(l) Ability to understand the meanings of words and ideas and to use words effectively;
(m) Ability to present information or ideas clearly;
(n) Ability to understand important detail in verbal or written material;
(o) Ability to perform arithmetic operations quickly and accurately;
(p) Ability to see important detail in objects and to make visual comparisons;
(q) Ability to see and recognize similarities or differences in colors;

9. The Dictionary of Occupational Titles, published by United States Department of Labor, identifies some occupations for which claimant might qualify with his current physical limitations and educational background. Those occupations include:

(a) Crew scheduler (air transportation);
(b) Assignment clerk (motor transportation);
(c) Personnel scheduler (clerical);
(d) Maintenance scheduler (clerical);
(e) Motor vehicle dispatcher (clerical);
(f) Parts manager;
(g) Laundromat manager;
(h) Automotive service manager;

10. Between the time of his industrial accident and December 6, 1978, claimant made no search for or application for employment, and has made no search or application for employment between December 6, 1978 and the present time.

11. Though the extent of the limitation of movement in claimant's spine has progressed since December 6, 1978, the progression has not created any material barriers to employment that were not *already* present on December 6, 1978, when claimant was awarded 75% industrial disability.

12. Claimant's employment opportunities are obviously severely limited. It is found, however, that severely limited they may be, they were at least as severely limited on December 6, 1978, and thus there has been no material change between that date and the present time in claimant's earning capacity.

Findings 1-10 are feasible and show that claimant has certain physical and mental skills. Findings 11 and 12, however, are not feasible and defeat defendants' case. First, claimant's vocational testing, which took place *after* the 1978 hearing, showed that claimant cannot compete in the job market and has poor potential for self-employment. Second, claimant's physical disability worsened *after* the 1978 hearing. Considering that at 75% permanent partial disability and only marginally supposed to be able to earn, it takes only a slight change to tip the balance to permanent total disability, and there was that change.

Defendants' second argument, that claimant underwent no change subsequent to the 1978 hearing, has been covered in the analysis above, and the same is true to the third argument. Finally, defendants argue that certain testimony by the rehabilitation counselor, Deborah Hanson, should not have been admitted. That testimony showed that it was Ms. Hanson's professional opinion that claimant was not employable. As reason for their argument, defendants state that whether or not claimant was employable was not an issue at the 1981 hearing and refers one to the argument that claimant had undergone no change since the 1978 hearing. Since one has already decided in claimant's favor on the issue of change, nothing need be said beyond the obvious conclusion that in 1978, claimant still had some earning potential, and that potential diminished subsequent to the 1978 hearing. Ms. Hanson's opinion as an expert is acceptable insofar as it remains within the limits of her expertise, and there was no problem within that limitation.

Findings of Fact

1. Claimant was hurt in a conceded work incident on July 7, 1976.

2. As a result of a hearing on December 6, 1978, claimant was awarded permanent partial disability in a review-reopening decision of December 14, 1978.

3. Claimant had a case on file with the vocational rehabilitation agency from February 9, 1978 through September 11, 1979 and was enrolled at the Des Moines facility January 16-19, 1979. (Tr. 36-37)

4. After January 16, 1979, claimant could not work at a vocationally competitive level and is not suited to a small business. (Tr. 38-39)

5. Claimant's physical condition as a result of the work injury has worsened since the 1978 hearing. (Joint exhibit A, Margules report April 14, 1981; Margules depo., 10)

6. Claimant's headaches are worse and his back is stiffer since the 1978 hearing. (Tr. 11)

Conclusions of Law

As a result of his injury of July 7, 1976, claimant is permanently and totally disabled from work as defined in §85.34(3), The Code.

Order

Defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of one hundred seventy-four dollars ($174.00) per week under §85.34(3), The Code, during the period of claimant's disability, accrued payments to be made in a lump sum together with statutory interest, if applicable. Defendants are to be given credit for all benefits previously paid.

Defendants are to reimburse claimant for the bill of Dr. Blume in the amount of thirty-five dollars ($35.00).

Costs of this action are taxed against defendants.

Defendants shall file a final report upon payment of this award.

* * *

Signed and filed at Des Moines, Iowa this 19th day of May, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

SUSAN EFKAMP,

Claimant,

vs.

OSCAR MAYER & COMPANY,

Employer,
Self-Insured,
Defendant.

Reopening Decision

Introduction

This is a proceeding in review-reopening brought by Susan M. Efkamp, claimant, against her self-insured employer, Oscar Mayer & Company, defendant, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury she sustained on December 21, 1979. This matter came on for hearing on July 6, 1981 at the Iowa Industrial Commissioner's Office in Des Moines, Iowa, and was considered fully submitted on July 8, 1981.

A first report of injury was received on January 15, 1980, a memorandum agreement was received on January 22, 1980. A form 2A shows payments of weekly benefits in the amount of $1,549.89 and medical expenses in the amount of $961.68.

The parties stipulated that the appropriate rate in the event of an award is $212.73 and that the claimant was off work until January 21, 1980 at which time she was released by her doctor.

The record consists of the testimony of claimant, Sue Monroe and Michael P. Murphy; claimant's exhibit 1, hospital records from claimant's admission on January 7, 1980; claimant's exhibit 2, a letter from John L. Beattie, M.D., dated January 26, 1980; defendant's exhibit A, a letter from R. F. Deranleau, M.D., dated August 20, 1980; defendant's exhibit B, a certificate for return to work from Dr. Deranleau; and defendant's exhibit C, a letter to claimant from the personnel manager dated January 22, 1980. Also submitted was the deposition of Dr. Rosenfeld. Briefs were supplied by the parties.

Issues

The issues to be determined, according to the prehearing order, are whether there is a causal connection between the claimant's alleged disability and her injury of December 21, 1979, and if so, the extent of that disability. Claimant's brief presents these additional issues:

> Whether the December 31, 1979 door lifting incident was a continued manifestation of symptoms arising out of the December 21, 1979 ladder incident or was a separate and distinct injury.
>
> If the December 31, 1979 door lifting incident was a separate injury whether the employer or his representative had actual knowledge of the occurrence of such injury within 90 days from the date of the occurrence thereof and cannot therefore claim that compensation therefore is barred by section 85.23, The Code, 1981.

Defendant's brief states an issue as "whether the Claiman [sic] is barred from asking compensation for any back injury

which may have occurred as a result of the lifting of some metal doors several days following the December 21, 1979 incident."

Statement of the Case

Married twenty-eight year old claimant has two natural and three step-children. She attended a naval school in Virginia and has a diploma in developmental disability from the Des Moines Area Community College. She testified to additional training in micrographics through vocational rehabilitation.

She said that her work life started when she was fourteen and began clerking, doing window displays, and going on buying trips for the clothing store managed by her family. She was paid $2.25 per hour. She also worked for a major department store selling clothing at a wage of $2.75 per hour. She labored with her first spouse on a farm in a hog confinement operation. Two and 95/100 dollars per hour was claimant's salary when she worked for a chemical company where her duties included reading blueprints and soldering. She used her training in developmental disabilities when she was at Woodward State Hospital for four and one-half years where she was employed both as a secretary and as a Child Development Worker II. She stated that she was earing $5.45 per hour when she left that employment. Her job for defendant was on the night cleanup crew working the 6 p.m. to 2:30 a.m. shift with a wage of $8.86 at the time of her termination. This job entailed such things as hosing down the freezer rooms and cleaning various units such as the scalding tub and involved lifting when items were moved for cleaning. At the time of hearing claimant had been working for an insurance company for approximately six months. She had recently moved to a new position using a computer terminal and processing claims. Claimant anticipated a $750 per month salary with her change in station.

Claimant recalled that on December 31, 1979 she and a co-employee, Sue Monroe, were sent to brush clean florescent lights on the kill floor using smokehouse acid. She claimed that when the twelve-foot ladder they were using would not stand still, they went to the foreman who ordered them back to work. She described the ensuing event thusly: The ladder went out. Claimant yelled and grabbed the pipe and was suspended about eighteen feet in the air. Monroe heard claimant's back pop. Claimant's arms hurt from acid running down. Monroe washed off the acid that had spilled and got the ladder back. Claimant estimated she hung onto the pipe for about five minutes. Claimant climbed down the ladder and then went to a phone and spoke with her foreman, Tom Kimball, who instructed her to go to the nurse's station where he bandaged her burn. He told her to call her spouse and have him bring a new shirt. Then she returned to work and finished her shift. She said that her arm hurt from the acid, but that she had no back pain.

Claimant reported that she did not seek medical treatment; however, she noticed some things such as laundry and vacuuming made her lower back hurt with sharp pain. It was relieved when she lay down.

Claimant testified to events occurring on December 31, 1979 as follows: She asked if she could get off work early and was told she could if the scalding tub was cleaned. Claimant characterized cleaning the tub as one of the harder jobs in the plant necessitating the use of hands and a hose. Claimant, who was under the supervision of Bill Wagner, was working alone. It was necessary for her to lift a series of metal doors numbering approximately ten and weighing about forty-five pounds to do the work. Claimant squatted down to lift her sixth door and then was unable to straighten up. Her back hurt. She yelled out. A co-employee helped her straighten up. As it was only her second time to clean the tub, the foreman was by to check on her and she told him of the incident. He took down the information. Although she finished the shift, she continued to have a dull pain in her lower back. Claimant worked for a few days.

On January 3 or 4, 1980, claimant went to see Dr. Beattie who told her she would have to see the company doctor by whom she was hospitalized on January 7, 1980 and treated with bedrest, muscle relaxants and traction. She recollected that at the time of her release from the hospital, she felt better. She was told to wait three weeks prior to returning to light work.

She asserted that she attempted to return to work on January 22, 1980, but she was told by her foreman she could not do so. The following day she returned to the plant, and, accompanied by her union president and vice-president, she had a meeting with Mike Murphy. She asserted that she was told by Murphy at that time that she had spina bifida and that she had an accident at the age of fifteen which she had failed to report to the company. She asserted this was the first time she was aware she had spina bifida as she had no prior treatment for it or reason to suspect she had the condition. She said she was told an investigation would be conducted. She denied telling Mike Murphy that she was hospitalized for four to five months following the car accident. Rather, she said, he told her that. She reported receiving a letter around the end of February informing of her discharge for falsification of her job application. She pursued a grievance through her union.

After her discharge she claimed she sought other employment as a secretary and as a waitress. She did not look for work such as that done at Woodward State Hospital because of the lifting involved. Eventually, she went to Job Services. She was referred to vocational rehabilitation and ultimately to her present employer.

Claimant thought she had seen Dr. Beattie four times for her back in 1980. She recalled being hospitalized for back problems in May of that year. Claimant saw Dr. Rosenfeld for an examination. He suggested exercises which had not been prescribed by anyone before. She denied telling Dr. Rosenfeld she fell sixteen feet from a ladder.

Claimant testified that she continues to take Flexoril, prescribed by Dr. Beattie, as she needs it. She estimated that she has pain confined to her back three times a week depending on what she does. She claimed that she no longer does parachuting, stock car driving, making beds, or vacuuming. She does not lift weights in excess of fifty pounds and she watches how she lifts. She said she has not missed work on her present job because of her back.

She denied on direct examination problems with her back, complaining to her co-employee, or missing work due

to back trouble prior to December 21, 1979, but she said on cross-examination she had difficulty "like any other person" and she admitted seeing a chiropractor for one treatment about six months before starting work with defendant. She listed surgeries as a tubal ligation, a finger reconstruction, a hysterectomy, and a hemorrhoidectomy. An additional hospitalization for excessive weight loss occurred in April 1981. She acknowledged three automobile accidents — one at age 15, one in 1977, and one more recently. She denied telling Dr. Deranleau that she was hospitalized for four or five months after the earliest accident. Subsequent to that accident, she developed blackouts and was medicated with Penobarbitol and Dilantin until she was seventeen. In 1977 she was in a one-car accident as she attempted to avoid a collision. She did not remember a back injury from that accident.

Sue Monroe, claimant's co-employee who has worked for defendant for about four years, was called as a witness by defendant. She recalled working with claimant on the night cleanup crew, and more specifically, in December with the ladder. She testified: She and claimant were cleaning either the lights or the railing. Claimant was on a fourteen-foot ladder about eight or nine feet off the ground when it began to slide on debris on the floor. The witness took a "couple minutes" to steady the ladder while claimant hugged the rail and its vertical support. Then claimant came down. She asked if claimant was all right and directed her to report the incident to the foreman. She then took claimant's place on the ladder. She did not recall that any of the cleaning solution which was hanging in a pail on the rail had spilled and she asserted that she made sure it did not fall as it would have fallen on her. She denied hearing claimant's back crack in what she described as a noisy environment. She thought she remembered claimant's telling her several days later her back was hurting. Monroe did not recollect claimant's being burned and she did not know if claimant sought first aid. The witness claimed that claimant complained of her back on an almost nightly basis and said she had warned her talk of back trouble could lead to her firing.

Michael P. Murphy, who is presently personnel manager and who was at the time of claimant's injury, assistant personnel manager, testified claimant's termination was precipitated by information received from Dr. Deranleau and claimant's hospitalization. An investigation was undertaken on the basis of those reports. Murphy said he was told by claimant she was hospitalized for four months for head injuries after the accident at age 15. At the request of defendant's counsel, he reviewed claimant's time cards and found claimant worked fron noon to 7 p.m. on December 31, 1979. He acknowledged his records contained an accident report filled out by the plant nurse regarding the incident of December 21, 1979.

R. F. Deranleau, M.D., in a letter dated August 20, 1980, reported first seeing claimant on January 4, 1980 at which time she gave a history of jumping off a collapsing ladder and twisting her back and later injuring her back lifting heavy doors. She reported two accidents to the doctor — one at age 15 involving hospitalization for four or five months with injuries "mostly to her head" and a second in 1977 which resulted in hospitalization for back and head injuries.

Dr. Deranleau found generalized tenderness in the back at the level of L3 to L5. He prescribed Percodan and Flexoril and advised claimant to take hot baths. When no improvement occurred when claimant was seen on January 7, 1980, she was hospitalized and treated conservatively. She was fitted with a lumbosacral brace.

X-rays of claimant's back taken in September of 1977 were reviewed and interpreted as showing a narrowing of the lumbosacral interspace. A spina bifida deformity of S1 was observed. X-rays taken January 2, 1980 showed "early osteoarthritis of the lower thoracic spine,... slight rotary levoscoliotic changes in the upper and mid lumbar regions with a compensatory curvature in the opposite direction, a transitional vertebra in the lumbosacral junction, narrowing of the L5, S1 intervertebral disc space... and Spina Bifida deformity of S1."

Claimant was released to return to work as of January 21, 1980 with a twenty-five pound weight restriction and instruction to wear her back brace.

Dr. Deranleau speculated that claimant injured her back when she was fifteen. He thought the injury in December of 1979 was a muscle strain as no change other than the development of osteoarthritis was seen on comparing the x-rays taken in January of 1980 with those taken in September of 1977. He wrote, "95% or more of her problems are due to the weak back which she was born with and the back injuries which were sustained at the time of her car accident at the age of 15 and again at the age of 24."

John L. Beattie, M.D., directed a January 26, 1980 letter to defendant's personnel manager in response to a request from claimant. He reported hospitalizing the claimant following an auto accident on September 22, 1977 at which time claimant had pain on motion in the cervical, thoracic, and lumbosacral spine. He noted a spina bifida deformity of S1, but he denied telling claimant of its presence. He reported claimant's back symptoms following that accident had "totally abated."

Martin Rosenfeld, D.O., board certified surgeon, saw claimant on May 8, 1981, at which time she reported a history of injuring her back and suffering acid burns to her arm at work when she fell approximately sixteen feet from a ladder. The doctor assumed claimant fell on a hard surface. Claimant also told the doctor that after being off work for two days she returned to work. She claimed that later she was lifting a steel door and was unable to straighten up. She said that she had been treated with traction during the hospitalization. She complained of continued intermittent back pain; and inability to compete in stock car racing, do horseback riding, or participate in parachute jumping; headaches with severe back pain; and increased pain with coughing or sneezing. In addition to relief through application of heat, claimant indicated she was taking four or more Flexoril per day and Robaxisol, Percodan, and Empirin 3, as needed. She denied prior back problems. On physical examination, straight leg raising was negative to eighty degrees. Popliteal compression was negative. Motor strength sensory testing was normal. Circulation was satisfactory. There were no pathological reflexes. The Trendelenburg showed no hip joint pathology. "A light degree of non-compensation

of a lower lumbar scoliatic curve" was present. Tenderness was found over the left lower back. Mild paraspiny muscle spasm was present more so on the right than the left. Range of motion in the lumbar spine was satisfactory. X-rays revealed what the doctor termed "an insignificant spina bifida occulta in the first sacral segment." The doctor explained:

> A spina bifida means open spine. The spine forms from two sides, and as the backbone is forming the part that you would feel if you run your hands down somebody's back is made up by each side contributing to a piece of bone that gets stuck in the middle. Now, we classify spina bifida or open spine either as occulta, which means a small occult type opening which means that some place along in there they just don't quite meet; or spina bifida vera, which means a true open spine. When you have a true open spine you can have problems because the spinal cord can come out. With the spina bifida occulta means that the opening hasn't completely infused and it's an insignificant roentgenographic finding.

Dr. Rosenfeld's diagnosis was "chronic lumbosacral strain with pre-existing congenital anomaly of the lumbosacral spine" resulting in a fifteen percent impairment to the body as a whole based "[o]n a combination of the injury that was sustained, the problems that she has, the things that she can't do because of the spasm, my findings at examination and the changes present on the x-ray." The doctor recommended that the claimant restructure her leisure activities, avoid heavy lifting, obtain a position where she would neither sit nor stand for prolonged time, and refrain from repetitive motion.

The doctor was questioned as to causation:

Q. Now, assuming the medical history this patient had, as indicated by Exhibits 1 and 2, and the history that she gave you regarding the injury of December 21, 1979, that you have testified to during this deposition, and assuming the findings upon examination that you have testified to including the x-ray findings, do you have an opinion that you can state with a reasonable degree of medical certainty as to the cause of the injuries of which she complained when you examined her on May 8, 1981?

A. Yes. I feel that the complaints that she had were caused by a combination of the fall on December 21, and then subsequent lifting that steel door, I think two days after she returned to work.

Q. Okay. Now, just looking at her and in conjunction with the problems she apparently was born with or developed at a young age, do you feel that the injuries she sustained on December 21, 1979, was an aggravation of a pre-existing condition, or was it a specific additional injury which she got on that date?

A. Oh, I think it was a specific injury. After reviewing her charts, she had had an auto accident in 1977 where the back and neck had been injured, and she had healed up fine. She hadn't had any residual. She was able to drive the stock cars and race the horses and do the parachute jumping. I feel that she certainly wasn't having any problem prior to the injury, and after the injury now is when she's limited.

He further testified:

Q. Other than the history that she gave you, is there any way that you could objectively determine when her back problems arose, whether they arose as a result of the accident at age 15 or an automobile accident in 1977, or the work injury in December of '79 or lifting the doors a couple days later? In other words, apart from the information she gave you.

A. No, most of it has to be from the information she gives.

Q. In other words, there's nothing you can look at and say, 'Okay, I know that this lady had to have injured her back on December 21, 1979, and some other date.'

A. Right.

Q. So that you really don't know whether this 15 percent rating that you are giving your opinion on is due to a work injury on December 21, 1979, or whether perhaps it's due to an injury she sustained either earlier or later; do you?

A. Well, no. I know that it's before December 21, of '79 she was involved in some very strenuous activities. She was.

Q. In other words, the only reason that you are saying what you are saying is because of the history she gave you?

A. Correct.

Q. You don't have any firsthand knowledge of whether or not these are due to an injury that occurred on December 21, 1979?

A. Just medical probability tells me that she could do the activities before and she couldn't do them after, and she was injured on December 21, and therefore, medical probability tells me that that is the cause.

Q. But you did indicate that the cause was both the December 21 incident and the lifting the doors incident?

A. Yes.

Findings of Fact

WHEREFORE, it is found:

That claimant sustained an injury on December 21, 1979 as she cleaned lights on the kill floor in defendant-employer's plant.

That on December 31, 1979 claimant had difficulty straightening up and back pain as she lifted doors on a scalding tub in defendant-employer's plant.

That claimant was hospitalized in January of 1980 and treated conservatively for back pain.

That claimant was released to return to work on January 21, 1980 with a twenty-five (25) pound weight restriction and a back brace.

That claimant attempted to return to work on January 22, 1980.

That Dr. Deranleau made a diagnosis of muscle strain and attributed "95% or more" of claimant's problems to "the weak back which she was born with" and the injuries she sustained in two car accidents.

That Dr. Beattie reported cervical, thoracic and lumosacral pain "totally abated" following claimant's auto accident of September 22, 1977.

That Dr. Rosenfeld made a diagnosis of "chronic lumbosacral strain with preexisting congenital anomaly of the lumbosacral spine" resulting in a fifteen (15) percent impairment to the body as a whole.

That claimant has spina bifida occulta.

That claimant has been involved in three auto accidents.

That claimant is 28 years old.

That claimant has a diploma in developmental disability and training in micrographics.

That claimant has work experience in various aspects of operating a clothing store, hog raising, blueprint reading and soldering, working with handicapped children, doing secretarial work, cleaning a packing plant and using a computer terminal in the processing of insurance claims.

That claimant's wages have ranged from two and 25/100 dollars ($2.25) to eight and 86/100 dollars ($8.86) per hour.

That prior to getting her present employment claimant sought work, went to Job Services and was referred to vocational rehabilitation.

That claimant was employed at the time of hearing.

Applicable Law and Conclusions of Law

This matter was filed as a review-reopening concerning an injury of December 21, 1979. On June 29, 1981 claimant filed an amendment to her petition alleging: "On or about three nights subsequent to the original injury and while working as [sic] Oscar Mayer, the Claimant attempted to lift some heavy metal doors which resulted in additional pain and injury to Claimant's back. The Claimant could hardly get up because of the back pain." Defendant responded with a denial and asserted that any injury occurring at that time would be barred by the failure of claimant to give proper notice.

Claimant's brief argues alternatively that the incident of December 31, 1979 was a continued manifestation of the incident of December 21, 1979 or that if the incident of Decmeber 31, 1979 was a distinct injury, it is not barred by the claimant's failure to give notice as defendant-employer had knowledge of the incident through its foreman. Defendant's brief treats the incident of December 31, 1979 as separate and distinct.

Claimant's testimony was that although she neither sought medical treatment nor stopped working, she had sharp pain in her lower back after December 21, 1979. The history recorded at the time of her hospitalization on January 7, 1980 was of a chronic back condition aggravated at work two weeks before. Dr. Deranleau's letter of August 20, 1980, reports both the ladder collapse and the lifting incident. Claimant told Dr. Rosenfeld about both. In view of claimant's testimony of continuing symptoms from December 21, 1979, the undersigned believes claimant's back pain and difficulty in straightening which she experienced on December 31, 1979, were further manifestation of the prior injury. In view of this finding, it is unnecessary to address the issue of whether or not any injury of December 31, 1979 is barred by the claimant's failure to give notice.

The remaining issues are whether there is a causal connection between the claimant's alleged disability and her injury of December 21, 1979, and if so, the extent of that disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 21, 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).

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 587 (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.2d 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). An expert's opinion based on an incomplete history is not necessarily binding on the commissioner but must be weighed with other facts and circumstances. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128, ___ (1967). Expert medical evidence must be considered with other evidence introduced bearing on causal connection. *Rose v. John Deere Ottumwa Works*, 247 Iowa 910, 76 N.W.2d 756 (1956).

Claimant's version of the incident of December 21, 1979 differs from that of her co-employee, Sue Monroe. Monroe's version is found to be more plausible. Their testimony differed in that claimant gave the impression of the ladder falling while Monroe said it slipped and required steadying, in that claimant said she was suspended from the pipe for five minutes while Monroe said it was a couple of minutes and in that claimant stated the acid spilled while Monroe stated she made sure it did not spill as it would have spilled on her.

Neither Dr. Deranleau nor Dr. Rosenfeld were given an adequate history of the incident. It is understandable that claimant, who personally experienced the ladder incident, might view it of greater magnitude than in reality it was. But

the stories given the doctors go beyond the license normally allowed a person who has suffered a traumatic event. Dr. Deranleau reported claimant jumped off a collapsing ladder and twisted her back. Dr. Rosenfeld believed claimant fell sixteen feet from the ladder. Additionally, Dr. Rosenfeld had some misconception of claimant's activities immediately prior to the injury in that he thought claimant was parachuting, but her testimony was that she had not jumped since 1975. Claimant did not tell Dr. Rosenfeld of her auto accident in 1977; however, he was made aware of it at the time of his deposition. He had not reviewed or compared claimant's prior x-rays. Dr. Rosenfeld did not believe claimant was having back problems prior to December 21, 1979. Claimant did deny back difficulties on direct examination. Later, on cross-examination, she testified to back problems "like any other person" and admitted seeing a chiropractor on one occasion. Monroe, her co-employee, testified to almost daily back complaints.

Dr. Rosenfeld proposed a rating of fifteen percent. Included in that rating was "the injury that was sustained, the problems that she has, the things that she can't do because of the spasm, my findings at examination and the changes present on x-ray." He acknowledged that he was establishing the causal connection between the injury and the disability based on the history claimant gave.

Dr. Deranleau, the treating physician, made a diagnosis of muscle strain based on comparison of claimant's x-rays in 1980 with those of September of 1977. He attributed "95% or *more* [emphasis added] of her problem . . . to the weak back which she was born with and the back injuries which were sustained at the time of her car accident at the age of 15 and again at the age of 24."

Had either of the doctors been given accurate and complete histories of the injury, it might have been possible to attribute claimant's disability to her injury of December 21, 1979. There is scant evidence to support claimant's claim.

THEREFORE, IT IS CONCLUDED that claimant has failed to sustain her burden of proving by a preponderance of the evidence that her disability is causally connected to her injury of December 21, 1979.

Order

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

That the costs of the proceedings as provided in Industrial Commissioner Rule 500—4.33, including a one hundred fifty dollar ($150) witness fee for Dr. Rosenfeld, be taxed to defendants.

* * *

Signed and filed this 10th day of August, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

CHARLES E. ELAM,

Claimant,

vs.

MIDLAND MANUFACTURING,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a review-reopening decision in which claimant was awarded permanent partial disability benefits to the arm as a result of an injury received December 27, 1978.

The record consists of a stipulation of the issues and evidence together with pleadings previously filed. The evidence consists of two medical reports from Joe F. Fellows, M.D., dated February 8, 1979 and April 2, 1981. The defendants have filed briefs in support of their position at the review-reopening proceeding and on appeal.

The issue on appeal and at the proceeding below is the same. Simply stated, the issue is whether the wrist (carpus) is properly a part of the hand or the arm for the purposes of section 85.34(2)(1) and (m).

The facts are clear and not in dispute. Claimant received a traumatic amputation of his left hand through the wrist. Surgery completed the amputation at the distal radius and ulna.

Prior rulings of this office and pronouncements in publications have implied or indicated that the wrist would be considered a part of the arm. Defendants' brief which contains extensive research into the medical definitions and legal precedents supports the proposition that the prior implications and indications are in error and should no longer be followed.

The lay, medical and legal dictionaries are in almost universal agreement that the word "hand" or "manus" includes the parts of the upper limb distal to the forearm composed of the wrist or carpus, palm or metacarpus and fingers and thumb or phalanges.

Examples are:

Webster's New Twentieth Century Dictionary, Unabridged, Second Edition (1977) ". . . the human hand is composed of twenty-seven bones; namely, the eight bones of the carpus, or wrist, the five bones of the metacarpus forming the palm, and the fourteen bones or phalanges of the fingers."

Stedman's Medical Dictionary, 23rd Edition (1976), — "Manus" — "Hand; the distal portion of the superior member

below the forearm, comprised of the carpus, metacarpus, and phalanges."

Black's Law Dictionary, Revised Fourth Edition (1968) —"In anatomical usage the hand, or manus, includes the phalanges, or fingers and thumb; the metacarpus, or hand proper; and the carpus, or wrist; but in popular usage the wrist is often excluded."

As reference to loss to a scheduled member in the workers' compensation law in Iowa is to loss of function or impairment, it would appear and is entirely supported by the evidence in this case that the loss by amputation of a wrist should be considered a part of the hand.

Findings of Fact

Claimant received an injury consisting of an amputation of the left upper appendage distal to the radius and ulna.

There is no injury to the arm above the wrist.

Conclusions of Law

Claimant's injury entitles him to benefits for 100 percent loss of a hand pursuant to section 85.34(2)(1), Code of Iowa.

Claimant's injury does not entitle him to benefits pursuant to section 85.34(2)(m), Code of Iowa.

WHEREFORE, claimant is entitled to benefits for one hundred ninety (190) weeks of permanent partial disability for the loss of one hundred percent (100%) of a hand at the agreed rate of sixty-seven and 49/100 dollars ($67.49) per week.

THEREFORE, it is ordered:

That defendants pay unto claimant one hundred ninety (190) weeks of benefits at the rate of sixty-seven and 49/100 dollars ($67.49) per week.

That credit be given for any amounts previously paid.

That interest shall accrue pursuant to section 85.30, Code of Iowa.

That defendants pay costs pursuant to Industrial Commissioner Rule 500—4.33, IAC.

That a final report be filed when this award has been paid.

* * *

Signed and filed this 28th day of December, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

FLOYD ENSTROM,

Claimant,

vs.

IOWA PUBLIC SERVICE COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant appeals a proposed review-reopening decision and ruling denying rehearing in which claimant was awarded additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained in October of 1978.

On October 3, 1979 defendant filed a first report of injury concerning an October 9, 1979 injury. On October 15, 1979, defendant filed a memorandum of agreement (form 2 and 2B) indicating that the weekly rate for compensation benefits was $182.08. On December 11, 1980, defendant filed a final report indicating that 32 weeks and six days of temporary total disability benefits (September 26, 1979 through May 12, 1980) and 22 weeks of permanent partial disability (based on ten percent of the leg) had been paid pursuant to the memorandum of agreement.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 and 2; defendant's exhibits 1 — 6, together with the briefs of counsel on appeal.

According to the parties at the time of the hearing, the only issue to be determined was the extent of permanent partial disability.

Findings of Fact

On October 23, 1978, claimant was welding on a #4 turbin generator in an extremely confined area which required maneuvering varied positions in order to get the job done. When he finished the welding he asked his foreman if he could leave two hours early because of the sharp pain he was experiencing throughout his right buttock. He saw Rex L. Morgan, M.D., the following day and was referred to Albert D. Blenderman, M.D. Claimant recalled being off work a week at that time. (Although the final report does not indicate that workers' compensation benefits were paid at that time, the parties seemingly agreed that claimant was compensated for all actual time loss and no decision with regard to additional healing period was necessary.)

Claimant went back to his certified welder's job in November of 1978. He experienced such sharp constant pain in the right buttock that he was unable to squat and found it difficult to bend or to climb. He was on light duty work throughout the winter per doctors' instructions. In spring he bid to central storekeeper, which position entailed clerical work, some lifting and general warehouse duties.

Claimant reinjured himself in September of 1979 when pushing a barrel lifter at work. Claimant indicated that a hamstring muscle was involved, that he again experienced sharp pain in the right side of his lower back. He was off work from September 27, 1979 to May 12, 1980 at which time he returned to work at the same job. Claimant noted that his lower back and right buttock pain have continued. He was still under Dr. Blenderman's restrictions (not more than

25-30 pounds continuous lifting and 50 pound lifting not more than once a day). Claimant explained that the combination of continuous stopping and picking items up from the floor is what really bothers him.

Claimant had no prior back pain until 1974 when he pulled a leg muscle while unloading a coal pit. He was treated by Dr. Morgan. Claimant experienced severe pain in the groin and right buttock. The pain developed into a dull low back discomfort which would become sharp only upon straightening after stooping. This condition continued until sometime in 1976. His pain definitely worsened after the October 1978 injury.

Thirty year old claimant, married and the father of one child, has a high school education and some specialized training in mechanics and welding. He served as a boiler technician and fireman during his four years in the Navy. When he first went to work for defendant in September of 1974, he was a plant helper for six to eight months. That position consisted of scooping coal, unloading line cars and helping the mechanics. He then bid to a relief job and later to a regular shift position. Claimant operated a Caterpillar on a coal pile before bidding to a mechanics position which included three progressive levels — power plant mechanic, mechanic welder and then certified welder.

Claimant earns $9.17 per hour as a plant storekeeper. He would like to bid on: storeroom and shop foreman, $11.65 per hour; mechanic welder (certified), $10.89 per hour; mechanic welder, $10.35 per hour; assistant unit operator; $10.03 per hour; water and fuel analyst, $9.28 per hour; unit operator, $10.46 per hour. According to the claimant, the first and last mentioned positions entail no lifting and the second and third to last require minimal lifting. He can not bid on such positions in that his present job has been "red circled" meaning the union and company have agreed that claimant should not be allowed to make such bids. The underlying reason is that they are concerned about his medical condition and possibility of reinjury.

Prior to October of 1978, claimant had been remodeling his house. He also did yard work but is trying to taper off. He no longer shovels snow. He noted that his back hurts when be bends in playing basketball. He also noted that running hurts his leg muscle but that he had this problem before October of 1978.

Claimant sustained a right shoulder injury in the service when he slipped on an oily ladder and currently is receiving 20 percent disability for such incident. He also suffered a sprained ankle in a prior job, pulling a back muscle in 1977, smashing his index finger in February of 1978 and having a foreign object in his eye in April of 1979. At the time of the October 1978 injury, he reported a "repulled back muscle" on the backside of his time card.

Claimant did not complete defendant-employer's four year training program in welding because he bid to another job. Claimant is the only person in the storekeeper position and supervises two storekeeper helpers who do the necessary unloading of materials.

Claimant had help in some of the heavier tasks of his home remodeling such as in blocking the basement. He did do the sheet rocking, taping of joints and putting up a wall by himself. The extensive remodelling was done over time. He also engaged in karate and judo in the past and did some snow skiing two or three years ago.

According to Gary L. Gollhofer, the defendant's manager of employee benefits, the employer's records reflect an October 11, 1978 date of injury rather than the October 23, 1978. It was his understanding that the claimant was on light duty from October 1978 to September 1979 and on workers' compensation after the incident wherein claimant pulled a hamstring muscle; that claimant was paid based on the ten percent loss of a leg rating given by Dr. Blenderman; that claimant was sent to Dr. Blenderman for treatment of his leg problem and at that point Dr. Blenderman discovered a congenital back defect; that the company records show no record of back complaints or injury from the time claimant began employment to the time he saw Dr. Blenderman; and that it was his understanding that claimant's medical restrictions apply to his back and not to his leg. Gollhofer was not qualified to answer whether claimant's position was "red circled" because of his back problems.

According to William Van Eldik, defendant's plant maintenance manager, claimant only complained about leg pain, not his back, since his return to work in May of 1980; the company was concerned about the likelihood of reinjury in the claimant's case and therefore the medical restrictions were reviewed with the claimant; that the claimant complies with such limitations and "nearly" can perform his present job but needs occasional assistance; that claimant's job has not been "red circled;" that there was some sort of agreement that the claimant cannot do certain lifting jobs per Dr. Blenderman's restrictions; that the restrictions are of a light duty nature and there are light duty jobs in almost every classification; that claimant's indefinite restrictions interfere with claimant's ability to bid other jobs; and that claimant would be so restricted until a reexamination would show that claimant could perform the other work safely.

Eldik only observes claimant once a week, usually for a minute, and does not always converse with him. The last time he remembered the claimant complaining about leg pain was when the claimant was an apprentice mechanic and wanted another job. He observed a limp in claimant's walk.

Bidding into a job in another level would depend on the job. Because the defendant's welder training program was long term, defendant's policy was that once an employee dropped out of the program, as claimant had done, the employee would not be allowed to reenter.

Rex L. Morgan, M.D., states he first examined the claimant "for an industrial accident in 1974-1975, with a hamstring pull of the right leg at the insertion into the hip bone at the margin of the rotator cuff, which is a piece of cartilage which allows the hip bone to move." Dr. Morgan notes that on October 9, 1978 claimant "reinjured the right hamstring, which has been pulled at the insertion of the ligament to the leg bone and rotator cuff (which allows rotation of the leg)." He noted that scarring from the previous injury would delay the healing and recommended that claimant avoid a lot of the movements connected with his work lest he reinjure the hamstring. (Defendant's exhibit 2.) On March 27, 1979, Dr. Morgan released claimant from his care but recommended the same restrictions. (Defendant's exhibit 3.)

In an orthopedic case history dated October 23, 1978, Albert D. Blenderman, M.D., reports that the claimant was referred to him "by Dr. Morgan for evaluation of a painful right hip." Claimant related the earlier work injury in 1974-1975 and reported that the discomfort gradually "moved upward to a point above the ischial tuberosity and near the inferior border of the acetabulum." Physical examination revealed rather mild "pain on palpation just below the posterior-superior border of the acetabulum, but not in the region of the ischial tuberosity." When claimant adducted the leg against resistance pain intensified in the posterior acetabulum. Dr. Blenderman reviewed x-rays taken October 9, 1978 and saw no evidence of bone pathology or soft tissue calcification. His diagnosis was: "ROTATOR MUSCLE STRAIN, RIGHT HIP, WITH POSSIBLE IRRITATION TO THE POSTERIOR HAMSTRINGS ATTACHMENT INFERIOR TO THE BORDER OF THE RIGHT ACETABULUM." He could recommend no specific treatment other than to suggest that claimant restrict activities such as squatting, stooping and bending because such motions

> * * * place additional stress on the posterior aspect of the right hip where the muscles attach to the bone.
>
> * * *
>
> Squatting especially, carrying the leg into wide abduction or acute flexion, would tend to continue the discomfort; whereas simple walking or standing without excessive use of the leg should gradually relieve his pain. (Claimant's exhibit 1, pages 5 and 6.)

In an orthopedic case history dated February 4, 1980, Dr. Blenderman states that he saw the claimant for reevaluation because the claimant has applied for the job of plant storekeeper and defendant was fearful of reinjury. Claimant reported doing a little repair work around his home. His complaints at that time included the right lower back and upper right buttock.

Examination revealed:

> * * * full range of motion, which the patient says is not uncomfortable. There is no palpable muscle spasm and the patient says he has no pain on palpation over the muscles in a band about four inches wide to the right of the midline in the lower back, from the level of L-1 through 5. He says he has no discomfort on palpation over the right upper buttock in the area where he has his mild pain, on occasion.
>
> No muscle spasm is noted in the lumbar region. The patient has no muscle discomfort to the left of the midline in the lower back and no pain on palpation over any of the lumbar spinous processes.
>
> On evaluation of the right leg the patient has full flexion and extension of the leg without pain. On abduction and external rotation, the patient states this gives discomfort on the inner side of the right groin, though it is mild in degree. He has a minimum of discomfort on palpation in this area.
>
> He has no pain on palpation posteriorly in the right region of the greater tuberosity of the right ischium and none over the back of the hip joint.
>
> Because of his low back complaints, as well as those of his right hip, lumbar spine x-rays were taken this date, along with an x-ray of the pelvis to include both hip joints.
>
> The x-rays of the pelvis to include both hip joints show no evidence of soft tissue calcification, no evidence of joint narrowing and no evidence of sacroiliac joint involvement.
>
> X-rays of the lumbar spine show an extra transitional lower lumbar vertebra with narrowing of the disc space between the transitional vertebra and the upper sacral segment.
>
> Because of the transitional vertebra with narrowing of the disc space between this extra vertebra in the lower back and the pelvis, plus wide lateral processes articulating with the sacrum, this means that the patient has instability problems with the low back. [Claimant's exhibit 1, pages 7-8; defendant's exibit 4, pages 2-3.]

Dr. Blenderman's diagnosis was: "TRANSITIONAL LUMBAR VERTEBRA WITH NARROWING OF THE DISC BELOW THE TRANSITIONAL VERTEBRA." He recommended claimant not be allowed to do work requiring lifting 50 pounds or more. He added: "Lifting not to exceed 25 or 30 pounds would be acceptable, providing the patient does not have to continue doing it all day long." He anticipated claimant would have more problems with the lower back than he would with the prior hamstring injury. (Claimant's exhibit 1, pages 8-9; defendant's exhibit 4, pages 3-4.)

In a letter dated February 5, 1980 and addressed to Gollhofer, Dr. Blenderman advised against claimant being employed as a storekeeper because such work entailed continuous heavy lifting. (Defendant's exhibit 4, page 1.) In a followup letter dated March 20, 1980, Dr. Blenderman states:

> Enstrom's back condition, he should be able to perform the duties of a storekeeper. He might very well develop some discomfort in the upper thigh while performing these duties, but on the other hand, even though he does have mild discomfort — there is no reason to feel that this would totally incapacitate him as far as his work is concerned.
>
> With regard to the hamstring injury, I would feel the patient has a 10 percent disability of the lower extremity.
>
> It is impossible to estimate any future recovery period, if the patient should reinjure the hamstrings tendon attachment at the level of the pelvis. This discomfort could vary anywhere from mild to moderate and it is therefore impossible to tell you how long it would take for recovery to take place.
>
> As you will recall in my prior letter to you, I suggested the patient should not be employed as a storekeeper because of the heavy amount of lifting required

throughout the entire day. I do not feel that regardless of the fact that you asked me for an opinion regarding the leg only, the leg problem can be separated from the back.

If you employ him as a storekeeper, because of his low back problems he would probably have enough discomfort so that he would have to take varying degrees of time off because of low back pain and not necessarily because of his leg pain. (Defendant's exhibit 5.)

In a letter dated June 3, 1980 and addressed to claimant's counsel, Dr. Blenderman states: "Since Mr. Enstrom's back complaints are not related to his work, there is no disability rating on his back." (It should be noted that Dr. Blenderman's reports contain no mention of the specific welding incident that brought on claimant's lower extremity disability at 15 percent. (Claimant's exhibit 1, page 3.)

In response to a hypothetical propounded by claimant's counsel asking Dr. Blenderman to assume claimant would testify he had no prior back problems until he sustained an injury to his right hip or back (wrong date given) and to assess the causal connection between claimant's injury and the disability in addition to specifying the nature and extent of the disability, Dr. Blenderman responded:

> Assuming the facts proposed in your hypothetical question on your letter of September 17, 1980, one would have to assume that the patient sustained an aggravation of the pre-existing condition in the back — namely, the congenital changes with subsequent weakness.
>
> Since the patient has no evidence of a disc herniation, I would feel the patient has a small percentage of disability to the back, which would be attributed to the aggravation — not exceeding 8 percent, which would be a 5 percent disability of the body as a whole.
>
> A 15 percent disability of the lower extremity equates to a 6 percent disability of the body as a whole. (Claimant's exhibit 1, page 1.)

In his most recent letter (dated November 17, 1980), Dr. Blenderman explained that the five percent increase in claimant's lower extremity disability rating was a dictation or typographical error. He added that ten percent of the leg converted to four percent of the body. He further explained his view on the relationship between the aggravation and the back condition: "I am basing this on the fact that the aggravation to the preexisting condition is a permanent further injury to the back, even though he did have congenital problems prior to the back injury."

Analysis

Although the parties indicated that their dispute was merely over the extent of permanent partial disability, it is clear from the testimony of the various witnesses and the exhibits that the matter of causal connection between the injury and the disability likewise is contested. Claimant contends his back and leg problems were caused by the injury in October of 1978; defendant implies they are responsible only for the leg disability (hamstring) and not for the back condition which they infer is caused by congenital defects.

Although the correct date of injury is not crucial to the outcome of the issue (varied dates are found in the record), for clarity and recordkeeping sake, the deputy determined the date to be as shown on the first report of injury and in Dr. Morgan's November 6, 1978 letter — October 9, 1978.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury in October of 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 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 other disclosed facts and circumstances. *Bodish v. Fischer, Inc., supra*. 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, supra*. In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. *Sondag v. Ferris Hardware, supra*.

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

Conclusions of Law

The situs of the injury (or reinjury since the same area seemingly was involved in the earlier accident) already entails the body as a whole. Claimant's injury entailed the hamstring muscle at the intersection of the ligament to the leg bone and rotator cuff. The acetabulum is "a cup-shaped depression on the external surface of the innominate bone, on which the head of the femur fits." (Stedman's Medical Dictionary, Fourth Unabridged Lawyer's Edition.) Review of the medical books on anatomy reveals that this is in the pelvic area. Even Dr. Blenderman makes such reference. (Defendant's exhibit 5.) Clearly claimant's description of the

pain experienced subsequent to the 1974-75, the 1978 and the 1979 injuries spread to the lower back. Despite defendant's contentions that claimant only complained about his leg and not his back, claimant's testimony that he told his foreman immediately about experiencing pain in the buttock area is believable. Additionally, it cannot be overlooked that defense counsel directed attention to claimant's reference on the back of his time card of "repulling a back muscle."

The contribution played by claimant's congenital back problems or whether his home remodeling aggravated his condition further simply are not developed by the medical reports. However, both the medical reports and claimant's testimony confirm that the aggravation on October 9, 1978 was material and both doctors suggest the possibility of further flareup upon performing certain activities.

As noted above, Dr. Blenderman was apparently uninformed about a specific flareup of pain on October 9, 1978. His statement that claimant's back problems were not related to work are not determinative. Indeed, he later notes that claimant's leg complaints cannot really be separated from his back condition.

In *Parr v. Nash Finch Co.*, (Appeal decision, October 31, 1980) 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), it was noted by the industrial commissioner:

> 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.

Even though the employer may not be restricting the claimant in the present matter in exactly the same way and even though they maintain the restrictions are not related to the work injury, the record viewed as a whole indicates the claimant's limitations are in fact directly related to the October 9, 1978 episode and should not be viewed as a separate injury. In fact, claimant was on light duty work between those two dates unlike following the much earlier 1974-1975 incident. In any event, the effect of the injury on claimant's ability to perform the duties of jobs for which he was fitted prior to the injury which are no longer capable of being performed because of the effects of the injury are to be taken into consideration in assessing industrial disability.

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

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator is the same as industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance we are referring to loss of earning capacity and in the later reference is to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Based on claimant's age, education, specialized training and high motivation, his employment future appears optimistic at this juncture except for the limitation defendant seemingly has placed on his changing positions. Defendant's concern over claimant's reinjury is understandable, but the fact remains that because of such injury that his area of employability is restricted and this affects his earning capacity.

WHEREFORE, it is hereby found:

That based on the foregoing analysis, that claimant has sustained his burden of proving that as a result of the October 9, 1978 injury, he is twenty-five percent (25%) industrially disabled.

THEREFORE, it is ordered:

That defendant pay the claimant one hundred twenty-five (125) weeks of permanent partial disability at the rate of one hundred eighty-two and 08/100 dollars ($182.08) per week. Pursuant to Code section 85.34(2), permanent partial disability benefits shall begin as of May 13, 1980.

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

Credit is to be given to defendant for the permanent partial disability benefits previously paid by them for this injury.

Costs of the proceeding are taxed to the defendant. See Industrial Commissioner Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendant when this award is paid.

* * *

Signed and filed this 5th day of August, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ANN M. FAIRCHILD,

Claimant,

vs.

AVON, INC.,

Employer,

and

KEMPER GROUP,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Ann M. Fairchild, claimant, against Avon, Inc., employer, and Kemper Group, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of her employment on August 29, 1979. It came on for hearing on February 18, 1982 at the Juvenile Court Facility in Cedar Rapids, Iowa. It was considered fully submitted at that time.

A first report of injury was filed on October 29, 1980.

The record of this matter consists of the testimony of claimant. Briefs were filed by the parties.

Issues

The sole issue to be determined in this matter is whether or not claimant was an employee of Avon, Inc.

Statement of the Case

Married claimant, mother of one child, testified that she began selling Avon products on August 28, 1979. She described the circumstances thusly: She learned that the local representative of Avon was returning to school. She talked to that person and later to a Darlene Sloan who was sales director for the area. Sloan interviewed her and questioned her about her previous work and her reasons for wanting to sell Avon. She was hired by Sloan; she signed a contract; she received literature; and she gave Sloan a $15 check for her portfolio.

She characterized the contract she and Sloan signed as a long piece of paper with rules on it. Although she said she read the document, she did not recall whether or not there was a paragraph which said she would be an independent contractor. She subsequently lost the contract.

The literature she was given included instructions on how to keep books, to collect money, and to sell the product. Claimant looked over the materials and went out that very afternoon to make sales, dating the orders the next day. She recalled that she needed $250 for her first order to obtain some incentive gifts from the company.

Her procedure, which resulted in her earning about $70 every two weeks, was to take booklets from the company, place them in plastic bags which she purchased from the company, and leave them at the homes of her prior customers. She apparently went to most of the homes in the territory ignoring only those where she knew there were persons "strongly against Avon" and where she thought the door would be slammed in her face. Later she returned to her customers to take orders which were compiled and were sent to the company every two weeks. Her practice was to make her calls after women had their cup of coffee in the morning or around 10:00 a.m. and to stay out until 1:00 p.m. She called on working women after 6:30 p.m. and she took some orders by phone. She acknowledged she had no set hours. She claimed that she usually was able to complete all the soliciting in the first week of any two week period. When the mailing date arrived, the orders were sent in.

United Parcel Service or Iowa Parcel Service brought the products the following Wednesday unless it was a holiday. Claimant bagged the items in sacks purchased from Avon, delivered them and collected the money which she took to the bank. Every two weeks she sent a certified, cashier, or personal check to Avon for the cost of the goods in response to the invoice she received from the company which indicated the amount due including sales tax. The invoice was made out to her rather than to her individual customers.

Her profits ranged from five percent on the cheaper items to forty-five percent on the more expensive things. She asserted that prices were set by Avon in the booklets they published and she could not increase the prices. Neither did she feel the prices could be lowered as that would cut into her profits. she asserted "simple logic" dictated against lowering prices although she had not been told by the company that she could not do so. She got no separate payment or commission check from the company.

She agreed that Avon did not check on what she did with the products she was sent. She said she never acquired an

inventory. Products refused by customers could be returned to the company with an appropriate order blank. Claimant paid the postage on such items and was given credit.

Claimant received a book for her territory at the time she was hired. She stated she was confined to that territory unless she was making a sale to a relative. She thought it was her duty to contact new persons moving into her assigned area. Any expenses she incurred in servicing her route were her own.

Each month Sloan conducted a meeting to introduce new products, show films, discuss sales techniques, and present awards for sales. These meetings encouraged the salespersons to get out and "hustle." Those representatives who attended got a free gift from Avon. Representatives not making the meeting had to pay for what the others were given free. Claimant traveled to these meetings with two other representatives, one of whom drove and paid for the gas. Although claimant said the meetings were not required "in so many words," she felt it was better to go. She stated that she skipped two or three.

Claimant reported that Sloan came to visit her several times and that she called Sloan if she was having trouble. During her visits, Sloan would examine claimant's books to see if she had been making her calls. She did speak to Sloan after her fall. She remembered Sloan encouraged her to get out and and acted as a "nice person" who cared about claimant even to the point of volunteering to go and sell with her. Claimant characterized Sloan as helpful and supportive and her experiences with the sales director as a learning experience.

Claimant did not know if Avon withheld anything for tax purposes. She did not think social security or unemployment tax had been paid. She had purchased an insurance plan from Avon for $25 which she said would have provided coverage if she had been killed with her Avon bag with her at the time of death. She agreed that she had no guaranteed income from the company.

Although she was unsure whether or not there was a quota, she testified at another point that she had been told that if she did not meet her quota, something would have to be done. She ceased selling Avon around December 29, 1979. She testified, "I suppose I quit."

Findings of Fact

WHEREFORE, IT IS FOUND:

That claimant began selling Avon products on August 28, 1979 after signing a contract with Darlene Sloan, company sales director.

That claimant paid $15 for a portfolio and materials which included instructions on how to keep books, to collect money and to sell the product.

That claimant was assigned a specific territory by the company.

That claimant sold products from booklets where prices were listed which she did not lower or raise.

That claimant's percentage of various items changed with higher priced items yielding a higher percentage.

That claimant was paid nothing by the company.

That claimant kept what was left over after she collected from her customers and paid costs to the company.

That claimant was guaranteed no specific income.

That claimant selected her own hours for selling.

That claimant usually attended monthly meetings arranged by Sloan.

That claimant received no reimbursement from the company for transportation expenses.

That Sloan helped the claimant get started in her territory.

That claimant quit selling Avon in December 1979.

Applicable Law and Conclusions of Law

The claimant has the burden of proving by a preponderance of the evidence that she is an employee. If claimant establishes a prima facie case, the burden is on defendants to establish by a preponderance of the evidence an affirmative defense as a bar to compensation. *Nelson v. Cities Services Oil Co.*, 259 Iowa 1209, 1213, 146 N.W.2d 261, ___ (1967). Iowa Code section 85.61(2) defines worker or employee as:

> 2. *"Worker"* or *"employee"* means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws or a corporation, including a person holding an official position or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, school districts, area education agencies, municipal corporations, or cities under any form of government, and including members of the Iowa highway safety patrol and conservation officers, except as hereinafter specified.
>
> *"Workman"* or *"employee"* shall include an inmate as defined in section 85.59.

Iowa Code Section 85.61(3)(b) provides:

> 3. The following persons shall not be deemed "workers" or "employees":
>
> * * *
>
> b. An independent contractor.

Before a person can come within the purview of the Workers' Compensation Act, it is essential that there be an express or implied contract of service with the employer who is sought to be charged with liability. Common law definitions cannot be used when the legislature has expressly defined the term employed in the statute. *Knudson v. Jackson*, 191 Iowa 947, 949—50, 183 N.W. 391, ___ (1921). An employee is someone bound to the duty of service and not bound only by a duty to produce certain results. *Pace v. Appanoose County*, 184 Iowa 498, 508, 168 N.W. 916 (1918).

Although there are no Iowa cases which deal specifically with Avon representatives, there are cases which deal with commission salespersons. Decedent in *Arne v. Western Silo*

Company, 214 Iowa 511, 242 N.W. 539 (1932) was found to be an independent contractor. Among the factors the opinion evaluated were these: The contract was subject to cancellation at any time by either party. Decedent was paid by a commission. Decedent furnished his own transportation and paid his own expenses. Decedent made his own schedule, and the method and means of getting orders was left to him.

Similar factors were examined in *Meredith Publishing Co. v. Iowa Employment Security Commission*, 232 Iowa 666, 671—72, 6 N.W.2d 6, ____ (1942) wherein the opinion said:

> ...There is no evidence that anyone connected with the appellee exercised any control over Brumbaugh in the performance of the services which he agreed to perform, or that anyone exercised any direction or control over him in his daily work of canvassing his territory, or any detail of that work. His physical efforts were not controlled, nor the time, place, method, or character of his work. He did nothing but solicit. No other work of any kind was performed by him for the appellee. His earnings depended very largely upon his own efforts... Not only did the appellee exercise no control over him in fact, but there is no evidence that it had any right to exercise control over him. Whatever direction, supervision, or suggestions which it gave to him were with respect to the general result to be accomplished. Of course, the appellee was interested in retaining and increasing the number of its subscribers. It was interested in the diligent effort and efficiency of its subscription agents to accomplish that end by contacting prospects in every county as widely and as effectively as possible. It had a right to plan the most effective campaign to that end, and fix the terms of subscription. Such plans are in no way different from the plans and specifications of an owner who lets a lump-sum building contract to an independent contractor to furnish the material and labor to construct a building. Such as one may have an architect supervise the work, or may make suggestions, or see to it that the work is done properly or according to the plans, but the builder, nevertheless, is an independent contractor. There is nothing in the record which has the slightest tendency to establish that the control or direction over this agent in the solicitation of subscribers which the employer or master exercises or has the right to exercise over his servant.

See also, Robinson v. Meredith Publishing Co., 232 Iowa 885, 6 N.W.2d 283 (1942).

The Minnesota Supreme Court in *Gerdes v. J. R. Watkins Co.*, 103 N.W.2d 641 (1960) found a vendor-vendee relationship. In *Gerdes*, the company held meetings to acquaint its representatives with new products and to assist with selling techniques. The company also suggested the number of daily calls to be made and methods for presenting information. The company's actions were viewed as assistance rather than as control.

Defendants' brief cites many other decisions in varying jurisdictions and areas of the law.

While the Iowa Supreme Court has not decided the case of an Avon representative, it has recognized on many occasions five factors for determining whether or not an employer-employee relationship exists. They 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 to 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 and for whose benefit the work is performed? *Henderson v. Jennie Edmundson Hospital*, 178 N.W.2d 429, 431 (Iowa 1970); *Hjerleid v. State*, 229 Iowa 818, 826, 295 N.W. 139, ____ (1940).

Claimant's brief argues there is no dispute but that Avon had the right to selection. The undersigned does not agree. Claimant *sought* a job with Avon when she knew a representative was leaving. She was interviewed by the sales director and signed the contract. Avon undertook no responsibility for the payment of wages. Neither did the company pay any expenses claimant incurred in making sales or attending monthly sales meetings. Claimant urges that the decedent in *Mallinger v. Webster City Oil Co.*, 211 Iowa 844, 234 N.W. 254 was on a commission and was held to be an employee. That case is distinguishable in that Mallinger was paid a *fixed* commission by contract. There was little in the way of testimony as to whether or not Avon could terminate its relationship with claimant. In actuality, she said: "I suppose I quit."

The ultimate goal was to sell the product. The means of attaining that goal was left to the claimant. Claimant controlled her work. She selected the hours, elected whether or not to call at specific houses, and assumed the initiative in finding new customers. Her sole contact with the company was through Sloan. In her testimony, claimant did not characterize Sloan as a supervisor. Rather, her description portrayed her as a supporter, a teacher, a counselor.

Of course claimant's sales benefited the company, but unless she made sales, she attained no monetary advantage. The onus was on her to sell. She received remuneration only when she, through her own time and energy, collected orders.

The Iowa Supreme Court has added to the five elements set out above, the overriding consideration of the intention of the parties as to the relationship created. *Henderson, supra*. Claimant now maintains she was an employee. No witnesses were present to testify to the intent of Avon. However, the defense of this suit makes its intent clear. The operative point to be looked to is the intent of the parties at the time the relationship was created.

Having seen claimant and having had the opportunity to hear her testimony, the undersigned believes that she carefully selected this type of employment. Claimant is the mother of a young child who apparently has had some illness. Claimant said that the reason she wished work was that she wanted to get into the public. Claimant struck this deputy as being the sort of person who prefers to control, to be her own boss, and to exercise her independence. That freedom would not have been available with many forms of part-time work. Based on the record as a whole, there is not

sufficient evidence of factors favorable to the claimant to establish an employee-employer relationship.

THEREFORE, IT IS CONCLUDED that claimant has failed to prove by a preponderance of the evidence that she was an employee of defendant.

Order

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.
That costs of the proceedings be taxed to defendants.

* * *

Signed and filed this 25th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

HELMUTH FEDDERSON,

Claimant,

vs.

CLINTON CORN PROCESSING, CO.,

Employer,

and

COMMERCIAL UNION ASSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed August 5, 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.

The record on appeal consists of the transcript; the deposition of Richard A. Brand, M.D.; claimant's exhibits 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, and 18; and defendants' exhibit A. Also a part of the record was a report of Steven R. Jarrett, M.D., dated August 22, 1980, which was enclosed in a letter of August 27, 1980 from defendants' counsel.

Claimant severely hurt his back on August 14, 1978 when a heavy jug flipped and put a strain on two discs. Subsequently, claimant had surgery at L3/4 and L4/5. He was paid some benefits on the basis of a memorandum of agreement and other benefits as a result of a review-reopening decision of May 5, 1979. Claimant was given office work from February 5, 1979 until June 17, 1979.

In the instant case, the hearing deputy awarded healing period benefits from June 18, 1979 until May 13, 1980 and awarded permanent partial disability benefits to be paid for a period of 275 weeks.

This appeal decision will modify the review-reopening decision of March 21, 1981 somewhat in that a lesser number of weeks of permanent partial disability will be awarded.

The issues are stated in defendants' brief: "1. Whether the Deputy erred in awarding healing period benefits for a period of 44 2/7ths weeks duration. 2. Whether the Deputy erred in determining that Claimant had a permanent partial disability of 55% of the body as a whole."

Claimant has the burden of proof. *Olson v. Goodyear Service Stores*, 255 Iowa 112, 125 N.W.2d 251 (1963). Claimant's disability is industrial which is reduction of earning capacity and not just functional impairment. Such disability includes considerations of functional impairment, age, education, and relative ability to do the same type of work as prior to the injury. *Olson, supra* and *Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). Thus, the reasons for industrial disability may not always be related to the functional impairment. Further, claimant may have an award of industrial disability if the employer refuses to give him any sort of work after an injury or if claimant makes a bona fide effort to find suitable work and fails. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).

Section 85.34(1) 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 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.

Industrial Commissioner's 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.

With respect to the issue of healing period, the question is whether the employer's offer of lighter work could be construed to end the healing period. As noted above, claimant worked at the lighter job, office work, for some time. Later, he refused to cross a strike picket line in order to go to work. Of course, the fact that the employer offered claimant a job is commendable and had claimant taken the offer, the first method of stopping healing period under rule 8.3 (returning to work) would have been satisfied. However,

claimant did not accept the offer, so the second test must be examined.

Before the injury, claimant was a laboring person who worked as many hours as he possibly could. In the office work, he obviously worked less hours at a lighter job. The character of the office work, therefore would not be substantially similar to "that in which the employee was engaged at the time of the injury" (Rule 8.3), and therefore work in the office would not stop the healing period.

(The deputy ended the healing period on May 13, 1980, which in the opinion of Richard A. Brand, M.D., was the date that claimant's permanent partial disability was 20% of the whole man. Although choosing that date to end the healing period is not any indicator of recuperation, the date is reasonable because claimant was in the hospital earlier that same month for treatment and, presumably, recuperation.)

Claimant was born in March of 1932 in Germany and emigrated to the United States in the 1950s. His work record is basically one of laboring. It is obvious that his functional impairment is severe and that he cannot return to work of a heavy character. The record is inconclusive on the point of extent of claimant's pain; he seems to complain to doctors of pain but on the record stated that his pain was slight.

Although claimant may have a good surgical result, it is this deputy's experience that a laminectomy and discectomy at two levels is a serious functional impairment and, in the case of a laboring man, produces substantial industrial disability.

It appears that once the strike situation is cleared up, claimant will be able to work again for the employer. Whether that is the case or not, the record showed little by way of bona fide attempts by claimant to find work. Finally, claimant's German accent may cause him some linguistic difficulties. However, the following answer appears on page 31 of the transcript: "A. Just about. I think there has been a couple of instances where I couldn't, but in general it was the same. Not the same hours, because I always worked six, seven days a week before when I was working on my job, so — but I did get my 40 hours a week, you know." That example shows claimant is able to speak in compound and complex English sentences even though he may have a thick accent.

Findings of Fact

1. Claimant was born March 11, 1932. (Transcript, 7)

2. Claimant has the German equivalent of a high school education. (Transcript, 38)

3. Claimant had training as a tile roofer. (Transcript, 38-39)

4. Claimant had experience as a cement truck driver. (Transcript, 40)

5. Claimant had experience working on a farm. (Transcript, 41)

6. Claimant took a general management course. (Transcript, 41)

7. Claimant began work for the employer in 1962. (Transcript, 7)

8. At the time of the injury, claimant was a dextrin processor. (Transcript, 8-12)

9. On August 12, 1978, claimant hurt his low back while lifting a heavy jug over a ledge. (Transcript, 12-17)

10. Claimant was released to return to work on September 15, 1979 with restrictions: A 30-pound weight lifting limit and limitations on repeated bending, stooping and lifting. (Claimant exhibit 2; Brand depo. 32)

11. The same restrictions were repeated on November 16, 1979 and February 1, 1980. (Claimant exhibit 3, 4)

12. Claimant last worked for the employer on June 17, 1979. (Transcript, 30)

13. Claimant has slight but real back pain. (Transcript, 43; Brand 38)

14. The employer has employment for the claimant once the problems attendant to a labor dispute have been taken care of. (Transcript, 63-66)

15. On September 14, 1979 and November 16, 1979, claimant refused to return to work because of the labor dispute. (Transcript, 70; defendants' exhibit A)

16. The job offered to claimant in September 1979 and November 1979 was office work and would have enabled claimant to work less hours per week than at the time of his injury. (Transcript, 31, 37)

17. The employer did not refuse employment to claimant subsequent to the injury. (Transcript, 71)

18. Claimant was recuperated from the injury on May 13, 1980. (Brand 33, 35)

19. Claimant has permanent partial impairment of 20% of the whole man. (Brand 34)

20. Claimant's work injury aggravated a preexisting degenerative low back disc condition. (Brand 37-38)

21. On October 19, 1978, claimant had a laminectomy and discectomy at L3/4 and L4/5. (Claimant exhibit 5)

22. Claimant has sought work with another employer on one occasion since the injury and also visited Job Service of Iowa. (Transcript, 43-44)

23. Claimant was hospitalized in May 1980. (Transcript, 33-34; claimant exhibit 12)

The issue of the medical bills and the choice of physician and hospital raised at the hearing were not raised on appeal and will not be considered further.

Conclusion of Law

Claimant sustained an injury which arose out of and in the course of his employment on August 14, 1978.

As a result of the injury, claimant is entitled to additional healing benefits from June 18, 1979 through May 13, 1980.

As a result of the injury, claimant has sustained permanent partial disability for industrial purposes of forty-five percent (45%).

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from June 18, 1979 through May 13, 1980 at the rate of one hundred ninety-five and 08/100 dollars ($195.08) per week for the healing period and also to pay weekly compensation benefits for a period of two hundred twenty-five (225) weeks at the same rate for the permanent partial disability benefits, accrued payments to be paid in a lump sum together with statutory interest.

Defendants are to be given credit for any healing period benefits already paid by them and credit for any permanent partial disability benefits previously paid.

Defendants are also ordered to reimburse claimant the medical expenses shown in claimant's exhibits eleven (11) through sixteen (16), totalling three thousand seven hundred twenty-six and 46/100 dollars ($3,726.46).

The order of the deputy as to exhibits seventeen (17) and eighteen (18) will stand as written: If the parties are unable to reach an agreement as to the compensability of exhibits seventeen (17) and eighteen (18), claimant may resubmit those bills to the undersigned with itemized statements.

Defendants are to pay the costs of this action.

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

* * *

Signed and filed at Des Moines, Iowa this 28th day of October, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

TERESA G. FINN, AS GUARDIAN FOR JASON W. FINN,

Claimant,

vs.

GEE GRADING AND EXCAVATING, INC.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a commutation decision approving claimant's application for partial commutation.

The record on appeal consists of the testimony of Bruce Huston and Teresa Finn; claimant's exhibits 2 through 5; and defendants' exhibits A, B, C and D. An employer's first report of injury was filed on October 2, 1979. A memorandum of agreement was filed with this agency on February 11, 1980 calling for the payment of $218.04 per week.

Defendants state the issue on appeal simply as "whether a partial commutation should be granted."

Claimant's decedent, Terry Finn, sustained an injury arising out of and in the course of his employment on September 11, 1979. Terry Finn died as a result of this injury.

Claimant is the minor child of Terry Finn, having been born on February 22, 1976. This birth occurred during the marriage of decedent to Teresa Finn. Teresa Finn was married to decedent on May 21, 1975 and was divorced on January 4, 1977. She has not remarried.

Teresa Finn was appointed guaradian for claimant by the court for Rutherford County, Tennessee. Claimant's guardian desires a partial commutation of 662 weeks of compensation. This number represents the number of weeks which will elapse until claimant attains the age of eighteen. The guardianship has received $36,000 in life insurance proceeds which has been placed into certificates of deposits. In addition, claimant and Teresa Finn each receive $331.00 per month in Social Security Survivors Benefits. The guardianship receives a net of $654.12 per month in workers' compensation benefits. To date, the guardianship has not expended any workers' compensation benefits. They have been placed in savings accounts.

Claimant's guardian has entered into an agreement for the compensation of her attorneys in Iowa and Tennessee for twenty-five percent of the compensation receipts. This fee arrangement has been approved by the Tennessee court.

The guardianship plans to use the money granted in a partial commutation to pay attorneys' fees in the amount of $26,750, pay about $23,000 as down payment for a home, and purchase an insurance annuity which will provide 144 months of payments at the rate of $654.12 per month.

Claimant's brief justifies the proposed commutation accordingly:

> The Claimant has shown that an annuity will be purchased that will produce the same benefit as that he is receiving under Worker's [sic] Compensation. In addition, the Claimant will have $23,000 which will allow the Claimant to purchase a home that will provide him with valuable asset, with a hedge against inflation, that will teach him valuable lessons about the management of money, and that will provide him with a higher standard of living. The Claimant need not show that the commutation is necessary, but only that it is in his best interest. The Claimant has clearly shown this...

The supreme court in *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation

or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In *Diamond* the court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *ID.* at 929, 129 N.W.2d at ____. A reasonableness test was applied by the court in *Diamond* to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Professor Arthur Larson's philosophy on granting commutation is much more restrictive than that of the Iowa Supreme Court in 1964. He warns that:

> In some jurisdictions, the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings... The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will be best served by a lump-sum award. The beginning point of the justifiability of the lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice. *Larson, Treatise on the Law of Workmen's Compensation*, §82.70.

Professor Larson indicates that experience has shown that a claimant is often under pressure to seek a lump-sum payment, and once the payment is received it is soon dissipated.

Additionally, Iowa's first industrial commissioner, in the first *Biennial Report of the Workmen's Compensation Service* (1916) at page 12, pointed out that, although in exceptional cases commutation promotes personal welfare, weekly payments should be regarded as a general rule better adapted to the real needs of compensation services since large lump sums are often unwisely used by beneficiaries.

Despite the rational reasoning in support of the more restrictive views on commutation of compensation benefits, the *Diamond* guidelines still prevail in Iowa. Relying on *Diamond* and claimant's substantial monetary resources, excluding weekly compensation benefits, this commissioner would be hard-pressed to conclude that a lump-sum payment would not be in the best interest of claimant, notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.

Although workers' compensation benefits differ from the benefits claimant is receiving from Social Security, they are philosophically for the same purpose, i.e., periodic payments to partially replace lost earnings. In this economic era few would not jump at the chance to have future earnings paid to them in advance so they could invest them in a lump-sum and live off the earned income. The difference in the workers' compensation law is that it provides a vehicle, commutation, for doing just that.

That a sum invested at today's prevailing interest rates would yield considerably more than the claimant is now receiving in workers' compensation benefits (even after taxes) is elementary.

It is archaic that the discount rate for commutations is still at five percent. Nevertheless, it is the law, and, as this agency is a creature of statute, it must be guided by the statute and decisions of the supreme court which interpret the statutes and define the authority of the agency.

Lump-sum awards in this and most other cases gives workers' compensation the appearance of damages in a tort action. Workers' compensation was implemented to replace tort damage cases. Until action is taken either by the courts or legislature, this agency is duty bound to follow the current authority. As previously mentioned, it would be incredible for this agency to say that a commutation which would produce considerably more money than the claimant is currently receiving would not be in his best interests.

Findings of Fact

1. Claimant's decedent, Terry Finn, sustained an injury arising out of and in the course of his employment on September 11, 1979 in Linn County, Iowa. As a result of this injury, he died.

2. Jason William Finn is the minor child of Terry Finn, having been born on February 22, 1976.

3. This birth occurred during the marriage of decedent to Teresa Finn. They were married on May 31, 1975 and divorced on January 4, 1977.

4. Teresa Finn has not remarried.

5. Teresa Finn has been appointed Guardian for Jason Finn by the court for Rutherford County, Tennessee, and pursuant to the procedures there, is required to make periodic reports to the court for its approval.

6. Claimant's guardian desires a partial commutation of 662 weeks of compensation. This represents the number of weeks which will elapse until claimant attains the age of eighteen.

7. Claimant's guardian has entered into an agreement for compensation of her attorneys in Iowa and Tennessee, wherein twenty-five percent of her receipts of compensation are paid to said attorneys. This fee arrangement has been approved by the Tennessee Court. This agency has not been asked for approval of the fee arrangement and none should be inferred.

8. The guardianship has received $36,000 in life insurance proceeds, which money has been placed into certificates of deposits. In addition, Jason and Teresa Finn each receive $331.00 per month in Social Security Survivors'

Benefits and the guardianship receives a net $654.12 per month in workers' compensation benefits.

9. The guardianship plans to use the money granted in a partial commutation to pay attorneys' fees in the amount of $26,750, pay about $23,000 as down payment for a home, and purchase an insurance annuity from The Manufacturers Life Insurance Company, which will provide 144 months of payments at the rate of $654.12 per month.

10. To date, claimant's guardianship has not expended the net workers' compensation payments. They have been placed in savings.

11. That by purchasing a home, said home to be in the name of Jason, a net estate gain will be had for Jason and it would appear to be in his best interest to follow the plan as proposed.

12. Bruce Huston testified in this matter. He has special professional experience and seeks a fee in the amount of $150.00.

Conclusions of Law

1. Section 85.45, Code of Iowa, governs the granting of commutations. It states either that the best interest of the claimant *or* that hardship upon the employer will be the sole criteria used. Inasmuch as the plan, as suggested by the claimant, appears to be in his best interest, the criterion has been met.

2. Section 622.71, Code of Iowa, governs the payment of expert witness fees not to exceed $150.00 per day. Inasmuch as claimant has indicated that $150.00 should be paid to Bruce Huston for his testimony, the award for costs will include an expert witness fee in the amount of $75.00 for Huston's testimony. His testimony was not of such length to warrant the maximum fee.

3. Commutation of 662 weeks is hereby granted and with appropriate discount, totals $107,466.11, which shall be paid immediately.

WHEREFORE, partial commutation is found to be in the best interests of the claimant.

THEREFORE, it is ordered:

That defendants pay claimant the partially commuted sum of one hundred seven thousand four hundred sixty-six and 11/100 dollars ($107,466.11).

That claimant's guardianship file appropriate pleadings with this office to evidence payment of the sums as herein approved.

Costs are to be paid by defendants, to include a seventy-five and 00/100 dollar ($75.00) witness fee for Bruce Huston.

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

. . .

Signed and filed this 5th day of November, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LESLIE F. FRY, JR.,

Claimant,

vs.

HY-VEE FOOD STORES,

Employer,

and

EMPLOYERS MUTUAL COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals an order entered by a deputy industrial commissioner on February 11, 1982 which sustained defendants' special appearance asserting a lack of subject matter jurisdiction due to the expiration of the prescribed limitation period found in §85.26 of the Code of Iowa.

For reasons to be set forth, it is held that §85.26(1) does not affect the jurisdiction of the agency but such section may impose a condition on a person's right to recover in a cause of action for compensation.

On January 21, 1982 claimant filed his petition for arbitration stating he received an employment-related injury in October 1978. Claimant alleged his injury occurred when a shopping cart was pushed into him by a customer resulting in his falling to the floor thereby causing an injury to his left leg.

Pursuant to §85.26(1) a petition for arbitration, which is an original proceeding under chapter 85 of the Code of Iowa, "shall be commenced within two years from the date of occurrence of the injury." Thus, in this case the petition was filed more than two years from the incident producing the injury.

Claimant's petition did not show any excuse for the lateness of his claim. On January 21, 1982, the claimant also filed a request for production of medical information, claimant's statements regarding any entitlement to workers' compensation benefits, and claimant's statements regarding any entitlement to workers' compensation benefits, and claimant's personnel records.

Defendants filed a special appearance on January 29, 1980 contesting the industrial commissioner's subject matter jurisdiction over the cause of action due to the "running of the statute of limitations" in §85.26(1). Subsequently on February 4, 1982, the claimant filed a motion for leave to amend his petition, a resistance to dismissal for lack of jurisdiction and a request for a hearing. Claimant's motions

were submitted without supplementary affidavits.

Claimant sought to amend his petition to include he was "materially prejudiced" in failing to file within the applicable period because after his injury he relied upon the employer's "false representations and assurances of employment" to the extent he did not file a workers' compensation claim.

He requested an evidentiary hearing to determine whether there were facts which would estop the defendants from raising the "statute of limitations." Claimant also asserted in his resistance that the defendants had not fully complied with his request for production. The defendants did not respond to these motions by the claimant.

The deputy sustained the special appearance and stated "[i]t is obvious from a reading of Code section 85.26(1) that a claimant cannot maintain an action before this agency unless it is brought within two years of the date of the occurrence of the injury." The deputy did not reach the claimant's motion for leave to amend or his request for an evidentiary hearing.

The legislature, through enactment of the Workers' Compensation Act, removed the jurisdiction of an employee's right to a cause of action and remedy against an employer for injuries arising out of and in the course of employment from the general original jurisdiction of the district courts and place it exclusively with the industrial commissioner. *Jansen v. Harmon*, 164 N.W.2d 323, 326 (Iowa 1969); *Groves v. Donohue*, 254 Iowa 412, 419, 118 N.W.2d 65, 69 (1962). In connection with this jurisdiction, the legislature affixed conditions under which the right to a cause of action is to be enforced.

One condition for enforcement of the right of action is §85.26(1) which requires original proceedings to be commenced within a prescribed period of two years. Section 85.26(1) is not a limitation on the jurisdiction of the industrial commissioner. *Mousel v. Bituminous Material & Supply Co.*, 169 N.W.2d 763, 768 (Iowa 1969); *Secrest v. Galloway Co.*, 239 Iowa 168, 173, 30 N.W.2d 793 (1948).

Section 1386 of the Iowa Code of 1936 (currently §85.26) was described by the Iowa Supreme Court as a "special statutory limitation" in a claimant's right to a cause of action and not a general statute of limitations which bars enforcement of a claim beyond a specified period of time. *Secrest v. Galloway*, 239 Iowa at 173, 30 N.W.2d at 796. *Ct.: Arnold v. Lang*, 259 N.W.2d 749 (Iowa 1977) (citing *Secrest v. Galloway* for distinction of a special statutory limitation from a pure statute of limitations in a case involving the Dram Shop Act).

In explanation of the distinction between a special statutory limitation and a pure statute of limitations, the Iowa Supreme Court in *Secrest, supra*, cited approvingly from 37 C.J.S. *Limitation of Actions* §5 (1925):

> "A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance, time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether."

Secrest, 239 Iowa at 173, 30 N.W.2d at 796.

In *Mousel v. Bituminous Material & Supply Co., supra*, the Supreme Court of Iowa turned to 100 C.J.S. Workmen's Compensation §468(2) (1958) for restatement of the rule announced in the case:

> "Further, it is held that the requirement as to the time within which a claim for compensation must be made or filed is a matter going to the right to compensation, and being a condition on the right * * * rather than on the remedy * * * it must be strictly complied with."

Mousel, 169 N.W.2d at 768.

Therefore, as interpreted by the Supreme Court of Iowa, a timely filed claim is not "jurisdictional," i.e., a condition precedent for consideration of a claim by the industrial commissioner. The commissioner obtains this jurisdiction by virtue of the legislative removal of such jurisdiction from the district courts and conferring it upon this administrative agency.

It has long been established that the industrial commissioner is the final and exclusive judge of fact questions under conflicting evidence. See, e.g.: *Murphy v. Shipley*, 200 Iowa 857, 205 N.W. 497 (1925) (commissioner is the ultimate fact finder on whether an employer-employee relationship existed). The commissioner must decide whether a claimant has satisfied the legislative requisite conditions for entitlement to compensation benefits, such as employment relationship and causal connection of the injury with work activities. An additional condition on the right to receive benefits is whether or not the conditions of §85.26(1) have been met.

When a claim is filed beyond the prescribed time limit, the claimant has most generally lost the right to receive compensation benefits. However, since the subject matter of the industrial commissioner is not defeated by an untimely filed claim, it is the statutory duty of the commissioner to determine whether there is any factual evidence providing a reason to the excuse the lateness of the filed claim. If a claimant is unable to bring forth a justifiable reason for lateness, the special limitation condition will be activated to deny his right to receive compensation under the workers' compensation laws.

This matter is before the commissioner on appeal of the deputy's decision to sustain the defendants' special appearance on grounds the industrial commissioner lacks jurisdiction due to lateness of filing. Therefore, based upon foregoing analysis, the defendants' special appearance should be overruled.

THEREFORE, it is ordered:

The order filed February 11, 1982 sustaining defendants' special appearance is reversed and defendants' special appearance is overruled.

Defendants are to answer or otherwise plead within twenty (20) days of the filing of this decision.

This case is returned to the regular docket.

* * *

Signed and filed this 26th day of April, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

JOHN A. FULLAN,

Claimant,

vs.

STANDARD OIL OF INDIANA,
d/b/a/ AMOCO,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Defendant has appealed from a proposed arbitration decision wherein claimant was given healing period benefits and a 60 percent permanent partial disability award.

* * *

The issues concern (1) the extent of healing period; (2) the extent of loss of earning capacity; (3) a question ancillary to reduction of earning capacity: whether defendants get credit for a preexisting disability; and (4) another ancillary question to earning capacity; that is whether another nonemployment condition contributes to claimant's overall disability.

Claimant is a successful person. He has held various jobs and positions and has been quite successful as a commission agent and oil jobber for Standard Oil Company, later Amoco. He has had lumbar back problems since 1963 and had a lumbar laminectomy at L4/5 in 1970. In 1971, he fractured three vertebrae when he dove through a window during a fire at his home.

On August 11, 1976, claimant sustained a work injury when he was working with some heavy barrels. As a result of that injury, claimant had further surgery at L4.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 11, 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).

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

It is further clear that the claimant has sustained an industrial disability which is defined in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 593, 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, supra*. This department is charged with the statutory duty of determining a claimant's industrial disability. In an attempt to further clarify this issue, we quote from *Olson, supra*, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered [citing *Martin, supra*,]. In determining industrial trial 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. * * * *

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 Services Stores, supra*. 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 Co., supra*, 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."

Section 85.34(1) states:

> *Healing period:* If an employee has suffered a personal injury causing permanent partial disability for

which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Further, Rule 500—8.3, IAC, states:

Healing period: A healing period exists only in connection with an injury causing permanent partial disability. It is that period of time after a 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.

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

With respect to the healing period issue, there is no clear indication in the record as to when recuperation occurred. (Of course, claimant never did return to employment which was substantially similar to that in which he was engaged at the time of the injury in that he can no longer perform heavy physical labor. The work as a jobber is, in essence, substantially similar to the overall work claimant was doing when he was injured.) Franklin H. Sim, M.D., an orthopedic surgeon at the Mayo Clinic, who did claimant's September 8, 1977 surgery, examined claimant on July 28, 1978 and on March 8, 1979 gave claimant a rating of permanent impairment of 30 percent of the spine. Usually, it takes some six months to recuperate from such surgery. Since claimant's operation was the second laminectomy in that area, it is not unreasonable that the date of the examination (July 28, 1978), some 46 weeks after the operation, stands as the date of recuperation.

Claimant's loss of earning capacity is prospective only. Even with the extra impairment caused by his compensation injury, he can function well as a business executive. With his experience and position, there is little chance that his 1976 compensation injury and disability would more than moderately interfere with his earning capacity. Yet, his physical impairment is substantial and shows certain restrictions that would prevent him from doing physical labor. To that extent, claimant does have a loss of earning capacity.

With respect to defendant's assertion that it should be given credit for claimant's prior disability, it can be said that defendant owes permanent partial disability only to the extent of the amount of disability caused by the injury, and it is that amount which is assessed here. Finally, claimant's wrist condition, which defendant states contributes to his industrial disability does not appear to affect claimant's earning capacity one way or another.

Findings of Fact

1. On August 11, 1976, claimant hurt his back while working for the employer when he was handling a barrel which weighed 460 pounds. (Transcript, page 87, claimant's exhibit 1, 8, 9, 11; defendant's exhibit B)

2. Claimant had back problems prior to August 11, 1976, namely in 1963, in 1970 when he had a laminectomy at L4/5 and 1971, when he fractured three vertebrae including two in the area of the laminectomy. (Transcript, pages 82-86)

3. After his 1971 back injury and until his August 11, 1976 compensation injury, claimant was able to do physical labor. (Transcript, page 86)

4. Claimant has performed no physical labor since August 1976. (Transcript, page 76)

5. On September 8, 1977, claimant had surgery for a protruded midline disc at L4. (Claimant's exhibit 10)

6. Claimant has serious permanent impairment as a

result of his August 1976 work injury. (Claimant's exhibit 10, 12; defendant's exhibit H)

7. At the time of the hearing, claimant was a jobber for Amoco. (Defendant's exhibit D)

8. The work as a jobber does not in and of itself require physical labor if the jobber hires outside help. (Beltz deposition, pages 7, 8)

9. Claimant is the owner of the plant in Clinton, Iowa and is an independent businessman. (Transcript, page 127)

10. Claimant's recuperation from the 1977 surgery ended July 28, 1978. (Claimant's exhibit 10)

11. Claimant was born May 19, 1925. (Application for arbitration)

12. Claimant has a high schobl education and an Associate of Arts degree from a junior college. (Transcript, page 70)

13. Claimant has been a janitor, a member of the armed services (Navy, with training in visual communications), a clothing salesman, construction worker, shoe salesman, service station attendant, mail handler, outside representative for a finance company, commission agent for Standard Oil Company, and oil jobber. (Transcript, pages 71-74)

Conclusions of Law

On August 11, 1976, claimant sustained an injury which arose out of and in the course of his employment.

The injury caused permanent partial disability of thirty percent (30%) of the body as a whole for industrial purposes.

The healing period extended from August 11, 1976 through July 28, 1978, a period of one hundred two and three-sevenths (102 3/7) weeks.

The correct weekly rates of compensation are one hundred seventy-four dollars ($174) per week for the healing period and one hundred sixty dollars ($160) per week for the permanent partial disability.

THEREFORE, defendant is ordered to pay weekly compensation benefits unto claimant for a period of one hundred two and three-sevenths (102 3/7) weeks at the rate of one hundred seventy-four dollars ($174) per week for the healing period and one hundred fifty (150) weeks at the rate of one hundred sixty dollars ($160) per week for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

Defendant is to pay the costs of this action as provided in Industrial Commissioner Rule 500—4.33, which shall include up to one hundred fifty dollars ($150) for witness fees of Doctor O'Donnell and the charges of the court reporter for attendance and transcription of the testimony.

A final report is to be filed when this award is paid.

. . .

Signed and filed this 19th day of August, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

SELMA C. FURLER,

Claimant,

vs.

QUAKER OATS,

Employer,

and

IDEAL MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed August 5, 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 consists of the transcript of the hearing; claimant's exhibits 1, 2, 3 and 4; and defendants' exhibit A.

The result reached by the hearing deputy will be modified slightly.

The facts clearly show that claimant fell at work and hurt her back and that later, while she was walking for exercise as recommended by an orthopedic physician, she hurt her right knee.

The first issue is stated by defendants: "[w]hether Claimant's knee injury is noncompensable because it did not 'arise out of and in the course of employment' within the meaning of Iowa Code §85.3(1)?"

The evidence is distinct enough that David Nade, M.D., recommended exercise and that claimant hurt her knee while so doing. In order to recover for the second injury (the knee injury), claimant must show that the disability was proximately caused by the first injury or that the second injury and ensuing disability were proximately caused by the first injury. *DeShaw v. Energy Manufacturing Company*, 192 N.W.2d 777, 780 (Iowa 1971). Although her work in April 1980 may have contributed to her knee condition, the problem seems to be more the sequela of the original injury. That is, it was because of the exercise that the knee condition arose. As such, it is compensable under the second proposition in *DeShaw*, cited above.

As a second issue on appeal, defendants state: "[w]hether claimant's chiropractic expenses for her back injury are noncompensable because not authorized by the employer within the meaning of Iowa Code §85.27?"

Section 85.27, Code, states in part:

> Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for determination, and the commissioner may, in connection therewith, utilize the procedures provided in sections 86.38 and 86.39 and conduct such inquiry as he shall deem necessary. Any institution or person rendering treatment to an employee whose injury is compensable under this section agrees to be bound by such charges as allowed by the industrial commissioner and shall not recover in law or equity any amount in excess of that set by the commissioner.

The record is unclear as to whether claimant first saw David W. Johnson, D.C. (her choice) or W. R. Basler, M.D. (employer's choice). She then saw James W. Turner, M.D., and subsequently, was treated by another orthopedic surgeon, Dr. Naden. Claimant has the burden of proof that the employer authorized her visits to Dr. Johnson or that they were of an emergency nature. Under the record, the first visit may be construed to be an emergency. However, the subsequent visits would not be so construed because claimant was under the care of an employer-chosen physician, and her visits to Dr. Johnson were by her own volition only. For that reason, only the charge for the first visit must be paid by the employer.

Defendants state the third issue on appeal: "[w]hether the determination that Claimant suffers a five percent (5%) permanent partial disability to her back is erroneous in light of expert testimony of a lesser disability?" The hearing deputy gave an award of 5% industrial disability for the back injury and 10% functional disability to the leg, for a total of 47 weeks of permanent partial disability. In view of the undersigned, the disabilities should be combined to create one industrial disability. As shown in the findings of fact, claimant is a middle aged woman with a limited education. Her work history has been that of an unskilled laborer. Thus, although she does have some measurable quantity of industrial disability because of the injury, the injury does not prevent her from continuing her work and should not be a major deterrent to other employment if such becomes necessary.

Consideration is given to claimant's functional disability, age, education, and relative ability to do the same type of work as prior to the injury. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963); *Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). Taking those factors into account in the instant case, claimant's industrial disability if found to be 10%.

Findings of Fact

1. On or about January 5, 1980, claimant hurt herself at work when she fell. (Tr. 8, 24)

2. The fall at work aggravated a preexisting degenerative disc disease in her lower back. (Claimant exhibit 4: Naden report January 9, 1981)

3. Soon after the injury, claimant's supervisor, Dorothy Higgens, told claimant to see a doctor if she (claimant) had "trouble". (Tr. 24-25)

4. Claimant saw Dr. Basler the employer-chosen physician and saw Dr. Johnson, the chiropractor, in 1980. (Tr. 37, 26)

5. Dr. Naden recommended claimant to exercises as a part of her treatment. (Tr. 27; claimant's exhibit 4: Naden note February 29, 1980)

6. While doing a trotting or walking exercise, claimant hurt her right knee on or about the Monday after Easter, 1980. (Tr. 28-29, 41, 42; claimant's exhibit 4: Naden note February 29, 1980)

7. Claimant had surgery on her knee on September 4, 1980. (Tr. 32)

8. Claimant's right knee condition was a traumatic effusion. (Claimant's exhibit 4: Naden note September 4, 1980)

9. Claimant has a permanent partial impairment to her back and to her knee as a result of her injury of January 5, 1980. (Claimant's exhibit 4: Naden reports, January 9, 1981, September 22, 1980 and October 16, 1980)

10. Claimant was born March 19, 1925. (Tr. 11)

11. Claimant has a sixth grade education. (Tr. 11)

12. Claimant's work has been as a houseworker, babysitter, waitress, and factory production worker. (Tr. 11-14)

13. At the employer, claimant worked as an insert dropper and a bottle dumper. (Tr. 14-16, 44)

14. Claimant began to work for the employer August 27, 1973. (Tr. 13)

15. Claimant is unable to perform all her customary work at the employer. (Tr. 23)

16. Claimant's first visit to Dr. Johnson was of an emergency nature. (Tr. 26)

17. Claimant's subsequent visits to Dr. Johnson were not authorized by the employer. (Tr. 37)

Certain matters on appeal were uncontested. The healing period awarded by the hearing deputy appears to be proper and is incorporated into the conclusions of law. Likewise, the weekly compensation rate, the mileage due under §85.27, and reasonableness of the medical bills appear correct.

Conclusions of Law

Claimant sustained an injury arising out of and in the course of her employment on January 5, 1980.

Because of her January 5, 1980 injury, claimant exercised her back by walking and in so doing hurt her right knee, thereby entitling her to benefits for a knee injury in addition to her back injury.

Claimant is entitled to industrial disability for her injuries.

Claimant's industrial disability is ten percent (10%).

Except for the first visit, claimant's treatment by Dr. Johnson was not authorized by the employer.

Claimant's healing period is for a period of twenty (20) weeks.

The proper rate of weekly compensation is one hundred sixty-nine and 74/100 dollars ($169.74).

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of twenty (20) weeks at the rate of one hundred sixty-nine and 74/100 dollars ($169.74) per week for the healing period and for a period of fifty weeks at the same rate for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

It is further ordered that defendants pay the following medical expenses to wit:

David Johnson, D.C.	$ 60.00
David Naden	846.00
Mercy Hospital	1,736.92
Anesthesiologists (Dr. Bates)	215.00

It is further ordered that defendants reimburse claimant twenty-two and 80/100 dollars ($22.80) in mileage.

Costs of this action are taxed to defendants.

Defendants are ordered to file a final report upon completion of payments.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

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

THOMAS H. GANN,

Claimant,

vs.

GRIFFIN PIPE PRODUCTS CO.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant appeals from a proposed review-reopening decision filed June 24, 1980 wherein claimant was awarded permanent partial disability as the result of an injury on October 12, 1978. Claimant's rate of compensation, as indicated in the memorandum of agreement previously filed in this proceeding, is $163.21.

The record on appeal consists of the transcript of the hearing which contains the testimony of the claimant, Connie Gann, Dorothy Gann, Lawrence Beard, Stanley Hall, and Tom Frieburg; claimant's exhibits 1 through 5, 7 through 9 and 11; defendant's exhibit A; the depositions of Carl H. Dahl, M.D., Ralph L. Hopp, M.D., Bernard Roy Cogley, Ph.D., John V. Fernandez, M.D., and Stephen C. Papenfuss, M.D.; Hopp deposition exhibits 1 and 2; Cogley deposition exhibit 1; and claimant's brief on appeal.

On October 12, 1978, claimant sustained an admitted industrial injury. On that date, claimant was attempting to empty a pan of hot slag with a fork-lift when the slag flared back and caught the claimant on fire. Claimant suffered burns over his face, ears, arms, legs, chest, and back necessitating hospitalization until November 4, 1978. Claimant returned to employment with defendant on December 10, 1978 without restriction. (Transcript, page 10.)

Claimant testified at hearing that since returning to work he has noticed a sensitivity to heat, restricted arm motion, and cramping in the legs. Claimant also contends that he has become irritable and socially withdrawn. Claimant voluntarily admitted himself for alcoholism treatment from September 12, 1980 through October 17, 1980 under an employee program of the defendant.

Claimant contends that remaining physical and psychological impairments justifies a finding of permanent partial industrial disability.

Claimant's brief on appeal sets forth the following issues for determination:

1. Did the deputy err in allowing medical examinations and depositions after hearing and in refusing claimant's request to submit rebuttal testimony by way of deposition if the said medical depositions were allowed?

2. Did the deputy err in his finding that the claimant had no permanent psychological problems as a result of his injury?

3. Did the deputy err in assessing claimant's permanent partial industrial disability rating at five percent, and if so, what percentage of industrial disability should the claimant have been awarded?

4. Did the deputy err in holding that the *American Medical Association Guides to the Evaluation of Permanent Impairment* are not independently admissible as probative evidence in a case under section 85.34(2), Code of Iowa?

Each issue will be addressed separately.

ISSUE I

WAS ERROR COMMITTED IN ALLOWING THE DEFENDANT'S LEAVE FOR MEDICAL EXAMINATION AND TESTIMONY AFTER HEARING?

The prehearing order of October 1, 1980 specifically states that medical depositions would be allowed thirty days after the hearing scheduled for October 22, 1980. Upon review of the record, full notice of the depositions was given, and all depositions were taken by November 20, 1980.

Iowa Industrial Commissioner 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 contested 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.

In each medical deposition taken, the deponent had examined the claimant prior to the date of the hearing. The admission of testimony in deposition as to such examinations was therefore in compliance with Rule 500—4.31 and proper.

Moreover, it should be remembered that not only did the deputy additionally leave the record open after hearing for the claimant to produce documents (transcript, page 5) but that claimant also enjoyed the right of deposing Dr. Cogley after the date of the hearing.

Finally, claimant asserts that the deputy should have allowed rebuttal of the testimony in deposition by Dr. Fernandez. In addition to having the opportunity to cross-examine Dr. Fernandez, claimant wished to introduce his own testimony in rebuttal to testimony of Dr. Fernandez relating to the question of alcoholism. Claimant seeks to introduce the issue of alcoholism contrary to his own stipulation set forth in the prehearing order of October 1, 1980.

The deputy's admission of the post-hearing depositions and the refusal of a rebuttal deposition was therefore proper.

ISSUE II

WAS ERROR COMMITTED IN FINDING THAT THE CLAIMANT HAD NO PERMANENT PSYCHOLOGICAL PROBLEMS AS THE RESULT OF HIS INJURY?

Claimant attempts to causally connect alleged psychological problems with burns he received on October 12, 1978. Claimant testified at hearing that since the injury of October 12, 1978, he has become more irritable, experiences nightmares and flashbacks about the incident, has become self-conscious about his personal appearance, and is more socially withdrawn. (Transcript, page 35.) Claimant testified: "I don't go swimming or take part in any activities where I'd have to take my shirt off or expose my legs. I've kind of restricted myself as to people I associate with as far as social gatherings or anything like this." (Transcript, page 35.)

Claimant also stated at hearing that he had several problems but refused to specify beyond saying that they were "mostly personal problems." (Transcript, page 58.)

Claimant's activities since the injury would indicate that his psychological functioning has not been significantly altered by his injuries, if at all. Claimant testified that he participated in a well publicized boxing match in the spring of 1980. Such participation required claimant to voluntarily expose most of his scars to the public.

Stanley R. Hall, superintendent of production for defendant, testified at hearing that claimant's productivity did not decline after his return to work on December 10, 1978 and that he classified claimant as a good, reliable worker. If claimant has developed psychological problems as the result of injuries, his public life does not show them.

The testimony of claimant's spouse, Connie Gann, as to claimant's behavior must be considered at arm's length given the interplay of alcohol abuse and marital strife present in their home life at the time of the hearing.

Bernard Cogley, Ph.D., testified in deposition that he is a licensed clinical social worker, family counselor, and psychologist. Dr. Cogley testified that he examined claimant on July 2, 1980 administering the Minnesota Multiphasic Personality Inventory or MMPI. Dr. Cogley indicated that MMPI testing showed the presence of depression and anxiety:

> Q. Based upon your interviews, the test results, your education and experience, do you have an opinion as to whether or not Mr. Gann suffered a psychological impairment due to the burns he received?
>
> A. Yes.
>
> Q. What is your opinion?
>
> A. Well, I think that he suffered anxiety, depression, irritability, that kind of syndrome which is typical for anyone who experiences severe trauma.
> (Cogley deposition, page 8.)

Dr. Cogley concluded from MMPI test results that the injuries sustained on October 12, 1978 had created a psychological impairment which translated to a functional impairment of 20 percent to the body as a whole. (Cogley deposition, page 11.) Dr. Cogley felt that claimant's alcoholic problem was not sufficiently related to the trauma reaction to place his conclusions in doubt.

John Fernandez, M.D., a psychiatrist, testified by way of deposition that he examined claimant on October 21, 1980. This examination consisted of an MMPI, a clinical interview, and review of claimant's medical records. Dr. Fernandez noted that a number of circumstances were shaping claimant's psychological profile.

> Q. Doctor, with regard to his marriage situation, was there any history obtained as to whether or not the October 1978 injury was a pivotal time or was there a history of problems before that and a history of problems after October of 1978?

A. From what I gathered from him, there were some problems before which continued after. He feels they may have been aggravated a little bit by his accident, but he attributes the most significant problems, that his problems were due to his drinking. He does not see the accident as that big a problem psychologically and the marriage as his alcoholism. (Fernandez deposition, pages 11-12.)

Contrary to the opinion of Dr. Cogley, Dr. Fernandez felt that claimant did not display the symptoms of a stress or trauma reaction. (Fernandez deposition, page 28.)

Q. Based upon your examination, the history obtained from the patient, do you have an opinion as to whether or not this claimant at the present time has any psychiatric impairment or disability by reason of the occurrence on October 12, 1978, involving burns, based upon a reasonable degree of medical certainty?

A. There is a mild self-consciousness about his burns to expose himself to the public, but that is again questionable because of some of his other actions that he has done. He has not been whole and I think anybody feels poorly about it but he's able to cope with it quite well. He can joke about it and he states it does not bother him too much at the present moment. He still feels a little self-conscious and he does not like people staring at him if they see his scars. But otherwise, he does not — and it is my opinion, too, that he does not suffer any permanent psychiatric disability because of this.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 12, 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).

Given claimant's recent work history, his participation in a public boxing match, and the emphasis which he assesses to his problems with alcoholism, the opinions of Dr. Fernandez are given the greater weight. Based upon review of the record, there exists substantial evidence to support the deputy's finding that the injury of October 12, 1978 did not cause permanent psychiatric disability. Claimant has failed to meet his burden in proving his injury resulted in any permanent psychiatric disability.

ISSUE III

WAS ERROR COMMITTED IN ASSESSING CLAIMANT'S PERMANENT PARTIAL INDUSTRIAL DISABILITY RATING AT FIVE PERCENT?

Claimant contends that sensitivity and flexion restriction in scar tissue remaining from the injury of October 12, 1978 have resulted in greater permanent disability than that found by the deputy.

Stephen Papenfuss, M.D., who testified by way of deposition, stated that he specializes in dermatology and examined claimant on April 4, 1980.

Q. Could you tell us what the observations were on your gross examination?

A. On the gross examination all the areas of burn were entirely healed and scar tissue was intact. His hair was normally present and there was no loss of facial hair of the eyebrows. Spotty changes in pigmentation was noted on the forehead and the ears showed scarring with thickened skin and small dilated blood vessels. The right arm was marked by an area of scarring measuring approximately 17 by seven centimeters extending over the lateral and posterior portion. On the left arm burns extended from the metacarpal phalangeal joints on the back of the hand up the total arm. There was evidence of a burn over the palm also. All these scarred areas were hypopigmented. In many areas newer colors of hyperpigmentation discounted the depigmented areas. In a patchy distribution there was total loss of hair follicles. Examination of the leg revealed the left one to be involved with scar tissue over the lateral and posterior surfaces and once again, the most marked change was in lack of pigmentation and lack of hair growth. The right leg was somewhat less involved and the feet were entirely within normal limits. There were also small patches of hypopigmented tissue and scar tissue over the chest and on both buttocks. Examination of the nails and mucous membranes was normal. No evidence of loss of function due to motion across joints was noted. That completed the gross examination.

Q. Maybe I missed something, doctor, but were there any scars observed on the back of the patient?

A. Yes. On his back there was patchy formation of scar tissue with resultant hypopigmentation. This was most marked in the mid and upper left back over the left scapula. (Papenfuss deposition, pages 6-7.)

Dr. Papenfuss further testified that on examination of claimant, he found no loss of functioning in the limbs and joints, no thickening of the scar tissue or loss of skin pliability, and no evidence of skin cancer or actinic keratosis. (Papenfuss deposition, pages 22-24.)

Dr. Papenfuss opined, however, that claimant did suffer a permanent functional impairment due to the sensitivity of scarred and hypopigmented skin tissue. Dr. Papenfuss stated that this increased sensitivity over portions of claimant's body, limited toleration to heat and sunlight thus restricting his activities. Dr. Papenfuss concluded that claimant is 20 percent permanently impaired due to scar tissue and hypopigmentation. (Papenfuss deposition, page 16.) This rating did not take into consideration the possibility of any psychological problem relating to the burns according to Dr. Papenfuss.

Carl Dahl, M.D., who testified by way of deposition, stated that he is a plastic surgeon and examined claimant on March 19, 1980 and November 5, 1980.

Q. Going to the November 5, 1980 examination, did you find loss of pliability of any of the areas of the skin?

A. He had improved greatly since the time that I saw him March 19 to where he didn't have any — I didn't think what he had would give him any functional difficulty.

Q. Thickening of the skin, what areas did you find where there was what you would call thickening of the skin?

A. Principally about the back of the arm.

Q. Any functional loss associated with the thickening of skin?

A. No, I don't believe so.

Q. Did you find any thinning of skin in your November 5, 1980 examination?

A. Yes. He had some which was present on the anterior neck, which I do not believe would give him any marked trouble. He had thinning of skin over the superior aspect of the ears, which I think would restrict his activities somewhat. (Dahl deposition, pages 7-8.)

Dr. Dahl opined that claimant's primary difficulty was scar tissue sensitivity to cold weather and increased vulnerability to abrasions. Dr. Dahl noted that claimant complained of the cold temperatures in March of 1980, but had no later complaints about sensitivity to either hot or cold temperatures.

Dr. Dahl continues:

> He's had no complaints referable to — and to say how many sweat glands or what he has lost, the two structures you mention are the deepest ones in the skin so that's improbable that he's lost an appreciable amount of that. What he's lost rather than hair follicles or sweat glands are some of the elastic fibers in his skin with partial thickness burns. Part of the thickness of the skin is destroyed and replaced by a single layer or very few layers of epithelial cells on the surface so the quality of the skin isn't the same as it was initially. What the structures that he's lost of the skin is the elastic fibers which allow you mobility and resistance to abrasion. The course of daily living, I think, is the best test of how severe this was. Over the extremities and the back, I thought this improved and he didn't have any difficulty with it. Over the ears I thought he had a thinning and this was significant. (Dahl deposition, pages 15-16.)

Dr. Dahl testified that as of the March 19, 1980 examination, claimant was estimated to have a functional impairment of eight percent of the body as a whole. As of the November 5, 1980 examination, Dr. Dahl felt that claimant's condition had improved justifying a functional impairment rating in the three to five percent range. (Dahl deposition, page 12.) Dr. Dahl testified:

> The skin was thinner and my impression at that time was this skin wasn't as supple over his extremities. The skin over his extremities and back had improved where essentially I think he has no functional difficulty remaining from the thinning and thickening I mentioned. He's had no complaints in that time. I think he still has a potential for some difficulty, which is why I think he has some disability, but not as severe as when I saw him in March. (Dahl deposition, page 13.)

Ralph Hopp, M.D., who testified by way of deposition, stated that he is a general surgeon. Dr. Hopp first examined claimant in an emergency room on October 12, 1978. Claimant remained under the care of Dr. Hopp through discharge from hospitalization on November 4, 1978.

Dr. Hopp testified that on admission to the hospital, claimant had first and second degree burns over approximately 55 percent of the body including third degree burns over minute areas of the legs. (Hopp deposition, page 5.) Dr. Hopp testified that upon discharge, claimant's burns were completely healed except for small scabs on the legs where the deepest burns existed. (Hopp deposition, page 8.)

Dr. Hopp examined claimant after discharge on November 17, 1978 and November 28, 1978. Again, Dr. Hopp noted that all areas had healed well and that claimant had almost complete range of motion in his limbs. Claimant was then given a full release to return to work on December 11, 1978. (Hopp deposition, page 9.)

Dr. Hopp concluded that claimant suffered no permanent functional impairment as the result of his injury of October 12, 1978.

Claimant contends that because of his injuries, he is having difficulty performing employment duties. Claimant contends that his work product continues to be limited because of problems with temperature and restricted body movement.

The testimony at hearing of Mr. Hall, defendant's plant supervisor, indicates that claimant's job productivity did not decrease after the injury of October. Mr. Hall noted that claimant was an eager worker who has successfully bid for and performed a number of jobs with defendant. Mr. Hall stated that claimant reported discomfort only one occasion shortly after returning to employment. Claimant was issued protective clothing to cover exposed scars from heat.

Thomas Frieburg, plant personnel manager for defendant, testified that there were approximately thirty-five jobs which could be bid for. Mr. Frieburg stated that claimant was classified as eligible to perform any of those jobs.

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).

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

In his decision of June 24, 1980, the deputy writes:

> Claimant's functional impairment is only one of the considerations in determining his industrial disability. Claimant is thirty-four years old and received a GED while in the military. Claimant's work history includes managing a shoe store, lumber inspector and foreman, laborer in factories and construction work. Claimant's injury has not stopped him from his duties with defendant and claimant has actually advanced while in defendant's employment by bidding and obtaining better jobs. The evidence does not indicate that he would be unable to handle any of his former positions as a result of the injury. It must be remembered that claimant was released without restrictions. Even claimant's psychological problems which have previously been determined as unrelated to his injury have not warranted a change in employment. The greater weight of evidence indicates that claimant's job with defendant is somewhat secure and has in no way been endangered by his injury. It is determined that claimant's industrial disability is 5 percent of the body as a whole.

While the evidence shows that claimant has no work restrictions or a functional loss of motion as the result of his injuries, there is conflict in the record as to whether claimant suffers permanent impairment as the result of sensitivity of scar and hypopigmented tissue. The fact that claimant has had minor complaints of discomfort lends credibility to the deputy's finding that claimant suffers a 5 percent permanent industrial disability.

ISSUE IV

WAS ERROR COMMITTED BY THE DEPUTY IN HOLDING THAT A.M.A. GUIDES TO EVALUATION ARE NOT INDEPENDENTLY ADMISSIBLE AS PROBATIVE EVIDENCE?

The hearing transcript outlines this evidentiary dispute accordingly:

MR. COMES: Claimant would offer into evidence pertinent chapters from the Guide to Evaluation of Personal Impairment as prepared by the American Medical Association. These would be chapter 12 dealing with skin disabilities, including burns, and also chapter 13 dealing with mental illness. I have prepared photocopies of pages 143 through 157, which cover the appropriate chapters, and I would ask the Commission accept the photocopies of these pages instead of the original book.

THE COMMISSIONER: Any objection?

MR. THORN: For what purpose is the Exhibit being offered?

MR. COMES: Documentation of the rating of disability.

MR. THORN: Your Honor, I understand this is a claim for benefits under Iowa Code Section 85.34 paragraph 2.

Is that correct, Mr. Comes? --

MR. COMES: I'm not sure at this time, Mr. Thorn, as to what you are referring to.

THE COMMISSIONER: Are you talking about industrial disability?

MR. COMES: Yes.

MR. THORN: I would object to Exhibit No. 2 for the reason that it's hearsay, and I would direct the Court's attention that the Guide to Impairment — the Guide to the Evaluation of Personal Impairment published by the American Medical Association is recognized by our or by the rules of the Iowa Industrial Commissioner under Rule 2.4 but only as it relates to Sections A through R of the Code, and then to be used as a guide only; that any use for any other Sections is not permitted to the best of my knowledge and understanding of this Rule.

THE COMMISSIONER: Do you have any doctors that use it in your testimony?

MR. COMES: Two.

THE COMMISSIONER: You have two doctors that use it in their testimony?

MR. COMES: Yes. I believe Section 86.18 providing for the liberal rules of evidence and Section 17A.14 would both allow the use.

THE COMMISSIONER: It will be taken subject to the objection. (Transcript, pages 16-18.)

In his decision, the deputy indicates that he accorded the A.M.A. guides weight only as they related to the testimony of witnesses who used it. No where does the deputy indicate that the exhibit was inadmissible.

Iowa Industrial Commissioner Rule 500—2.4 states in part:

> *Guides to evaluation of permanent impairment.* The guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2)"a"-"r" of the Code. The extent of loss or percentage of permanent impairment *may* be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly... (Emphasis added.)

While Rule 500—2.4 does not require the exclusion of A.M.A. guides in the consideration of non-scheduled injuries, use of such guides would be subject to the same objections as other books, treatises and other professional literature regarding specialized areas of knowledge.

Further, Iowa Code section 17A.14 states in part:

> *Rules of evidence—official notice.* In contested cases:
>
> 1. Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be required to be submitted in verified written form.
>
> * * *
>
> 5. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

Given the experience and expertise of the deputy and the fact that the A.M.A. guides were considered in relation to medical testimony, the record does not indicate that the deputy's refusal to give the guides independent significance was in error.

Findings of Fact

1. That claimant, at hearing, was 34 years old and married with two children. (Transcript, page 22.)

2. That claimant has a GED and a diversified work history. (Transcript, pages 45-50.)

3. That claimant suffered extensive burns over 55 percent of his body while working for defendant on October 12, 1978. (Transcript, page 24.)

4. That as a result of forementioned injuries, claimant sustained permanent scarring and discoloration of skin over burned portions. (Papenfuss deposition, pages 6-7.)

5. That claimant's burns resulted in increased sensitivity to temperature and light. (Dahl deposition, page 9.)

6. That claimant has a history of alcohol related problems. (Fernandez deposition, page 12.)

7. That claimant's ability to engage in gainful employment has not significantly been diminished as a result of the forementioned injury. (Transcript, page 107.)

8. That as a result of forementioned injury, claimant was off work from October 12, 1978 until December 10, 1978. (Transcript, page 31.)

Conclusions of Law

That error was not committed in allowing the introduction into evidence post-hearing medical depositions.

That the injury of October 12, 1978 has not caused psychological problems creating an industrial disability.

That error was not committed by the deputy in refusing to independently consider the *American Medical Association Guides to Evaluation of Permanent Impairment* as probative evidence.

That claimant is entitled to healing period benefits from October 12, 1978 until December 10, 1978.

That as the result of injuries sustained on October 12, 1978, claimant is five percent permanently industrially disabled.

WHEREFORE, it is found:

That the findings of fact and conclusions of law in the deputy's decision of June 24, 1981 are proper and together with those set out herein are adopted as the final decision of this agency.

THEREFORE, defendant is to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at a rate of one hundred sixty-three and 21/100 dollars ($163.21) per week and eight and four-sevenths (8 4/7) weeks of healing period benefits at a rate of one hundred sixty-three and 21/100 dollars ($163.21) per week.

Defendant is to be given credit for any benefits previously paid.

Defendant is to pay the cost of the original review-reopening proceeding. Costs of the appeal are taxed to appellant.

Payments that have accrued and are unpaid shall be paid in a lump sum together with statutory interest pursuant to Code section 85.30.

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

* * *

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

ROBERT C. LANDESS
Deputy Industrial Commissioner

No Appeal.

LUIS GARCIA,

Claimant,

vs.

HON INDUSTRIES, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 23, 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. The case was submitted for a decision on March 1, 1982. Claimant appeals from an adverse arbitration decision.

The record on appeal consists of the transcript; the deposition of Steven Ronald Jarrett, M.D., and the deposition of Thomas Lehmann, M.D.; claimant's exhibits A through T, inclusive; defendants' exhibits 1 through 4, inclusive; and a joint stipulation filed April 29, 1981.

The result of this final agency decision will be the same as that reached by the hearing deputy; however, it is necessary to make certain specific findings of fact.

Findings of Fact

1. Claimant's testimony as to the time and nature of his alleged work incident is inconsistent. (Transcript, 10, 11, 38, 14, 35, 36.)

2. Claimant's testimony about whether or not he had back problems prior to the alleged work incident is inconsistent. (Transcript, 24; Stipulation filed 4/29/81.)

3. Dr. Lehmann's opinion was based upon an incomplete history. (Depo., 4, 5, 13-14.)

4. Claimant's back problems result from degenerative disc disease. (Jarrett depo., 15-18.)

Issues

The issues concern claimant's credibility and the medical evidence. The hearing deputy had a low opinion of claimant's credibility.

Applicable Law

Claimant has the burden of proof to show that he received an injury on the job. *McDowell v. Town of Clarksville*, 241 N.W.2d 904 (Iowa 1976); *Musselman v. Centr. Tel. Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967). The question of causal relationship between an alleged injury and the disability is in the realm of expert testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960). An expert's opinion based upon an incomplete history is not binding upon the industrial commissioner. *Bodish v. Fischer, Inc.*, 257 Iowa 516, 522, 133 N.W.2d 867 (1965).

Analysis

Claimant's inconsistent statements, referred to above, make it impossible to support a recovery in this case. Where the versions of the injury change, one cannot tell which version to believe. Further, Steven Jarrett, a qualified psychiatrist, was of the opinion that claimant's disability stemmed from degenerative disc disease. Dr. Jarrett's opinion is taken over that of Dr. Lehmann, a qualified orthopedic surgeon, because Dr. Lehmann did not have a complete history of claimant. Indeed, it seems improbable that the history would have been any more consistent than the evidence at the hearing.

Conclusion of Law

Claimant failed to prove that he sustained an injury which arose out of and in the course of his employment on or about

December 14, 1977.

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

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 15th day of April, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

B. RUTH GERVAIS,

Claimant,

vs.

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed September 18, 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 arbitration decision.

The record on appeal consists of the transcript; the deposition of Walter Eidbo, M.D.,, claimant's exhibits 1-9, inclusive; defendants' exhibits 1 and 2; and a defendants' exhibit received after the hearing, a report of Robert Hayne, M.D., dated April 10, 1981.

The result reached in this final agency decision will be the same as that reached by the hearing deputy.

Claimant began work for the employer on June 4, 1975. During October and November 1979, the period of time in question, her duties involved dragging heavy mail bags a distance of some 50 feet. She claims that on November 14, 1979, she strained her back while working with the heavy mail bags. Thereafter, she was hospitalized on some three occasions for low back pain but never had surgery.

The issue is stated by claimant in the appeal brief: "The sole issue presented by this appeal is whether the Deputy Industrial Commissioner erred in finding that the Appellant failed to prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the Appellee."

Claimant has the burden of poof. *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945); *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). It is not necessary that a special incident occur in order for claimant to prove a personal injury under the law. *Almquist, supra.* See also *Black v. Creston Auto Co.*, 225 Iowa 671, 281 N.W. 189 (1938). Matters of causal relationship are essentially within the realm of expert testimony. Lay testimony plus expert testimony of possible causation is sufficient to establish the causal link. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960). Expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974).

The opinion of Walter Eidbo, M.D., is that claimant has a strain to her low back and to her mid-back. Claimant's testimony, on the whole, shows her problem to be in the low back. Thus, as claimant's brief points out, evidence of preexisting mid back disability would not be good evidence to disestablish a low back injury. Also, one would agree with claimant's argument that the fact that claimant applied for disability benefits other than workers' compensation makes no difference as to the merits of the case. Nevertheless, in whatever manner one looks at claimant's condition, the evidence fails to show convincingly that there was a causal relationship between the work and the disability. Although the medical evidence shows a possible causal relationship, on the whole, such evidence is not strong enough to prevail here. The evidence shows that the treating doctors indeed treated claimant for a back condition but at the time did not assume they were treating her for a work injury; only retrospectively is it conceded that the work could have caused the condition.

Findings of Fact

1. Claimant's work at the employer included the daily dragging of 2 to 2½ heavy mail bags some 50 feet. (Tr., 22, 26.)

2. Claimant had back and leg pain on July 11, 1979. (Eidbo depo., 22; tr., 24.)

3. On October 26, 1979, claimant complained of muscle spasms in the neck and headaches and pain in the low back. (Claimant exhibit 7; Eidbo 25.)

4. On November 14, 1979, claimant had a strain of the right flank area and the lumbosacral spine. (Claimant exhibit 7; Eidbo 26.)

5. On December 1, 1979, claimant complained of pain between the shoulders and in the low back. (Claimant exhibit 7; Eidbo 29. See also tr., 33.)

6. On December 2, 1979, claimant was treated in an emergency room and subsequently hospitalized, complaining of pain in the dorsal spine from a November 1979 injury. She also complained of pain radiating to the right hip and leg. (Claimant exhibit 7; Eidbo 31-32. Tr., 24.)

7. On December 26, 1979 claimant was readmitted to the hospital for low back pain with radiation down the right side. (Claimant exhibit 7; Eidbo 36.)

8. Claimant was again hospitalized for back complaints in February of 1980. (Claimant exhibit 7.)

9. Claimant's involvement in an automobile accident on August 15 or August 17, 1980 did not exacerbate her back symptoms. (Eidbo 44-45.)

10. Claimant had a prior back injury in 1962. (Claimant exhibit 7.)

11. Claimant complained of back pain prior to her alleged injury in the fall of 1979. (Tr., 102-121, 131.)

12. Claimant has a strain of the lumbosacral spine and of the dorsal spine. (Claimant exibit 7.)

13. Claimant's back problems did not result from a work injury. (Eidbo 26, 52-53; Hayne report of April 10, 1981; Tr., 118, 131-132.)

Conclusion of Law

Claimant did not sustain an injury which arose out of and in the course of her employment on or about November 30, 1979.

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

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 27th day of October, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

JERRY GILGE,

Claimant,

vs.

FISHER CONTROLS COMPANY,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Jerry D. Gilge, against Fisher Controls Co., employer, and Insurance Company of North America, insurance carrier, for benefits as a result of an injury which culminated on September 5, 1980. On September 21, 1981, this case was heard by the undersigned. This case was considered fully submitted upon receipt of defendants' brief on September 29, 1981.

The record consists of the testimony of claimant, Kathleen Ann Gilge, George W. Longeman, Naomi Winkelman and Wendell Smith; claimant's exhibits 1 through 13; defendants' exhibits A through C; and the September 7, 1981 report of William R. Boulden, M.D. Official notice is also taken of claimant's file regarding his injury on June 5, 1975.

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, healing period and permanent partial disability benefits he is entitled to.

Facts Presented

Claimant testified he had a truck accident in June of 1975 which resulted in a broken sternum, hip and pelvis. Claimant stated he had no back pain prior to that accident or after it. Claimant stated he started working for defendant employer in February of 1977 and worked as a bar stocker. Claimant indicated his work with defendant employer requires him to obtain metal bars from racks and cut off desired lengths. Claimant indicated retrieving the metal bars required bending, reaching up, and carrying of bars weighing up to 125 pounds. Claimant disclosed that hoists were available for heavier bars. Claimant stated that inventory was taken once a year and lasted from the last week of August to the last week of September and was all done on overtime. Claimant testified he noticed his first back pain in the latter part of 1978 or the first part of 1979. Claimant stated his back pain intensified the more he worked. Claimant indicated that Carl O. Lester, M.D., gave him exercises to do in March of 1980 to relieve his back pain.

Claimant indicated he injured three fingers at work on August 28, 1980 and only worked four hours on August 29 because he started a vacation. Claimant indicated he had more pain in his back while digging some potatoes and on Labor Day was walking around his dining room table after getting up in the morning when he felt a knife-like pain going up and down his leg. Claimant stated he was taken to the hospital by ambulance and surgery was performed on September 8, 1980. Claimant indicated his pain had increased as time went on but did not ask for a different job because his job paid well.

On cross examination, claimant disclosed that he felt something pop in his back on Labor Day.

Kathleen Ann Gilge, testified she is claimant's wife and was with claimant when he tried to help her dig potatoes. Mrs. Gilge indicated claimant's leg and back were hurting him. Mrs. Gilge was also present when claimant started to scream in pain after walking around their dining room table. Mrs. Gilge also stated that when claimant came home from work he would be pale and tired.

George W. Longeman testified he was claimant's supervisor in 1980 and indicated he had seen claimant limp. Mr. Longeman also stated that claimant called him and said he had injured his back while digging potatoes.

Naomi Winkelman testified she is employed by defendant employer as head nurse. A review of claimant's file revealed no complaints of low back pain at work.

Carl O. Lester, M.D., who testified by way of report, indicated in a report dated March 10, 1980 claimant was having back problems as a result of a truck accident in 1975. The report indicated claimant had pain radiating down his leg. Claimant was hospitalized on September 1, 1980 and Dr. Lester took a history from claimant the following day. Dr. Lester's report reveals that claimant told Dr. Lester he had increased pain after digging potatoes which required him to be taken to the hospital by ambulance. On September 8, 1980, Dr. Lester performed surgery on claimant's back. In his report of October 16, 1980, Dr. Lester stated:

> In answer to your questions, the ruptured disc was doubtless a result of deterioration over a period of time, rather than a single episode of stress. As you know, the episode that brought him to the hospital was an episode that occurred in his garden when he was digging potatoes. Most of the time, using best medical judgement, this is simply the final act and not the cause of the herniated disc. His probable original cause was related to his automobile accident at which time he dislocated his hip. He had had trouble for a year prior and approximately during the year 1978 or early 1979 he started having back and leg problems. I have talked to Mr. Gilge about the type of work that he does, he lifts heavy bar stock and does this daily. This could account for some of the degeneration or deterioration of the disc in his case, however there is no clearcut evidence of injury at any time. I would state that this is a possible cause of his disc degeneration over the past year or two.

William R. Boulden, M.D., who testified by way of reports, reviewed claimant's charts for defendants. Dr. Boulden indicated a causal connection between claimant's truck accident in 1975 and his back problems.

Applicable Law

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 5, 1980 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 September 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). 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 opinion of an expert witness need not be couched in definite, positive or unequivocal language. *Dickinson v. Mailliard*, 175 N.W.2d 588, 593 (Iowa 1970). An expert may testify to the possibility of a causal connection, but the possibility, standing alone, is not sufficient — a probability is necessary to generate a question of fact or to sustain an award *Burt v. John Deere Waterloo Tractor Works, supra*. 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*.

Analysis

Claimant's petition alleges an injury which aggravated a preexisting condition. Claimant states that his repeated lifting of heavy bar stock resulted in degeneration and deterioration of his disc leading to herniation. The evidence does not support claimant's allegation.

The greater weight of evidence discloses a causal connection between claimant's truck accident in 1975 and his back condition. Such a conclusion is supported by the testimony of both Dr. Lester and Dr. Boulden. The greater weight of evidence also indicates that claimant's digging potatoes aggravated that preexisting back condition. This conclusion is supported by the history obtained at the time claimant entered the hospital, both by Dr. Lester and Dr. Boulden, and claimant's statement to Mr. Longeman.

Defendant's nurse stated that claimant never complained of back problems. No evidence presented indicated that other employees noticed claimant having any difficulty with his work. Claimant's wife testified that claimant was tired when coming home from work but being tired does not mean a person is being injured.

One might infer that claimant's work over a long period of time might cause injury but creating an inference of injury is not the same as proving an injury. As stated by Dr. Boulden:

> I feel that the leading cause was the truck accident of 1975. It is my opinion also that his job digging the potatoes did contribute to him to have the surgery. There are many other factors that have to be taken into consideration as far as the actual rupturing of the disc. The disc could have ruptured from any other causes besides his work and digging his potatoes. It wcould [sic] have been ruptured from a sitting position, it could have ruptured while he was driving a car; therefore, since he had a weakned [sic] disc with a history of right leg pain after the accident I feel the most likely cause is the accident in 1975.

Although Dr. Lester indicated he talked to claimant about his job and opined that it is a possible cause of his disc degeneration, it is not known if Dr. Lester knew claimant failed to make ahy complaints of back pain, and had machinery to help him do some of his heavy lifting. It is determined that claimant failed to prove he had an injury arising out of and in the course of his employment with

defendant employer or any disability was causally connected with his work.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. Claimant was involved in a truck accident in June of 1975 in which he broke his sternum, hip and pelvis.

Finding 2. As a result of his accident in June of 1975 claimant also injured his back.

Finding 3. Claimant's job with defendant employer requires claimant to move heavy bar stock.

Finding 4. Claimant had no injuries at work.

Finding 5. Claimant never complained of back pain at work.

Finding 6. Claimant was able to perform his work.

Finding 7. Claimant reinjured his back while digging potatoes.

Conclusion A. Claimant failed to prove he had an injury arising out of and in the course of his employment with defendant employer.

Conclusion B. Claimant's back problems are causally connected to his truck accident and his injury while digging potatoes.

THEREFORE, claimant is to take nothing from this proceeding.

Claimant is to pay the costs of this action.

* * *

Signed and filed this 17th day of December, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

Appealed to Commissioner; Short-Form Affirmed.

FRANKLIN W. GODWIN, JR.,

Claimant,

vs.

HICKLIN G.M. POWER,

Employer,

and

I.A.D.A. WORKMAN'S COMPENSATION GROUP

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by defendants seeking review of a proposed decision in review-reopening wherein the claimant was awarded 225 weeks of permanent partial disability.

On appeal, the record consists of the transcript of the review-reopening proceeding together with claimant's exhibit 1-5; defendants' exhibits A-K; joint exhibit 1; and the depositions of Donald W. Blair, M.D., and Roger Franklin Marquardt. The parties have filed briefs on appeal.

Defendants state the issue:

> The deputy industrial commissioner erred in finding that the claimant met his burden of proving by a preponderance of the evidence that he sustained impairment beyond a scheduled member and in awarding benefits on the basis on industrial disability.

Briefly, claimant injured his right shoulder on August 25, 1978 while trying to loosen a pulley and fan from an engine. He was off work until March of 1979. Then, because of the shoulder injury, he suffered an acute ruptured long head of the right biceps. Later, he was laid off work by the employer (not because of the injury) and has since found no other work. Marquardt, a rehabilitation professional, testified about certain work claimant would be able to do for the employer, namely to clean and rebuild "cam followers" and to act as a parts man; however, these jobs apparently ended along with claimant's erstwhile job at the time of the lay off.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 16, 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).

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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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 injury to the shoulder is an injury to the body as a whole. *Alm v. Morris Barick Cattle Company*, 240 Iowa 1174, 1177, 38 N.W.2d 161 (1949).

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 (1960), and again in *Olson v. Goodyear Service Stores, supra.* This department is charged with the statutory duty of determining a claimant's industrial disability. In an attempt to further clarify this issue, we quote from *Olson, Id.* at 1021:

> Disability* * * as defined by the Compensation Act means industrial disability, although function disability is an element to be considered [citing *Martin, supra,*]. In determining industrial trial 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 deputy commissioner stated in his decision that Dr. Misol concluded claimant has a "functional impairment of 36 percent of the whole man." (page 3) A close reading of the evidence reveals some problems with Dr. Misol's rating procedure. Further, the opinion of Dr. Blair, giving claimant a 15 percent "disability" of the right arm (Blair deposition, page 18), also presents difficulties.

In the latter case, Dr. Blair says claimant's disability is confined to the right arm and that disability is occasioned by the biceps tear. The examination of the right shoulder and arm is described in defentants' exhibit A:

> On examination at this time, there is tenderness described over the anterior aspect of the humeral head. Passively, the motions in the left shoulder are abduction 90°, flexion 150°, extension 45°, external rotation 5° and internal rotation 80°. As he attempts to flex the elbow against resistance, there is some generalized discomfort though the anterior aspect of the shoulder. The biceps is weak but there does not appear to be an excessive amount of distal bunching. This is apparent when compared to the left shoulder. There is again very definite tenderness noted over the long head of the biceps.

In the experience of the undersigned, flexion and extension are not measurements of shoulder impairment. Of course, Dr. Blair may be using a different rating guide than the one by the American Medical Association. (Although not used as evidence *per se*, the Guides to Evaluation of Permanent Impairment, published by the A.M.A., are recognized by the industrial commissioner as a valid method of determining such impairment [Rule 500—2.4, I.A.C.]). Dr. Blair's description of the shoulder, repeated in his deposition, is further confusing in its measurement of rotation; the *external* rotation is stated to be 5 degrees and the *internal* rotation, 80 degrees. By any guide, it would not seem that internal rotation from a neutral position could exceed 40-50 degrees; 80 degrees would seem improbable.

Thus, although Dr. Blair concludes that claimant has no disability in his left shoulder, the basis for that opinion is confusing enough to suggest that his zero rating to the shoulder be ignored.

To return to Dr. Misol, his letter of March 11, 1980 sets the impairment. In turn, his note of May 16, 1979 contains the measurements of shoulder manipulation. By those measurements, Dr. Misol states the impairment is 25-30 percent (of the arm, excluding the biceps tear). A check of the A.M.A tables, which Dr. Misol apparently used, shows that impairment to be correct. Then, he goes on in his note:

> . . . This, of course, does not take into consideration the amount of pain he has. He states that even his upper neck muscles and posterior muscles of the shoulder hurt and he has discomfort running down the arm to the fingers. When we add all of this and the amount of physical and mental strain together I think he has a physical impairment of the extremity at this time in the range of 45 to 50%.

However, the Guides do take pain into account in assessing impairment. In defining impairment (page iii), the Guides state:

> . . . Furthermore, unlike disability, permanent impairment can be measured with a reasonable degree of accuracy and uniformity, as it is evidenced by loss of structural integrity, loss of functional capacity, or persistent pain that is substantiated by clinical findings.

Pain that is unsubstantiated by clinical findings is not a part of impairment.

Thus, in evaluating Dr. Misol's evidence, it seems best to take his rating of 25-30 percent of the arm (for the shoulder impairment) and add the 10 percent for the biceps tears, giving a total of 35-40 percent of the arm, which translates into 21-24 percent of the whole person, a stark contrast to the 36 percent whole person rating postulated by the doctor.

Of course, the Iowa Supreme Court has pointed out that physical impairment is only one factor to be used in determining industrial disability (see above authorities). However, it is important here to look at that factor most carefully here, for it is the precipitating and residual element of claimant's troubles. Here, in addition to the 21-24 percent impairment rating, we have a man who was 49 at the time of the hearing, a high school graduate, who has had varied experience and some post high school courses in welding, automobile mechanics and small engine repair. He is a person who should be able to adapt rather well to his impairment. Although he testified that he was unable to find work since the injury, there were no specific details as to how his shoulder and arm condition prevented his finding employment, only the bare conclusion that he could not find work for that reason. (Transcript, page 38.)

In conclusion, claimant's industrial disability is serious, but not so serious as the deputy's assessment of 45 percent.

Findings of Fact

Claimant worked as an engine assembler and disassembler for the employer. (Transcript, page 20)

On August 25, 1978, claimant injured his right shoulder at the employer's premises while trying to remove a pulley and fan from an engine. (Transcript, pages 23-24, Misol notes, October 10, 1978, claimant's exhibit 1)

The character of the injury was a partial tear of the posterior aspect of the rotator cuff of the right shoulder. (Misol notes, October 10, 1978, November 7 and 28, 1978, and December 14, 1978, claimant's exhibit 1; see also Blair report, September 3, 1979, defendants' exhibit B)

On or about October 4, 1979 or October 7, 1979, claimant sustained an acute ruptured long head of the right biceps which was caused by the original injury on August 25, 1978. (Misol notes, October 9, 1979, claimant's exhibit 1, transcript, page 36, Blair deposition, page 7)

Claimant returned to work for the employer in March 1979. (Transcript, page 27)

Claimant was laid off work by the employer in April 1980. (Transcript, page 38)

Claimant has sought employment since the layoff. (Transcript, page 38)

Claimant has had classes in welding, automobile mechanics, and small engine repair. (Transcript, page 44)

Claimant's date of birth was June 24, 1931. (Transcript, page 15)

Claimant is married. (Transcript, page 15)

Claimant graduated from high school in 1950. (Transcript, page 15)

Claimant worked in a grocery store, 1950-1955. (Transcript, page 16)

Claimant worked for Iowa Electric Company as a meter reader and delinquent bill collector for thirteen years. (Transcript, page 17)

Claimant also worked at a truck stop and later drove a truck which transported mail. (Transcript, page 18)

Claimant also worked as a maintenance worker at a canning company and at Ideal Manufacturing Company. (Transcript, page 19)

Both the original injury to the right shoulder and the ruptured biceps are permanent. (Misol report, March 11, 1980, claimant's exhibit 1. Also Blair deposition, page 18 as to permanent impairment to the arm.)

The degree of permanent impairment is 21-24 percent of the whole man.

Conclusions of Law

On August 25, 1978, claimant sustained an injury which arose out of and in the course of employment.

As a result of said injury, claimant has sustained permanent partial disability as a whole for industrial purposes of 35 percent.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period on one hundred seventy-five (175) weeks at the rate of one hundred forty-three and 64/100 dollars ($143.64) to begin March 26, 1979, accrued payments to be made in lump sum together with statutory interest.

Costs of this action are taxed against the defendants.

Defendants are ordered to file a final report of payments upon the completion thereof.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MELVIN BYRON GOOD,

Claimant,

vs.

INTERNATIONAL PAPER COMPANY,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Melvin Byron Good, claimant, against International Paper Company, his self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury of October 25, 1979. It came on for hearing September 9, 1981 at the Muscatine County Courthouse in Muscatine, Iowa. It was considered fully submitted at that time.

A first report of injury was received by this agency on November 7, 1980.

The record in this matter consists of the testimony of claimant; of Lloyd Lanning, of James Parkorny, of Donald M. Cousins, and of Terry Gertson; claimant's exhibit 1, records of a hospital admission of December 1, 1979; claimant's exhibit 2, records from Arnis B. Grundberg, M.D.; claimant's exhibit 3, records from Iowa Methodist Medical Center as well as records from Dr. Grundberg; claimant's exhibit 4, outpatient emergency room records, lab reports, and x-ray reports; claimant's exhibit 5, a report from L. A. Sadlek, M.D.; defendant's exhibit A, records from Jackson County hospital; defendant's exhibit B, a deposition of Paul H. Koob, D.O.; and defendant's exhibit C, a statement of claim for accident and sickness weekly benefits.

Issues

The issues presented are whether or not claimant received an injury which arose out of and in the course of his employment, whether or not there is a causal relationship

between the alleged injury and his disability, and whether or not the claimant is entitled to healing period and permanent partial disability benefits.

Recitation of the Evidence

Claimant, who has been employed by defendant since May of 1960 and who is presently employed by defendant, testified that in October of 1979 his job title was press helper and he worked at feeding the presses. As he was preparing a load for the press, he snipped and was removing a steel strap which went around protective heavy paper on material to be inserted in the press. After the press was loaded, he observed a small one-quarter to one-half cut ahead of the middle knuckle and a bit to the side on the middle finger of his left hand and found blood on the wrapping paper. He denied feeling anything at the time he cut his hand. He recalled paper cuts on a number of occasions prior to this time and a laceration of his palm in February of 1978.

He claimed that Lloyd Lanning, acting supervisor, took him to the first aid area where peroxide and a bandage were applied. Claimant finished out the shift and continued to work. He was aware that injuries were to be logged, but he did not know if Lanning wrote anything down. Claimant asserted he was approached by Jim Pakorny who said something about his finger bleeding. Claimant assumed he had seen blood in the first aid room. Claimant also stated he later visited with someone in personnel whom he told he thought he had a sliver. Although the two examined his finger, they were unable to find a point of entry.

Claimant, who denied subsequent injuries, recalled that his finger healed, but then began to fester with swelling toward the end of the finger. He saw Dr. Koob who he said gave him antibiotics. He did not remember any incident or injury at the time he first had trouble with his finger. When Dr. Koob asked about an injury, claimant said he responded he thought he could have had a splinter. He did not mention a cut on the finger. He was hospitalized and two surgeries were performed. After his release from the hospital he continued therapy. Claimant denied filling out a form applying for accident and sickness benefits. Rather, he claimed his spouse had completed that form.

Although seemingly his wound started to heal, swelling went down further in his hand. Claimant described his condition at that time as worsening and stated his "skin wouldn't heal to flesh." Following x-rays he was sent to Dr. Grundberg who determined more surgery was needed and that surgery was carried out.

Finger problems continued and claimant remained on antibotics. Eventually he was rehospitalized for corrective surgery in September of 1980. His last treatment or medication for his hand was provided in December of 1980. Claimant admitted that his injury at the plant was related to his condition. He testified that the first time he told his employer he believed his finger problems were caused by the cut was about the time he went back to work in May of 1980.

Claimant was able to return to work in January of 1981 after his September surgery. His present complaint is of cramps that preclude his holding or his letting go. He claimed some difficulty with the press reloading process. He acknowledged that his right hand is his primary hand and the one he uses in his work.

Lloyd Lanning, pressman for the defendant, recollected claimant's receiving a cut; but he was unsure of both the time and the location of the cut claimant received. He recalled telling claimant to go to first aid, but he did not remember accompanying him there. He said the procedure would have been for the log to be filled out in the first aid area and for a second report to be prepared in the work area by the foreman. Lanning did not recall preparing a report for claimant.

James Pakorny, assistant pressman for defendant, stated paper cuts were common among the workers. Steel band cuts were less common. He did not remember when he worked with claimant, being approached by claimant with a cut on his finger, seeing blood on the floor, or having a discussion with claimant regarding his finger.

Donald M. Cousins, shift foreman for defendant, said that claimant would be on his shift from time to time. He had no recollection of claimant's having a cut; however, he did remember claimant's coming to him with a swollen finger. He was uncertain of the time, but he placed it before claimant entered the hospital. He stated that he told claimant to see a doctor. No report was filled out as he said claimant did not tell him the finger had been hurt or make any statement as to why it was swollen.

Terry Gertson, supervisor in employee relations for defendant, listed various duties including administering workers' compensation claims. He testified that his awareness of a cut at work came in September of 1980 when he got a call from the Industrial Commissioner's Office. He reviewed both the first aid reports and the foreman's reports and found no entries regarding a cut to claimant's finger. Gertson stated that notices are posted in the plant relating to reporting injuries and a portion of the union contract discusses it. Although he had knowledge of claimant's filing an action with the industrial commissioner, he said claimant had yet to personally report his claim for compensation benefits.

Paul H. Koob, D.O., saw claimant on November 23, 1979 for a mild gastroenteritis. The doctor's partner, Dr. Meyer, saw claimant on November 28 at which time claimant had developed swelling and redness of his left middle finger. Claimant was given Tegopen for what was believed to be a mild cellulitis or infection. Dr. Koob saw claimant for his finger on December 1, 1979. No history of injury was recorded. The doctor observed marked swelling and redness to the base of the finger which was beginning to move into the hand itself. He testified he saw nothing to suggest a cut or laceration. Claimant was hospitalized later in the day. The doctor's history recorded, "no known injuries." Intravenous medication was initiated by the doctor who believed claimant's swelling and pain was an indication of an abscess which was defined as "an area of infection that is walled off by fibers or scarring due to infection and accumulates with cellular debris, white cells, forming an exudate that we usually call pus, and causes considerable pain."

On December 2, 1979 an incision was made by R. A. Fernando, M.D., to drain the abscess. The wound was only

partially closed because of swelling.

On December 12, 1979 additional surgery in the form of exploration, debridement, and drainage was done by Duane B. Wilkins, M.D. Aerobic and anaerobic cultures taken at the time of each surgery failed to grow any organisms.

Dr. Koob, at the time of his deposition, discussed staphylococcus bacteria, a common type, which could be found anywhere. He acknowledged that trauma is "not necessarily" required for a staph infection. Another potential source is a sliver. He agreed that is never known why some staph infections appear.

As laboratory tests failed to grow bacteria at the time of the first hospitalization, the doctor was asked:

Q. Does that tell you anything in terms of what might have been the source for the Staphylococcus type infection?

A. No, it doesn't.

Q. I gather the fact you cannot get them to grow in the laboratory doesn't mean he didn't have a Staphylococcus infection?

A. No definitely, but it makes it kind of hard to prove that he did.

Q. Other than the Staphylococcus infection, what other types of infection or disease could be producing the type of flexor tendon damage that was described by both surgeons?

A. It — well, a different type of infection, possibly from a fungus or another type of irritant of some type, would cause abscess formation without actually being a bacterial infection.

Q. When you talk about a fungus type infection, included in that group would there be fungus organisms that are found in the human body as resident agents?

A. Possibly.

Q. As you think back to Mr. Good's case, did you form an opinion at the time as to what was the source of Mr. Good's infection in his finger?

A. I really didn't have any idea what the source could have been. I was completely at a loss for explaining it and that's why the consultations. I really didn't know how to treat it.

Q. Would it be fair to say that the consultations and resulting surgeries really did not produce and answer as to the cause for the infection?

A. That's correct.

Q. In fact, they kind of ruled out one of the things you thought might be the cause?

A. Yes.

Q. Namely, the staff [sic] infection?

A. That's correct.

The doctor was questioned about the time span involved in this case and this exchange followed:

Q. From your training and experience, doctor, would it be highly unusual that a person could have a cut say, 30 to 35 days before there was any swelling and have there still be a causal relationship going back to the original cut?

A. It would be unusual. I'm not a microbiologist, but depending on the type of organism, I could see it as a possibility; but it would be highly unusual.

Q. In the greater or vast majority of cases, doctor, is it a fact that if you have a laceration, and that is the source for an infection, that you usually note redness and swelling certainly within a week?

A. True. Correct.

Dr. Koob evaluated with defendant's attorney portions of the record of Dr. Fernando who performed claimant's surgery:

Q. In Dr. Fernando's record, as he's describing the scene inside the finger, he remarks that he opens up an area on the ulnar side of the finger. What side of the finger would that be, doctor?

A. Opposite the thumb.

Q. Towards the little finger —

A. Yes.

Q. — is that correct? And found pus in that area. Then this is the part I was interested in. He offers a statement, 'The patient's abscess probably started here and went into the flexor tendon.' Do you note that?

A. Yes.

Q. What's the flexor tendon?

A. It's — well, it's a group of several tendons that allow the finger to be flexed. In other words, down toward the palm.

Q. Are those tendons typically on the underside of the finger?

A. Yes.

Q. The side of the finger that would be facing the palm?

A. Palm; yes.

Dr. Koob assessed the surgery performed by Wilkins as extending the incision made by Dr. Fernando and occurring in the area of the flexor tendon sheath.

The doctor stated that had the claimant at some later time described a cut finger, a record would have been made.

Arnis B. Grundberg, M.D., orthopedic surgeon, saw claimant on January 15, 1980. Claimant gave a history of pain and swelling developing in the left long finger. At the time of the examination there was drainage from the incision on the radial aspect of the finger as well as drainage

from the proximal palm incision. The doctor found infection present in the flexion sheath, the distal joint, and the distal phalanx. After reviewing lab cultures, Dr. Grundberg admitted claimant to the hospital for treatment with IV antibiotics. On January 31, 1980 the doctor performed surgery to drain the distal joint and flexor sheath.

Claimant's finger continued to drain in February. X-rays showed that infection had partially destroyed the distal joint of the long finger. A culture taken in March grew a staph epidermidis. Dr. Grundberg found claimant's finger "stiff as a board" when he examined him in April. The surgeon thought claimant capable of returning to work in May of 1980.

After examination on September 30, 1980 Dr. Grundberg determined a flexor tenolysis would be helpful to the claimant. That procedure was carried out on the flexor profundus and extensor tendon on October 20, 1980. Claimant was seen subsequently on follow-up. On December 2, 1980 claimant's range of motion was zero to ninety-three degrees in metacarpophalangeal joint to forty-eight degrees in proximal interphalangeal joint, and forty-eight to fifty-five in the distal interphalangeal joint. It was believed claimant could return to work on January 5, 1981.

L. A. Sadlek, M.D., examined claimant on February 2, 1981. Claimant gave a history of cutting his left middle finger on a steel band. His complaints at the time of this examination consisted of pain, stiffness, swelling, tenderness, weakness, loss of grip, and difficulty lifting and carrying objects. Dr. Sadlek found swelling, weakness, stiffness, and deformity of the left middle finger. Some limitation of motion was present. X-rays showed "an absorption of the articulating surfaces of the mid and anterior phalanges with some spurring and flexion deformity" which the doctor thought might be due to an old injury or infection or rheumatoid arthritis. His diagnoses were: "Deupstrans [sic] contracture and laceration of the left middle finger with secondary infection of tendons and palmar spaces." The doctor commented that the claimant had a major industrial loss of his left upper extremity and rated his disability at eighty percent permanent.

Finding of Fact

That right-handed claimant is a press operator.

That claimant denied injury to his hand prior to October 1979.

That claimant developed swelling toward the end of his middle finger on the left hand.

That claimant was seen with swelling and redness of his left middle finger on November 28, 1979 by Dr. Meyer.

That claimant had four surgeries to his finger including a flexor tenolysis by Dr. Grundberg.

That claimant did not report an injury or incident to his finger at the time he first saw Dr. Koob.

That claimant's spouse completed an application for accident and sickness benefits.

That claimant never told Drs. Koob, Wilkins or Fernando that he thought his condition was related to cutting his finger at the plant.

That claimant believed he first told his employer that he thought his finger problem was caused by the cut at work when he returned to work in May of 1980.

That claimant's present complaints are of cramps and some trouble doing his job.

That Lloyd Lanning recalled claimant's receiving a cut but he did not remember preparing a report.

That James Pakorny recollected nothing relating to any cut claimant received.

That Donald Cousins did not remember claimant's cutting his finger but did recall his having a swollen finger.

That Terry Gertson first learned of claimant's allegations when he received a call from the Industrial Commissioner's Office in September 1980.

That Gertson reviewed the first aid reports and the foreman's reports and found no injuries relating to a cut to claimant's finger.

That Dr. Koob first saw claimant for finger complaints on December 1, 1979 and observed nothing suggesting a cut or laceration.

That Dr. Koob was unable to state what was the cause of claimant's infection.

That Dr. Koob thought there was a possibility of a causal relationship between a cut and swelling which developed thirty to thirty-five days later.

That Dr. Sadlek diagnosed claimant as having a Dupuytren's contracture and laceration of the left middle finger with secondary infection of the tendons and palmar spaces resulting in a major industrial loss of the left upper extremity.

Applicable Law and Conclusions of Law

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 "in the course of" relates to time, place and circumstances of the injury. *McClure v. Union County*, 188 N.W.2d 283 (Iowa 1971). An injury occurs "in the course of" employment when it is within the period of employment at the 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.

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).

Claimant alleges a cut to his finger as he was unbanding some paper in October of 1979. Had such an injury occurred while claimant was on his employer's premises, it would have been an injury arising out of and in the course of his employment. According to Gertson, defendant's records do not document a cut finger for the claimant. Lanning testified that he remembered claimant's getting cut, but he could not recall details. Pakorny's testimony supplies little support for either claimant or defendant's case. Cousins observed the swelling, but he did not recollect a cut. Although it seems company policy was to record injuries in two separate

entries, something as minor as a cut might have been overlooked as there was testimony that such injuries were commonplace.

Whether or not claimant did or did not cut his finger in October is not determinative of the outcome of his case in any event. The claimant has the burden of proving by a preponderance of the evidence that his cut finger in October of 1979 was the cause of his ensuing disability. *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). An award for benefits cannot stand on a showing of a mere possibility of causal connection between the injury and 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 587 (1946).

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 evidence must be based on more than mere speculation, conjecture, and surmise. *Burt, supra.* The opinions of experts need not be couched in definite, positive, or unequivocal language. *Dickinson v. Mailliard,* 175 N.W.2d 588 (Iowa 1970). An expert's opinion based on an incomplete history is not necessarily binding on the commissioner but must be weighed with other facts and circumstances *Musselman, supra* at 360, ____ . Expert medical evidence must be considered with all other evidence introduced bearing on causal connection. *Rose v. John Deere Ottumwa Works,* 247 Iowa 910, 76 N.W.2d 756 (1956).

The evidence is insufficient to allow claimant to preponderate on the issue of causal connection.

Dr. Koob recorded no observations regarding claimant's finger on November 23, 1979. The history taken by Dr. Koob, who testified that a good history is important and that he questioned claimant regarding trauma, at the time of claimant's hospitalization on December 1, 1979, states claimant's malady began on Tuesday and specifically notes, "no known injuries." The history summarized by Dr. Wilkins lists "no previous known history of any particular trauma, other injury, or other illness." X-rays showed "no evidence of any foreign body or bone disease or injury." Dr. Wilkins referred claimant to Dr. Grundberg who wrote of commencement of the problem on November 28, 1979. He made no notation as to any work related event. At no time do Dr. Grundberg's notes even hint at a causal relationship between a cut and the ensuing condition.

Dr. Sadlek comments that "Mr. Melvin Good sustained injury to his left middle finger as a result of his accident while at work in October 1979." Dr. Sadlek's examination, which was not made until February 2, 1981, took place after the filing of claimant's petition in October of 1980. Lesser weight is being given to the report of Dr. Sadlek as he was not the treating physician in the matter; his examination was done and his history recorded after the initiation of litigation; and his assessment of a major loss to the upper extremity seems a bit overstated.

THEREFORE, IT IS CONCLUDED that claimant has failed to sustain his burden of proving by a preponderance of the evidence that his disability is causally connected to an injury arising out of and in the course of his employment.

Order

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That costs of the proceedings as provided in Industrial Commissioner Rule 500—4.33 be taxed to defendants.

* * *

Signed and filed this 27th day of October, 1981

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

KEVIN GRANDSTAFF,

Claimant,

vs.

CONTAINER RECOVERY, INC.,

Employer

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Ruling

Now on this day the matter of claimant's motion for order compelling discovery comes on for determination. A resistance has been filed by defendants.

Claimant filed interrogatories to defendants. Claimant first asked if he had been under surveillance. Defendants responded that he had. Claimant next asked defendants to state "(a) Each date such surveillance was maintained; (b) The name, address, and job title of each investigator or other person who maintained such surveillance; (c) The activities that Claimant was engaged in during such period of surveillance; and (d) Each location at which such surveillance was maintained." Defendants responded: "The information requested in this interrogatory is objected to as it requests information which is privileged and confidential, is part of the attorney work product and provided to this attorney in preparation for and anticipation of litigation." Defendants' resistance cites Iowa Rule of Civil Procedure 122(c).

Industrial Commissioner's Rule 500—4.35 allows for the application of the Iowa Rules of Civil Procedure in contested case proceedings before the commissioner unless those rules are obviously inapplicable or in conflict with chapters 85, 85A, 85B, 86, 87, 17A or with the commissioner's rule. Rule 126(a) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, and other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Trial Preparation: Materials. Subject to the provisions of subdivision "d" of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision "a" of this rule in preparation and anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without due hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Iowa Supreme Court has held that "discovery rules are to be liberally construed to effectuate the disclosure of relevant information to the parties." *Pollock v. Deere and Co.*, 282 N.W.2d 735, 738 (Iowa 1979); *Schroedl v. McTague*, 169 N.W.2d 860, 865 (Iowa 1969). After reviewing the interrogatories and responses in this matter, the undersigned has concluded that defendants should provide claimant with the name, address and job title of each investigator or other person who maintained surveillance of claimant. That information should enable claimant to obtain discovery. No further order will be made absent an allegation of undue hardship.

THEREFORE, it is ordered:

That defendants answer claimant's interrogatory 16(b).

* * *

Signed and filed this 16th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

DAVID M. GREGG,

Claimant,

vs.

WILBUR FORD SALES, INC.,

Employer,

and

AUTO-OWNERS INSURANCE,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by David M. Gregg, the claimant, against Wilbur Ford Sales, Inc., his employer, and Auto-Owners, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an industrial injury which occurred on December 5, 1979. This matter was heard in Waterloo, Iowa on March 4, 1981. At the conclusion of the hearing it was agreed that upon the receipt of concurrent letter briefs the record was to be closed on March 20, 1981.

The record, based upon the undersigned's notes, consists of the testimony of the claimant, Ruth Roach and Earl Wilbur; joint exhibit A, medical report; joint exhibit B, medical report; joint exhibit C, payroll record; and defendants' exhibit 1, payroll record.

There is sufficient credible evidence contained in this deputy's notes to support the following statement of facts:

Claimant, aged 26, married with one dependent child, had been employed as an auto body repairman for Wilbur Ford since 1975. On November 9, 1979, however, a fire destroyed the auto body repair shop. On November 12, 1979 defendant-employer met with the employees of the body shop and agreed to retain them as employees of Wilbur Ford. Due to the fact that the working space was limited, the auto body repair shop was moved to another building and the shop employees would help in cleanup and construction. Because less auto body work could be done, and due to some change in employment duties, claimant's wages were reduced to $250 per week.

Claimant accepted defendant-employer's offer and did perform cleanup duties as well as performing some auto body work between November 9, 1979 and December 5, 1979 at which time claimant fell from a scaffolding and suffered the injuries under review.

The sole issue is whether or not claimant is entitled to workers' compensation benefits based upon an average weekly salary of $250, or based upon an average weekly wage of $398.94 computed on the basis of claimant's prior 13 weeks draw and commission while claimant was employed as a body repairman.

The bookkeeper later filled out the industrial commissioner's form figuring the average weekly salary for a 13 week period in compliance with Section 85.36(6), Code of Iowa 1979, as amended and which is outlined below:

> In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Defendants submit that Section 86.36, Code of Iowa, is dispositive of the issue of claimant's rate. In pertinent part, Section 85.36 provides as follows:

> The basis of compensation shall be the weekly earnings of the injured employee *at the time* of the injury. Weekly earnings means gross salary... to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured,... computed or determined as follows:
>
> 1. In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings. (emphasis added)

Defendants further contend that the parties entered into a new contract during the meeting that followed the fire.

Claimant contends that the commission pay did not end but rather his commission was reduced since he would work on fewer cars due to a space reduction, together with cleanup and construction duties. It should be further noted that none of claimant's other benefits such as vacation or profit sharing were terminated or changed as a result of the post fire meeting. At least the new arrangement was a temporary one pending the restoration of the destroyed shop.

With little or no guidance from the courts on this matter, it is concluded that Section 85.36(6) is controlling and the 13 consecutive calendar weeks immediately preceding the industrial injury under review are to be used in the computation of claimant's weekly entitlement.

The defendants' assertion that a new contract of employment was entered into following the fire is not born out by the facts. Claimant was paid commission subsequent to the fire and it therefore appears that Section 85.36(6) is applicable since it does provide for resolution of irregular wage payments as present here.

It was stipulated by the parties that the claimant earned a total of $5,186.24 for the 13 week period preceding the injury, resulting in gross weekly wages of $398.94, thereby entitling the claimant to a weekly rate of $237.61.

It was further stipulated that the claimant incurred a healing period of 27.57 weeks for which he received a weekly rate of $158.47 or a total of $4,391.88.

It was further stipulated that claimant sustained a functional impairment of ten percent of his left leg and five percent of his right leg and is entitled to an impairment as contemplated by Section 85.34(2)(s).

In applying the combined values table as contained in the Guides to Evaluation of Permanent Impairment as published by the American Medical Association and recognized in Iowa Industrial Commissioner Rule 500—2.4, it is found that the claimant has sustained a six percent impairment of the body as a whole as a result of the industrial injury under review.

WHEREFORE, after having heard and seen the witnesses in open hearing and after taking into account all of the credible evidence contained in this deputy's notes, the following findings of fact are made:

1. That the claimant, as a body shop repairman, received his weekly wages based upon his work activity and output.

2. That following a reduction in the amount of auto body repair work available through his employer, claimant's weekly wage was reduce.

3. That based upon the foregoing, claimant's wage computation is to be made in accordance with Section 85.36(6).

4. That the claimant sustained an admitted industrial injury on December 5, 1979, resulting in a healing period of twenty-seven point fifty-seven (27.57) weeks together with a permanent partial disability of six (6) percent of the body as a whole.

5. That claimant's rate of weekly entitlement is two hundred thirty-seven and 61/100 dollars ($237.61).

THEREFORE, it is ordered that defendants pay the claimant a healing period of twenty-seven point fifty-seven (27.57) weeks at the weekly rate of two hundred thirty-seven and 61/100 dollars ($237.61) together with statutory interest from the date due, with credit to be given to defendants for those amounts previously paid.

It is further ordered that commencing on June 17, 1980 defendants pay the claimant a permanent partial disability of the body as a whole of a thirty (30) week duration at the weekly rate of two hundred thirty-seven and 61/100 dollars ($237.61) together with interest from the date due.

Costs are charged to the defendants who are further ordered to file a final report within twenty (20) days from the date this decision becomes final.

* * *

Signed and filed this 5th day of August, 1981.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

BILLY HALL,

Claimant,

vs.

EBY CONSTRUCTION,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 16, 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.

The record on appeal consists of the transcript of the testimony of the hearing of May 28, 1980 and the hearing of June 29, 1981; the depositions of John T. Lux, Billy Hall, and Ivan Abdouch (which were marked in the May 1980 hearing as exhibits 1, A and B); the exhibits from June 29, 1981 hearing were marked claimant's exhibits 1-7; exhibits from May 28, 1980 hearing were marked A, B, C, and D, and 1-12, inclusive. Also a part of the record on appeal will be a letter dated January 15, 1982 from attorney Gregory G. Barntsen, addressed to the undersigned deputy industrial commissioner and attorney Sheldon Gallner. The attorneys are the lawyers for defendants and claimant respectively.

The result of this final agency decision will be identical to that of the hearing deputy. The findings of fact and conclusions of law are those of the undersigned deputy industrial commissioner.

Claimant hurt his back while working for the employer on August 15, 1977. On October 12, 1978, he had surgery for a ruptured disc in his low back. A life long laborer, claimant's physical problems affected his mental state and he became very depressed. A course in auto body and fender repair and painting and phychiatric treatments, along with treatment for his physical problems, have not resulted in enabling claimant to return to any sort of work.

The issues on appeal concern (1) an overpayment which resulted from a prior partial commutation of weekly benefits; (2) the hearing deputy's alleged failure to reconcile the expert medical testimony; and (3) the hearing deputy's alleged failure to support his decision by correct findings of fact and analysis.

Section 85.48, Code, states:

> When partial commutation is ordered, the industrial commissioner shall fix the lump sum to be paid at an amount which will equal the future paymants for the period commuted, capitalized at their present value upon the basis of interest calculated at five percent per annum, with provisions for the payment of weekly compensation not included in such commutation, subject to any provisions of the law applicable to such unpaid weekly payments; all remaining payments, if any, to be paid at the same time as though such commutation had not been made.

As to the question of the extent of claimant's disability, claimant has the burden of proof. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). Claimant's disability is industrial, reduction of earning capacity and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, and relative ability to do the same type of work as prior to the injury. *Olson, supra; Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). Direct evidence is not always essential to establish the permanency or future effects of an injury, and they may in some cases be inferred from the nature of the injury alone. *Katlenheuser v. Sesker*, 255 Iowa 110, 121 N.W.2d 672 (1963).

At the request of the undersigned deputy industrial commissioner, defendants' lawyer wrote a letter dated January 15, 1982, which explained the circumstances of the overpayment. It is understood that the claimant agrees to the description of how the overpayment was made. In part, the letter states:

> The overpayment resulted as a result of the parties entering into a partial commutation in the spring of 1979. At that point the parties agreed to a 30% industrial disability and on that basis the Deputy Industrial Commissioner approved a partial commutation. After the partial commutation was entered the claimant filed a review-reopening petition claiming that the claimant's condition had changed and that he was entitled to additional benefits. A decision was rendered and the Deputy Industrial Commissioner determined the claimant's condition had worsened both physically and mentally and that he was still healing. Consequently, the majority of the funds paid by the insurance company for the partial commutation turned out to be an overpayment since the current decision holds the claimant has a permanent partial [sic] disability and is entitled to benefits for life.

There is no doubt that claimant should somehow repay the $9,262.50 overpayment. Defendants' continuing the payments to claimant pursuant to the original reopening decision was a good-faith effort to comply with the deputy industrial commissioner's order. The method of repayment presents some difficulty; however, a good routine would be to allow defendants to deduct $25 per week from claimant's weekly indemnity payments for a period of 371.7 weeks. ($9,262.50 ÷ $25 = 371.7)

Issues 2 and 3 may be discussed together. It should be emphasized that Maurice P. Margules, M.D., a qualified neurosurgeon, rated claimant's permanent partial impairment as a result of the injury and subsequent surgery at 25 percent of the body as a whole (Margueles report, March 12, 1980). It is the experience of the undersigned deputy industrial commissioner that a rating of 25 percent permanent partial impairment to the body as a whole as a result of such an injury and low back surgery is high. It indicates that the surgeon did not obtain a result as good as

hoped for. Because of the physical problems, claimant was enrolled in and completed a course in auto body and fender repair and painting. However, psychological problems along with physical pain in his back prevented him from successfully entering the job market. As he put it, it was too painful an occupation and he went "all to pieces" (Tr., June 29, 1981). And, as of May 1980, vocational rehabilitation counselor John T. Lux did not believe claimant was capable of working in auto body and fender repair and painting work. (Lux depo., p. 21)

Claimant was treated by John V. Fernandez, M.D., a qualified psychiatrist, for the mental problems. In May of 1980, claimant had shown some progress, but in August 1980, his prognosis was described by Dr. Fernandez as "extremely guarded" and remained "guarded" in October 1980. (Reports, August 15, 1980 and October 6, 1980.) In February 1981, Dr. Fernandez rated claimant at "ten percent for psychiatric reasons." (Report February 25, 1981.) In that report Dr. Fernandez explained that claimant's psychiatric problems were complicated by his socioeconomic status, lack of education, and some belief that claimant does not desire to return to work. (Of course, in the background of claimant's psychiatric problems there remains the physical difficulty.)

Claimant was examined by John D. Baldwin, M.D., a qualified psychiatrist in February 1981. His view of claimant's psychiatric prognosis was perhaps less sanguine than that of Dr. Fernandez: claimant is "in all likelihood, going to have ongoing emotional distress as a result of this and probably is going to be somewhat chronically depressed indefinitely." (Report February 11, 1981.)

Thus, in the face of his own prior statement that claimant's prognosis is extremely guarded or guarded and Dr. Baldwin's opinion that claimant's depression will last indefinitely, Dr. Fernandez opines that claimant's condition has now stablized and results in a 10 percent permanent partial impairment. However, to this deputy industrial commissioner the inference from all the psychiatric evidence is that claimant's work related depression along with physical pain now renders him unfit for work. To the time of the hearing in June 1981, claimant had not worked for some 3 1/2 years, because of physical and psychiatric symptoms, and a mere recital of numbers representing permanent partial impairment does not mean that claimant is able to work, see *Katlenheuser, supra.*

It should be noted that whereas §85.34(3) speaks in terms of permanent total disability, the statute also says that payments are to continue "during the period of the employee's disability," implying the possibility that over the passage of time, claimant might regain some capacity to earn. Such may be the case here, and it is hoped that claimant and defendants will work together in an attempt to minimize the claimant's disability.

Findings of Fact

1. Claimant sustained an injury arising out of and in the course of his employment on August 15, 1977.

2. Defendants made an overpayment of $9,262.50 because they were ordered to switch from permanent partial disability payments to payments for a running healing period subsequent to a partial commutation of the permanent partial disability payments. (Barntsen letter, 1-15-82)

3. Claimant had surgery for a herniated lumbar disc at L4-L5 on October 12, 1978. (Margules operative report typed 11-6-78)

4. As a result of the injury, claimant has severe reactive depression, chronic radicular pain and psycho-physiologic musculoskeletal reaction. (Baldwin, 2-11-81)

5. Claimant's psychiatric prognosis is guarded. (Fernandez report 8-15-80, 10-6-80)

6. Claimant's depression was caused by the injury. (Fernandez, 10-6-80)

7. Because of the injury and subsequent surgery, claimant can no longer work as a laborer in the construction field. (Margules report 10-27-79; Skultety report 4-18-78)

8. Claimant has a permanent partial impairment as a result of the injury of 25 percent to the body as a whole. (Margules report 3-12-80)

9. Claimant's entire work career has been as a laborer, mainly in the field of construction. (1981 tr., p. 7)

10. Claimant has an eighth grade education. (1981 tr., p. 7)

11. Claimant attempted vocational rehabilitation by attending a school to learn auto body and fender repair and painting. (1981 tr., pp. 8-9; Lux depo., pp. 18-21)

12. Claimant is unable to work in the field of auto body and fender repair and painting. (1981 tr., pp. 8-9; Lux pp. 18-21)

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of his employment on August 15, 1977 and which resulted in his being permanently and totally disabled from work.

As a result of a good-faith overpayment, defendants are entitled to be reimbursed in the amount of nine thousand two hundred sixty-two and 50/100 dollars ($9,262.50).

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant under the provisions of §85.34(3) for permanent total disability, said payments to continue during the period of the employee's disabiliity, at the rate of one hundred ninety-five and 43/100 dollars ($195.43) per week, less twenty-five dollars ($25) per week until the nine thousand two hundred sixty-two and 50/100 dollars ($9,262.50) is repaid.

Defendants are further ordered to pay Dr. Frenandez five hundred ten dollars ($510).

Costs of this proceeding are taxed against defendants.

Defendants are ordered to file a final report upon completion of payments.

* * *

Signed and filed at Des Moines, Iowa this 29th day of January, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

DOROTHY L. HANKINS,

Claimant,

vs.

PHIL HUNGET d/b/a FRIENDS AND NEIGHBORS SUPPER CLUB,

Employer

and

NORTHWESTERN NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Dorothy L. Hankins, claimant, against Phil Hunget d/b/a Friends and Neighbors Supper Club, employer, and Northwestern National Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on December 16, 1978. A hearing was held before the undersigned on May 19, 1981. The case was considered fully submitted upon receipt of the trial transcript on June 12, 1981.

The record consists of the testimony of claimant and Richard Dale Hankins; claimant's exhibits 1 through 11; and defendants' exhibits A and B.

Issues

The issues presented by the parties at the time of the hearing are the extent of temporary total, healing period and permanent partial disability benefits she is entitled to; and her rate of compensation.

Facts Presented

Claimant received an injury arising out of and in the course of her employment with defendant employer on December 16, 1978 when while making coffee, she felt pain in her back. A little while later when she was attempting to get a plate out of a cupboard below waist level she bent over and was unable to straighten up. Claimant stated her husband helped her up and she was able to make it the rest of the day. Claimant indicated that when she got home the pain increased so the following Monday claimant went to see a doctor. Claimant was given muscle relaxants and Empirin and worked for 2 more weeks. On January 2, 1979 claimant saw M. H. Peterson, D.C., at the defendants' suggestion. Dr. Peterson gave claimant manipulations and put her on a month's bedrest.

On April 13, 1979 claimant started working for Lauridsen Foods at $6.00 per hour because defendant employer had closed the cafe. Claimant worked for Lauridsen as a ham packer and canner until July 30, 1979. On July 30 or 31, 1979 claimant was seen by D. E. Fisher, M.D., on a referral from Dr. Peterson. Claimant indicated she would have her good days then bad days.

On August 1, 1979 claimant had a herniated disc removed. Claimant returned to work on October 1, 1979 but had a problem tolerating the standing so remained off work from October 2, to October 29, 1979. Claimant continued to work for Lauridsen Foods until February 7, 1980 when she was told by her supervisor that they did not have part-time work and suggested that claimant quit or be fired. Claimant testified she had no injuries while working for Lauridsen Foods but indicated she did have 58 hour work weeks.

Claimant stated she looked for work with 15 employers but was unable to find work and only filled out 2 job applications. For 3 days she worked for a school because the cook was sick. Claimant states that she would like to work but has transportation problems outside the Corwith-Britt area.

Claimant stopped seeing Dr. Fisher in September of 1979 and did not see him again until November of 1980 when her back pain again increased. Claimant stated:

Q. All right. Now, I've tried to bring you up to the point where you were seeing Doctor Fisher again almost a year later in November '80.

A. Uh-huh.

Q. And you said you were starting to have more pain. Would you describe this pain as similar or dissimilar to the pain that you had before the surgery?

A. It's somewhat similar, with the exception that the pain hasn't started radiating down my legs yet. It's just into the buttocks and the lower back.

Q. Did you have pain into your leg or legs before this surgery?

A. Yes, sir. Into my right leg.

Q. And have you experienced any pain in your right leg now since the surgery?

A. Umm, it's more an ache than a pain. It's just the — The only way I know how to describe it is a dull toothache is the way it aches.

Q. Now, do you have any other complaints of pain or any other indications of pain other than low back pain?

A. No, sir.

Claimant went on to state she now has pain in both buttocks whereas before the operation she only had pain in the right

buttock. Claimant indicated she is presently on medication, exercises, walks a lot and tub soaks. Claimant indicated prolonged standing or sitting is uncomfortable.

Claimant revealed that at her attorney's request she was seen by John R. Walker, M.D., in April of 1980. Claimant also sought vocational rehabilitation without any results other than obtaining her G.E.D.

On cross-examination, claimant revealed that none of the places she tried to obtain employment indicated that her physical condition in any way affected their decisions about hiring claimant. Claimant also revealed that in 1980 she was hospitalized by a Dr. Powell because of depression and an alcoholic problem. Claimant testified that she averaged 50 1/2 hours of work with defendant employer per week.

In talking about unemployment benefits, claimant stated:

Q. And from what I read here this afternoon, apparently you were able to satisfy the deputy or the hearing officer or whatever person may have been that you were eligible for work and actively seeking work in order to be able to be eligible; is that correct?

A. Yes, sir. Yes, sir.

Q. And did you continue to stay in that status so that you continued to receive unemployment benefits until your period of eligibility expired; is that correct?

A. Yes, sir.

Richard Dale Hankins testified he is claimant's husband and was present when claimant was unable to straighten up. Mr. Hankins stated he could tell claimant was in pain because of how she moved and limped. Mr. Hankins indicated claimant's condition remained the same for some period. Mr. Hankins testified that immediately after the surgery claimant was better but then seemed to get worse again. Mr. Hankins supported claimant's statements regarding her pain. Mr. Hankins stated:

Q. Your wife has indicated to us that she would like to find other employment. What is your observation with respect to that?

A. Well, I know she would like to work. She doesn't have to work. We're not in the money problem where she has to work, but just the two of us together, she doesn't like to stay around home by herself.

Q. Based upon your knowledge of your wife, do you think she is or is not motivated to return to work?

A. I believe she wants to work. I know she wants to work.

M. H. Peterson, D.C., who testified by way of report, stated he first saw claimant on January 2, 1979 and ordered complete bedrest. On April 11, 1979 Dr. Peterson dismissed her because she was pain free with normal range of movement. Claimant then returned to see Dr. Peterson on May 21, 1979 with the return of low back pain and right leg and foot pain. Dr. Peterson continued to see claimant. Dr. Peterson indicated that claimant was again pain free on May 30 and June 8, 1979. Dr. Peterson stated:

She was in my office again on July 28 in severe pain. Had been working long hours while packing hams which weighed 4 to 5 lbs. She could not recall any injury at work except the long hours. I instructed herto [sic] get to bed, and I would get her an appointment with an orthopedist if she was not improved on July 30, 1979. She was not improved, and an emergency appointment was made for her for the same day.

Dr. Fisher examined her in his office and performed surgery for a herniated lumbosacral disc on August 1, 1979. I have not seen Mrs. Hankins since July 30, 1979.

D. E. Fisher, M.D., an orthopedic surgeon, who testified by way of report, stated the following in his report of January 28, 1980:

Symptomatically she had signs and symptoms of a herniated intervertebral disc when I examined her July 30, 1979. She was admitted to NIMC on July 30, 1979, and had a myelogram which demonstrated an extradural defect of the lumbosacral space on the right suggestive of a herniated disc. She was taken to surgery the following day where under general anesthesia an extruding disc was found of the lumbosacral joint and relieved. She had relief of her sciatica several days following surgery as she proceeded with post-operative ambulation and recovery. She was dismissed from NIMC on August 8, 1979, and followed there on a regular post-op basis until October 2, 1979.

I allowed her to return to work October 1 though her job of 55-60 hours per week was in my opinion too stressful and I recommended that for at least one month she pursue only half time work on her former job.

In my opinion, she has a permanent partial physical impairment of 5% of the body as a whole after successful removal of a single level herniated disc.

I told her she could resume her former job of meat packing lifting 40 pound hams at the Lauridsen Foods but was to restrict stooping, bending, shoveling and heavy lifting for the next 4-6 months. She was dismissed from further required followup when I saw her October 2, 1979.

In his report of April 20, 1981, Dr. Fisher states:

I have recently reexamined Mrs. Dorothy Hankins on 3-9-81 and 4-3-81.

It is now 1 1/2 years since her surgery. She is persisting in having some low back and left leg pain. She has been on Tylenol with Codeine for pain relief and has been on restricted activity level doing very little of her homework.

It has recently become obvious that she has gained considerable weight. I would estimate that she is about 50 lbs. over ideal weight at this time. I have asked her to start a strict reduction diet. If her left sciatica

continues, she will probably require repeat myelogram evaluation.

I am scheduled to see her again in 2 months and will make that decision at the time. At the present time it is obvious that her permanent partial impairment rating is currently greater than 5% of the body as a whole and I will wait until we have resolved her current difficulty before that is given final assessment.

John R. Walker, M.D., who is an orthopedic surgeon and testified by way of report dated April 4, 1980, stated:

Physical examination today reveals a well-developed, well-nourished, pleasant female, in no acute distress. She does get up and down from the examining table, somewhat slowly and guards her low back and leg. She has a well-healed, not particularly tender, four inch scar overlying the lumbosacral area. Back motion is fairly good. She can bend down and come within about three inches of touching her fingers to her toes, however, this causes a good deal of pain and pulling in the sciatic notch on the right side and it is uncomfortable and gives her some back ache as well. Leg lengths are equal. She has 3/4 of an inch atrophy of the right thigh and 1/4 inch atrophy of the right calf. The reflexes are as follows; patellar reflexes are 2+/2+; ankle and plantar reflexes are 1-/1+. I feel that the right Achilles and plantar are slightly depressed, although they are fairly equal at this point. The Babinski is negative. There is no defect in the sensorium particularly. The fourth and fifth toes have parethesias from time to time, but there is no true anesthesia.

AP & lateral, right, left, oblique views and spot views of the lumbar spine reveal that the patient has only four true lumbar vertebrae and the 5th lumbar appears to be somewhat transitional. The so called 5th lumbar or transitional vertebra is fairly well sacralized, particularly as viewed on the left oblique. For practical purposes only a rudimentary disc in this area.

OPINION: Under ordinary circumstances, following a problem and an operation such as this, I would give this patient a permanent, partial disability of 12% of the body as a whole. This is based on an average patient and certainly is not the AMA evaluation which takes in to [sic] account only back motion itself.

Basically, she has a permanent, partial disability of 12% of the body as a whole. In-as-much [sic] as she is apparently unable to do a job which she is fitted for, the industrial disability, I am sure you will realize may be somewhat higher.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 16, 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).

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, Id.*, 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.* * * *

Analysis

Even though the causal connection between claimant's injury on December 16,1978 and her present disabiliity seems somewhat lacking, causal connection between claimant's injury and her disability was not one of the issues presented to the undersigned at the time of hearing. Neither was it claimed to be an issue at the time of pre-hearing. The issue presented was the extent of claimant's healing period and permanent partial disability.

In January of 1980 Dr. Fisher opined claimant's permanent partial impairment to be 5 percent of the whole body. On April 20, 1981 Dr. Fisher revised his calculation to greater than 5 percent of the body as a whole. Dr. Walker opines claimant's permanent disability to be 12 percent of the body as a whole. More weight is given to Dr. Fisher's determination because he was claimant's treating physician and has had a more current examination of claimant.

As indicated previously, functional impairment is only one of the factors used in determining a person's industrial disability. In making a determination on industrial disability, one must look at the claimant before the date of injury and compare it to the claimant after the date of injury. Claimant is 45 years old and at the time of her injury had only gone through the first semester of ninth grade and some schooling as a nursing assistant. Prior to her injury, claimant had 3 years experience working in grocery stores, approximately 7 1/2 years experience in factory work, 6 months experience in a program for nursing assistants and experience in food service as cashier, waitress, cook and dish washer.

After claimant's injury she obtained her G.E.D. and started working for Lauridsen Foods and went from a salary of $2.50 per hour prior to her injury to $6.00 per hour after her injury. It is apparent that claimant may not be able to return to her job packing hams but there is no evidence to indicate claimant could not return to any of the work she was able to perform prior to her injury. Also it is apparent from the cross-examination of claimant that she most likely was turned down on other jobs because of the present state of the economy and not any physical limitations which she has. Furthermore, the evidence presented indicates that defendant employer's failure to rehire claimant is not due to her disability but due to the fact that defendant employer no longer has a cafe. Although there was testimony presented which indicated claimant was well motiviated, all the evidence presented does not indicate such a high motivation.

In his closing argument, claimant's attorney indicated that claimant has already been paid permanent partial disability benefits based on 12 percent of the body as a whole but argued claimant's permanent partial disability is 25 percent of the body as a whole. Based on the evidence presented, claimant has failed to prove her industrial disability is greater than 12 percent of the body as a whole.

The evidence presented also indicates claimant returned to work on October 29, 1979 and worked until February of 1980. The record as it presently stands fails to indicate that claimant ever made any further recuperation. In fact, the record tends to indicate claimant's condition became worse. Therefore, claimant's healing period appears to have ended on October 29, 1979.

On cross-examination, claimant revealed that she averaged 50 1/2 hours of work per week at $2.50 an hour at the time of her injury. Claimant's gross weekly wage was apparently $126.25. It is determined that claimant's rate of compensation should have been computed as $88.12 per week.

Findings of Fact and Conclusions of Law

Finding 1. At the time of hearing, claimant has a permanent impairment greater than five (5%) percent of the body as a whole.

Finding 2. Claimant is forty-five (45) years old and up until the injury had not completed ninth grade.

Finding 3. Prior to her injury, claimant had worked for grocery stores, factories, as a nursing assistant and in food service.

Finding 4. Claimant's job at the time of her injury required claimant to cook, clean tables, wash dishes and serve meals.

Finding 5. Since her injury, claimant has worked in a meat packing house making more money per hour than her former jobs. Since the injury, claimant worked three (3) days as a cook.

Finding 6. Since her injury, claimant has received her G.E.D.

Finding 7. The record fails to indicate that claimant could not return to any of her former employment positions prior to her injury.

Finding 8. Claimant may not be able to return to her ham packing but that job was taken on after injury.

Finding 9. Claimant has not been turned down for her employment because of her disability.

Conclusion A. Claimant has failed to meet her burden in proving her industrial disability is greater than twelve (12%) percent at the time of her hearing.

Finding 10. Claimant is not now working.

Finding 11. Claimant reached maximum recuperation on October 29, 1979.

Conclusion B. Claimant is entitled to healing period benefits for the time she missed work from the date of her injury until October 29, 1979.

Finding 12. At the time of her injury, claimant was paid two and 50/100 dollars ($2.50) per hour and averaged fifty and one-half (50 1/2) hours of work a week.

Conclusion C. Claimant's rate of compensation is eighty-eight and 12/100 ($88.12) per week.

Order

THEREFORE, defendants are ordered to pay unto claimant sixty (60) weeks of permanent partial disability benefits at a rate of eighty-eight and 12/100 dollars ($88.12) per week and healing period benefits for the days of work missed from the date of her injury until October 29, 1979 at the same rate.

Defendants are also to reimburse claimant for the following medical expenses:

Drugs	$129.48
Surgical Associates	25.00

Defendants are also to reimburse claimant for mileage in the amount of sixty-nine and 84/100 dollars ($69.84).

Defendants are to be given credit for benefits previously paid.

Defendants are taxed costs of the proceedings.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Code section 85.30.

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

* * *

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

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DAROLD G. HARRIS,
Administrator of The Estate of
KENT LEE HARRIS
and Conservator of
BENJAMIN LEE HARRIS,

Claimant,

CONCRETE INDUSTRIES INC.,

Employer,

and

ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants,

and

GLENDA ARLENE HARRIS,
Guardian and Conservator of
BENJAMIN LEE HARRIS,

Intervenor.

Ruling on Motion for Summary Judgment

This case began as a dispute as to which party should receive the compensation benefits due to Benjamin Lee Harris, the minor son of the deceased, Kent Lee Harris. The father of Kent Lee Harris, Darold G. Harris, filed the action as administrator of the estate of Kent Lee Harris and conservator of Benjamin Lee Harris. Later, on October 16, 1981, Glenda Arlene Harris (Benjamin's mother who was divorced from Kent Lee prior to the latter's injury) filed a petition for intervention.

A memorandum of agreement was filed by defendants with the Iowa Industrial Commissioner on October 8, 1981.

In their motion for summary judgment, defendants stated that deceased was hired in Nebraska to work in Nebraska, the employer's principal place of business being in Lincoln. The only contact with the state of Iowa was deceased's domicile. An affidavit from the employer's personnel director supported the motion.

In *Iowa Beef Processors, Inc. v. Miller,* 312 N.W.2d 530 (Iowa 1981), the court ruled that claimant's domicile alone was insufficient to give the Iowa Industrial Commissioner jurisdiction of a workers' compensation injury in another state. The instant case is similar to *Miller* except that here, defendants filed a memorandum of agreement.

Even so, say defendants, the memorandum of agreement cannot confer jurisdiction and cite two non-workers' compensation cases for the proposition that jurisdiction cannot be conferred by consent. *Wederath v. Brant,* 287 N.W.2d 591 (Iowa 1980); *O'Kelley v. Lochner,* 259 Iowa 710, 145 N.W.2d 626 (1966).

Section 86.13 states in relevant part:

> If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and employee of his disapproval of the agreement by certified mail sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 85 and 87.
>
> Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this chapter 85.

Clearly, §86.13 contemplates the memorandum be binding on defendants *only* when the case conforms to the workers' compensation chapters of the code, and this section does nothing toward creating a legal accountability upon defendants who admit a certain liability with no obligation to do so. Thus, the unilaterial filing of a memorandum of agreement under §86.13 does not confer jurisdiction. A memorandum of agreement simply establishes an employee-employer relationship and that an injury arose out of and in the course of the employment. *Whitters & Sons, Inc., v. Karr,* 180 N.W.2d 444 (Iowa 1970); *Freeman v. Luppes Transport Co., Inc.,* 227 N.W.2d 143 (Iowa 1975). The memorandum of agreement cannot by its very filing, in view of *Miller,* create jurisdiction where the Iowa Supreme Court has indicated no jurisdiction exists.

Finally, defendants state that *Comingore v. Shenandoah Artificial Ice, Etc. Co.,* 208 Iowa 430, 226 N.W. 124 (1929) gives the industrial commissioner authority to "revoke its Approval of the Memrandum [sic] of Agreement, since such was made without subject matter jurisdiction..." (p. 2 of defendants' motion for summary judgment). Whatever *Comingore* says, it doesn't say that. Even so, a ruling on the motion in defendants' favor does not require an actual revocation of the memorandum of agreement. Since the filing of the memorandum cannot confer jurisdiction, such filing likewise cannot confer any liability of defendants under the Iowa Workers' Compensation Law.

THEREFORE, defendants' motion for summary judgment is sustained and the petition of Darold G. Harris, Administrator of the Estate of Kent Lee Harris and Conservator of Benjamin Lee Harris and the petition for intervention filed by Glenda Arlene Harris are hereby dismissed. No rulings are necessary on the various motions for declaratory ruling, since the present ruling renders other questions moot.

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 29th day of January, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ROBERT HEATH,

Claimant,

vs.

SIDLES DISTRIBUTING CO.,

Employer,

and

AETNA CASUALTY & SURETY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 23, 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.

The record on appeal consists of the transcript of testimony at the review-reopening hearing; claimant's exhibits 1 through 14, inclusive; defendants' exhibits 1 through 10, inclusive; the deposition of Alfred J. Marschisio, Jr.; and a report from David D. Kentsmith, M.D., which was made a part of the industrial commissioner's file when it was submitted after the hearing.

The result will be the same and the findings of fact and conclusions of law will be copied from the hearing deputy's decision. However, defendants raised certain issues in their brief which must be addressed.

The hearing deputy's decision is commendably thorough and may be referred to for the detailed facts. Claimant hurt his back in a compensable work injury and, as a result, had three surgeries. He has problems with hearing and speech (not related to the injury) and has limited work experience. The hearing deputy declared claimant to be permanently and totally disabled.

Defendants' brief cites the following issues:

I. Whether the hearing officer erred in concluding that claimant is permanently totally disabled.

A. Whether the hearing officer erred in allowing claimant to breach his rehabilitation and reemployment contract.

B. Whether the hearing officer erred in considering the present condition of claimant instead of considering claimant's capacity to be retrained and reemployed.

C. Whether the evidence showed lack of motivation.

II. Whether the hearing officer erred in failing to apportion claimant's disability among the various causes shown and limiting the award to the portion caused by the accident in question.

A. Only a portion of claimant's disability was caused by the accident involved herein.

The first main issues cited by defendants concern claimant's participation in his own economic recovery. The record shows claimant made bona fide attempts to participate but that he failed. The vigorous program of rehabilitation put forth by the employer and insurance carrier was for claimant's own good, and defendants should be congratulated for their efforts. Nevertheless, claimant cannot be penalized for his failures.

The second main contention labeled "B" under the first main issue states that the hearing officer erred because she considered the present condition of claimant (unemployable) instead of claimant's capacity for retraining or reemployment. It is true that claimant *may* be employable in the future, given the right circumstances. However the hearing deputy only used the evidence he had at his disposal: claimant has no present or foreseeable earning capacity. In this regard it would be useful to quote the last paragraph of the letter from David K. Kentsmith, M.D., the psychiatrist, who examined claimant upon the request of defendants:

> I find nothing in my examination to suggest that this man has a personality disorder or a neurotic condition that would cause him to exaggerate his symptoms or seek compensation. It is also apparent in my examination that he lacks the skills and basic ability to work successfully in any other area than manual arts. He has major difficulties reading, hearing and interpreting instructions and in spite of his best efforts and high motivation would not be successful in a retraining program for the development of managerial or office type skills.

This report is not the description of a man with much economic future.

Defendants also argue that claimant's disability is contributed by his lack of speaking and hearing skills and by the fact that his back "popped" in December 1979. However, it should be pointed out that the report from which this allegation is taken, defendants' exhibit 8, goes on to say that tha pain caused by the popping sensation resolved itself with no difficulty after four or five days.

As for the argument that the claimant's hearing and speech impairment contributed to his disability, it may be said that these limitations are no different in species from having to wear eye glasses or a major amputation. Everyone works within certain limitations, more or less severe. Claimant had worked for many years within the confines of his impairments and had done rather well. His earning capacity was established and defined within the context of those impairments, and it is his loss of that earning capacity which is compensable.

Findings of Fact and Conclusions of Law

Finding 1. On February 22, 1978 claimant received an injury arising out of and in the course of his employment which resulted in permanent impairment.

Finding 2. At defendants' request, claimant was examined by defendants' physician, who injured claimant which resulted in some additional disability.

Conclusion A. Defendants are liable for any disability which resulted from claimant's injury on February 22, 1978 and any disability caused by defendants' examining physician.

Finding 3. The injuries to claimant's back were not an aggravation of a preexisting condition because the injuries were to different areas of claimant's back.

Finding 4. Claimant is forty-five (45) years old and a high school graduate.

Finding 5. Claimant is not able to return to work in any area of previous employment.

Finding 6. Claimant is unable to obtain future employment.

Conclusion B. Claimant is permanently totally disabled.

Finding 7. Claimant failed to prove how many weeks he actually participated in vocational rehabilitation.

Conclusion C. Defendants are not liable for claimant's vocational rehabilitation.

THEREFORE, defendants are to pay unto claimant weekly benefits under Code section 85.34(3) for the period of claimant's disability at the rate of two hundred twenty-two and 13/100 dollars ($222.13) per week.

Defendants are to be given credit for all weekly benefits previously paid.

Defendants are to reimburse claimant for all of Dr. Margules' bills.

Defendants are to pay the costs of this action.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Code section 85.30.

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

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RONALD F. HEBENSPERGER,

Claimant,

vs.

MOTOROLA COMMUNICATIONS AND ELECTRONICS, INC.,

Employer,

and

ZURICH-AMERICAN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

Both claimant and defendants appeal from a proposed arbitration award for permanent disability, healing period, and medical and hospital benefits.

The record on appeal consists of the transcript; the deposition of John J. Dougherty, M.D., a qualified orthopedic surgeon; claimant's exhibits 1-27, inclusive; and defendants' exhibits C and D. Defendants' exhibits A and B were not taken into the record as a part of the evidence in the case. Also a part of the record by late submission where copies of check counterfoils wherein the Washington National Insurance Company was the drawer and the claimant and various suppliers of §85.27 services were the payees; this evidence was enclosed in a letter from Deck and Deck, dated December 1, 1979.

The employee claims that the jolting ride of a Blazer vehicle which he used in his employment caused a ruptured intervertebral disc in his low back. The discomfort developed over a period of months in the early and middle part of 1979. Claimant eventually had surgery on the back and never returned to work for the employer although there was evidence that the employer would furnish employment to claimant. Claimant's only work since the operation has been as a part-time security guard. Under a disability plan, he draws a pension based upon 50 percent of his gross pay.

The issues on appeal concern the origin and cause of the injury, the statute of limitations, whether defendants are allowed certain credits under §85.38, and the length of the healing period. Also in issue are whether a medical bill and a hospital bill should be paid or reimbursed to claimant, whether defendants should be ordered to reimburse the group plan for credit taken under §85.38, and whether claimant's loss of earning capacity was more than the 15 percent awarded.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 14, 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 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 damages or injures a part or all of the body.* * * *

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

In *Ziegler v. U.S. Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591 (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 Co., supra*, 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."

A gradual injury may be compensable. *Black v. Creston Auto Co.*, 225 Iowa 671, 281 N.W.2d 189 (1938).

It is further clear that the claimant's injury is to the body as a whole and he therefore 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, Id.* 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.* * * *

Section 85.26(1) states: "No original proceedings for benefits under this chapter or chapter 85A, 85B, or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of occurrence of the injury for which benefits are claimed except as provided by section 86.20."

The record clearly shows that the rough-riding Blazer vehicle aggravated a prior back condition and supports the causal connection between the continued trauma and the necessity for surgery and disability. It is true, of course, that other evidence exists in the record; however, the evidence of Dr. Dougherty and especially that of Martin R. Hullender, M.D., is convincing of the compensable nature of the injury.

As to the statute of limitations issue, defendants state in their supplemental brief, p. 2:

> But, in order to clear the statute of limitations hurdle, the Deputy also found that the "main trauma" occurred after July 1, 1976. In other words, if one were to accept that the injury involved was a herniated disc for which disability was awarded, then it is imperative for the Claimant to show by substantial evidence that the herniation or extrusion occurred as a proximate result of employment activity sometime after June 16, 1976 (the filing date of the petition being June 16, 1978). A failure to do so will cause the claim to fail.

The deputy stated that the injury occurred on July 14, 1976; the industrial commissioner's file shows that the petition was filed June 16, 1978, some 23 months later. It is therefore difficult to follow defendants' reasoning with respect to the amount of time elapsed.

Section 85.38(2) states:

> 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.

As for the credit due defendants under §85.38, the record clearly showed that those payments by the Washington National Insurance Company were within the provisions of §85.38(2); on the contrary, with respect to the payments by CNA, the record failed to show that such payments would be unpayable if claimant received workers' compensation. The statute clearly defines when group payments are to be credited, and the CNA payments do not fall within that definition.

Defendants point that claimant's healing period should end before the date found by the deputy, June 30, 1979, is well taken. Industrial commissioner's rule 500—8.3, I.A.C., which supplements §85.34(1) 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.

It is clear that claimant did not return to a similar occupation and has never done so; thus, the return to work test cannot be applied here. Dr. Hullender stated in his report of May 10, 1979 that claimant would have "temporary disability" of at least six months and possibly an additional three months of very limited activity. Using that letter as a basis for the finding, six months from the date of surgery, would be a reasonable end of the healing period.

Claimant's brief states that the deputy's refusal to award a medical bill and a hospital bill was incorrect. The record shows that all the bills except for those of Dr. Hullender and Jackson County Memorial Hospital in Altus, Oklahoma, were fair, reasonable and necessary. In the case of the two bills, the parties only stipulated as to fairness and reasonableness; defendants specifically excepted the two bills as being necessary. Without any showing that the bills resulted from the injury, no award for them can be made.

As shown above, §85.38(2) provides defendants shall receive a credit for payments made under a group plan. Claimant states that defendants should specifically be ordered to make such reimbursements; however, claimant is not a party to the respective rights of defendants and the group carrier and cannot complain of any lack of action by defendants. Of course, in case any claim were made against the employee on account of defendants claiming credit, the employee could be held harmless.

Finally there is the paramount question of claimant's loss of earning capacity. The deputy awarded 15 percent permanent partial disability for industrial purposes although there was evidence in the record that claimant's functional impairment was as high as 35 percent. First, it should be pointed out that the rating of 35 percent was given by Dr. Hullender, the physician who did claimant's surgery. An impairment rating of 10-15 percent was given by Dr. Dougherty, who also treated claimant.

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

This case is a good example of the principle that the functional impairment is unreliable as the sole basis for determining an industrial disability. Here is a claimant who has a college education and should be able to find work in a growing field, electronics. By drawing workers' compensation and the CNA pension, claimant can make more than the amount of his salary at the time of the injury. Such a circumstance does not promote good motivation to return to work. Considering claimant's high education and ability as well as his physical impairment and low motivation, 15 percent permanent disability appears to be a correct figure.

Findings of Fact

1. Claimant injured his back while driving a Chevrolet Blazer for the employer. (Dr. Dougherty depo., 6, 9, 34, 48; Tr. 22-27)

2. The injury was caused by the jolting ride of the vehicle. (Dr. Dougherty 6, 9, 34, 38; Tr. 22-27; exhibit 23)

3. The injury occurred on or about July 14, 1976. (Claimant's exhibit 1; TR. 23-26)

4. The injury was permanent. (Dr. Dougherty 37; exhibit 23)

5. The employer had knowledge of the injury in mid-summer, 1976. (Tr. 99)

6. Claimant filed his petition for arbitration June 12, 1978. (Industrial commissioner's file)

7. Claimant ceased working for the employer on September 20, 1976. (Exhibit 4; Tr. 32)

8. Claimant had surgery for two herniated discs at L4/5, L5/S1 on September 25, 1978. (Exhibit 21)

9. Claimant's period of recuperation from surgery lasted until March 25, 1979. (Six months from the surgery of September 25, 1978.) (Exhibit 23)

10. It was stipulated that the bills of Dr. Hullender and Jackson County Memorial Hospital were fair and reasonable but not that they were necessary for treatment of the injury. (Tr. 3-4)

11. The parties stipulated that all other medical and hospital and allied expenses were fair, reasonable and necessary. (Tr. 3)

12. The Washington National Insurance Company paid benefits under a group plan which was contributed to wholly or in part by the employer. (Tr. 6-7)

13. There is no evidence that the weekly indemnity benefits paid by CNA would not be payable if workers' compensation was paid.

14. Claimant was married and age 39 at the time of hearing. (Tr. 12)

15. Claimant has a four-year college degree from Westmar College. (Tr. 46)

16. Claimant draws a disability pension from CNA that is based upon 50% of his gross pay. (Tr. 47)

17. Claimant had advanced training in electronics. (Tr. 46)

18. Claimant has been working as part-time security guard for Wells Fargo since July 1979. (Tr. 45)

19. Claimant began work for the employer May 15, 1972 as a senior electronics technician and became manager of a microwave relay operation February 28, 1973 to May 31, 1974. (Tr. 13-14)

20. Claimant then worked for the employer as a systems service engineer from June 1, 1974 until September 20, 1976.

Neither side appealed the weekly compensation rate of $159.30, which appears to be correct.

Conclusions of Law

1. Claimant sustained an injury arising out of and in the course of his employment on July 14, 1976.

2. The injury caused permanent partial disability to the body as a whole for industrial purposes of fifteen percent (15%).

3. Claimant filed a petition for arbitration of the July 14, 1976 injury on June 12, 1978, which was within the two-year statute of limitations in §85.26(1).

4. Defendants are entitled to a credit of five thousand one hundred sixty-three and 67/100 dollars ($5,163.67) in medical and hospital benefits represented by exhibit C, three thousand seven hundred sixty-five and 16/100 dollars ($3,765.16) in such benefits under cover of the Deck and Deck letter of December 14, 1979, one thousand eight hundred sixty-four and 20/100 dollars ($1,864.20) in temporary indemnity payments by the Washington National Insurance company shown under the same cover letter; defendants are not entitled to credit for indemnity payments made by CNA.

5. Claimant failed to show that the bills of Dr. Hullender and Jackson County Memorial Hospital were connected to the injury.

6. Claimant is entitled to healing period benefits for a period of one hundred thirty-three and four-sevenths (133 4/7) weeks.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of one hundred thirty-three and four-sevenths (133 4/7) weeks at the rate of one hundred fifty-nine and 30/100 dollars ($159.30) per week for the healing period disability and seventy-five (75) weeks of compensation at the same rate for the permanent disability, accrued payments to be made in a lump sum together with statutory interest, less a credit for the amounts mentioned above.

Defendants are also ordered to pay or reimburse claimant for the following bills:

St. Joseph Hospital	$ 1,657.84
St. Vincent Hospital	505.60
St. Vincent Hospital	375.35
St. Vincent Hospital	8.00
St. Vincent Hospital	53.40
St. Vincent Hospital	8.00
St. Vincent Hospital	1,521.85
St. Joseph Hospital	16.00
St. Joseph Hospital	126.00
St. Joseph Hospital	1,706.21
St. Joseph Hospital	22.55
Dr. Blume	2,067.00
Dr. Dougherty	1,950.50
Dr. Bjork	117.00
Dr. Hollenback	11.00
Medication	149.43
Chair Back Brace	125.00

Costs are taxed against defendants.

Defendants are ordered to file a final report of payments upon completion thereof.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court;
Remanded for Settlement.

PAUL H. HENNINGER,

Claimant,

vs.

JOSEPH BUCHEIT & SONS CO.,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

Introduction

This is a proceeding in review-reopening brought by Paul H. Henninger, claimant, against Joseph Bucheit & Sons, Co., employer, and United States Fidelity & Guaranty Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workmen's Compensation Act for an injury arising out of and in the course of his employment on June 29, 1976. It came on for hearing on January 12, 1982 at the Pottawattamie County Courthouse in Council Bluffs, Iowa. It was considered fully submitted on February 19, 1982 with the filing of Dr. Faier's deposition.

The industrial commissioner's file shows a first report of injury received June 21, 1978. A memorandum of agreement showing a maximum rate was also received on that date. A form 5 shows the payment of seven weeks and two days of healing period for a total of $1,165.70 as well as doctor and hospital expenses.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a letter from Robert G. Faier, M.D., dated Feburary 27, 1981; defendants' exhibit A, a letter from Ted E. Hoff, M.D., dated December 28, 1981; defendants' exhibit B, a letter from Dr. Hoff dated November 3, 1981; defendants' exhibit C, a letter from Dr. Faier dated February 27, 1981; defendants' exhibit D, a first treatment medical report from Nebraska; defendants' exhibit E, a series of surgeon's final reports and bills from Drs. Faier and Hoff; claimant's answers to interrogatories; claimant's deposition; the deposition of Dr. Hoff; and the deposition of Dr. Faier. The parties filed briefs.

Defendants objected to some of the testimony of Dr. Faier on the ground that he used an evaluation guide other than the AMA Guide. Industrial Commissioner Rule 500—2.4 relates to that guide and provides:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2)"a"—"r" of the Code. The extent of loss or percentage of permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa Workers' Compensation Act. Nothing in this rule shall be construed to prevent the presentation of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.

That rule allows for the use of the AMA Guides, but that is not the only guide which may be referred to. Defendants' motion to strike Dr. Faier's testimony relating to permanency based on the use of the AMA Archives of Industrial Medicine is overruled.

Issue

The sole issue in this matter is claimant's entitlement to permanent partial disability.

Statement of the Case

Fifty-six year old married claimant with one child living at home testified to his injury of June 29, 1976 as follows: It was the afternoon. Another crew was working above claimant's crew. A strong wind was blowing. Claimant was wearing both goggles and glasses. A piece of slag blew into his left eye and was embedded there. He was taken to the hospital where he saw Dr. Hoff. Later he sought care from Dr. Faier who did surgery on the burned eye. Claimant returned to work after the surgery.

Claimant acknowledged that prior to his injury he had surgery for a condition called pterygium which had been treated by Dr. Faier. He denied trouble following surgery.

Claimant reported another injury in August. He complained of his legs in that regard and said the doctor would not allow his return to work. It appears that some treatment had been suggested to claimant, but that he preferred his leg to get better by itself. He presently is experiencing hoarseness and has had radiation treatments for a tumor of the throat. Claimant denied any other injury to his eye or having foreign objects stuck in his eye other than dirt which he could wash out.

Claimant stated that he has been given different kinds of medicine to put in his eye. He had recently been told by Dr. Hoff to stop using the medication which he asserted he was not using very often and just to keep his eye clear if something got in it. Claimant's current complaints are of

distortion off to the side and down, itching and occasional blurriness. He agreed that he had itching with the pterygium. Claimant admitted he is able to selectively read the newspaper and magazines, to drive and to watch T.V. when he gets squared away to do it. He insists that he would be bothered by his vision if he were back on the job.

Claimant's answers to interrogatories indicate he worked from October 23, 1976 to December 30, 1976; from January 3, 1977 to June 28, 1977; from August 9, 1977 to October 31, 1977; from November 22, 1977 to November 25, 1977; from December 12, 1977 to December 30, 1977; from January 3, 1978 to January 4, 1978; from February 9, 1978 to April 6, 1978; and from May 17, 1978 to October 3, 1978. Those answers showed claimant received unemployment benefits from October 10, 1976 to October 23, 1976; from November 15, 1976 to December 18, 1976; from February 1, 1977 to February 12, 1977; from November 1, 1977 to December 10, 1977; and from January 14, 1978 to February 4, 1978.

Robert S. Faier, M.D., F.A.C.S., board certified opthalmologist who specializes in opthalmic surgery and research on the diabetic eye, first saw claimant on December 19, 1967 with inflammation of the left eye. On February 6, 1968 the doctor performed a resection of a pterygium or a growth on the cornea provoked by inflammation which, in claimant's case, extended into the stroma or supporting structure of the cornea. After healing and on May 25, 1968 claimant's vision was found to be 20/15 in each eye with glasses prescribed for near vision.

In 1970 claimant returned with a nonspecific inflammatory reaction.

Claimant had a complete examination on June 6, 1975 at which time he had normal fundi and corrected vision of 20/15 for each eye.

Claimant was next seen on July 21, 1976 at which time he reported being hit in the left eye by hot slag. Visual acuity dropped to between 20/35 and 20/40 on the left. There was inflammation into the anterior chamber. The opthalmologist's diagnosis were burn of the cornea, conjunctiva and sclera and stimulation of the pterygium. The latter condition was related, according to the doctor, to an inflammatory response caused by the accident.

On February 4, 1977, Dr. Faier performed surgery and treated the limbus with trichloroacetic acid to burn adjacent tissues so that inflammation would not promote regrowth. The surgeon was asked why the surgery was performed. He responded: "Because his vision went down. It was a recurrence of the situation we had previous." As to the situs of the surgery, he was questioned:

Q. —the place where you did surgery in '78 was substantially the same place you've done surgery in '67 [sic], wasn't it?

A. Had to look at the — I'm sure it was, but I didn't take any pictures at the time. But it [sic] have to be essentially in the same area, except I believe that the second time around, it had to be — as I mentioned, it had to be a more extensive procedure. In other words, the cut —

Q. It was deeper?

A. It was deeper. Plus, besides being deeper, it then had to be covered up with some stuff called trichloroacetic acid, which actually causes the chemical burn to that area and actually kills all vessels which can go into the area which can provoke these things to grow again.

The doctor said: "I believe it was related in some manner to the original injury that he had from this hot slag, 'cause actually we were doing right well until that event happened." In further explanation he said:

Q. So it wouldn't have surprised you if just running the normal course, that there had been a recurrent pterygium at a later date?

A. Not necessarily. 'Cause I've done millions — many pterygiums, and you can take them off once, and that ends it. Actually it takes something usually to provoke it, which one of the more common things in this situation or similar — situations similar, would be regard to some type of thermal type of energy. What you're doing, you're denaturing part of the collagen in the cornea itself, like the heat. And doing that, it has to protect itself, so it protects itself by a regrowth of this tissue over that area.

When claimant was seen on May 12, 1978 his vision was 20/25.

One year later claimant's vision had dropped to 20/60 on the left. The reading was attributed to chronic irritation and inflammation which was secondary to claimant's accident. Claimant was seen on a number of occasions in 1979 with claimant's vision at 20/25 in early 1980. In April of 1980 it dropped to 20/30. Anti-inflammatory medicines were used to get the vision to 20/25. Vision improved to 20/15, but inflammation returned and vision went to 20/25. At one point an infection was suspected as a cause for inflammation; however, a check of claimant's flora was normal.

Dr. Faier in his most recent examinations had recorded no significant abnormality of the fundus.

The doctor said that there is some risk involved in the long-term use of steroid medication. Claimant's current medications were listed as an anti-inflammatory steroid, another antihistamine drug and a vitamin A product.

Dr. Faier rated claimant's permanent disability and he thought future medical treatment for claimant was a possibility. Initially the doctor seemed to say claimant's impairment was based solely on his left eye. Later he was asked:

Q. Now, as I understand, your disability rating is 5 percent to each eye?

A. About 10 percent is what it figures out to.

Q. But that was 5 percent to each eye?

A. Yeah.

Q. It that right?

A. Yeah.

Then he was questioned: "In your opinion, you testified that, in your opinion, Mr. Henninger has sustained a 10 percent permanent disability to the left eye; is that correct?" He responded, "Yes." As to the cause of claimant's disability, the opthalmologist said:

> A. I believe it was due to that — the injury, inasmuch as the history would indicate that there was a time prior to his injury when his vision came back to a pretty good level, 20/15, twice as good as normal. Here after that second injury, that other situation here, the patient's visual accuity. So through that cause and effect situation, I would — I would not only assume but I believe that is secondary to this accident.

In assessing claimant's impairment the doctor referred to the AMA Archives of Industrial Medicine.

Ted E. Hoff, M.D., board certified opthalmologist, reported seeing claimant on June 30, 1976 for a welding injury resulting in a burn to the conjunctiva of his left eye. Claimant's vision was found to be 20/50 on the right and 20/25 on the left. A slit lamp examination revealed two areas of third degree thermal burns to the sclera, or extension of the cornea which stretches backward and forms the globe, both located adjacent to the limbus or the junction between the sclera and the cornea. One area was three to four millimeters in dimension, the other was two to three. A pterygium or overgrowth of tissue from the conjunctiva was seen on the medial aspect of the cornea with an encroachment of one to two millimeters onto the corneal surface. Although the pterygium, which according to the doctor, was not related to the injury, would usually have no significance, he said it could encroach on the pupillary space causing visual changes and necessitating surgical removal. He volunteered that pterygiums are found in persons exposed to dust, dirt, and ultra violet light and particularly in persons who work out of doors in sunlight. Neodecadrone opthalmic solution was prescribed to reduce the possibility of infection. on July 2, 1976 claimant's vision was 20/30 plus 2. Four days later claimant's vision had improved to 20/25. On July 9, 1976 there was some clearing of the conjunctiva. Vision on the left was 20/25. Claimant's medication was changed and he was advised to return in ten days. He did not do so.

The doctor's report of May 1, 1978 indicates no permanent disability is contemplated. A report of May 5, 1978 states claimant is capable of doing the same work as before his injury.

Dr. Hoff testified that claimant's cornea was not involved in the area of the burn.

Dr. Hoff examined claimant on December 4, 1981 testing visual fields, looking for glaucoma and performing a fundoscopic exam. He found claimant's uncorrected vision at 20/70 on the right and 20/50 on the left. Claimant told the doctor he was not wearing his newest glasses as his older ones were more comfortable. Claimant's eye appeared red and swollen with irritation medially or on the opposite side of the thermal injury. Claimant's vision was found correctable to 20/40 minus for distances and 20/30 for near. The right eye was clear. Visual fields were full. Mild senile macular degeneration was present in both eyes. An old pterygium was seen on the medial aspect of the left eye as well as old scars on the bulbar conjunctiva from the traumatic burn which the opthalmologist pronounced, "well healed and appearing to present no problems at this time." Dr. Hoff characterized the scar tissue as inert and found nothing to suggest increased vascularization or irritation. Early cataracts were seen, but the opthalmologist did not believe they contributed to visual loss. The doctor was unable to find an explanation for claimant's complaints of blurring as visual fields assessing the amount of peripheral vision were normal. The injection and swelling was attributed to "prolonged eyedrop medication and appears to be allergic in nature." The doctor proposed taking claimant off all eye medications to see if the condition of his left eye would resolve. A second cause was residuals from the old pterygium surgery.

In summary Dr. Hoff saw nothing in the eye examination in December of 1981 which was related to claimant's June 1976 injury.

As to the pterygium the doctor was questioned:

> Q. So if I correct you — in other words, pterygium that may have been subdued and under control can reoccur after a traumatic incident such as slag in the eye?
>
> A. Yes. But I think it would be more likely for the pterygium to recur in the area where the thermal injury —
>
> * * *
>
> A. Yes.
>
> Q. And you're telling me today you didn't find that. You found pterygium in one area and the thermal injury in the other area of the eye?
>
> A. Yes. That is correct.
>
> Q. Now, this — I take it that Dr. Faier, during this four-and-a-half year period from what you learned from Mr. Henninger, had been treating Mr. Henninger for this pterygium; is that correct?
>
> A. Yes.
>
> Q. Okay. And is pterygium something that does reoccur?
>
> A. Yes. They can recur.
>
> Q. Okay. And what [sic] it does reoccur, what type of procedures can you, as a physician, take to correct the problem?
>
> A. They can be treated medically with steroid, topical steroids. If the pterygium shows signs of growth, then we become more aggressive in our behavior and usually approach them surgically. And many times afterwards we will treat them with a form of beta radiation to prevent their recurrence. If a pterygium is very recurrent and responds even after beta radiation, we sometimes can use anticancer chemotherapy, eye drops, to retard their growth.

And further:

Q. Does pterygium change or have anything to do with changing the curvature of one's eye?

A. Yes, it can. Aggressive pterygiums can cause some astigmatism to develop and when you remove a pterygium surgically, of course, you remove some of the normal tissue in order to get all of the pterygium off. And that scarring that can occur can cause astigmatism to develop in some patients.

Q. And when astigmatism develops, does that result in inflammation and that type of thing? Or does that change the eyesight the ability of one to see, I guess

A. Astigmatism changes the shape of the eye. Instead of the eye being shaped round, like inside of a bowl, it becomes shaped like a spoon, has two different curvatures on it, because of the pulling of the scar tissue that develops at the limbus.

Q. And does that change the ability of one to see? Out of that eye?

A. It changes one's need for glasses by adding astigmatism to the final correction needed.

Q. Did you note in reviewing Mr. Henninger's left eye as to whether or not there was any change in the curvature of his eye because of this incident?

A. On my refraction, I found there was no astigmatism in his left eye and there was three-quarters of a diopter in his right eye. The glasses that he had, that he was wearing, had a half a diopter of astigmatism in his right eye and a quarter of a diopter in his left eye.

Claimant's visual acuity was assessed as "down in both eyes from the early macular degeneration or a progressive change which allows a breakdown in the retinal pigment epithelium and the paramacular tissues." Dr. Hoff assessed claimant's visual loss as compatible with the degeneration.

Findings of Fact

WHEREFORE, IT IS FOUND:

That on June 29, 1976 claimant was working at his job site when a piece of slag blew into his left eye.

That claimant received seven weeks and two days of healing period benefits and medical expenses.

That prior to his injury claimant had surgery for a pterygium in 1968.

That claimant had another injury in August which is unrelated to his injury of June 29, 1976.

That claimant also has a tumor of his throat which is unrelated to his injury of June 29, 1976.

That claimant's current complaints are of distortion, itching and blurriness.

That claimant worked after his injury and also collected unemployment benefits from time to time.

That Dr. Hoff saw claimant on June 30, 1976 who found third degree thermal burns to the sclera adjacent to the limbus, and on the lateral aspect of the globe and a pterygium on the medial aspect of the cornea.

That Dr. Faier saw claimant on July 21, 1976 who found a burn of the cornea, conjunctiva and sclera.

That Dr. Faier related the pterygium he found to an inflammatory process caused by claimant's accident of June 29, 1976.

That Dr. Faier performed surgery on February 4, 1977 to remove the pterygium and treated the limbus with trichloracetic.

That claimant's current medications include an anti-inflammatory steroid, and antihistamine type drug, and a vitamin A product.

That Dr. Faier gave claimant a five percent permanent disability to his left eye.

That Dr. Hoff found no permanent impairment to claimant's left eye related to his injury.

Applicable Law and Conclusions of Law

The sole issue in this matter is claimant's entitlement to permanent partial disability.

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 award of benefits cannot stand on a showing of a mere possibility of a causal connection between the injury and claimant's employment. An award can be sustained if a causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 221 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.2d 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). The expert medical evidence must be considered with all other evidence introduced bearing on a causal connection between the injury and disability. Rose v. John Deere Waterloo Tractor Works, 247 Iowa 900, 76 N.W.2d 756 (1956). See also, Nellis v. Quealy, supra.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of her employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. *Soukup v. Shores*, 222 Iowa 272, 268 N.W. 598 (1936). That a worker sustaining one of the injuries for which specific compensation is provided under this statute might, because of such injury, be unable to resume his employment and, because of

his lack of education or experience or physical strength or ability, might be unable to obtain other employment, does not entitle him to be classed as totally and permanently disabled. *Id.*, 278, ____.

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 385, 290, 110 N.W.2d 60, ____ (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).

Larson, in 2 *Workmen's Compensation,* Section 58 at 10-165 discusses the nature of scheduled benefits and points out that "payments are not dependent on actual wage loss" and that they are not "an erratic deviation from the underlying principle of compensation law — that benefits relate to loss of earning capacity and not to physical injury as such." The theory, according to Larson, is unchanged with the only difference being that "the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage loss experience."

Evidence from two board certified opthalmologists has been presented and the conflicts therein must be resolved. The claimant had a resection of a pterygium in 1968. Dr. Faier testifed that "there was a time prior to the injury when his [claimant's] vision came back to a pretty good level, 20/15, twice as good as normal."

When Dr. Hoff examined claimant at the time of his injury, he found two areas of burn to the sclera and a pterygium on the medial aspect of the cornea. When Dr. Faier examined him three weeks later, he described a burn to the cornea, conjunctiva, and the sclera. Dr. Faier characterized a pterygium as an inflammation resulting from an irritation and related the simulation of the pterygium to claimant's burn on June 29, 1976. In further explanation, he said: "Actually it takes something usually to provoke it, which one of the more common things in this situation or similar — situations similar, would be regard to some type of thermal type of energy. What you're doing, you're denaturing part of the collagen in the cornea itself, like the heat. And doing that, it has to protect itself, so it protects itself by a regrowth of this tissue over that area."

Dr. Hoff was equivocal. On the one hand, he proposed the location of the pterygium is different from the thermal injury and he thought it more likely that the pterygium would recur in the area of the burn. On the other hand, he agreed a pterygium could recur after traumatic injury. Greater weight in this matter is being given to Dr. Faier's opinion in that he has a wider and longer experience in the treatment of traumatic eye injuries. The evidence is sufficient to relate the pterygium to claimant's injury.

Dr. Hoff found nothing in claimant's condition in 1981 to connect it to his 1976 injury and made no functional impairment rating. Dr. Faier finds a functional impairment rating. As set out above, Dr. Faier's opinion is being given greater weight. His testimony is not terribly clear, but the better reading appears to be that claimant has a five percent impairment to his eye.

Iowa Code section 85.34(p) (1975) provides for 125 weeks of compensation for loss of an eye. As claimant has a five percent loss of the left eye, he is entitled to six and one-quarter weeks of permanent partial disability at the maximum rate at the time of his injury.

THEREFORE, IT IS CONCLUDED that claimant has a five percent functional impairment to his left eye.

Both parties have made reference in their briefs to a finding regarding further medical payments. No finding will be made in that regard. It is hoped that claimant's difficulty with his eyes will no longer trouble him. The employer, of course, has the duty to furnish claimant medical care which is causally related to the June 29, 1976 injury. In the event that the parties are unable to agree on the relatedness of medical care, an action for 85.27 benefits will have to be pursued.

Order

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant six and one-quarter (6 1/4) weeks of permanent partial disability at a rate of one hundred forty-seven dollars ($147) per week for a five percent (5%) impairment of his left eye.

That defendants pay claimant in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500—4.33.

That defendants file a final report within thirty (30) days.

* * *

Signed and filed this 18th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

BERNICE HEWETT,

Claimant,

vs.

KROBLIN REFRIGERATED EXPRESS,

Employer,

and

TRANSPORT INDEMNITY,

Insurance Carrier,
Defendants.

Appeal Decision

Statement of the Case

Defendants appeal from a proposed review-reopening decision filed December 29, 1981 wherein claimant was awarded permanent total disability as the result of an injury occurring on January 25, 1974.

A review of the file indicates that claimant was awarded forty-five percent industrial disability in a prior review-reopening decision filed July 13, 1978.

The record on appeal consists of the transcript of the hearing which includes the testimony of claimant, Arlyne Bonefas, Roger Weldon Hewett and Kathryn Bennett; claimant's exhibit 1 being the deposition of Arnold E. Delbridge, M.D.; and the transcript of the hearing of March 16, 1978.

Issues

As no specific errors on the part of the hearing deputy are alleged, the record is examined to determine the appropriateness of the findings of fact and conclusions of law in the decision filed December 29, 1981.

Review of the Evidence

Claimant, age 51 at hearing testified that she and her husband started working as a truck driving team in 1974. She testified to a difficult life before marrying her present husband. Claimant testified that her husband taught her how to drive so that they could spend more time together and that she greatly enjoyed traveling and working together.

Claimant's new found life was cut short, however, on January 25, 1974 when she fell on a loading dock injuring her lower back. Claimant's pain grew progressively worse until she underwent a laminectomy at the L-4, L-5 level. This treatment was provided by Jonn R. Walker, M.D. After more than a year, claimant's complaints of low back and leg pain persisted unabated. Dr. Walker felt that he had run the gamut of treatment and set a permanent disability rating of 20 percent of the body as a whole.

Claimant saw Bernard Diamond, M.D., on April 28, 1975. Examination on that date showed straight leg testing positive at 65 degrees and lumbar flexation restricted by 30 percent. Dr. Diamond diagnosed post-surgical fibrosis affecting the nerve root with a permanency rating of 25 percent of the body as a whole.

Dr. Diamond saw claimant again on August 18, 1975. Claimant's complaints were essentially the same except her right leg was now going temporarily numb. A repeat myelogram was performed on October 22, 1975 which showed minimal asymmetry of the L-4, L-5 disc space due to post-operative change with minimal obliteration of the nerve root sheath. Dr. Diamond performed a repeat laminectomy on October 28, 1975 at the L-4, L-5 level. At that time, Dr. Diamond found a great deal of scar tissue, impinged nerve roots, disc fragments and bulging at the L-5 level.

As of April 13, 1976, claimant's complaints of pain were essentially the same with straight leg testing positive at 50 to 60 degrees. Claimant was hospitalized for traction which temporarily provided improvement.

On June 7, 1977, Dr. Diamond suggested another surgical attempt, but claimant did not wish to undergo another such procedure at the time. However, claimant was rehospitalized on June 18, 1977 for more traction. Injections of cortisone into the right thigh provided relief for about a week.

Claimant was referred to John G. Mayne, M.D., at Mayo Clinic in Rochester, Minnesota in September of 1977. Dr. Mayne could offer claimant no relief. In December of 1977, claimant was referred to the Industrial Injury Clinic at Theda Clark Regional Medical Center in Neenah, Wisconsin. Claimant's complaints remained unchanged.

As noted previously in a review-reopening decision filed July 13, 1978, claimant was found to suffer a 45 percent permanent industrial disability as a result of the injury of January 25, 1974.

Claimant testified at hearing that her pain had worsened by the spring of 1979 to the point that she had to abandon home traction and seek further medical attention. (1981 Tr., p. 20) Because Dr. Diamond had since retired, claimant consulted Arnold E. Delbridge, M.D.

In an examination of April 13, 1979, claimant's pain was found to be of the same type, but was more pronounced than before. Dr. Delbridge testified:

> She stated that she had had severe pain in her back and down her right leg, and that she was having some difficulty with getting about and bending and in general being active.
>
> On examination at that time she had a positive straight leg raising at 55 degrees. She had a decreased Achilles reflex on the right and had difficulty moving about the office. She was hospitalized for a time by me. Traction, physical therapy and bed rest did not help. She had a repeat myelogram, which was of course somewhat suspect because of her previous surgery, but it did suggest that she might have a defect on the right side, which correlated fairly well with her symptoms. (Delbridge depo., p. 5)

Dr. Delbridge rehospitalized claimant for more traction, apparently without relief. Claimant was hospitalized in June of 1979 for yet another surgical procedure involving a laminectomy and facetectomy at the L-4, L-5 level. Dr. Delbridge testified as to what was found during this third surgery:

> A. At the time that I performed the surgery, I of course found a great deal of scar in the area of the previous surgeries. And going through the scar was a very slow process. We went down to the nerve — and found the two nerve roots on the right, lumbar-5 and sacral-1, and freed them up as much as possible from the scar. And then after that we turned our attention to the left at lumbar-5 sacral-1 where the defect on the myelogram was located. Some disc material here was noted to be bulging. This was removed and the nerve root was hollowed out on the left.
>
> Also during the neurolysis of both L-5 and S-1 nerve on the right, the L-5 nerve root on the right was also checked and a neurolysis was done. After that we controlled the bleeding, irrigated the area and put

some Depo-Medrol around the nerve roots, being a steroid which hopefully will reduce the scarring.

Q. Doctor, would you state whether or not the area in which you were performing surgery on June 29, '79, was the same area or a different area that was performed by Dr. Walker when he operated in 1974 and Dr. Diamond when he operated in 1975?

A. The areas were the same. I checked both levels done by Dr. Walker and the two levels done by Dr. Diamond, but I did not go above those levels. Both sides at both levels had been previously done as there was much scar tissue there. (Delbridge depo., pp. 12-13)

Dr. Delbridge reported that despite the surgery, claimant's pain continued and that as of August 17, 1979, pain had spread down her left leg as well as the right. (Delbridge depo., p. 15)

Claimant was hospitalized again in February of 1980 for more treatment. Again, claimant's complaints remained. Dr. Delbridge testified as to claimant's pain and the prospects for the future:

A. Well, she walks with difficulty. She uses a cane. She has somewhat of a shuffling gait. She seems uncomfortable a lot of times when she walks. When she sits, she will sit in one position for a bit and then turn to one side or move about to get more comfortable. Occasionally I'll come in the examining room and she is standing up because she is uncomfortable sitting.

Q. In the future do you foresee the need of further treatment? And if so, what type of treatment?

A. I feel that Mrs. Hewett would probably not benefit significantly from any surgical procedure such as has been performed in the past. I think that she will continue to have considerable discomfort. She may, such as she did in February of 1980, get so uncomfortable that she just can't be controlled as an outpatient and she may have to be admitted for a period of time until she can get back on her feet. She also may require on occasion some pain medication and/or some injections, which she seems to find helpful. (Delbridge depo., p. 17)

As of June 1981, claimant was found to have a loss of forward back flexation of 40 degrees. Dr. Delbridge found claimant suffering a permanent impairment of 31 percent of the body as a whole. (Delbridge depo., p. 20) Dr. Delbridge also found that claimant had difficulty remaining stationary for periods longer than 10 to 15 minutes (Delbridge depo., p. 20) and felt that claimant was an unlikely candidate for any type of employment. Finally, as to the cause of claimant's condition, Dr. Delbridge was asked:

Q. Now, Doctor, you have described to us Mrs. Hewett's condition. Do you have an opinion based on reasonable medical certainty as to the cause of this condition?

A. The back problem that I treated in Mrs. Hewett was a continuation of her previous back problems. Apparently that was thought to be due to her injury at work. And I did not treat her for a new condition. It was a condition that she had been treated for all along.

Testimony at hearing was even more compelling as to claimant's change in condition since July of 1978. Claimant testified that since the last surgery, she is now totally dependent upon use of a cane. (Tr., p. 26) Claimant still finds it necessary to consult Dr. Delbridge about every six weeks for shots of cortisone in the spinal area. (Tr., p. 33) In-patient treatment is usually required once a year. Claimant also testified that she is unable to sit or stand more than 15 to 20 minutes at a time and that her daily activities were almost completely devoted to relief of her pain. On cross-examination, claimant stated "* * * Now it's a living hell. If I weren't a God-fearing person, I would have already done something about it." (Tr., p.36)

Claimant's testimony was corroborated by her neighbor, Arlyne Bonefas. Mrs. Bonefas testified that claimant's condition has visibly deteriorated since 1978. She stated at hearing that claimant has used a cane constantly for the last three years and that claimant constantly shifts her weight. (Tr., p. 44) Mrs. Bonefas concluded her testimony:

Well, at first, you know, when she was first walking around with her cane, it seemed to me that she didn't have near the problems. And I'd say maybe a week or so ago I saw her and she was getting in the car. So I went over to talk to her. And she was in dreadful pain that day. She just — she looked terrible. And I felt so sorry for her. Well, in fact, she started to cry because she hurt so bad. And she had never done that before with me. (Tr., p. 46)

Claimant's testimony was further supported by that of her husband, Roger W. Hewett. Mr. Hewett stated that his wife was unable to stay stationary for more than 15 to 20 minutes at a time and often cried alot because of the pain. (Tr., p. 49) He further stated that claimant is totally dependent upon her cane, can no longer drive a car, and even has difficulty lifting a gallon of milk. (Tr., p. 51)

Kathryn Bennett, M.A., a vocational consultant, testified at hearing. Ms. Bennett testified that based upon claimant's age, education, and functional limitations, claimant was not a realistic candidate for any employment or vocational rehabilitation. (Tr., p. 78)

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 25, 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).

When a worker sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he or she must prove one of two

things: (a) that the disability for which he or she 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 (Iowa 1971).

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, 1121, 125 N.W.2d 251, ____ (1963).

In *Parr v. Nash Finch Co.*, (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of *Mc Spadden 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 earning, 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.

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Analysis

The unrebutted medical evidence in the record establishes that claimant's functional abilities have decreased since 1978 while her pain has increased necessitating further surgery and treatment. While the medical evidence shows that claimant's back condition has not changed drastically, unrebutted testimony at hearing further establishes that claimant's ability to carry on a normal existence has gone completely. Despite claimant's varied work experience and her life long struggle with hardship, the overwhelming weight of the evidence illustrates that claimant now has great difficulty merely caring for herself let alone performing any acts of gainful employment.

It is therefore concluded that claimant has met her burden of proof that she suffers a permanent and total industrial disability as the result of the injury of January 25, 1974.

It is noted that in the proposed decision of December 29, 1981, the deputy inadvertently assessed an incorrect rate of compensation. The proper weekly rate of permanent total compensation should be $91. per week.

Findings of Fact

1. That claimant sustained an admitted industrial injury of January 25, 1974.

2. That since claimant's previous hearing, she has had another operation as the result of the injury of January 25, 1974.

3. That since claimant's previous hearing she has found it necessary to use her cane for walking.

4. That since claimant's previous hearing her ability to stand or sit has diminished to 15 to 20 minutes at a time.

5. That since claimant's previous hearing, her functional impairment rating has increased to 31 percent of the body as a whole.

6. That claimant's condition is not anticipated to improve.

7. That claimant is unemployable.

8. That claimant's weekly rate of compensation for permanent total disability is $91.

Conclusions of Law

That claimant has met her burden of proof that the disabilities which she alleges are causally related to an

admitted industrial injury occurring January 25, 1974.

That claimant is permanently and totally disabled.

WHEREFORE, the findings of fact and conclusions of law are in the deputy's proposed decision filed December 29, 1981 are proper with the exception of the weekly rate of compensation.

THEREFORE, it is ordered:

That defendants pay unto claimant temporary total disability benefits pursuant to Iowa Code section 85.34(3) for the period of claimant's disability at the rate of ninety-one and 00/100 dollars ($91.00).

Defendents are to be given credit against all benefits previously paid.

Payments that have accrued shall be paid in a lump sum together with interest pursuant to Iowa Code section 85.30.

Costs of this action are taxed to the defendants.

* * *

Signed and filed this 3rd day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

PATRICK D. HIGGINS,

Claimant,

vs.

ARTHUR R. PETERSON,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from that portion of a proposed review-reopening decision and declaratory ruling in which defendants were allowed a credit of $15,567.56 against benefit amounts due claimant subsequent to November 6, 1979, the date of the settlement of a third-party action brought by claimant for injuries sustained.

The record on appeal consists of the testimony of claimant, of Randall L. Stephenson, Warren L. DeVries, and Marilyn Terrell; claimant's exhibits 1 through 33; defendants' exhibit A, the deposition of Randall L. Stephenson; defendants' exhibit B, the deposition of Warren L. DeVries; defendants' exhibit C; and a copy of the $50,000 draft; as well as appeal briefs of both parties.

The evidence specifically pertaining to claimant's sole issue on appeal consists of claimant's exhibits 24 through 32; defendants' exhibits A through C; a copy of the $50,000 draft and the testimony of the parties involved.

The issues claimant wishes to have addressed on appeal are whether an agreement was reached on November 6, 1979, between claimant, through his attorneys, and AID Insurance Company, through its representative, Marilyn Terrell; that AID would compromise its lien of $36,000 by accepting fifty percent of that amount and continue its responsibility to claimant for on-going medical expenses and other workers' compensation benefits without any assertion by AID of a credit; whether or not there was error committed by the deputy in failing to make a finding of fact as to whether there was or was not "consent" or an agreement under section 85.22(3); whether error was committed in failing to find that claimant was entitled to recover under theory of tender offer and settlement; whether error was committed in failing to find that defendants are estopped to claim a credit; and finally whether the credit allowed was properly computed.

Claimant sustained an injury on April 20, 1976, which arose out of and in the course of his employment when a tractor driven by his employer was struck by a vehicle owned and driven by Herbert H. Klasse. Claimant's right hip and knee injury has required extensive and continuing medical care.

Claimant retained Randall L. Stephenson, attorney at law, to represent him in a third-party action against Herbert H. Klasse. (Transcript, page 49.) Claimant testified that he was told by Stephenson of AID Insurance Company's $36,000 lien against any recovery he might receive. (Transcript, page 50.) Prior to filing the lawsuit, Mr. Stephenson engaged Warren DeVries to assist him with the complicated liability issue in the third-party action. (Transcript, page 49.) On November 6, 1979 the jury was chosen and sworn in and a recess was called. (Transcript, page 82.) At that time Mr. Klasse's attorney asked whether settlement for less than the policy amount might be feasible. (Transcript, page 82.)

Claimant and his two attorney's then discussed the possibility of a one-time settlement offer of $50,000. (Transcript, pages 52, 89.) Claimant testified that he informed his attorneys that his future hip surgery would have to be taken care of before he was willing to reach a settlement. (Transcript, pages 53, 89.)

Claimant's attorneys then called AID Insurance Company and spoke with Marilyn Terrell. Claimant was not present when this conversation took place. (Transcript, page 55.) During this discussion, which occurred at approximately 3:00 p.m., Mr. Stephenson merely informed Ms. Terrell that an offer of settlement for less than the policy amount might be made and asked whether AID would be interested. (Transcript, page 92.)

Following that phone conversation, claimant's attorney indicated to Klasse's attorney that they would consider an offer of settlement. (Transcript, page 94.)

Claimant was then informed that a one-time offer of $50,000 in full settlement of the claim was being made. (Transcript, page 94.) Mr. DeVries outlined a proposal for claimant which told him how the $50,000 would be divided. Mr. DeVries, Mr. Stephenson and claimant all agree that this proposal which was then presented to AID, outside

claimant's presence, was premised upon the insurance company maintaining future medical responsibility. (Transcript, pages 56, 96, 157.)

Mr. Stephenson testified that at approximately 3:30 p.m. he again telephoned Marilyn Terrell. (Transcript, page 97.) According to Mr. Stephenson he told Ms. Terrell of the $50,000 offer and related to her the following terms and conditions upon which claimant would accept the offer:

> . . . that AID Insurance Services would accept fifty cents on the dollar or eighteen thousand dollars of the amount of the lien that they had filed, that they would maintain future medical responsibility and keep the medical open for Mr. Higgins, that any and all claims for subrogation and consideration for all parties would be a part of this claim, all releases executed by the parties to be satisfied, that our attorneys' fees were going to be fifteen thousand dollars. I do believe I think that I informed her that we had expenses of approximately two thousand dollars and that the remaining balance in cash would go to Mr. Higgins.

When Ms. Terrell asked whether the settlement offer was a good one, Mr. Stephenson turned the phone over to Mr. DeVries due to his expertise concerning the liability issue. (Transcript, page 99.)

According to Mr. DeVries, he told Ms. Terrell that most carriers are agreeable to accepting 50 percent and that it was a fair sum in this case. (Transcript, pages 152-153.) Mr. DeVries then testified that he made the following statements to Ms. Terrell:

> . . . 'Now, you have already paid the thirty-six. That's gone. Every bit of that is gone. By having made those payments, you are on the hook. There is no defense that you have to any future problems that may arise. You have got to pay those. The injury is there.'
>
> Q. Did she make any comments to these comments you are making so far?
>
> A. No. Except I felt generally that she was agreeing with me, with what I was stating, and I said, 'It comes down to a very simple decision. You have a chance; you are going to have one bite of the apple. You are going to get an opportunity at this stage to get your eighteen thousand dollars, and if you want to take the eighteen thousand dollars now and get it in your hot little hand, it's available. If you think that that isn't enough and you want to go, you have got a perfect right to say you won't take it.'

According to DeVries, he and Terrell reached an agreement by which AID would receive $18,000 and would continue to pay expenses incurred by claimant from the day after the trial. (Transcript, page 160.) No discussion of a credit or threshold occurred. (Transcript, page 159.) Stephenson and Terrell also agree that there was no discussion of a credit or threshold. (Transcript, pages 100, 101, 191.) Mr. Stephenson testified that to the best of his recollection the words "maintain future medical responsibility, keep the medical open" were used. He recalled only two conditions placed by Terrell on the settlement agreement and these were a waiver on the part of Klasse's carrier for any subrogation claim and waiver of the receipt of attorney's fees from AID's $18,000. (Transcript, pages 101, 102, 155.)

Mr. Stephenson stated his understanding of the consent and agreement reached as follows:

> We were receiving from Iowa National Mutual Insurance Company the sum of fifty thousand dollars in full settlement of all claims and/or subrogation consideration, one party to the other. From that fifty thousand dollars, we would receive attorneys' fees of fifteen thousand dollars. AID Insurance Services would receive eighteen thousand dollars against their lien of thirty-six thousand dollars that had been filed. They would maintain future medical responsibility and keep it open relative to future medical expenses for Mr. Higgins, that the expenses we had would be approximately two thousand dollars. I think that's it.

AID's acceptance of the agreement was discussed with claimant and the offer by Klasse's insurer was accepted, the jury was dismissed and a stipulation was dictated into the record. (Transcript, page 105.)

Terrell's recollection of the second telephone conversation with claimant's attorneys on November 6, 1979 differs from that related by Stephenson and DeVries. When asked whether claimant's future medical bills were discussed, Terrell stated "I don't recall it being mentioned in either phone call by either gentleman." (Transcript, page 188.) Evidence of such a discussion was not apparent in the notes Terrell took during the conversations. (Transcript, page 188.)

Terrell's understanding of the settlement is stated as follows:

> That AID would get eighteen thousand cash, that AID would receive a release from Iowa National against cross petition, and that Mr. Stephenson would furnish us with a copy of that release and a copy of the total settlement papers for us to file with the commissioner's office and that our file would remain open.

Stephenson subsequently received a check payable to him, claimant and AID. He called AID on November 15, 1979 to tell Terrell the check had been received, but talked to Swartzbaugh who instructed him to write to Terrell. (Transcript, page 106.) In this letter, dated November 16, 1979, Stephenson enclosed the $50,000 draft and reiterated the agreement stating:

> You [AID] are to receive the sum of $18,000.00 and will continue to maintain future medical responsibility for Mr. Higgins. I would therefore appreciate a draft from Aid Insurance Company made payable to Mr. Higgins and myself in the sum of $32,000.00, along with the approval from the Industrial Commissioner's Office, so that I may forward the same to Counsel for Iowa National Mutual Insurance Company, along with the dismissal with prejudice that I will prepare. (Exhibit 26.)

On November 20, 1979, Stephenson received a call from Terrell telling him that the settlement was a third-party settlement and not a compromise settlement. (Transcript, pages 109, 194.) Terrell testified that during the phone conversation she discussed AID's right to credit against future payments and that Stephenson's response was vague, as if he wasn't really sure what she was talking about. (Transcript, page 196.) Stephenson's testimony, however, is in direct conflict with Terrell's. He claimed no discussion concerning a credit took place. (Transcript, page 109.)

According to Stephenson, his first knowledge of the claimed credit was on November 28, when he received a letter dated November 27, 1979 from Terrell in which she sent the $32,000 draft and stated her version of the settlement agreement. The letter in part states:

> In accepting Eighteen Thousand Dollars ($18,000.00) as our share of the Fifty Thousand Dollars ($50,000.00), AID Insurance Company (Mutual) will release Herbert Klasse, the Defendant, and Iowa National Mutual Insurance Company, his carrier, from any future claim of damages in this matter in exchange for their agreement not to pursue any right, claim or cause for indemnity or contribution from the Plaintiff, Patrick Higgins, or his employer, Arthur Peterson, or the insuror, AID Insurance Company (Mutual).
>
> It is also agreed that AID Insurance Company will claim the full amount of the settlement against all future claims for weekly medical benefits that Patrick Higgins may claim or hereafter claim under Iowa's Workers [sic] Compensation Law in regard to the injuries he sustained in the accident of April 20, 1976. I find that our payments to date total approximately $36,097.61 and the balance of future credit will be approximately $13,902.39.

Stephenson testified that he did not understand what Terrell meant by "future claims for weekly medical benefits" in the letter, but that it did not embody their agreement. (Transcript, pages 111-112.) It was not until claimant notified Stephenson that AID had denied payment on some bills that he realized a problem existed. (Transcript, page 113.) Stephenson phoned Terrell and learned of the $13,092.39 threshold that had to be reached before payments of future medical benefits would be made. (Transcript, page 114.) According to Stephenson, he had had no prior discussions with Terrell concerning this credit. (Transcript, page 114.)

Stephenson then wrote a letter dated January 21, 1980 to Terrell in which he stated there was a disagreement concerning the terms of the settlement agreement. (Exhibit 30.)

Terrell's response, dated January 24, 1980, noted that Stephenson had "apparently accepted my letter [dated November 27, 1979] as the draft accompanying it was promptly deposited on 11-29-79." (Exhibit 31.)

Stephenson contacted DeVries about the inconsistency in the agreements who in turn sent a letter to Terrell reviewing claimant's understanding of the settlement agreement. (Exhibit 32.)

Terrell's response in a letter dated October 1, 1980 denied agreement with DeVries' letter and agreed to abide by what the law allowed. (Defendants' exhibit C.)

Stephenson had limited experience handling workers' compensation cases, having handled "only a couple of uncontested types of workers' comp [sic] cases." (Transcript, page 120.) He had no experience in handling a third-party case in which a workers' compensation lien was at issue, and was unaware of an insurer's right to claim a credit for a third-party settlement. (Transcript, page 120.)

DeVries testified that he has been practicing law since 1949 and considers his practice to be a general one with an emphasis on litigation. (Transcript, page 135.) According to DeVries, he had previously handled cases in which a workers' compensation lien was asserted in a third-party action and he was fully aware of AID's lien rights. (Transcript, pages 143-144.) However, DeVries' testimony indicates that the right of a carrier to claim a credit against a third-party settlement never entered his mind during the settlement negotiations. (Transcript, pages 169, 170.)

Both Stephenson and DeVries testified that if they had known AID was going to claim a credit against future medical payments, they would not have recommended settlement to claimant. (Transcript, pages 116, 161.) Terrell, on the other hand, stated that if AID had been required to relinquish future rights to credit, the settlement would have been refused because of AID's awareness that claimant would require extensive medical care in the future. (Transcript, pages 188, 189.)

Iowa Code section 85.22 provides in part:

> 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.
>
> . . .
>
> 3. Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the industrial commissioner. The industrial commissioner may compromise and settle on behalf of the state of Iowa any workmen's compensation cases of doubtful liability.

Although section 85.22 does not provide for payment of expenses, "[u]sually 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." 2A Larson, Workmen's Compensation Law, section 74.32 at 14—229 (1976).

In addition the Iowa statute does not discuss the issue of credit against future benefits. However, *Larson, supra*, section 74.31 at 14—200 provides:

> 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 third-party recovery over past compensation actually paid stands as a credit against future liability of the carrier.

The evidence is not in conflict with regard to portions of the settlement agreement negotiated between the parties on November 6, 1979. All parties agree that AID agreed to accept $18,000 of the $50,000 settlement which amounted to fifty cents on the dollar for AID's $36,000 lien. In addition, all parties agreed to the condition that Klasse and his carrier would not pursue any right, claim or cause for indemnity or contribution. Furthermore, the evidence demonstrates that agreement was reached among the parties that no attorney's fees would be paid from AID's $18,000 share. Upon all of the above points a settlement agreement was reached and is binding.

However, the evidence additionally clearly demonstrates that no agreement was reached concerning a credit to be applied by the insurer against future medical benefits. Stephenson, DeVries and Terrell, all testified that no discussion concerning such a credit occurred during the settlement discussion.

Stephenson and DeVries stated that future medical bills were discussed with Terrell, whereas, Terrell did not recall this subject being mentioned by either attorney. Terrell's notes taken during the settlement negotiation did not reflect discussion of future medical bills.

However, even if such a conversation did occur, the basic problem appears to be one of differing interpretations of the term "future benefits". Stephenson and DeVries apparently used the term to mean future benefits beginning the day after the trial, whereas Terrell interprets the phrase to mean future benefits beginning after the credit threshold had been recovered. Clearly, no meeting of the minds occurred and no agreement with respect to a credit evolved. As a result, the law, of which all parties should have been aware, must be applied.

The parties entered a stipulated settlement in the amount of $50,000. The amount was distributed as follows:

AID	$ 18,000.00
Attorney Fees	15,000.00
Expenses	1,432.44
Claimant	15,567.56

Iowa Code section 85.22(1) clearly states that attorney fees are to be deducted from the recovery. That reduces the amount in question to $35,000. Next, according to usual procedure, expenses are deducted which reduces the amount to $33,567.56. Subtracted from this amount is the $18,000 AID agreed to accept on its $36,000 lien, which leaves claimant a share in the amount of $15,567.56. Defendants therefore, receive a credit in the amount of $15,567.56 against the amount of benefits due after November 6, 1979. *See, Alexander v. Iowa Public Service,* Declaratory Ruling filed June 25, 1981 (method of distribution of proceeds from an award of damages).

Claimant asserts that he is entitled to recovery under a theory of tender offer and settlement. The $50,000 draft was enclosed in a letter dated November 16, 1979 sent to AID by Stephenson. Terrell testified that the draft was deposited by the accounting department and that she never endorsed nor saw the $50,000 draft. When she read the November 16, 1979 letter, Terrell called Stephenson to discuss problems she saw with the letter. Terrell followed this telephone conversation with a letter dated November 27, 1979, which set forth the agreement she believed had been reached. The draft was not deposited until November 28, 1979. Defendants never accepted the $50,000 draft subject to the terms set forth in Stephenson's accompanying letter, moreover, no tender was made on the condition that it was to be received in settlement of a disputed claim. Claimant's tender offer argument must fail.

Claimant next asserts that defendants are estopped to claim a credit. However, ordinarily estoppel must be affirmatively plead in order to be relied upon. *Iowa Department of Revenue v. Iowa Merit Employment Commission,* 243 N.W.2d 610 (Iowa 1976). In those cases where estoppel was not specifically plead it must have been submitted as an issue without objection. *Id.* In addition, the party asserting estoppel has the burden to establish all essential elements of estoppel by clear, convincing and satisfactory proof. *Anita Valley, Inc. v. Bingley,* 279 N.W.2d 37 (Iowa 1979). Claimant did not affirmatively plead estoppel and, even if he had, he did not sustain his burden of proof with regard to the elements of estoppel.

Findings of Fact

1. On April 20, 1976, claimant suffered an injury to his right hip and knee which arose out of and in the course of his employment.

2. Claimant brought a third-party action against Herbert H. Klasse.

3. Claimant was represented in this action by Randall Stephenson and Warren DeVries.

4. The third-party action trial began on November 6, 1979 and a jury was sworn before the settlement offer was made.

5. AID had a $36,000 lien on claimant's third-party recovery.

6. A one-time offer of settlement for $50,000 was made by Klasse's carrier.

7. Claimant's attorneys discussed the offer with him and were aware of claimant's desire to have all future medical benefits paid.

8. Stephenson called Terrell, the AID representative to alert her to the offer.

9. A second phone call resulted in AID's agreement to accept $18,000. of the $50,000. settlement on its $36,000. lien with the conditions that Klasse and his carrier institute no further actions and that no attorney fees be taken from the $18,000.

10. No credit or threshold was discussed by Terrell, Stephenson and/or DeVries on November 6, 1979.

11. Future medical bills of claimant were discussed on November 6, 1979.

12. No agreement was reached by the parties concerning a credit against future medical payments.

13. Terrell talked with Stephenson on November 20, 1979, after he had sent the $50,000. draft to AID, and at this time discussed the credit with him.

14. After this telephone conversation and even after receiving the letter sent by Terrell dated November 26, 1979, Stephenson was unaware that a credit was being asserted.

15. The $50,000. draft was deposited by AID's accounting department on November 28, 1979.

16. Stephenson and DeVries received $15,000. in fees from the $50,000. settlement.

17. Expenses totalled $1,432.44.

18. Claimant received $15,567.56 of the $50,000. settlement.

Conclusions of Law

1. Since no agreement was reached concerning credit applied against future medical benefits, the applicable law must be applied.

2. The amount of attorney fees and the expenses must be deducted from the $50,000. settlement in addition to the $18,000. AID received from the settlement, resulting in claimant receiving the amount of $15,567.56.

3. Defendants receive a credit in the amount of $15,567.56 against the amount of benefits due after November 6, 1979. No credit is to be taken for benefits due and owing prior to November 6, 1979.

THEREFORE, it is ordered:

That defendants be allowed credit for fifteen thousand five hundred sixty-seven and 56/100 dollars ($15,567.56) against benefit amounts due subsequent to November 6, 1979.

Interest shall accrue pursuant to Iowa Code section 85.30.

Defendants pay costs pursuant to Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 29th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GEAROLD HOXSEY,

Claimant,

vs.

FRANK FOUNDRIES CORP.,

Employer,

and

ALEXSIS RISK MANAGEMENT SERVICES, INC.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from an arbitration decision and decision on rehearing wherein claimant was awarded 43 2/7 weeks of healing period compensation benefits and permanent partial disability benefits based on 20 percent permanent partial disability of the body as a whole. The rehearing decision reversed the arbitration decision regarding credit to be given for payments previously made by defendants to claimant.

The record on appeal consists of a first report of injury filed October 15, 1979; a final report filed October 15, 1979; claimant's petition for arbitration filed January 29, 1981; proof of service filed February 11, 1981; defendants' answer filed February 26, 1981; various pretrial documentation including prehearing order and notice of assignment filed April 9, 1981; form 2A indicating memorandum of agreement and rate agreement filed May 6, 1981 (post hearing); arbitration decision filed September 9, 1981; claimant's request for rehearing filed September 21, 1981; order granting rehearing filed September 25, 1981; claimant's brief and argument filed October 7, 1981; defendants' application for extension of time filed October 8, 1981; defendants' brief and argument filed November 6, 1981; decision on rehearing filed December 4, 1981; defendants' application for rehearing filed December 21, 1981; defendants' notice of appeal filed December 21, 1981; order denying rehearing filed December 24, 1981; claimant's answer to appeal filed December 30, 1981; amended notice of appeal filed January 15, 1982; order filed January 29, 1982; ruling filed February 9, 1982; defendants' request for extension of time filed February 16, 1982; defendants' brief filed March 10, 1982; claimant's brief filed March 22, 1982; various correspondence regarding settlement negotiations; the transcript of the arbitration

proceeding including claimant's exhibits 1 through 7 and defendants' exhibits A through C.

Defendants' notice of appeal cites three issues (1) extent of permanent partial disability, (2) duration of healing period and (3) nonallowance of credit for prior payments made by defendants to claimant. Defendants' appeal brief is silent as to issues (1) and (2). Review of the record shows the analysis, findings of fact and conclusions of law of the deputy in the arbitration decision regarding duration of healing period and extent of permanent partial disability are proper and are adopted as the final decision on these issues.

The third issue is somewhat more complex. Prior to the Iowa Supreme Court holding in *Wilson Food Corporation v. Cherry*, Iowa, 315 N.W.2d 756 which was filed February 17, 1982 (subsequent to the ruling of the deputy) the issue would have been controlled by prior agency rulings generally holding that payments which are made without the appropriate filing of either a notice of voluntary payment, Code §86.20, or memorandum of agreement, Code §86.13, are not payments which are being made in compliance with the workers' compensation act and are therefore something other than the payment of weekly compensation benefits for which credit is allowed.

In this case there was an injury on July 23, 1979. Notice of the claimed injury was acknowledged by filing with the industrial commissioner an employer's report of injury on October 15, 1979. The report indicated claimant's expected duration of disability would be "5-13 days". A report of injury is required to be filed within four days after an injured employee has been disabled for more than three days. Thus, the report of injury was filed some 2 1/2 months late. Code §85.11. At the same time defendants filed the report of injury, they also filed a final report indicating they had made payments for eleven weeks and one day. The final report was made on the standard form and indicated the payments had been made as compensation payments. No memorandum of agreement was filed as required by Code §86.13 at this time nor was a voluntary payments notice filed as required by Code §86.20. The final report did indicate that a copy of the form was sent to the employee (claimant). The effect of failing to file a memorandum of agreement was to cause claimant to file for arbitration rather than review-reopening as the items which are admitted by the filing of a memorandum of agreement were not admitted by the failure to file the memorandum. A good argument can be made, and it has been held at least one time, that the final report is a memorandum of agreement. Such has not been considered the practice as a memorandum of agreement form has been in existence for many years for that purpose.

Further dilatory filing by the defendants is indicated by a resumption of payments shortly thereafter with no subsequent filings with the industrial commissioner until after the petition was filed in January of 1981. Now defendants are asking the industrial commissioner to forgive their transgressions of the law and give them credit for payments they made to the claimant in this contested case although they failed to make proper reports to the industrial commissioner previously which if appropriately made may have preempted the necessity of maintaining a contested case.

Although defendants did not timely comply with filing requirements with this agency, they did, after the initiation of a contested case proceeding, file a subsequent memorandum of agreement. It is further noted that the prehearing order and stipulation at the hearing indicate the only issue to be the extent of temporary and permanent disability to which the claimant is entitled.

Thus, it would appear from the copy of the report sent to the claimant in October 1979 indicating what compensation payments had been made to claimant to that time and advising how to reopen his claim; the prehearing order and stipulation indicating that only the extent of disability was in issue as well as claimant's testimony (transcript, p. 40 l 1 15-23; p. 46 l 22-25; as well as numerous references throughout regarding control of medical care) that claimant was aware that the payments he was receiving were for workers' compensation.

Recently the Iowa Supreme Court in *Wilson Food Corp. v. Cherry*, Iowa, 315 N.W.2d 756, 757, 758 stated, in a similar but not identical case in which the issue was whether or not credit should be allowed for overpayment of healing period benefits against the obligation to pay permanent partial disability benefits, as follows:

> This case arises because, through administrative error, the employer continued the $91 weekly payments until February 9, 1979, whereas they should have been reduced to $84 per week beginning December 9, 1975, when the claimant reached maximum recovery. The error was the employer's, not the claimant's. The sole question is whether the overpayment should be credited toward the employer's liability on the permanent partial disability benefits.
>
> I. The claimant notes that the chapter omits expressed permission for such a credit. This absence is contrasted with the allowance of credit in two other situations. Temporary disability benefits under section 85.33 are to be deducted from any amount of healing period benefits to which a claimant is entitled. *See* section 85.34. A similar credit is expressly granted in section 85.34(3) for permanent partial disability payments from benefits for permanent total disability. Claimant thus calls for an application of the time-honored maxim often used in statutory construction. The expression of one is the exclusion of another. *See In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972); Southerland, *Statutory Construction*, §47.23—25 (4th ed. C. Sands 1973).
>
> We do not believe the maxim is appropriate for application here. The two situations alluded to by the claimant were intended by the legislature to prevent dual benefits. They do not apply to provide overpayment. The provisions the claimant contrasts with the present one prevent simultaneous collection of two related but different benefits. The credit sought here was not needed in the legislative scheme to proscribe simultaneous collection of two benefits. Benefits for permanent partial disabilities under section 85.34(2) do not begin until termination of the healing period (§85.34(1). The credit here is not one which the

legislature chose to omit; it is a credit question the legislature did not address.

* * *

Employers may generally recover payments made by mistake in workers' compensation matters* * * *

* * *

It is argued that it is unfair to allow the employer to recoup for his own error at the inconvenience to the claimant. We think not. We think the public interest will be better served by encouraging employers to freely pay injured employees without adversary strictness. It is not so unfair to compel the claimant to face at an earlier date the termination he would face later in any event so as not to penalize the employer.

Although defendants have not followed the letter of the law it does not appear to have inconvenienced nor deceived the claimant.

THEREFORE, it is held and found:

1. As a result of claimant's injury he received a twenty percent (20%) industrial disability to the body as a whole.

2. Claimant is entitled to healing period benefits for forty-three and two-sevenths (43 2/7) weeks.

3. Defendants are entitled to credit for payments previously made.

WHEREFORE, the decision on rehearing filed December 4, 1981 is reversed.

The arbitration decision filed September 9, 1981 is affirmed.

* * *

Signed and filed this 30th day of April, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

GERALD LEO HUBER,

Claimant,

vs.

HEARTLAND EXPRESS, INC.,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Gerald Leo Huber, claimant, against Heartland Express, Inc., employer, and Great West Casualty Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of his employment on January 23, 1981. It came on for hearing on February 18, 1982 at the Juvenile Court Facility in Cedar Rapids, Iowa. It was considered fully submitted at that time.

A first report of injury was received by the industrial commissioner on February 6, 1981.

At the time of hearing the parties stipulated to gross weekly wages of $331; to time off work amounting to four weeks; and to the fairness of the medical expenses and the necessity of the treatment.

The record in this matter consists of the testimony of claimant, of Leonard Butterbaugh and of Dennis Thompson; claimant's exhibit 1, a letter from Richard L. Sedlacek, M.D., dated March 2, 1981; claimant's exhibit 2, a return to work slip dated February 24, 1981; claimant's exhibit 3, a letter from William R. Basler, M.D., dated March 2, 1981; defendants' exhibit 1, a letter from Dr. Sedlacek dated January 29, 1982; defendants' exhibit 2, hospital records relating to a January 24, 1981 admission; defendants' exhibit 3, a letter from Justin L. Ban, M.D., dated September 9, 1981; defendants' exhibit 4, a letter from Dr. Basler dated June 1, 1981; defendants' exhibit 5, a letter from Dr. Basler dated March 2, 1981; defendants' exhibit 6, hospital records relating to an admission of January 24, 1981; and defendants' exhibit 7, a workmen's compensation preliminary medical report dated February 10, 1981. Briefs were submitted by the parties.

Issues

The issues in this matter are whether or not claimant had an injury arising out of and in the course of his employment; whether there is a causal connection between the alleged injury and his disability; and whether or not claimant is entitled to temporary total disability payments.

Statement of the Case

Forty-six year old single claimant commenced work for defendant as a semi driver in August of 1980. He testified to driving the maximum the law allowed which he quoted to be ten hours on and eight hours off. Claimant recalled the events leading up to January 23, 1981 as follows: On January 20, 1981 he was dispatched from his home for Atlanta, Georgia. He left Iowa City after lunch driving tractor 3014 to Atlanta. He arrived in Atlanta on January 21 after stopping for sleep in Shepardsville, Kentucky. He slept in Atlanta and drove a load to Chattanooga. He returned to Iowa City on January 23. He did no loading or unloading on the trip.

He claimed that prior to undertaking the trip, he felt "not right" and like he had the flu. He stated that he reported not feeling well to Len Butterbaugh, the dispatcher, before he took the load and when he talked to him from the road.

On the day he returned he experienced a sour taste in his mouth, burning in his eyes, heat in his lower stomach,

nausea, and pain in the rectal area as he had been unable to defecate for three and one-half days. He called the doctor three times and then saw him on Saturday. He was admitted to the hospital where he said he had shots, a CT scan, and a freezing procedure. He recollected that he had daily examinations and that he summoned the nurses frequently. Claimant testified to a lengthy surgical procedure.

Claimant asserted that he left the hospital in "extreme pain" and that he was unable to tolerate even the vibration caused by footsteps. He used a hospital bed. He refused pain pills because of an experience with addiction of another person. He claimed that he took 125 hot baths. He asserted that he did not work prior to his release on February 25, 1981. His last work for defendant was July 28, 1981.

Claimant's petition, which he filed pro se and which was given official notice, states:

> I felt rather bad comming [sic] home, but I thought a nice hot bath and all would be okay again. I had just had a day and a half off. Took trip to Atlanta, Ga. 800 miles one way and return in 3½ days. This is normal travel time. I had the flu about 3 or 4 weeks before, but not feel ill, just off when I ate. I got my medical book out and read untill [sic] I found what I thought was the matter and done [sic] (Parents magaizine [sic] medical library — 24 volumes) and I done what was recommeded [sic] but pain continued and worsened, until at 2:30 am. I again called Dr. Basler and recommed [sic] a powerful pain pill. This worked till [sic] 7:00 am. when I took another hot bath, to ease pain and internal suffering. Pain continued, took another pain killing pill (I seldon [sic] take any pills, asprins [sic] or anything, from apast [sic] experience) called Dr. Basler again, told to come in Monday am., pain continued so I went to the office Saturday morning. He took one physical appearance check and asked if I knew a surgeon, I said Dr. Sedlacek. He said go to St. Lukes immediately. Rush now no way out but this [sic].

Claimant recalled that subsequent to his return to work, he continued to have pain, to wear a pad, and to bleed.

Claimant denied problems with hemorrhoids prior to the incident. He admitted that he had pimple-like outgrowths in 1970 and 1972 which neither pained him nor drained.

Claimant, who is now driving a truck for another company, testified to having had a chauffeur's license since age 15, to having driven trucks for thirty years, and to having always passed his physicals.

Claimant complained that the seat in one of the trucks he drove failed to cushion properly, vibrated badly, seemed to be off base, and left him sore in his hip area and lower stomach. He acknowledged that he had not listed a problem with the seat in his logs. He said he had written up a sheet and turned it in at the shop to one of the mechanics. His reason for placing nothing in the log was that he believed whatever was wrong with the seat to be minor in nature; however, he thought a seat was replaced.

Leonard Butterbaugh, who is operations manager for defendant employer and whose duties include dispatching, testified that claimant did not indicate he was not feeling well. He said it is company policy for drivers to call in the morning and in the evening. Claimant did not complain during these calls. However, on January 24, 1981, claimant told him that he had been taking hot baths, that he was bleeding, that he was going to the doctor, and that he had suffered the same problems before. Mr. Butterbaugh who had reviewed the logs, remembered no complaints by claimant about the trucks he was driving. The witness said that had complaints been made, it would have been his duty to contact Dennis Thompson to ensure everything was all right.

Dennis Dean Thompson, who is director of safety for defendant employer and who had pulled all of claimant's logs, described the logs as records kept by the drivers in compliance with federal regulations and recorded simultaneously with occurrences. The front of the daily form provides a graph on which the driver can chart his activity for a twenty-four hour period. The back is a vehicle inspection form.

The witness reported the log showed claimant was driving tractor 3012. The vehicle inspection failed to indicate anything wrong with the tractor which was the only one driven by the claimant at any time during the month of January. He said that repairs were recorded in two places — the shop record and the driver's report. He agreed that a request for repairs might be made verbally, but he asserted that the law required repairs to be logged. However, repairs relating to conditions which were not unsafe probably would not be listed.

Thompson admitted that he had a large amount of equipment of which to keep track and that it was possible for a repair to be made without his knowledge. He did not recall anyone bringing a seat repair to his attention; but he thought that had a seat been replaced, someone would have talked to him about it.

Medical records show claimant was admitted to the hospital by William R. Basler, M.D., on January 24, 1981 with a history of hemorrhoid trouble since 1970. More specifically, claimant was seen in 1970 with a thrombosed external hemorrhoid which was incised and drained under local anesthesia. That procedure was repeated in 1972. Claimant complained to Dr. Basler of constipation and of a mass which developed in his anal area the day prior to his admission. Richard Sedlacek, M.D., recorded: "He recently apparently had no precipitating diarrhea or constipation and was taking a hot bath at home and noticed severe acute pain and prolapsing of his hemorrhoids . . ."

Claimant was treated initially with soaks. A barium enema was normal. Later, in a procedure requiring twenty-seven minutes, claimant underwent a proctoscopy and hemorrhoidectomy performed by Dr. Sedlacek who released him to return to work on February 25, 1981.

On March 2, 1981 Dr. Basler wrote: "Bowel habits do [sic] to truck driving are not the best and I feel that a condition such as hemorroids are [sic] aggravated by his occupation."

On that same day Dr. Sedlacek wrote:

> It would be my opinion that hemorrhoids could certainly be aggravated by vocation in which the person is a truck driver, particularly cross country truck driving. It apparently is Mr. Huber's contention that over the years this has, if not caused his hemorrhoids, certainly

> aggravated them. Hemorrhoids are of course probably was caused in that everybody has them but the enlargement of same and the symptoms of same certainly could be caused by long trips in a truck tractor.

It appears that Dr. Sedlacek's opinion was based on what he claimed was a "fairly well known and accepted fact that long driving periods are very hard on hemorrhoids." In a subsequent letter dated January 2, 1982 the doctor expressed the opinion that claimant had no permanent disability.

Justin L. Ban, M.D., of the Industrial Medical Clinic, reviewed a statement by claimant and his medical records. The doctor who characterized hemorrhoids as distended or engorged veins about the anal canal, pointed out that "[b]ecause hemorrhoidal disease is so common it usually is impossible to ascribe a particular cause to them [sic]"; however, some factors can be ascertained which contribute to the formation or manifestation of symptoms. The first factor listed by Dr. Ban was excessive straining with defecation which took on additional importance with inborn weakness of the venous structure. Constipation, he wrote, serves to magnify the distending effect on the veins.

Dr. Ban commented on Dr. Sadlacek's letter of March 2, 1981 as follows:

> [Dr. Sedlacek] indicates that driving long periods in a truck is hard on hemorrhoids in that it causes them to enlarge and symptoms to appear. Driving a truck per se has no immediate effect on hemorrhoids. If the truck driver however, becomes constipated so that he has to strain to an abnormal degree at the time of defecating then pre-existing hemorrhoids could certainly become symptomatic.
>
> While some medical observers may assume that truck drivers universally suffer from faulty bowel habits, constipation, and hemorrhoids, I know of no study indicating that truck drivers have a greater incidence of constipation or hemorrhoids than anyone else. In fact these conditions are so common that it is difficult to relate them causally to any particular occupation.

He further remarked:

> Occupational strain may likewise aggrevate [sic] hemorrhoids. "Strain" in this since [sic] refers to prolonged or repeated lifting, standing, or straining. The patient's statement does not indicate he was involved in any of these activities.
>
> In conclusion, if abnormal straining did not directly occur by reason of his employment, then the patient did not suffer a personal injury.

Findings of Fact

WHEREFORE, IT IS FOUND:

Claimant, who has had a chauffer's license since age 15, has been driving trucks for thirty years.

That from January 20, 1981 to January 23, 1981 claimant drove from Iowa City to Atlanta through Chattanooga to Iowa City.

That claimant was not feeling well prior to beginning the trip on January 20, 1981.

That claimant's symptoms became more severe on the day of his return.

That claimant was hospitalized on January 24, 1981 and a hemorrhoidectomy eventually was performed.

That claimant was released to return to work on February 2, 1981.

That claimant had thrombosed external hemorrhoids in both 1970 and 1972.

That claimant complained that a seat in a truck failed to cushion properly.

That claimant did not record a problem with the seat in his log.

That claimant's petition filed by him makes no reference to a faulty seat.

That claimant believed that he was driving tractor 3014 in December of 1980 and January of 1981 and that he was driving 3014 at the time of his accident.

That claimant did not complain to Leonard Butterbaugh, operations manager, about either the trucks he was driving or his physical condition prior to January 24, 1981.

That claimant was driving tractor 3012 in January.

Applicable Law and Conclusions of Law

The first issue to be determined is whether or not claimant has sustained an injury arising out of and in the course of his employment.

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. * * * *

Because of the broad definition of injury found in *Almquist*, a condition such as hemorrhoids falls within the purview of the Act.

In order to receive compensation for an injury, an employee must establish that the injury arose out of and in the course of his employment. Both conditions must exist. *Crowe v. DeSoto Consolidated School Dist.*, 246 Iowa 402, 405, 68 N.W.2d ____ (1955).

In the course of relates to time, place and circumstance 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 duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *McClure v. Union County*, 188 N.W.2d 283, 287 (Iowa 1971).

Iowa code section 85.61(6) provides:

> The words 'personal injury arising out of and in the course of 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. . .

If indeed claimant suffered an injury while driving his truck, he was in the course of his employment. However, the telling issue here is whether claimant's injury arose out of his employment.

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).

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). *Crowe v. Consolidated School Dist.*, 246 Iowa 402, 405, 68 N.W.2d 63, ___ (1955).

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.2d 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). An expert's opinion based on an incomplete history is not necessarily binding on the commissioner but must be weighed with other facts and circumstances. *Musselman, supra* at 360, ___ . Expert medical evidence must be considered with all other evidence introduced bearing on causal connection. *Rose v. John Deere Ottumwa Works*, 247 Iowa 910, 76 N.W.2d 756 (1956).

The Iowa Supreme Court in *Becker v. D & E Distributing Co.*, 247 N.W.2d 727 (1976) indicated that an expert may testify to a possibility, a probability, or an actuality of causal connection between claimant's employment and his injury. If the testimony shows a probability or actuality of causal connection, this will suffice to raise a question of fact for the trier of fact. If the testimony reveals a possibility, it must be buttressed with other evidence such as lay testimony regarding objective symptoms before and after the incident claimed to have resulted in the injury.

The record clearly shows claimant had thrombosed hemorrhoids on two previous occasions. Claimant complained of a faulty seat which he thought was truck 3014. Claimant's testimony regarding the degree of that problem ranged from somthing minor like a nut and bolt to a total seat replacement. Testimony from claimant's coemployees fails to substantiate any repair.

The history claimat reported to the doctors at the time of surgery was inconsistent with Dr. Basler's reporting "some constipation" the day prior to admission and Dr. Sedlacek's reporting no precipitating constipation. Neither Dr. Sedlacek nor Dr. Basler recorded the history to which claimant testified at the time of hearing; i.e., flu-like symptoms prior to undertaking the trip and the flu three to four weeks prior to the trip as reported in his petition. Neither doctor recounted a problem with a truck seat. It appears that if either were aware of such a problem, he failed to find it of enough significance to mention.

Dr. Basler stated that a truck driver's bowel habits are not the best and then went on to say claimant's condition was aggravated by his occupation. Dr. Sedlacek wrote that it is a well known and accepted fact that truck driving is hard on hemorrhoids. He then said that claimant's symptoms *could* be caused by long trips. Dr. Ban who had reviewed records, pointed out that occupational strain produced by prolonged or repeated lifting, standing, or straining could aggravate hemorrhoids. Claimant testified that he neither loaded nor unloaded. There is no testimony that he stood for long periods of time. Dr. Ban noted that if a truck driver became constipated so that he had to strain to an abnormal degree, then preexisting hemorrhoids could become symptomatic.

The medical evidence which was presented to a very great degree deals with truck drivers generally and not with this specific claimant. After reviewing the record and the case law to be applied, the undersigned finds the evidence does not support claimant's claim.

THEREFORE, IT IS CONCLUDED that claimant has not proved by a preponderance of the evidence an injury arising out of and in the course of his employment on January 23, 1981.

Order

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That defendants pay costs.

Signed and filed this 8th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

KATHY ANN INGHRAM,

Claimant,

vs.

WINEGARD COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a deputy industrial commissioner's ruling filed May 27, 1981 which granted defendants' motion for summary judgment.

The record on appeal consists of the pleadings, interrogatories, motions and rulings; the transcript of the hearing on the motion; and the appeal briefs of the parties.

The issue on appeal is whether no genuine issue as to any material fact exists which would entitle defendants to a summary judgment as a matter of law.

Claimant filed an original notice and petition on October 30, 1980 stating that she fractured her right leg when a company van in which she was riding with fellow employees during a company Christmas party struck a pole. The injury occurred on December 22, 1978. Defendants' answer, in which they contend that claimant's injury was not job related, was filed on November 13, 1980.

On December 3, 1980 defendants served interrogatories on claimant. The answers to these interrogatories were received in the Industrial Commissioner's office on February 2, 1981. In answers to interrogatories numbers 6 and 8, claimant contends that the accident occurred during the time of a company sponsored Christmas party, and that she was being paid for the time she was at the party. Claimant also stated in her answer to interrogatory number 12 that attendance at the party was not required by her employer.

Defendants filed a motion for summary judgment on March 31, 1981 in which they argued that no material issue of fact existed with regard to the question of whether claimant's injuries arose out of and in the course of her employment. Defendants attached a supporting statement and memorandum to their motion; an order filed by the Iowa District Court in which defendants' motion for summary judgment was sustained on the basis of lack of factual dispute concerning consent to operate the employer's van; claimant's answers to the interrogatories; and the deposition taken in the district court action of Thomas G. Koehler, Daniel J. Smith and claimant. Defendants filed no affidavits.

Claimant's resistance to the motion for summary judgment was filed on April 17, 1981. Claimant argued that the resolution of the issue of consent decided in the district court was not determinative of the issue of whether the injury arose out of and in the course of claimant's employment. According to the claimant, the Christmas party was for the benefit of the employer and the employees and that claimant was paid wages at the time of the party.

The Iowa Rules of Civil Procedure govern contested case proceedings before this agency unless the provisions conflict with Workers' Compensation Law, administrative law or agency rules. Industrial Commissioner Rule 500—4.35. The Iowa Rules of Civil Procedure relating to summary judgment and the law and rules pertaining to the Industrial Commissioner are not in conflict. Therefore, a motion for summary judgment is proper in a workers' compensation claim.

Iowa Rule of Civil Procedure 237(b) states in part that "[a] party against whom a claim... is asserted... may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 237(c) further states:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Therefore, the party seeking summary judgment is asserting that, on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. *Drainage District No. 119 v. Spencer*, 268 N.W.2d 493, 499 (Iowa 1978). When a court, and in this case an agency, is confronted with a summary judgment motion, it must examine, in the light most favorable to the party opposing the motion, the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine for itself whether any genuine issue of material fact is generated. *Id.* If the court, based upon this examination, determines that no material issue of fact exists, and that the movant is entitled to judgment as a matter of law, granting of summary judgment is proper. *Id.* at 499—500.

In *Sherwood v. Nissen*, 197 N.W.2d 336, 338 (Iowa 1970) the court remarked that the motion for summary judgment is similar in theory to the motion for directed verdict. If, upon the basis of such material before the court as would be competent proof at trial, the court would be compelled to direct verdict for the movant, then it is proper to render summary judgment. *Id.* When a court rules upon a motion for summary judgment, the court's function is to determine whether a genuine factual issue exists, not to decide the merits of one which does. *Daboll v. Hoden*, 222 N.W.2d 727, 731 (Iowa 1974). Where there is no genuine issue of fact to be decided, the party with a just cause should be able to

obtain a judgment promptly and without the expense and delay of a trial. *Id.* However, summary judgment is not proper if reasonable minds may draw different inferences from the facts. *Tasco, Inc., v. Winkel,* 281 N.W.2d 280, 282 (Iowa 1979).

Section 85.61(6) provides:

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

In order to receive compensation for an injury, an employee must establish that the injury arose out of an 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.*

"Arising out of" employment refers to the cause and the origin of the injury, while "in the course of" employment refers to the time, place and circumstances of the injury. *McClure v. Union County,* 188 N.W.2d 283, 287 (Iowa 1971).

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).

> [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. *Farmers Elevator Co., Kingsley v. Manning,* 286 N.W.2d 174, 177 (Iowa 1979), quoting *Bushing v. Iowa Railway & Light Co.,* 208 Iowa 1010, 266 N.W. 719, 723 (1929).

An employee, although not at his regular place of employment and outside customary working hours, is within the course of his employment while performing some special service or errand or duty incidental to the interest of his employer, and also while on his way from his home to perform, and on his way home after performing such service, errand or duty. *Pohler v. T. W. Snow Construction Co.,* 239 Iowa 1018, 1022, 33 N.W.2d 416 (1948).

Absent special circumstances, an employee who is injured while 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).

In her answer to interrogatory number 7, claimant admitted that she went along for the ride with a fellow employee who was driving to his brother's house. According to claimant, they "intended to return to the cafeteria" where the party was held. Claimant additionally stated in her answer to interrogatory number 12 that her employer did not require the employee to attend the party. Claimant, by her own admission in answer number 17, performed no function at the party.

Nowhere in the pleadings, resistance to the summary judgment motion, or at the hearing, does claimant allege that the ride she took was business-related or intended to benefit her employer. As a result, there is no genuine issue as to material fact regarding whether claimant was in the course of her employment and summary judgment is proper.

It is not even necessary to examine the documents relating to the issue determined by the district court pertaining to consent in order to reach this conclusion. Reasonable minds could draw no different inference from the record before this agency; therefore, it is determined as a matter of law that the injury did not occur in the course of claimant's employment and that defendants' motion for summary judgment must be granted.

Findings of Fact

1. Claimant rode along with Dan Smith who was driving to his brother's house from the company cafeteria.

2. Claimant intended to return to the cafeteria.

3. Claimant's attendance at the party was not required by the employer.

4. Claimant performed no function at the party.

5. Claimant left the party at 2:25 p.m.

6. The accident occurred at 2:24 p.m.

Conclusions of Law

1. Claimant was not in the course of her employment when the accident occurred.

THEREFORE it is ordered:

That defendants' motion for summary judgment be sustained and claimant's cause of action be dismissed.

Signed and filed this 24th day of November, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

EARL W. JENSEN,

Claimant,

vs.

W. HODGMAN & SONS, INC.,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed May 21, 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 decision wherein he was awarded 15% disability for industrial purposes.

The record on appeal consists of the transcript of the testimony of Earl W. Jensen and Carol Feye; the depositions of Thomas W. Bower, a licensed physical therapist, William Follows, M.D., a qualified orthopedic surgeon, William R. Boulden, M.D., a qualified orthopedic surgeon, and David A. Neidhart, M.D., a qualified orthopedic surgeon, which was marked claimant's exhibit 1; also a part of the record were defendants' exhibits A, B, C, D, E, and F; as well as claimant's exhibit 2.

The result of this final agency decision will be the same as that of the hearing deputy except that the findings of fact and conclusions of law are those of the undersigned deputy industrial commissioner. The issue is stated in claimant's brief:

> Was the Deputy Commissioner's finding that Earl Jensen had suffered only a 15 percent whole body disability too low in view of his finding that Mr. Jensen was 60 years old and his present complaints prevented him from doing any of the jobs he had been trained for and done?

Claimant was injured when he was struck by a pickup truck at a job site. He was treated as an outpatient and thereafter had many treatments by a chiropractor. Almost ten months after the injury, he saw an orthopedic surgeon, David A. Neidhart, M.D., and thereafter saw two orthopedic surgeons at the behest of the employer and insurance carrier, namely William R. Boulden, M.D., and William Follows, M.D. Claimant has worked only briefly since the injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 27, 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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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 (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 trial 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. * * * *

Although Dr. Neidhart saw claimant six times as a treating physician, he did not see claimant until almost ten months after the injury and the treatment was not extensive. Dr. Follows saw claimant on two or three occasions as an examining physician. Since there is no disc involvement or other serious back problem other than some degenerative changes, Dr. Neidhart's estimate of 20% permanent impairment seems rather high. Also, the opinions of the other two orthopedic surgeons, that claimant has zero percent disability, form a meaningful contrast. Although his testimony is of lesser weight than those of the physicians, Mr. Bower, the

licensed physical therapist, perhaps comes closest when he assigns a small amount of permanent partial impairment, namely 4%.

Although claimant may not be capable of returning to work as a heavy equipment operator, his mere ability to operate such machines shows that he should be capable of finding work commensurate with his physical capabilities.

Findings of Fact

1. While at work for the employer on September 27, 1976, claimant was injured when he was struck by a pickup truck. (Tr., 13-14)

2. In the work incident, claimant injured his cervical spine and low back. (Neidhart depo., 83)

3. Claimant has a minimal functional impairment to his spine as a result of his injury. (Boulden depo., 10, Fellows depo., 13, Bower depo., 15)

4. Claimant was age 60 at the time of the hearing on November 18, 1980. (Tr., 7)

5. Claimant is a high school graduate. (Tr., 7)

6. Claimant has worked as a farm laborer and was in the United States Army. (Tr., 7-8)

7. After World War II, claimant worked as a set-up man in an implement shop for two years. (Tr., 9)

8. He worked for Welp's Hatchery for two years driving a truck and gathering eggs. (Tr., 10)

9. Claimant worked for several years as a heavy equipment operator for three construction companies. (Tr., 10-12)

10. Claimant has not returned to work for the employer and has done only a few hours of any work since the injury. (Tr., 20-23)

11. Claimant has not looked for work since his injury. (Tr., 39)

Conclusions of Law

On September 27, 1976, claimant sustained an injury which arose out of and in the course of his employment.

As a result of said injury, claimant sustained a disability of fifteen percent (15%) of the body as a whole for industrial purposes.

THEREFORE, defendants are hereby ordered to make weekly compensation payments unto claimant for a period of seventy-five (75) weeks at the rate of one hundred sixty dollars ($160.00) per week for said permanent disability, accrued payments to be made in a lump sum together with statutory interest.

It is ordered that expert witness fees be paid in accordance with the pleadings filed by the parties.

Costs of this action are taxed against defendants.

A final report is to be filed upon payment of this award.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

EDITH F. JOHNSON, f/k/a/
EDITH F. RAINBOLT,

Claimant,

vs.

THE IOWA INJURY FUND OF IOWA,

Defendant.

Appeal Decision

Claimant has appealed from a proposed second injury fund decision in which it was determined that claimant failed to establish by a preponderance of the evidence that she sustained any industrial disability as a result of work-related injuries to her arms.

The record on appeal consists of the testimony of the claimant and Donald Johnson; claimant's exhibits 1 through 5; defendant's exhibits A through E; and appeal briefs of the parties. Claimant's exhibit 5 is a report from James A. Gwaltney, M.D., dated January 21, 1981.

The issues on appeal as stated by claimant are as follows:

1. Whether the decision rendered by the Deputy Industrial Commissioner sets out findings of fact and conclusions of law sufficient to support his decision in this matter.

2. Whether the Deputy Industrial Commissioner erred in concluding that the claimant failed to establish that she sustained industrial disability.

3. Failure on the part of the Deputy Industrial Commissioner to determine the extent of the claimant's industrial disability.

Claimant is presently 52 years of age, is married and has five children. One child still resides with claimant. Claimant has attended one year of college, worked as a newspaper reporter for one year and has operated her own business. (Transcript, pages 45-47.) Claimant began working for her employer, Sheller-Globe Corporation, in 1965 and has periodically worked for them since that time. (Transcript, page 11.) On December 13, 1972 claimant sustained an injury to her left arm which arose out of and in the course of her employment with Sheller-Globe. On January 14, 1974 she sustained an injury to her right arm which also arose out of and in the course of her employment with the same

employer. Prior to these job-related injuries, claimant was in good health without physical limitations.

Claimant testified that she has performed various jobs while employed at Sheller-Globe. (Transcript, page 11.) At the time claimant began experiencing problems with her left arm, claimant's duties involved putting clips in weather stripping, for which she was paid a piecework job rate rather than an hourly rate. (Transcript, pages 13-14.) A piecework job is an incentive position, which claimant described as a position wherein the employee has the opportunity, with rapid production, to make over the basic hourly rate. (Transcript, page 44.)

Claimant subsequently underwent surgery on her left arm and returned to work on April 18, 1973. (Transcript, page 16.) Problems then developed in her right arm since claimant used that arm more while favoring her left arm. (Transcript, page 17.) Surgery was again performed in 1974 on her left arm and approximately six weeks later her right arm was operated on. (Transcript, page 19.) Claimant returned to work in March 1976 with the limitations that she not lift anything over ten pounds regularly and fifteen pounds occasionally and not "pull on anything hard." (Transcript, pages 20, 25.)

Initially after her return, claimant did "plugging" which was a piece rate job. Claimant's testimony indicates that she was able to perform her job in the plugging department "to a point." (Transcript, page 43.) After a brief period in the plugging department, she began working at a "coiling" job. (Transcript, pages 20-21.) The record is unclear whether claimant requested this job transfer or whether her employer initiated the change. Claimant worked in the coiling department from April 1976 until May 1980. In this department she occasionally worked overtime. (Transcript, page 42.)

The job description in the coiling department was changed so that weight lifting requirements were imposed upon workers in that department. These additional requirements exceeded claimant's weight lifting restrictions. (Transcript, pages 40-41.) Incidentally, the new weight lifting requirements effectively excluded most women from working in that department. (Transcript, page 21.)

Claimant is presently employed in the repair department. Both "coiling" and "repair" are hourly rate and not piecework rate positions. (Transcript, pages 22-23.) Claimant's hourly rate in "repair" was $5.50 per hour, while the piecework rate was $5.06 per hour. (Transcript, pages 28, 101.)

Claimant testified that when she performed jobs in which she was paid by the piece, she was "making as much or more over the average than other people that were doing the same work." (Transcript, page 15.) Claimant, however, was unable to recall how much above the standard she had previously made. (Transcript, pages 14-15.)

Donald Johnson, a union representative with Sheller-Globe, testified that seventy-five to eighty-five percent of the jobs in the company were incentive jobs and that the average person would make around 125 percent. (Transcript;, page 88.) Johnson, however, had no knowledge of what claimant's average output was. (Transcript, page 100.)

Claimant testified that without her job limitations she would have been entitled to work at other jobs due to her seniority, whereas, due to her restrictions she was laid off when the work load was reduced. (Transcript, pages 24-25.) According to claimant, during a layoff from May through October 1980, there were jobs in the plant that people with less seniority than she had were performing. (Transcript, page 28.)

Although claimant acknowledged there were certain jobs at Sheller-Globe that she was unable to perform due to allergies, she stated that with her limitations, she has been told that she is working in the only department she is physically qualified for. (Transcript, page 56.) Donald Johnson was of the same opinion, stating, "[a]bout the only thing that would be available to her would be the repair operation in ECC where she wouldn't have the heavy lifting or pulling." (Transcript, page 86.)

The medical evidence in this record establishes that claimant sustained a fifteen percent permanent partial disability to both the left and right arms, or a total of seventy-five weeks of compensation.

Iowa Code section 85.64 provides:

> *Limitation of Benefits.* If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there 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.

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).

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is

to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of 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, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

As the Iowa Supreme Court noted in *Irish v. McCreary Saw Mill*, 175 N.W.2d 364 (Iowa 1970), a total loss of use of the member is not required in order to qualify for second injury fund benefits.

In a second injury fund case, when the industrial commissioner finds as to the claimant's present condition an industrial disability to the body as a whole, he must also make a factual determination as to degree to the body as a whole caused by the second injury. *Second Injury Fund v. Mich Coal Co.*, 274 N.W.2d 300 (Iowa 1979).

Claimant asserts that she has sustained an industrial disability. The record indicates that claimant could only perform "up to a point" her duties "plugging" after her return following the second injury. The evidence further indicates that claimant's ability to perform some jobs at Sheller-Globe has been reduced due to her limitations.

Claimant has other medical conditions unrelated to her injuries which have caused her to be laid off. Although the record is sketchy the evidence indicates that at least once claimant's inability to transfer, even with her seniority to another department during a repair department layoff because of reduced workload, was due to the limitations as a result of her injuries. (Transcript, pages 23, 24, 27, 28, 42, 58.)

While it is true that the record is less than adequate concerning claimant's production record while working on incentive, piecework rate jobs, the record does show that claimant has undergone some loss of job opportunity due to the disability at issue. Potentially higher paying jobs, which were formerly available to claimant before her injuries, are no longer available as a result of her limitations.

Taking all factors into consideration, based upon the record, it is determined that claimant has sustained a loss of earning capacity as a result of her second work-related injury and, as a result, is ten percent industrially disabled.

Pursuant to Iowa Code section 85.64 an employee is paid compensation from the second injury fund for the degree of permanent disability involved only after the compensable value of the industrial disability involved is greater than the sum of the compensable values of the prior and subsequent disabilities. The compensable value of claimant's left arm injury is 37.5 weeks and the compensable value of claimant's right arm injury is 37.5 weeks. The compensable value of a ten percent industrial disability is 50 weeks. Therefore, the scheduled values of 75 weeks is greater than the value of claimant's industrial disability and the second injury fund incurs no liability.

Findings of Fact

1. Claimant is 52 years of age, married and has five children, one of whom resides with claimant.

2. Claimant has had one year of college, has worked as a reporter for one year and has operated her own business.

3. At all material times claimant was an employee of Sheller-Globe.

4. Claimant sustained separate injuries to her left and right arms, both of which arose out of an in the course of her employment with Sheller-Globe.

5. Claimant has job restriction wherein she is not allowed to lift anything over ten pounds regularly and fifteen pounds occasionally and cannot pull "hard" on anything.

6. At the time of the hearing, claimant worked at a "repair" job, for which she was paid an hourly rate of $5.50.

7. Prior to her injuries and for a brief period after returning to work following her second injury, claimant performed incentive jobs which were paid at piecework rate.

8. Claimant worked in the coiling department from 1976 until 1980 when the job description was changed to impose additional weight lifting requirements which precluded women from working in that department.

9. Claimant does not work overtime in "repair".

10. Claimant worked overtime occasionally in the coiling department.

11. Claimant's ability to engage in certain jobs at Sheller-Globe has been reduced.

12. When the workload in claimant's department was reduced, her ability to transfer to another department because of her seniority was impeded by her limitations.

13. Claimant is ten percent (10%) industrially disabled as a result of her second work-related injury.

14. The compensable value of claimant's left arm injury is 37.5 weeks and the compensable value of her right arm injury is 37.5 weeks.

15. The compensable value of a ten percent industrial disability is 50 weeks.

Conclusions of Law

1. Claimant has established by a preponderance of the evidence that she has sustained an industrial disability as a result of her two work-related arm injuries.

2. The scheduled value of claimant's two separate arm injuries amounts to seventy-five (75) weeks, which is greater than the value of fifty (50) weeks computed on the basis of claimant's industrial disability, therefore, pursuant to Iowa Code section 85.64 the second injury fund is responsible for no compensation payments.

THEREFORE, it is ordered:

That costs of this proceeding be taxed to the second injury fund.

* * *

Signed and filed this 17th day of February, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DAN BRADLEY JORGENSEN,

Claimant,

vs.

DALE HENRIKSEN,

Employer,

and

FARM BUREAU MUTUAL,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Dan Bradley Jorgensen, claimant, against Dale Henriksen, employer, and Farm Bureau Mutual, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of his employment on July 20, 1979. It came on for hearing on January 12, 1982 at the Pottawattamie County Courthouse in Council Bluffs, Iowa. It was considered fully submitted with the filing of the deposition of Dallas Munch on February 11, 1982.

The record in this matter consists of the testimony of claimant, Dale Lee Jorgensen, defendant employer, Ruth Jessen Henriksen; defendants' exhibit 1, the deposition of Dale Henriksen; the deposition of Dallas Munch; and a transcript of the hearing. This deputy industrial commissioner appreciated the filing of the transcript of the hearing by defendants. Defendants also filed a brief.

Issues

The sole issue in this matter is whether or not claimant's injury arose out of and in the course of his employment.

Statement of the Case

Twenty-four year old married claimant, father of one child at the time of his accident, testified that he began work for defendant employer in March 1979 following his answering an advertisement in a newspaper for a farmhand. He came from a farm background which included involvement with livestock. He first talked with defendant employer on the phone and then saw him personally. There was a brief time lapse after he was hired as he had to give notice to his prior employer. He worked for defendant until September of 1979.

Claimant said he was paid on a weekly basis with overtime accruing after 6:00 p.m. He was given a house owned by defendant rent free on which he paid no electric bill. He also had use of a garage on the farmstead. He was to get a half beef every six months. Defendant employed one other full-time worker and other part-time help depending on the time of the year.

Claimant listed his duties as feeding and checking cattle, penning animals that got out or contacting someone to help get them in, doing crop work, and referring persons who came to the farm to defendant. He claimed he fed heifers on lots one-quarter mile west of his house, three miles east of his house, and eight miles south and east of his house. He said that he gained more responsibility over the time he was on the job. More specifically, as to his tasks on the farm on which he lived, he stated that although he had "no official type duties" there and he did not feed cattle there, he did look them over. If cattle got out, he would run them in; and if repairs needed to be made, he would make them.

He described his typical daily activities in July of 1979 as follows: He left his house at 6:40 or 6:45 a.m. He glanced around for cattle out at the place where he lived. He drove his truck one-quarter mile west to check the cattle. He got out of his truck and looked at the bunks to see how much feed was left. Different feeds were given to the heifers and steers who were separated into two lots. His job was to feed the heifers who he said occasionally went off feed. Feed was mixed by using cards kept in the truck or on the tractor. Claimant drove to the home place where he commenced his feeding duties. The feeding would take until 11:00 o'clock or so. He had lunch. In the afternoon he did appointed tasks.

Claimant asserted that he checked the lots at defendant employer's direction as the evaluation helped with the work plan and that defendant employer was aware of claimant's daily trips. He agreed that it would be unusual not to have to take the heifers any food at all. Claimant claimed that he would not have been able to check the heifers when he took feed to the steers who were seldom off their feed as the standard procedure was to feed the heifers first. If there was too much food on the truck, according to claimant, it was taken back, remixed, and delivered elsewhere. Each lot was given a different ration. Claimant alleged that going to the west feed lot made time shorter as there was no need to recalibrate to get a proper mix. He recollected two occasions in which he had taken no feed to the heifers. Claimant testified that his co-employee checked on another lot and informed him of the situation there.

Claimant recalled the date of his accident thusly: He was at home. He looked over the cattle at the farmstead. He went to the west lot in his own vehicle. At around 6:50 he was headed for defendant's place. He had an accident three-quarters of a mile east of his place.

It was claimant's opinion that he was on call after 6:00 p.m. and before 7:00 a.m. as he said if the cattle were out, he would have been called. He said he had been called to sell or receive cattle outside of working hours. He was then paid overtime. He stated that he might not charge overtime when the cattle were out and he and his spouse were able to drive them in. Neither did he charge overtime for the time he spent looking at the cattle at the west lot before reporting to work at 7:00 a.m.

Twenty-one year old Dale Lee Jorgensen, claimant's spouse of four years, grew up on the farm. She testified that she did her part in the operation by making claimant's lunch, keeping an eye out, helping get cattle in, and, on one occasion, fixing the truck. She verified claimant's testimony regarding his daily activities saying he left at 6:40 or 6:45 and went west. He honked each morning as he headed for defendant's place. She recalled the day of the accident because she had a friend staying with her and she remembered claimant's honking as he went by. She said that she learned of the accident from defendant employer.

Fifty-two year old farmer, defendant employer, who operates a twelve hundred acre farm and cattle feeding operation, testified that he placed ads in the newspaper seeking experienced persons to obtain his farm help. He thought that he had interviewed several applicants in addition to claimant and had probably conducted two interviews with him. Defendant said initially that at the time of the interview, claimant's duties were outlined. Later, he said he did not recall telling claimant of his duties as he did not know precisely what they would be.

As he recalled, claimant was to start work at 7:00 a.m., to be paid overtime for work after 6:00 p.m., to have primary responsibility for running a cattle feeding unit, and do whatever crop work was necessary. Defendant thought claimant was paid $175.00 per week, a week's paid vacation after a period of time, and free housing and electricity. There was a lunch break as well as a coffee break in the morning and afternoon. He stated that the furnishing of the house made no difference in the employee's pay. He hired persons with farm experience as he expected them to exercise some judgment in performing their work and to be thrifty in feeding.

Defendant insisted that claimant's responsibilities did not start until claimant got to his place in the morning and that he did not recall telling claimant he had duties prior to 7:00. He asserted that had he required claimant to check the cattle, his employment would have commenced sooner or he would have expected claimant to report to work later. He said claimant had not sought overtime for the inspection done prior to his starting work. Although there was no advance discussion, he anticipated that claimant would assist visitors who came to the farm on farm business. It was also expected that claimant would either pen livestock which got out or notify someone to seek assistance. He assumed that some deterrent effect was achieved by having the house where claimant lived occupied. He judged the furnishing of the house to be of more convenience to claimant than to him. He recalled that renters had performed such services as reporting cattle out and a shortage of water.

He described a typical day as requiring claimant to get the feed truck loaded following instructions printed on a card kept in the truck, feed the cattle, observe the cattle and equipment for problems and then fulfill whatever responsibilities had been assigned for the day. He was unable to recall if the operating procedure at the time of injury was for the heiferds to be fed first as the sequence could have varied. He said that the last cattle fed would be given all the feed and none would be left over.

He testified regarding claimant's inspection of the feed lots as follows:

Q. Would he visually inspect the feedlots prior to delivering the feed?

A. No.

Q. Was it necessary that he do that or required that he do that?

A. No.

Q. Do you know if he did do that?

A. I — No, I don't know that he did. Once he got on the job, then it was his responsibility to be observant.

And further:

Q. Do you know if Dan made a practice of checking those lots before he came over to your place in the morning?

A. No, I don't think he did. It wasn't required.

Q. Would the amount of feed to any of those lots vary from one day to the other?

A. It could, depending on the weather situations.

Q. When will cattle eat a varied amount of feed?

A. Hot weather like we just had two weeks ago throw them off a lot.

Q. Would it have been of any benefit in your operation to have checked the lots to see what was needed before loading the feed wagon to go to the lots?

A. Well, I usually like to do that myself. I never required him to make that inspection before he got on the job. If they had some questions about it, they were to come to me and ask about it.

Q. Did Dan ever talk to you about this type of procedure?

A. I'm sure that he did. I can't remember that specific conversation that many years ago now. I am sure he did consult with me about problems or questions. It would have been after he got on the job, after he got to my premises at seven o'clock.

And again:

Q. Would it have been of any benefit to you if Dan would have checked the feedlots at his place prior to driving over to your farm in the morning?

A. Well, I never — I never had that spelled out as a responsibility. Their responsibility was to be at the job at seven o'clock and that's when their responsibility started.

Q. Excuse me. That is not my question, though. Would it have been of any benefit to you for him to have checked the feedlots before he came over to the farm, not whether you absolutely required it.

A. No, I don't — I don't think that it would be.

Q. It wouldn't have saved any time?

A. No. It probably would have — would have been the other way. It probably would have taken up additional time.

Q. Well, if he would have checked the feedlots before coming over at seven o'clock in the morning, so he would have known how much feed may have been used out of those bunks the previous evening, would that have been of any benefit to you?

A. No.

Q. Are you saying it would have been a detriment?

A. No.

Q. If he checked those lots to see if any cattle were in trouble or had strayed from the premises, would that have been of any benefit before seven o'clock in the morning?

A. Well, it probably would have been a benefit had it been a routine practice. Just like you go by the neighbor's house and saw some cattle or hogs, or something, out there and stopped and told them. I would put it in the same category. I have had neighbors call me and tell me I had livestock out here or there, and I have called other neighbors. I guess that is just a brotherly thing to do. I don't expect any renumeration for it.

Q. Well, was there any benefit to load only a certain amount of feed on the feed wagon before going to these other feedlots.

A. Not necessarily because I always had the understanding if they got to the feedlot and there was feed lèft, just don't feed it all. Keep 10 percent of it or 5 percent or 20 percent on the wagon, or something like that, to compensate for those situations.

Q. Would there have been any difficulty with leaving feed in the wagon during the day?

A. I think it could usually be incorporated in the next load of feed that was being fed.

As to the feed lots on the farmstead where claimant lived, he said it was only logical for claimant to look around and see what was going on when he came out of the house although it was not required. He claimed he was aware of times when employees had not checked the lots. He claimed that claimant's co-employee was not required to tell claimant about the feed lots where he later delivered feed. He reported that he, himself, made daily inspections of the lots after feeding.

He stated it was claimant's responsibility to get himself back and forth to work. A farm vehicle might be used to get parts from town. He said that "very infrequently" an employee might use a vehicle of their own for some farm purpose and then have been instructed to get some gas out of the farm barrel.

He recalled someone stopping at his house to tell him of the accident. He went to the accident scene and then to tell claimant's spouse of the incident. He testified that claimant had not reported to work on that day. He thought he continued to pay claimant's check while he was layed up.

Ruth Jessen Henriksen, spouse of defendant employer, recollected claimant's hiring and being present at an interview. She thought claimant had been given time to think about the job, had gone hom to do so, and may have had a second interview. She said it was their practice to take prospective employees to the various lots. It was her understanding that claimant was to start work at 7:00 a.m. She testified that claimant was to be observant of the various yards and lots as he was feeding, but it was not, to her knowledge, that observations would be made prior to his coming to work.

Fifty-two year old Dallas Munch, who has been employed by defendant employer for nine years and who continues work for him at present, testified that his duties commenced at 7:00 o'clock. While he could see feed lots on his way to work, he did not consider it his duty to check the lots prior to reporting to defendant employer's farm, nor did he see a necessity for doing so as two loads would be taken and the feeder could see on the first load how much feed he needed to take on the second. He denied ever hearing defendant employer tell claimant he had a duty to look in on the feed lots before coming to work. He admitted that he had been asked by claimant about the feed lots he passed, but he was

seldom able to tell him of their conditions because he had not looked at them. He said that once in a great while he would look at the feed lots before he went to pick up the feed when he was doing the feeding. He had not inspected the west lots prior to going there to feed.

Munch agreed that there were some duties incident to being a hired man which were not spelled out in black and white, such as pointing out locations for deliveries, keeping an eye on things, and letting his employer know if something is amiss. He agreed that he would perform the same services for a neighbor. He considered himself and claimant as well on call. He said that in some situations he would perform work after hours and not charge extra. On other occasions overtime would be charged.

Findings of Fact

WHEREFORE, IT IS FOUND:

That claimant answered an ad in the newspaper, underwent a personal interview, and commenced work as a farmhand for defendant employer in March of 1979.

That defendant employer liked to employ persons with farm background who were capable of exercising judgment.

That claimant was paid on a weekly basis and given a house, electricity, and meat.

That claimant was paid overtime after 6:00 p.m., for work that was occasionally performed.

That claimant reported to defendant employer's farm at 7:00 a.m.

That claimant was assigned feedlots and to varying duties with the farm crop.

That claimant used cards prepared by defendant employer to determine the feed mix of the different feedlots with each group of cattle receiving a different ration.

That the feed mixture had to be recalibrated if it remained on the truck from a prior feeding.

That no feed was left on the truck at the end of the day.

That claimant checked on the cattle west of his house before he reported to defendant employer's farm.

That claimant charged no overtime for his daily checks before 7:00 a.m.

That defendant employer acknowledged no benefit to him from claimant's having checked the feed bunks.

That claimant was responsible for his own transportation to and from the farm.

That claimant's co-employee rarely inspected the feedlots prior to feeding.

That claimant asked his co-employee about conditions at the feedlots.

That claimant was involved in the truck accident in his own truck prior to reaching defendant employer's farm, but after visiting the west feedlot.

Applicable Law and Conclusions of Law

The primary issue to be decided herein is whether or not claimant was in the course of his employment at the time of his accident.

Claimant's sole citation is to *Phipps v. Mahaska County*, (Appeal Decision filed January 31, 1980). Defendant correctly distinguishes that case.

The real issue to be decided is whether or not the going and coming rule precludes claimant's recovery under the act. The going and coming rule stated most recently in the opinion in *Frost v. S. S. Kresge Co.*, 299 N.W.2d 646, 648 (Iowa 1980) is that: "absent special circumstances, an employee is not entitled to compensation for injuries occurring off of the employer's premises on the way to and from work."

Defendants argue that claimant was not required to check the feedbunks; that his checking the bunks was not the performance of a special service or errand; and that no beneficial service was being provided to defendant employer.

As a starting point for this discussion, it is useful to recall that the opinions of the Iowa Supreme Court have consistently held that workers' compensation statutes are to be given a broad and liberal construction to comply with the spirit as well as the letter of the law. *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402, 411, 68 N.W.2d 63, 68 (1955). In order to receive compensation for an injury, an employee must establish the injury arose out of and in the course of his employment. Both conditions must exist. *Crowe, supra*, at 405, ___. In the course of relates to time, place, and circumstance 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 duties while he is fulfilling those duties or engaged in doing something incidental thereto. *McClure v. Union County*, 188 N.W.2d 283, 287 (Iowa 1971).

The Iowa Supreme Court said many years ago in *Bushing v. Iowa Railway and Light Co.*, 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929) that

> [a]n injury occurs in the course of 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 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 abandonment of employment or 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, Id., was cited with approval in *Farmers Elevator Co., Kingsley v. Manning*, 286 N.W.2d 174, 177 (1979).

The opinion in *Kyle v. Greene High School*, 208 Iowa 1037, 226 N.W. 71 (1929) at 1040, ___ states:

> An exception to the aforesaid general rule is found in cases where it is shown that the employee, although

not at his regular place of employment, even before or after customary working hours, is doing, is on his way home after performing, or on the way from his home to perform, some special service or errand, or some duty incidental to the nature of his employment in the interest of, or under direction of, his employer. In such cases, an injury arising en route from the home to the place where the work is performed, or from the place of performance of the work to the home, is considered as arising out of and in the course of the emplcyment. [Citations omitted.]

There is some conflict in the testimony in this case. Claimant maintained that he checked the cattle feeders at his employer's direction and that his employer was aware of his trips. Defendant employer insisted claimant was not required to check the feeders and that no benefit accrued to him from claimant's having done it. The employer's testimony varied as to whether or not he knew what the claimant was doing.

The undersigned believes the totality of the evidence and the Iowa case law dictate the conclusion that claimant was in the course of his employment at the time of his accident. Whether or not claimant was specifically directed by defendant to check on the cattle prior to reporting to work is not determinative. *See, Fintzel v. Stoddard Tractor & Equipment Co.*, 219 Iowa 1263, 260 N.W. 725 (1935). It seems likely that defendant employer was aware claimant was going to the feedlots before reporting to work as he appeared to be the sort of manager who knew how his operation was running. Perhaps the strongest evidence in claimant's favor is that he deemed his morning trips necessary and he perceived a benefit to his employer. More specifically, he thought he was saving time in furthering the daily work plan. As each group of cattle got a different ration, claimant's trip to determine the precise amount of food needed eliminated the necessity of recalibration and thereby the potential for an error occurring in feeding. Proper nutrition was of ultimate importance in defendant employer's cattle feeding. Defendant employer testified that he picks employees who are capable of independent judgment and who can exercise frugality in feeding. Claimant's conduct provided his employer with exactly what he was looking for. Claimant had not as yet reached his place of employment at the time of his accident, but he already had performed an employment related task.

THEREFORE, IT IS CONCLUDED that claimant's accident on July 20, 1979 arose out of and in the course of his employment.

Order

THEREFORE, IT IS ORDERED:

That this case be returned to the hearing assignment docket so that the remaining issues may be determined.

That defendants pay the costs of these proceedings pursuant to Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 18th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

DARLENE JUNGE,

Claimant,

vs.

CENTURY ENGINEERING CORP.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

The defendants have appealed from a proposed arbitration decision wherein claimant was given an award for running healing period benefits under section 84.31(1) and for medical and hospital benefits.

On appeal the record consists of the transcript of the hearing; the deposition of Albert R. Coates, M.D.; claimant's exhibits 1 - 12 inclusive; and defendants' exhibits A - H inclusive. Both parties filed briefs and arguments on appeal.

The issues are stated in defendants' brief:

1. It has not been established by a reasonable degree of medical probability that any of Claimant's several conditions involving the left foot were substantially or materially aggravated by her work.

2. No evidence exists to support continuing payment of healing period benefits as a result of any condition caused by Claimant's employment.

Briefly, the facts show that claimant has two foot problems which are not connected with the employment. First, she forms callus easily and second, she has a cavus (high arched) foot. In her work for the employer she was required to keep a great deal of her body weight on one foot, the left, and that action caused complications. However, the evidence also showed that claimant's problems did not originate with the employment. Most clearly, the evidence showed that her time off work after May 1980 was not a result of any employment incident or disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury which became disabling on May 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 probabil-

ity is necessary. *Burt v. John Deere Waterloo Tractor Works,* 247 Iowa 691, 73 N.W.2d 732 (1956). The question of causal connection is essentially within the domain of expert testimony. *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960).

The supreme court of Iowa has defined "personal injury to be any impairment of health which results from employment. The court in *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W.35 (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 here contemplated * * * 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 (1963). 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 with the Iowa law."

In *Yeager v. Firestone Tire & Rubber Co.,* 253 Iowa 369, 375, 112 N.W.2d 299 (1961), the court quotes with approval from C.J.S.: "Causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a preexisting latent disease which becomes a direct and immediate cause of his disability or death."

As stated above, the evidence clearly shows that claimant has a predisposition to problems in her left foot. The evidence likewise clearly shows that these preexisting conditions were aggravated by the work at the employer's plant (see, for example, Dr. Coates' testimony in his deposition, page 11): "If I understand her job correctly, I think it is probable that it was irritated by her working, only because of the fact that she was using her foot for full weight bearing on her job."

Thus, there was an injury which is compensable under the Iowa Workers' Compensation Law. The extent of the disability caused by the injury, however, is temporary only because there is no showing that claimant's work injury prevented her from returning to work after March 1980. The evidence showed two surgeries in 1980, one in January and one in May, and most conclusively showed that the May 1980 surgery was not work-connected and was not the cause of claimant's extended disability.

Finally, there was no showing of any permanent partial disability which was caused by the work injury.

The mileage shown by claimant's exhibit 9 on the whole appears reasonable through April 7, 1980:

May 15, 1978 - June 30, 1978, 37 miles at .15	$ 5.55
July 1, 1978 - June 30, 1989, 82 miles at .18	14.76
July 1, 1979 - April 7, 1980, 141 miles at .18	25.38
	$45.69

The time off work shown by exhibit 10 is accepted as being correct for the work claimant missed in 1978 and 1979.

The medical and hospital expenses would be partly compensable up to the May 1980 hospitalization. The record, however, is incomplete because the bills were not attached to the exhibits, except for the bill of Dr. Coates and of American Prosthetics. The parties are directed to consult with one another and determine which portion of the bills are payable in accordance with the above. If the parties cannot agree, claimant may submit the itemized bills as exhibits together with defendants' objections and a determination of compensability will be made.

Findings of Facts

1. Claimant began working for Central Engineering Corporation in August 1977. (Transcrpit, page 11)

2. Claimant had previously injured her left foot while working for Mid-Continent Bottling Company when a piece of glass became imbedded in it. (Transcript, page 10)

3. Claimant had previously injured her left foot while working for Mid-Continent Bottling Company when a fork lift truck ran over the foot. (Transcript, page 11)

4. Claimant worked on an assembly line at the employer's plant for about eight months. (Transcript, page 12)

5. In February of 1979, claimant began to operate a machine called a stomper which necessitated placing more weight on her left foot and leg. (Transcript, page 13-14)

6. Dr. Coates first saw claimant June 3, 1976 for a penetrating wound to the left heel. (Coates deposition, page 6)

7. Claimant is predisposed to form callus. (Coates, page 8-9)

8. Claimant has a cavus foot, an unusually high arch, which is a congenital condition. (Coates, page 9-10)

9. By March 1977, claimant had virtually no pain in her left heel. (Coates, page 29)

10. The tendency to form callus and the cavus foot are the geneses of the claimant's problems. (Coates, page 10)

11. The full weight-bearing upon the left foot was a probable irritation to her foot problem. (Coates, page 11)

12. Dr. Coates saw claimant December 6, 1978 for pain between the third and fourth toes caused by a neuroma and

for a painful bunion. (Coates, page 15-16)

13. The neuroma and bunion were not caused by her employment. (Coates, page 16-17)

14. The neuroma was aggravated by the work. (Claimant's exhibit 8, Coates report 1-2-79)

15. Claimant had a bunionectomy, a realignment of the great toe and excision of the neuroma. (Coates, 16-17)

16. Claimant was treated by Dr. Coates on September 5, 1979 for a continuation of her left foot problems and also treated in December 1979. (Coates, page 19)

17. Claimant was hospitalized in January 1980 to correct a hammertoe condition on the second, third and fourth toes and to do an osteotomy of the second metatarsal. (Coates, page 20)

18. The callus under the metatarsal head was aggravated by chronic weight-bearing. (Coates, page 20)

19. The hammertoes were caused by the cavus foot. (Coates, page 20)

20. The major reason for the January 1980 hospitalization was to correct the hammertoe conditions. (Coates, page 23)

21. The treatment of the plantar callus during the January 1980 hospitalization was coincidental to the treatment of the hammertoes conditions. (Coates, page 23, 26)

22. The recuperation period after treatment by metatarsal osteotomy is two months. (Coates, page 23)

23. Claimant has not returned to work since the January 1980 hospitalization. (Coates, page 23)

24. On May 27, 1980, claimant had an oblique osteotomy of the third metatarsal and a tendolysis to the left foot. (Coates, page 24)

25. The necessity for the surgery on May 27, 1980 arose subsequent to the January 1980 surgery. (Coates, page 25)

26. The surgery of May 1980 was not caused or aggravated by the employment but was to correct congenital anomalies. (Coates, page 25, 26)

27. Had the necessity for treatment which arose between January 1980 and May 1980 *not* arisen, claimant would have recuperated from the January 1980 operation and would have been ready for employment by May 1980. (Coates, page 26)

28. Dr. Coates has not released claimant to return to work following her May 1980 surgery; claimant has recuperated from her surgeries. (Coates, page 27, 32-33)

29. Claimant was off work because of her compensation injuries for 8 1/7 weeks in 1978 and 13 1/7 weeks in 1979. (Claimant's exhibit 10) She was also entitled to compensation benefits for time off work from January 14, 1980 through March 14, 1980, a period of 8 5/7 weeks. (Coates, page 23)

Conclusions of Law

WHEREFORE, it is found that on or about May 15, 1978, claimant sustained an injury which arose out of and in the course of her employment while working for the employer, Century Engineering Corporation.

That said injury caused temporary total disability for a period of eight and one-seventh (8 1/7) weeks in 1978, thirteen and one-seventh (13 1/7) weeks in 1979 and eight and five-sevenths (8 5/7) weeks in 1980.

The proper rate of weekly compensation is one hundred sixty-two and 59/100 dollars ($162.59) per week.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of thirty (30) weeks at the rate of one hundred sixty-two and 59/100 dollars ($162.59) for temporary total disability, accrued payments to be made in a lump sum together with statutory interest.

The parties are also ordered to consult with one another as stated above in an attempt to determine the extent of the compensability of the medical and hospital expenses.

The costs of this action are taxed against defendants.

Defendants are ordered to file a final report of payments upon completion thereof.

* * *

Signed and filed this 18th day of August, 1981.

ROBERT C. LANDESS
Deputy Industrial Commissioner

No Appeal.

DORREL KELLY, Wife of
LAWRENCE KELLY, Deceased,

Claimant,

vs.

KROBLIN REFRIGERATED EXPRESS,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Introduction

By order of the industrial commissioner filed February 16, 1982 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 commutation decision.

The record on appeal consists of the transcript and claimant's exhibits 1, 2, 3, 4, 5, 6, 7, 10 and 11.

The result of this final agency decision will be similar to that of the hearing deputy; however, the mathematical computation has been changed.

Summary

Claimant's husband was killed in an injury arising out of and in the course of his employment on November 9, 1979. As surviving spouse, claimant wants a partial commutation to buy a duplex, whereby she commutes the latter part of her benefit period so as to be able to continue receiving workers' compensation benefits. Defendants contest this. Claimant and her Illinois attorney testified at the hearing.

Issues

The hearing deputy awarded a partial commutation with a value of $143,014.41, which is similar to the figure which will be commuted in this final agency decision. However, whereas the deputy showed a remainder of 670.46 weeks after the commutation, the correct remainder would be 398 weeks.

The issues on appeal concern (1) the method of computation; (2) whether or not the periods which compensation is payable is determinable; and (3) whether or not a commutation would be in the claimant's best interests.

The rate of $348.76 per week was not contested on appeal.

Applicable Law

Section 85.45 basically provides that future payments may be commuted to a present lump sum value when the period during which compensation is payable can definitely be determined and when it appears the computation will be in the best interests of the claimant. Section 85.48 provides for partial commutation. The case of *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964) is often cited to the effect that the court [industrial commissioner] should not be the "unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not insured." (p. 929 of the Iowa Report) One takes that quotation in the context of the whole case as the standard by which claimant's best interests should be evaluated.

The *Diamond* case is also authority for the proposition that a life expectancy table does not provide a valid determination of a determinable period of future payments.

Analysis

Concerning defendants first argument as to how the partial commutation is computed, it appears they are closer to being correct than is claimant. Figured as of May 18, 1982, the date of this final agency decision, 24.714 weeks (or 47.52692%) remain between the 3rd and 4th anniversary of the employee's death. For a widow age 35 at the time of the death, the life and remarriage expectancy table shows 1252.55 and 1314.10 weeks for the third and fourth anniversaries, respectively, giving the year a value of 61.55 weeks. Using the factor .4752692 times 61.55 gives the value remaining in the year: 29.2528 weeks, which may be subtracted from the value at the fourth anniversary:

1314.10
-29.2528
1271.8472 (rounded to 1271.85)

The figure of 1271.85 weeks is the remainder as of May 18, 1982 and *nothing* is deducted by way of prior payment. The commuted value of 1271.85 weeks is 742.2864 and claimant needs some 410 weeks in commuted value to achieve the amount of cash she desires. The computation is expressed thus:

	A	B
Present remainder	1271.85	742.2864
New remainder	-398	331.9786
	873.85	410.3078

(Column A is the total unaccrued weeks to be paid and column B is the present or commuted value of Column A.)

Claimant wants a large partial commutation off the far end of the period so that her payments will continue into the future. Under the above computation, she will use up some 873.85 weeks to achieve her desired goal of 410.3078 weeks and will draw weekly benefits for a further 398 weeks, assuming she remains eligible. At the expiration of that time, she will have to wait the 873.85 weeks before she can again draw benefits, assuming she remains eligible.

With respect to the issue of whether the period is determinable, rule 500.6.3(3), I.A.C., was adopted by the industrial commissioner and is intended to implement §85.45 of the Code. The rule states in part that the "table expresses the combined probability of life expectancy and remarriage in weeks," thus providing a mechanism to arrive at a determinable period. At the time of *Diamond, supra,* there were limits on death benefits (300 weeks) and permanent total disability (500 weeks). In holding that an expectancy table should not be used, the court specifically stated that "[t]here is nothing in the statute injecting the question of probable life expectancy in the case before us." (p. 923 of the Iowa Report) Since that time, the legislature has removed the limitations of a certain number of weeks in cases of death and permanent total disability. Section 85.31(1) and section 85.34(3). Thus, the court at the time of *Diamond* was dealing with a different statute and a different question. Since rule 6.3(3) was intended to implement §85.45, one has no choice but to go by that rule.

Finally, defendants argue that the commutation would not be in claimant's best interests. The testimony showed, however, that claimant had good advice with respect to the purchase of the duplex apartment building and had thought out her plans carefully. With the building as an asset and being able to draw compensation for another 398 weeks, claimant should be able to find the partial commutation to be in her best interests. She is industrious and religious and

not likely to become a victim of her own or any other person's bad monetary habits.

Findings of Fact

1. Claimant was born February 27, 1944 and was age 37 at the time of the hearing. (Tr. 5)

2. Claimant has been receiving workers' compensation benefits at the rate of $348.76 per week as surviving spouse of Lawrence R. Kelly, who was killed in a trucking accident on November 9, 1979. (Tr. 7)

3. Claimant has four children by a prior marriage who live with their father in Jamaica. Claimant and decedent had no children who survived. (Tr. 26, 6)

4. Claimant is not a high school graduate but is working on obtaining an equivalency. (Tr. 9, 26, 28)

5. Claimant is a citizen of the Bahamas and is attempting to obtain U.S. citizenship. (Tr. 25, 6-7)

6. Claimant wants to invest a lump sum of money in real estate. (Tr. 8)

7. Claimant wants to buy a duplex which would cost one hundred forty-three thousand dollars ($143,000) and upon which she put five thousand seven hundred fifty dollars ($5,750.00) in earnest money. (Tr. 13, 16, 18)

8. The asking price for the duplex of one hundred forty-three thousand dollars ($143,000) is reasonable. (Tr. 34)

9. Claimant is a reliable practical individual. (Tr. 38-42)

Conclusions of Law

The period for which compensation is payable can be definitely determined.

The partial commutation would be in the best interests of the claimant.

Order

Defendants are hereby ordered to pay unto claimant the commuted value of 410.3078 weeks, said award of commutation being made as of May 18, 1982, at the rate of three hundred forty-eight and 76/100 dollars ($348.76) per week, and to continue to pay claimant for a period of three hundred ninety-eight weeks (398) into the future at the same rate so long as her eligibility lasts. Thereafter, claimant must wait eight hundred seventy-three point eighty-five (873.85) weeks (the unaccrued value of 410.3078 weeks accrued value) and must retain her eligibility before she can again draw weekly benefits.

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 18th day of May, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

VICTORIA B. KLUTH,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

IDEAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a proposed arbitration decision filed December 4, 1981 wherein claimant was denied compensation for an alleged industrial injury occurring on September 15, 1978.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant; claimant's exhibits 1 through 10 inclusive, exhibit 3 being the deposition of Thomas C. Burton, M.D.; defendants' exhibit A; the deposition of Alex G. Smith, M.D.; Smith deposition exhibits 1 through 4; and the briefs of all parties on appeal.

The issue on appeal is whether claimant's loss of vision in her right eye was causally related to an injury arising out of and in the course of her employment.

Claimant, divorced and 43 years old at the time of the hearing, testified that while completing her shift on Friday, September 15, 1978, she struck the front, right portion of her head, just behind the hairline, on the bottom of an overhanging door. She testified that the blow stunned her momentarily but that she was able to wait out the end of her shift before going home to put ice on the injured area. (Transcript, pages 10-17.)

Claimant testified further that she awoke the next day with a headache that persisted throughout the day. She stated that she was able to continue with her regular activities although she took aspirin to relieve the headache. Claimant stated that her headache had subsided slightly on Sunday for which aspirin was continued. Claimant was scheduled to be off work both days. (Transcript, pages 16-19.)

Claimant testified that she returned to work the following Monday. Claimant stated that she was able to complete her entire shift despite a "dull ache" over her right eye for which she continued aspirin. (Transcript, pages 20-21.)

Claimant testified that she returned to work on Tuesday for her regular 3:30 to midnight shift. She stated that around 4:00 p.m., she began to notice floaters in her right eye. After consulting defendant employer's plant nurse, claimant left work and went to a hospital for emergency treatment. Claimant was seen by Dr. Brinkman who in turn referred her to Alex G. Smith, M.D. (Transcript, pages 21-26.)

Dr. Smith, an ophthamologist, first examined claimant on September 20, 1978. Claimant underwent retinal detachment surgery on September 21, 1978. (Smith deposition, page 9.) This surgery proved unsuccessful in repositioning the retina. Claimant was then referred to University Hospitals in Iowa City for further treatment of the right eye as well as for treatment of a smaller retinal detachment in the left eye. (Burton deposition, page 20.)

Claimant was examined at University Hospitals on October 20, 1978 and again on October 27, 1978 by Jerald Bovino, M.D., and Norman Radtke, M.D., internists in the Department of Ophthamology, and Thomas Burton, then Professor of Ophthamology. Claimant was found at that time to have a massive preretinal retraction with severe scarring of retinal tissue. (Burton deposition, pages 24-25.) Claimant was also found to have very poor vision in the right eye with her condition beyond further treatment. (Burton deposition, page 25.)

As of the examination of September 20, 1978, claimant was moderately high myopic with uncorrected vision in the right eye of 20/60 and 20/20 in the left eye. (Smith deposition, page 6.) As noted above, vision in claimant's right had deteriorated significantly by the examination of October 27, 1978 with vision in the left eye found to be 20/25. (Burton deposition, page 23.) Internal eye pressure was found to measure 14 millimeters of mercury in the left eye; within normal limits. Pressure in the right eye was measured at only 7 millimeters. (Burton deposition, page 24.)

Claimant was also found to have preexisting degeneration of the lattice with lines of demarcation in the right eye (claimant's exhibit 3; Smith deposition page 27) as well as in the left eye (Burton deposition, page 30). Dr. Burton testified that lines of demarcation usually make their appearance over a period of three months in an attempt by the eye to seal off further detachment of the retina. (Burton deposition, page 30.)

While Dr. Burton found the right retina completely detached on October 27, 1978, treatment of the left eye halted further detachment there, leaving vision virtually intact. (Burton deposition, page 34.) Claimant, at time of hearing, had a 100 percent vision loss in the right eye and a 5 percent loss in the left. (Claimant's exhibit 3.) Despite this, claimant returned to work November 20, 1978. (Transcript, page 28.)

Dr. Burton testified as to lattice degeneration as it relates to retinal detachment:

> ... Lattice degeneration is associated with the following things; that is, that there is severe thinning of the retinal nerve tissue to the point where holes are actually created. There is an abnormal watery breakdown of the gelatinous substance of the vitreous overlying the region of the lattice degeneration so that there is a liquid pocket immediately over the lattice area. Furthermore, there are abnormal adhesions or attachments of the vitreous gel structure to the edges of the lattice degeneration, and at those zones elements of scar tissue called gliophil, that's g-l-i-o-p-h-i-l, go out from the edges of the vitreous and we can see those abnormal attachments in the form of little thin films or veils inside of the eye, and those are the characteristic features that we would see under a microscope in any patch of lattice degeneration. As it turns out, in a large population of retinal detachment patients we see these islands of lattice degeneration about 30 percent of the time, so that it's somehow or another highly associated with the eventual production of a retinal detachment. It is one of the most important considerations that we look for in anyone who has a detachment, and we look carefully for signs of similar lattice degeneration in the other eye so that we can do laser treatments or freezing treatments in order to hopefully prevents a retinal detachment from occurring or spreading in the other eye. (Burton deposition, page 57.)

Dr. Smith is a board certified ophthamologist and former student of Dr. Burton. Dr. Smith examined and treated claimant just days after her condition became symptomatic.

Dr. Smith testified by way of deposition that he was unable to formulate an opinion as to the cause of claimant's retinal detachment based upon his prior experience in over one hundred retinal surgeries per year and based upon the examination of claimant. (Smith deposition, page 9.) Dr. Smith stated, however, that he was able to formulate an opinion as to causation based upon the history which claimant related and various scholarly articles and treatises in the field of ophthamology. Dr. Smith opined that the injury of September 15, 1978, as related by the claimant, "could have contributed to the retinal detachment." (Smith deposition, page 11.) Dr. Smith indicated that it was impossible to state whether the retinal detachment in the right eye actually took place prior to September 15, 1978 and further that claimant's eye problems stem from a preexisting condition of lattice degeneration. (Smith deposition, page 24.)

The articles which Dr. Smith relied upon in formulating his opinion as to causation are reproduced as exhibits in his deposition. These articles contain brief case histories of individuals who have suffered retinal detachments as a result of indirect traumas similar to that suffered by the claimant. Claimant and Dr. Smith rely upon the articles as support for the proposition that the trauma of September 15, 1978 could have caused or at least hastened a retinal detachment in the right eye.

Dr. Burton was a professor of ophthamology at the University Hospitals during the period of claimant's treatment there. He is currently the Chief of the Division of Retina Surgery at the University of Missouri. In addition, Dr. Burton has published several articles and conducted research on retinal surgery. (Burton deposition, page 8.) Dr. Burton estimated that he sees some one hundred patients a year with histories of lattice degeneration. (Burton deposition, page 19.) Dr. Burton first examined claimant more than a month after the injury of September 15, 1978. The retinal detach-

ments in both eyes had apparently progressed significantly by this date.

Dr. Burton opined that there does not exist sufficient research material on the effects of indirect trauma as it relates to retinal detachments to justify an opinion as to causation. Rather, Dr. Burton stated that his opinions were based upon personal experience with other patients suffering retinal detachments. (Burton deposition, pages 51-52.) Dr. Burton estimated that 98 percent of all retinal detachments associated with lattice degeneration have no preexisting history of ocular trauma. (Claimant's exhibit 3.) In a report of February 28, 1979, Dr. Burton states that lattice related detachments occur spontaneously in myopic patients with the highest incidence between the ages of 30 and 50. (Claimant's exhibit 3.) As to the combined effects of myopia and lattice degeneration, Dr. Burton testified:

> If you took a nearsighted person with lattice degeneration at age twenty, their risk of spontaneously developing a retinal detachment over a ten-year interval is approximately about 10 percent, about one chance out of ten. That compares to non-nearsighted persons whose chances are less than one in a thousand, so it seems that the nearsighted person with lattice degeneration is at very much higher risk of getting a retinal detachment than someone who does not wear glasses. (Burton deposition, page 47.)

As to whether the September 15, 1978 injury related by the claimant is causally related to the retinal detachment in the right eye, Dr. Burton testified:

> A. It is my opinion that the trauma indicated in this case had no direct or even indirect cause and effect relationship to the retinal detachment, and I think that the trauma that we're discussing today in my opinion was in all likelihood and very probably a pure coincidence.
>
> Q. And it would have happened with or without the bump?
>
> A. That's my opinion.
>
> Q. And did the bump aggravate or accelerate in your opinion the detachment, based upon a reasonable degree of medical certainty and more probably than not?
>
> A. In my opinion the detachment condition was not accelerated by the head injury, and so probably did not have an accelerating factor to play. (Burton deposition, page 38.)

Dr. Burton opined that the onset of claimant's eye problems is fully consistent with many cases involving retinal detachment where the patient is myopic and suffers from lattice degeneration. Dr. Burton gave the basis for his opinion that claimant's retinal detachment in the right eye was not causally related to any indirect trauma. Dr. Burton stated:

> I base that on my opinion of the evaluation of those 3,500 to 4,000 retinal detachment cases that I've been associated with since 1968, a large number of which, approximately 7 or 8 percent or so, have had some kind of injury directed to the orbit or the eye and have resulted in characteristic kinds of retinal detachments. As we talked about earlier, Mrs. Kluth had a condition known as lattice degeneration which apparently existed in both eyes, but I have only Dr. Smith's hospital records to indicate the lattice degeneration was actually present on the right side, probably because the nature of the scar tissue developed such severe folding in the retina that we were not able to make that observation at the University Hospitals. However, in general, lattice degeneration is a bilateral condition, meaning that is frequently, if not usually, bothers both eyes. It is a condition that people are typically born with, but which usually doesn't become manifest until late childhood or teenage years, and gradually over the passing decades results in gradual thinning of the retina with hole formation in the retina and degenerative changes in the vitreous, which are all accelerated by moderate nearsightedness which Mrs. Kluth had, which results in the spontaneous and associated retinal detachment.
>
> I think that to me the symptoms which Mrs. Kluth presented were rather typical and quite characteristic of a relatively young person with a moderately high degree of nearsightedness and associated lattice degeneration present with this kind of set of visual symptoms when they had previously thought there was nothing wrong with their eyes except being nearsighted. Retinal detachments can stay very small and in the periphery of the eye and not cause any symptoms whatsoever, such as in the left eye, or they can come on very traumatically in a matter of a day or three days or so with a severe loss of vision, and despite the best efforts of surgery by the finest ophthamologists, the retina can become permanently detached with severe scar tissue and not be further reparable or ever be able to see again with that eye, and that's all consistent to me with a normal, if you will, pattern in patients with retinal detachment disease. This kind of pattern is repeated over and over again approximately, in my experience, a hundred times a year with no associated ocular trauma along with it. (Burton deposition, pages 36-37.)

Claimant suffers from retinal detachments in both of her eyes. The retina in the right eye is completely detached while the detachment in the left was halted with only a minor loss to vision. (Claimant's exhibit 1.) Both Drs. Smith and Burton felt that the lattice degeneration in the left eye existed up to three months before the injury of September 15, 1978 because of the presence of demarcation lines. (Smith deposition, page 35; Burton deposition, page 30.) Lattice degeneration was present in both eyes, while claimant's myopia was far greater in the right eye. Dr. Burton indicated that the rate of lattice degeneration within a pair of

eyes need not be symmetrical. The contention that a trauma could accelerate a retinal detachment in one eye but not the other eye under such circumstances was untenable to Dr. Burton. (Burton deposition, pages 60-61.)

Claimant's brief on appeal makes much over the fact that Dr. Burton relates a history of claimant having experienced photopsia or light flashes in addition to floaters on September 19, 1978. Dr. Smith indicated that claimant related no complaints of experiencing light flashes. (Transcript, pages 37-38.) Drs. Radtke and Burton took another history from the claimant and had the benefit of medical records sent by Dr. Smith. Drs. Radtke and Burton both note claimant experiencing photopsia. (Claimant's exhibit 3.) In his notes contained in claimant's exhibit 1, Dr. Smith writes, "says OD throbs, lights bother, waters quite a bit, flickers." Finally, claimant fails to discuss how the possible absence of photopsia might affect the finding of causal relationship between an alleged trauma and a retinal detachment.

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The injury must both arise out of and be in the course of the employment. *Crowe v. DeSoto Consol. Sch. Dist.*, 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also *Sister Mary Benedict v. St. Mary's Corp.*, 255 Iowa 847, 124 N.W.2d 548 (1963) and *Hansen v. State of Iowa*, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 15, 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).

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 opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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., supra.* See also *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

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. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 908, 76 N.W.2d 756, ___ (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812, ___ (1962).

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. *Yeager v. Firestone Tire and Rubber Co.*, 253 Iowa 369, 112 N.W.2d 288 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

While claimant has the burden of proof that the disabilities alleged are causally related to an industrial injury, that injury need not be the *sole* cause of the disability alleged. Claimant, however, must establish that the disability is in some way directly traceable to the injury. Therefore, claimant must show that were it not for the injury, her disability would not have existed. *Langford v. Keller Excavating & Grading, Inc.*, 191 N.W.2d 667, 670 (Iowa 1971).

In *Burt, supra*, at page 702, the court stated:

> Perhaps our latest consideration of this matter was in *Nellis v. Quealy, supra*, 237 Iowa 507, 511, 21 N.W.2d 584, 586, where we rejected defendant's argument that because the doctor's testimony went no further than to show a possibility of causal connection between the foreign substances in the eye and the ultimate disability, the commissioner could not find as a fact that there was such a causal connection. We held it was not necessarily conclusive when claimant's doctor said the condition was *possibly* caused by the foreign substance in the eye, so that the commissioner would not thereafter be permitted to determine the causal connection. This is certainly the sensible rule, for we cannot hold that no matter what the other evidence tended to prove, if the doctors said the causal connection was "possible" instead of "probable", then the courts and fact-finding bodies would be powerless to grant relief. Such a surrender of the judicial processes is unthinkable.

Medical evidence contained within the record on appeal establishes that claimant was myopic and had suffered from a significant degeneration of the lattice in both eyes as of September 15, 1978. The progression of the lattice degeneration was such as to convince Dr. Burton that the retinal detachment in claimant's right eye would have happened regardless of any trauma. (Burton deposition, page 38.) Dr. Burton testified that it has been his experience that 98 percent of all retinal detachments associated with lattice degeneration are unrelated to traumas. (Claimant's exhibit 3.)

Dr. Smith testified that it is *possible* that a trauma caused a retinal detachment in claimant's right eye while not causing a similar detachment in the left eye. This possibility is created totally by professional articles relating brief case histories of retinal detachments caused by indirect trauma. A review of these articles reveals that these case histories are often dated and fail to relate similar circumstances of preexisting myopsy and lattice degeneration.

While it might be argued that it is difficult to scientifically establish a positive causal relationship between an indirect trauma to the head and a retinal detachment, claimant's

burden of proof cannot be diminished because of that difficulty. To hold defendants liable merely because there exists a possibility that the trauma caused the retinal detachment is to defeat legislative intent and judicial directive.

Moreover, Dr. Burton points out that given the extent of claimant's myopia and lattice degeneration, it would be extremely unlikely that an indirect trauma could have caused the retina detachment in the right eye. While comparisons of odds should not be determinative in issues of causal relationship, mere possibilities of causation should not be sufficient to defeat overwhelming evidence against such a relationship.

On review of the record on appeal, it is concluded that claimant has failed in her burden to prove by a preponderance of the evidence that the retinal detachment of her right eye is causally related to an injury sustained on September 15, 1978. As noted by the deputy, both physicians who testified in this matter are well qualified to render opinions and nothing herein is meant to imply anything about the credentials of either.

Findings of Fact

1. That claimant sustained an injury to her head arising out of and in the course of her employment on September 15, 1978. (Transcript, pages 10-13.)

2. That claimant first began to experience visual difficulties in her right eye on September 19, 1978. (Transcript, page 22.)

3. That prior to September 15, 1978, claimant was myopic and suffered from lattice degeneration in both eyes. (Claimant's exhibit 3.)

4. That claimant suffers from a complete retinal detachment in her right eye causing a 100 percent vision loss in that eye. (Claimant's exhibit 3.)

5. That claimant suffers from a stabilized, partial retinal detachment in her left eye causing a five percent vision loss in that eye. (Claimant's exhibit 3.)

6. That the retinal detachment of claimant's right eye was not caused, aggravated, or accelerated by an injury occurring on September 15, 1978. (Burton deposition, page 38.)

Conclusion of Law

That claimant has failed in her burden of proof that the disabilities which she alleges are causally related to an injury arising out of and in the course of her employment.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision filed December 4, 1981 are proper.

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

Costs of the original proceedings are taxed to the defendants. The costs of the appeal proceeding is taxed to the claimant.

* * *

Signed and filed this 31st day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT D. KNIESLEY,

Claimant,

vs.

BRAZOS TRANSPORT, INC.,

Employer,

and

TRANSPORT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed review-reopening decision in which it was determined that defendants failed to properly notify claimant of the termination of his benefits. Defendants were ordered to pay claimant temporary total disability payments from the date of his termination to the date of the hearing.

The record on appeal consists of the testimony of claimant; claimant's exhibits 1 through 7; and the appeal briefs of both parties.

The issue on appeal as stated by defendants is "whether or not the due process clause of the United States Constitution and the Iowa State Constitution can be imposed upon private conduct and private individuals such as the above-named Employer and Insurance Carrier." Claimant has rephrased the issue to read "whether [the] *Auxier* ruling is applicable to Defendants since they are not a State agency."

Claimant is presently forty-seven years old, married and has one dependent child. At the time of his injury, claimant had two dependent children but since that time, one child was involved in a fatal accident.

On June 5, 1981, claimant received an injury which arose out of and in the course of his employment with defendant employer. On that date claimant was driving a truck with malfunctioning air-conditioning system through some southern states where the temperature was approximately one hundred degrees. (Transcript, page 14.) Due to the excessive heat, claimant became disoriented and dizzy and experienced "excessive pains" in his chest, shoulder and arm. (Transcript, page 15.) Claimant telephoned his em-

ployer and was told to "keep going" but that he should see a physician when he returned. (Transcript, page 15.)

Claimant was examined by a number of physicians to determine the cause of his heat intolerance. Sant M.S. Hayreh, M.D., and a Dr. Young each examined claimant and recommended that he avoid exposure to hot, humid weather. Both Dr. Young and Robert F. McCool, M.D., were of the opinion that claimant could perform his job as long as his truck was air-conditioned. On August 27, 1981, Dr. McCool gave claimant a note for his employer stating that claimant could work if his truck was air-conditioned. (Claimant's exhibit 7.)

On September 8, 1981 claimant received a notice from his employer stating "[d]ue to the fact our doctor reports that you hyper-ventolate [sic] when you get hot from the weather or from excessive work, you are placed on indeffinate [sic] layoff until such time that you can pass a company physical showing you wont [sic] hyper-ventolate [sic] in preformance [sic] of your required duties."

Claimant received a letter dated September 10, 1981 from Transport Insurance Company which stated: "Attached please find our draft in the amount of $36.48 in payment of 1 day of temporary total disability benefits. This letter will further advise we are suspending further benefits at this time."

The Iowa Supreme Court in *Auxier v. Woodward State Hospital*, 266 N.W.2d 139, 142-43 (Iowa 1978), *cert. denied*, 439 U.S. 830 (19), stated:

> We hold, on the basis of fundamental fairness, due process demands that, prior to termination of workers [sic] compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following:
>
> [1] the contemplated termination,
>
> [2] that the termination of benefits was to occur at a specified time not less that 30 days after notice,
>
> [3] the reason or reasons for the termination,
>
> [4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,
>
> [5] that the recipient had the right to petition for review-reopening under §86.34.

The court also stated that the due process clauses of both the federal and state constitutions require a procedure for notice of termination of a property right and that, although this notice is not statutorily required in Iowa, it can be derived from common-law principles. *Id.* at 142.

In the present case, it is clear that defendants' notice of termination of benefits to claimant failed to meet the requirements imposed by *Auxier*. The termination of benefits occurred immediately and claimant had no opportunity to contest the termination by submission of evidence.

Defendants contend that the *Auxier* requirements for notice are inapplicable to them since they are not a state entity. The Iowa Supreme Court in *Auxier*, however, made no such distinction between private and state employers when it held that due process demands proper notice of benefit termination. *See also, Davis v. Caldwell*, 53 F.R.D. 373 (N.D.Ga. 1971).

Iowa workers' compensation law is designed to benefit the employee regardless of whether he is employed by the state government or by a private company. To make such a distinction when the issue of benefit termination arises would be patently unfair. If such a distinction were made, an employee would be penalized by denial of *Auxier* protection simply because he or she was employed by a private entity. A state employee, on the other hand, would be afforded greater protection against unjust termination of benefits simply due to the fact that his state employer was required to comply with the *Auxier* standards. It is the opinion of this agency, that the Iowa Supreme Court did not intend to create such a distinction when *Auxier* was decided.

The evidence presented in this case indicates that the entire case was ready for hearing at the time the *Auxier* issue was heard and, as such should not have been bifurcated. However, since the hearing was limited to the *Auxier* issue this case must be returned to the ready-to-assign category in order that the remaining issues may be presented.

Findings of Fact

1. On June 5, 1981 claimant received an injury which arose out of and in the course of his employment.

2. Defendants filed a memorandum of agreement with respect to the work-related injury and paid claimant weekly benefits.

3. On September 10, 1981 defendants sent claimant a notice indicating immediate termination of his benefits.

Conclusions of Law

1. Defendants' notice to claimant failed to meet the notice requirements for termination of benefits set forth in *Auxier*.

2. *Auxier* notice standards are required in all workers' compensation cases in which benefits are to be terminated.

THEREFORE, it is ordered:

That defendants pay claimant temporary total disability payments from the date of his termination to the date of the hearing.

That accrued payments be paid in a lump sum together with statutory interest pursuant to Iowa Code section 85.30.

That defendants pay the costs of this action.

That a final report be filed upon payment of this award.

That this case be returned to the ready to assign category for consideration of the remaining issues.

. . . --

Signed and filed this 9th day of February, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Pending.

ANNA G. KOCH,

Claimant,

vs.

HON INDUSTRIES,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed September 18, 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 have appealed from an adverse arbitration decision.

The record on appeal consists of the transcript of the hearing; joint exhibit 1 which has under its cover respondents' exhibits 1 through 5 and claimant's exhibits B through G; exhibit A is the deposition of Robert G. Hunter; exhibits H and I (reports) were also a part of the record.

On review of the record, it is found that the hearing deputy's proposed findings of fact and conclusions of law are proper. They will be adopted and repeated below except that three additional findings of fact have been made. These additional findings are numbered 5A, 5B and 5C.

Findings of Fact and Conclusions of Law

Conclusion A. As stipulated by the parties, decedent was injured fatally in the course of and arising out of his employment on August 9, 1978.

Finding 1. Decedent was driving the car which struck a bridge abutment.

Finding 2. Decedent drank two or three martinis and ate a lobster dinner between 1½ and 2½ hours before the fatal accident.

Finding 3. Decedent's blood alcohol level was determined to be zero point twenty-one (0.21%) percent by means of dichromate reduction of a sample of blood taken from his inferior vena cava during an autopsy performed more than eleven (11) hours after his death.

Finding 4. None of the individuals involved in the procedure of withdrawing, transporting, and analyzing the blood sample were called as witnesses.

Finding 5. Both defendants' and claimant's expert witness testified to various corruptive influences that exist when a decedent's blood alcohol level is being determined and both agreed that the zero point twenty-one (0.21%) percent result was not compatible with the fact that claimant had no more than two (2) or three (3) martinis.

Finding 5A. There are basic problems of accuracy in the use of the dichromate reduction method of alcohol testing on a decedent. (Tr. 98-119; 42-43)

Finding 5B. The dichromate reduction method blood test was fallible enough to conclude that conflicting evidence from a reliable witness would be more accurate as to a person's sobriety or drunkenness. (Tr. 54-58)

Finding 5C. Claimant was not intoxicated at the time of his death. (Tr. 138)

Conclusion B. Defendants have failed to establish by a preponderance of the evidence that decedent was intoxicated and that intoxication was the proximate cause of his fatal injury.

Finding 6. Claimant is decedent's surviving spouse and was his only dependent on the date of injury and has not remarried.

Conclusion C. Claimant is entitled to death benefits pursuant to Code section 85.31(1)(a).

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant pursuant to Code section 85.31(1)(a) at the rate of two hundred sixty-five dollars ($265) per week, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay one thousand dollars ($1,000) in burial expenses pursuant to Code section 85.28.

Defendants are further ordered to pay to the treasurer of the State of Iowa one thousand dollars ($1,000) for the second injury fund pursuant to Code section 85.65.

Costs of this action are taxed against defendants. See industrial commissioner's rule 500—4.33, I.A.C.

A final report shall be filed by defendants when this award is paid.

. . .

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

BARRY MORANVILLE
Industrial Commissioner

Appealed to District Court; Pending.

PHILLIP W. KOGER, SR.,

Claimant,

vs.

HOCKENBERG FIXTURE & SUPPLY CO.,

Employer,

and

WAUSAU INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Phillip W. Koger, Sr., against Hockenberg Fixture and Supply Co., employer, and Wausau Insurance Companies, insurance carrier, for benefits as a result of an injury on March 6, 1981. On March 31, 1982 this case was heard by the undersigned. This case was considered fully submitted upon receipt of claimant's attorney's letter on April 23, 1982.

The record consists of the testimony of claimant, Kala Jean Smith, Tony Mark James, Jack Turnipseed, Stanley (Jim) Stein, and John Houghtaling; defendants' exhibits A through D and F through I.

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; and whether claimant's injury was the result of a willful intent to injure himself.

Facts Presented

Claimant testified that on March 6, 1982 he was injured while working for defendant employer when he got mad and hit a box with his right hand. Claimant stated that he was just mad and hit the box but did not intend to hurt himself. Claimant indicated he went to the hospital after work and told the doctor he hurt his hand at home because there were rumors of an impending layoff. Claimant disclosed that he later wrote his physician a letter stating he injured himself at work.

On cross-examination claimant revealed that he had been having problems with his previous wife over child support and his mother was in the hospital. Claimant indicated he was trying to fill an order that had been filled out wrong by a salesman right before he hit the box. Claimant testified he told John Houghtaling, a co-employee about hitting the box that day. Claimant stated that the following Monday he told his supervisor the injury occurred at work and two weeks later told Tony James he injured his hand when he fell off a shelf while working for defendant employer.

Kala Jean Smith testified that on the date of claimant's injury she was living with claimant and stated claimant was not injured when he went to work the morning of March 6, 1981. Ms. Smith disclosed that claimant later told her he hit the box because he could not handle everything going on at the time.

On cross-examination Ms. Smith disclosed that claimant's wife was denying him visitation with his children and that his mother's hospitalization also was of real concern to claimant. Ms. Smith stated that she helped make up the story which was given claimant's physician.

Applicable Law

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on March 6, 1981 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 words "out of" refer to the cause or source of the injury. *Crowe v. DeSoto Consol. Sch. Dist.,* 246 Iowa 402, 68 N.W.2d 63 (1955).

The words "in the course of" refer to the time and place and circumstances of the injury. *McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe v. DeSoto Consol. Sch. Dist., supra.*

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." *Cedar Rapids Comm. Sch. Dist. v. Cady,* 278 N.W.2d 298 (Iowa 1979), *McClure v. Union et al. Counties, supra. Musselman v. Central Telephone Co.,* 261 Iowa 352, 154 N.W.2d 128 (1967).

Analysis

Although claimant has met his burden in proving his injury occurred while he was working for defendant employer, claimant has failed to prove his injury arose out of his employment.

Claimant's credibility is obviously not very good. Of the three stories that he gave, the undersigned believes that claimant injured his hand as a result of hitting a box. The reason for hitting the box is another matter. Claimant would have the undersigned believe that he became angry when he received an order which had some errors. However, the greater weight of evidence indicates that claimant was angry because he was unable to cope with the problems created by his former wife as well as his mother's hospitalization. Jack Turnipseed testified that claimant told him he was having personal problems after he revealed he had gotten mad and hit a box. Ms. Smith's testimony would also indicate it was claimant's problems outside of work which caused him to hit the box. There was also plenty of evidence to indicate the order which claimant was filling out at the time was filled out correctly.

In that nothing at work caused claimant to get angry or upset to the point he hit the box, it cannot be maintained that the injury arose out of his employment. Since claimant has failed to show his injury arose out of his employment with defendant employer, it is unnecessary to determine if his injury was intentional or not.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On March 6, 1982 claimant injured his right hand when he hit a box.

Finding 2. Claimant hit the box with his right hand because of the frustrations he was experiencing with regards to child support, visitation rights, and the hospitalization of his mother.

Finding 3. Claimant did not hit the box as a result of anger over a faulty order form or any other work incident.

Finding 4. Claimant's injury occurred while working for defendant employer on defendant employer's premises.

Conclusion A. Claimant's injury occurred while he was in the course of his employment with defendant employer.

Conclusion B. Claimant's injury did not arise out of his employment.

Order

THEREFORE, claimant is to take nothing as a result of this action.

Defendants are to pay the costs of this proceeding.

* * *

Signed and filed this 30th day of April, 1982.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

LUCY KOLESAR,

Claimant,

vs.

SUPERIOR INDUSTRIES INCORPORATED,

Employer,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Lucy Kolesar against Superior Industries Inc., employer, and St. Paul Fire and Marine Insurance Company, insurance carrier, for benefits as a result of the death of Julius Kolesar which was allegedly caused by an injury on December 29, 1979. On December 2, 1980 this case was heard by the undersigned. This case was considered fully submitted upon receipt of defendants' brief on January 23, 1981.

The record consists of the testimony of claimant, Wesley I. Seaver, O.D., William Lamb, Donald G. Bailey, Richard Brown, Mickey Castagnoli, Dan Block, John Kolesar and Dale Eklov; claimant's exhibits 1 through 17, 19 through 29; defendants' exhibits A through K; and depositions of Thoralf M. Sundt, Jr., M.D. and William C. Robb, M.D.

Issues

The issues presented by the parties at the time of the pre-hearing and hearing are whether decedent's death arose out of and in the course of his employment; whether there is a causal relationship between the alleged injury and decedent's death; and claimant's marriage to decedent.

Facts

Donald G. Bailey testified that on December 29, 1979 he was working with decedent routing out doorways from a scaffold. Mr. Bailey disclosed that shortly before noon decedent left to go to the restroom which was outside. When decedent came back he was holding the back of his neck. Mr. Bailey stated:

Q. All right. Did you have a conversation with him?

A. I walked over that way, yes, because he wasn't coming my direction too fast. So I walked over that way, and he said — I asked him what was the matter, and he said, "I slipped and fell." And he said, "When I look up and then I look down," he said, "I feel funny."

Q. Uh-huh.

A. I asked if he was dizzy. He said no. But I think his equilibrium was off. He didn't walk normally. He kind of moved a little bit from side to side when he was doing this.

Q. How did he appear?

A. Well, knowing Juicy he is usually, you know, laughing and comical, this type of thing, but he wasn't. He was quiet. And he kind of — He looked real serious. He would kind of look up and then look down, and he said, "When I look down I feel funny."

Q. What was done then?

A. We stood there and talked for a few minutes, because it was about seven, eight, ten minutes to twelve, something like this, and then we went to lunch.

They had lunch in defendant employer's trailer. Decedent turned pale and didn't eat much. Decedent kept on putting his hand on the back of his neck and indicated that is where he hit. Mr. Bailey disclosed he drove decedent home and helped him to the house. Mr. Bailey stated:

A. He didn't say too much. We got around 15th Street there on 5th Avenue South and stopped at the stop sign there, and he said, "I can't hardly turn my head to the right. It kind of hurts when I turn to the right. I can look to the left pretty good, but not the right."

On cross-examination, Mr. Bailey indicated their work was not very strenuous that day. Mr. Bailey revealed that some snow was on the ground and there were a few icy spots. In cross-examination, Mr. Bailey changed his testimony in that decedent did not originally tell he had fallen, only slipped.

Claimant testified that she at one time was married to a man by the name of Brennan and that she received her wages in the name of Lucille Brennan. Claimant also revealed that she has a son who is 26 years old. Claimant stated:

Q. From September of 1963 for example until the time Julius Kolesar died, did you live together.

A. Yes.

Q. Continuously?

A. Yes.

Q. Did you sleep together?

A. Yes.

Q. Did you cohabit in every way together?

A. Yes.

* * *

Q. How long did you know Julius Kolesar?

A. Since about 1956.

Q. And how long did you live with him continuously?

A. Continuously from when he bought the house in the flats in '63.

Q. And was that cohabitation uninterrupted?

A. Yes.

Claimant indicated that her son referred to decedent as "Dad". Claimant testified that she considered decedent as her husband and decedent considered her as his wife. Claimant disclosed that decedent and she conducted their daily affairs as husband and wife, received mail as Mr. and Mrs. Kolesar and entered into some contracts that way. Claimant stated:

Q. Who put up the down payment for the last house you bought?

A. Juice did.

Q. And whose name is the house in?

A. Mine.

* * *

Q. Did he ever introduce you as his wife?

A. Yes.

Q. On more than one occasion?

A. Yes.

Q. On many occasions?

A. Yes.

Q. Did you ever introduce him as your husband?

A. Yes.

* * *

Q. How were you regarded by members of the family on both sides?

A. As husband and wife and as grandmother and grandfather for the grandchildren from his daughters as well as my son.

On cross-examination, claimant revealed that much of her business was done in the name of Lucille Brennan including utility bills and a mortgage. Decedent and claimant each had their own checking accounts.

John Kolesar, O.D., testified he was decedent's brother. Dr. Kolesar indicated he considered claimant's and decedent's relationship as a marriage. Dr. Kolesar stated:

Q. How did Juicy refer to his wife or to Lucy?

A. As his wife.

Q. And in your presence on more than one occasion?

A. Yes, sir.

Q. How did he introduce her?

A. Lucille Kolesar, my wife.

Dr. Kolesar revealed that he was the one who took decedent to the hospital and stated:

Q. Did Juice tell you what had happened?

A. Yes.

Q. What did he say?

A. He said he was at work. He said he had to go to the bathroom. On the way to the bathroom there was a patch of ice that he slipped on and fell and snapped his neck and immediately became ill.

Decedent was transferred to Rochester where he died 17 days later.

Wesley I. Seaver, O.D., testified he knew decedent for 43 years and knew he lived with claimant since 1968. Dr. Seaver indicated decedent and claimant lived as man and wife.

William Lamb testified that on January 2, 1980 he retired

from the position of chief of police of the Fort Dodge Police Department. Mr. Lamb indicated he knew decedent since Junior High School. Mr. Lamb stated claimant lived with decedent and once moved with decedent to a different residence. Mr. Lamb testified that decedent and claimant conducted themselves as man and wife.

Richard Brown testified that he lived next door to decedent for 12 years and indicated that claimant lived with decedent for that period. Mr. Brown stated:

Q. Who else lived there with them?

A. Well, Denny did, their boy, for a while. And he was in the service back and forth.

Q. Who is Denny?

A. That's her boy.

Q. That's Lucy's boy?

A. Yes.

Mr. Brown revealed that Lucy's son called decedent "Dad".

Mickey Castagnoli testified he knew decedent all of his life and indicated he knew decedent better than anyone else in Fort Dodge. Mr. Castagnoli stated:

Q. With whom did Juicy live the last 15 or 20 years?

A. With his wife Lucy.

Q. And how do you know that?

A. Well, I used to deliver food down to them, and — Well, I used to see them all the time.

Q. So you are testifying from your own observation, not from what someone else has told you?

A. That's right.

Q. If you know, tell us how Juicy considered Lucy. What relationship did he ever express to you that they had, if you know?

A. Well, I don't know exactly what you mean, but when we — You know how guys get together and talk. He always referred to her as his old lady.

Q. And in common parleys how did you interpret that?

A. His wife.

Q. Did they conduct themselves the same as any other ordinary couple?

A. Yeah.

Dan Block testified he was good friends with decedent and knew he had been living with claimant and that they conducted themselves like any other couple. Mr. Block stated he considered them man and wife. Mr. Block stated:

Q. And you have no knowledge of how they conducted their private or business affairs?

A. Yeah. I do. I don't know the entire context. They operated pretty much like a man and wife, like my wife and I do. You know, there was sharing of funds I feel and things of that nature, yes. The reason I know that is because Juicy use to buy antacids once in a while. He would drop in and bat the breeze, stop in at the store.

Dan Eklov testified he is employed by defendant employer as field representative. Mr. Eklov indicated for tax purposes decedent indicated he was single with no dependents. Mr. Eklov testified that he was told claimant slipped going to the portable toilet but no one told him claimant had fallen and hit his head.

Thoralf M. Sundt, Jr., M.D., testified he is a neurosurgeon and that decedent was admitted to Mayo Clinic on December 30, 1979. Mr. Sundt stated:

A. Mr. Kolesar essentially was what we would call a grade 3 or a grade 4 candidate for surgery following a subarachnoid hemorrhage and that phrase summarizes his entire neurological picture as far as we in neurology and neurosurgery are concerned. Translated, that means that this individual was semicomatose and able to move his extremities to pain and occasionally to allow verbal stimuli, but as far as his being appropriate, et cetera, he was not.

He had a left hemiparesis meaning he was somewhat weaker on the left than on the right which developed at some point in time after admission to the hospital and prior to surgery. The cause for that hemiparesis is spasm of the arteries and in turn spasms of the vessels developed from the effects of blood around the arteries because blood is a poison when it's on the outside of vessels. It belongs on the inside and not on the outside. On the outside it becomes a chemical irritant.

Now, if I may just briefly summarize this, I will answer all the questions you might have, counselor, I think. Mr. Kolesar underwent an angiogram on January 3, 1980 and it demonstrated a multilobulated aneurysm of the right posterior communicating artery and a mild degree of spasm in the vessels directly adjacent to that aneurysm.

Given the history of an unequivocal subarachnoid hemorrhage, bloody spinal fluid and the finding of a subarachnoid hemorrhage on neurologic examination there was no question in our minds whatsoever, none, that his patient had a subarachnoid hemorrhage and he had a subarachnoid hemorrhage from this aneurysm, and at the time of surgery the aneurysm was definitely identified as the source of his bleed, so we can state unequivocally that Mr. Kolesar had a subarachnoid hemorrhage from an aneurysm.

Q. Doctor, would you explain for the record what an aneurysm is?

A. An aneurysm is a blister off a blood vessel. It develops

> from a weakness on the wall of an artery. The weakness in the wall of an artery may be inherently there in life, but most people gradually develop this aneurysm over a period of years most commonly from hypertension, but a lot of people just gradually evolve an aneurysm even without hypertension just as an aging process.

Dr. Sundt opined that it was possible for a slip and fall to cause decedent's aneurysm to rupture. At the same time, Dr. Sundt indicated that if claimant did not actually hit his head it would be unlikely that the fall would contribute to the rupture. Dr. Sundt also disclosed that the rupture could cause a person to fall.

William C. Robb, M.D., testified he first saw decedent on January 29, 1980 when he examined decedent and talked to him as well as a member of decedent's family. Dr. Robb stated:

> The man said that he was walking along and got severe pain in his head, went down the back of his neck, and that he blacked out for a few seconds. And when he started to fall, they caught him.
>
> I found when I examined him no cutaneous injuries whatsoever. His eye grounds were normal, didn't see any choked discs. He had a little bit of a stiff neck and he had hyperactive reflexes on one side. I don't remember which side right now.
>
> Q. You got the information from Mr. Kolesar then that he had experienced a headache and some neck pain prior to falling or slipping or whatever, is that correct?
>
> A. They were describing it to me. I had the patient there and I had Ramsey and some member of the family. They described to me that he developed an excruciating headache with pain down the back of his neck, then he started to slump down and they grabbed him and kept him from falling. And that's the story I got from those people.

Dr. Robb disclosed he could find no bruises, abrasions or swelling on decedent's head. Dr. Robb opined that the hemorrhage happened before decedent's fall.

In his letter of February 13, 1980 Dr. Robb stated:

> At the time of Mr. Kolesar's admission I very carefully quizzed Mr. Kolesar and the other people present at the hospital. The patient did slip, the patient did fall, but everybody including the patient denied that he hit his head.
>
> It was the original contention that he fell and he may have snapped his neck at the time he fell. He definitely did not hit his head. There was no abrasion and no bruises, and I do not think there was any relationship between the fall and subarachnoid hemorrhage.

In his report of December 29, 1979, J. Kelly, M.D., stated: "History reviewed of man experiencing some mild discomfort in the neck and back of his head after he sort of slipped and sort of jerked his head. It has been quite firmly established he didn't fall or injure himself."

The report of Homer Ramsey, M.D., dated May 1, 1980, contains the following:

> This is the letter you requested concerning a patient seen by me in the Emergency Room on 12-29-79, a Julius Kolesar. The patient was seen originally in the Emergency Room complaining of not feeling well. He felt nauseated and complained of stiffness in his neck. At the time of the original examination, the patient was neurologically intact and stated that he had slipped on the ice and had twisted his neck. He was questioned closely at that time as to whether he had hit his head or was knocked out and denied both. . . .
>
> * * *
>
> The initial history of the fall and the twisted neck could or could not have related to this subsequent death from the cerebral aneurysm. It is my feeling, however, that I cannot say whether this fall and the twisted neck did or did not have anything to do with the sebsequent death.

Dr. Ramsey later stated in a report dated October 1, 1980:

> You request in your letter my impression, opinion, and conclusions and to the link between Mr. Kolesar's employment and the incident which precipitated his death. It is my stated opinion, as I also sent a letter to Mr. Gailey, the other attorney apparently involved in this case, that I could not one way or the other connect the incident at work with Mr. Kolesar's subsequent demise. I could not say that the fall precipitated the event or did not precipitate the event. In my mind it would be impossible to make a direct connection there or to on the other hand rule out a direct connection.

Applicable Law

Claimant has the burden of proving by a preponderance of the evidence that decedent received an injury on December 29, 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 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 also has the burden of proving by a preponderance of the evidence that the injury of December 29, 1979 is the cause of the decedent's death 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). *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 was the common law wife of decedent. The greater weight of evidence clearly indicates that decedent considered claimant his wife. Claimant testified that decedent introduced her to people as his wife. Even members of decedent's family considered claimant as decedent's wife. Obviously members of the community thought claimant and decedent were married.

However, claimant failed to prove that decedent had an injury arising out of and in the course of his employment with defendant employer or that any such injury was causally connected to his hospitalization or death. Reviewing the entire record, the undersigned is not convinced that decedent hit his head while going to or from the outside toilet. There is ample evidence that decedent did slip and fall but the greater weight of evidence indicates he did not hit his head or have any injury as a result of that fall. The histories given at the hospital clearly rule out a head injury. Also the examination by Dr. Robb did not reveal any evidence of a head injury. No one testified they saw decedent hit his head.

The testimony of Dr. Sundt and Dr. Robb indicate that without an injury to decedent's head, a causal connection between the slip and fall and the rupturing of an aneurysm cannot be shown. The greater weight of medical evidence reveals there was no causal connection between any slip and fall and decedent's death.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. Claimant and decedent lived together since 1963.

Finding 2. Claimant held decedent out to be her husband.

Finding 3. Decedent held claimant out to be his wife.

Finding 4. Claimant's and decedent's families considered decedent and claimant husband and wife.

Conclusion A. Decedent and claimant had a common law marriage.

Finding 5. On December 29, 1979 decedent slipped and fell on his way to or from an outside toilet while working for defendant employer.

Finding 6. Decedent did not hit his head when he fell.

Finding 7. Decedent did not injure himself when he fell.

Finding 8. On December 29, 1979 decedent had a subarachnoid hemorrhage from an aneurysm which resulted in his death on January 17, 1980.

Finding 9. Decedent's slip and fall did not in any way contribute to the hemorrhage of decedent's aneurysm or the aneurysm itself.

Conclusion B. Claimant failed to prove decedent had an injury arising out of and in the course of his employment with defendant employer on December 29, 1979.

Conclusion C. Claimant failed to prove a causal connection between decedent's slip and fall and hemorrhage of decedent's aneurysm and death.

THEREFORE, claimant is to take nothing from this proceeding.

Defendants are to pay the costs of this action.

* * *

Signed and filed this 18th day of November, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DARWIN M. LEE,

Claimant,

vs.

VERNON STARLING d/b/a AMERICAN ROOFING,

Employer,
Defendant.

Appeal Decision

Defendant appeals from a proposed arbitration decision wherein claimant was awarded temporary total disability and medical expenses as the result of an injury on June 7, 1979.

The record on appeal consists of claimant's exhibits 1 through 4; defendant's exhibit 1; and defendant's brief and exceptions on appeal. Both parties waived their right to have

oral hearing proceedings, including claimant's testimony, recorded pursuant to section 17A.10, Code of Iowa.

Defendant's appeal brief states:

> The issue on appeal is whether there was substantial evidence in the record to support the Deputy Commissioner's Decision, and specifically, whether medical evidence established causal connection between claimant's temporary disability and his alleged work injury, whether medical evidence established causal connection between claimant's medical expenses and his alleged work injury, and whether medical evidence estblished causal connection between claimant's medical condition and his alleged work injury.

Defendant asserts that because claimant failed to introduce medical evidence, the causal relationship between the incident of June 7, 1979 and claimant's disability was not proved.

At hearing, the deputy heard the uncontroverted testimony of the claimant that on June 7, 1979 he was splashed by hot tar; that his mother took him to J. L. Beattie, M.D., for treatment; that he was hospitalized until June 30, 1979; and that he was released for work on July 14, 1979. While the preparation for the hearing by either party was somewhat less than exhaustive, the record contains nothing that would place the testimony of the claimant in doubt. Moreover, claimant's exhibits 1 and 2, photographs of the injury leave no doubt that claimant has sustained an injury.

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).

Claimant's uncontroverted testimony establishes that he suffered an injury arising out of and in the course of his employment on June 7, 1979. The photographs plainly establish that this injury proximately caused severe burns across his chest and arm pit area. Finally, claimant's testimony establishes that because of his injury, he was unable to engage in acts of gainful employment until July 14, 1979.

While defendant is correct in pointing out that claimant has the burden of proof, the record establishes that claimant has met that burden; apparently without challenge. The fact that claimant has not introduced medical testimony to point out the obvious is of no consequence. Claimant's exhibits 1 and 2 plainly establish his injuries. Were claimant complaining of injuries which could not be externally viewed by a layman, expert testimony would be necessary. Such is not the case here.

3 Larson, *The Law of Workmen's Compensation*, section 79.50, 51 at pages 15-246, 247 states:

> In compensation law, the administrative-law-evidence problem of expert opinion and official notice finds its principal application in the handling of medical facts. The usual question is the extent to which findings of the existence, causation or consequences of various injuries or diseases can rest upon something other than direct medical testimony — the claimant's own description of his condition, for example, or the commission's expert k owledge acquired not by formal medical education but by the practical schooling that comes with years of handling similar cases.
>
> To appraise the true degree of indispensability which should be accorded medical testimony, it is first necessary to dispel the misconception that valid awards can stand only if accompanied by a definite medical diagnosis. True, in many instances it may be impossible to form a judgment on the relation of the employment to the injury, or relation of the injury to the disability, without analyzing in medical terms what the injury or disease is. But this is not invariably so. In appropriate circumstances, awards may be made when medical evidence on these matters is inconclusive, indecisive, fragmentary or even nonexistent.

The introduction of medical evidence may have strengthened claimant's case. But defendant did not overcome the obvious conclusions one would make from the evidence presented by the claimant.

Given the above, the record contains nothing that suggests that the findings of fact and conclusions of law in the deputy's decision of August 3, 1981 were improper.

Findings of Fact

1. That claimant received burns to his chest and arm pit areas on June 7, 1979 when a bucket he was removing from a tar kettle slipped off the pole he was using and splashed hot tar on him.

2. That claimant was hospitalized for treatment of his burns and discharged on June 30, 1979.

3. That claimant was released to return to work on July 14, 1979.

4. That claimant has suffered no permanent disabling effects from his burns.

5. That claimant earned three and 00/100 dollars ($3.00) per hour for two (2) weeks when he was injured. He worked thirty-five (35) hours per week. Claimant was single with no dependents on the date of the injury.

6. That the medical charge listed on claimant's exhibit 3 and the first three charges on claimant's exhibit 4 were reasonable and necessary treatment of the injury of June 7, 1979.

WHEREFORE, it is found:

That claimant sustained an injury arising out of and in the

course of his employment with defendant on June 7, 1979.

That as a result of the aforementioned injury, claimant was temporarily totally disabled from the date of the injury until July 14, 1979.

That pursuant to section 85.36(7), Code of Iowa, claimant is entitled to a weekly compensation rate of sixty-eight and 05/100 dollars ($68.05).

That claimant is entitled to reimbursement for the expenses indicated in finding of fact six pursuant to section 85.27, Code of Iowa.

THEREFORE, it is ordered:

That the defendant pay the claimant temporary total disability benefits at the rate of sixty-eight and 05/100 dollars ($68.05) per week from the date of injury through July 14, 1979.

Credit is to be given defendant for the three hundred ninety and 00/100 dollars ($390.00) of compensation paid.

Defendant is further ordered to pay unto the claimant the following medical expenses:

Dallas County Hospital	$1,918.69
Dr. J. L. Beattie	335.00

Costs of the proceeding are taxed to the defendant. See Industrial Commissioner's Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A first report shall be filed by defendant immediately and a final report shall be filed by the defendant when this award is paid.

* * *

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

ROBERT C. LANDESS
Deputy Industrial Commissioner

No Appeal.

DARYLD D. LEWIN,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed January 19, 1982 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 appeals from an adverse arbitration decision.

The record on appeal consists of the transcript; claimant's exhibits 1 and 2; and defendant's exhibits A, C, D, E, F, G, H, I, J, K, L, M, N, O, P and Q.

The result of this final agency decision will differ from that reached by the hearing deputy.

Findings of Fact

1. Claimant has worked for the employer since September 1970 and as a ham boner since 1977. (Tr. 9-10)

2. Ham boning involves repetitive use of the hands, forearms and wrists, and the more a worker bones, the stronger he becomes. (Tr. 12)

3. Claimant also does competitive arm wrestling and lifts weights. (Tr. 12)

4. On October 10, 1980, claimant had pain in his left arm and went to the employer's nurse. (Tr. 14, 28, 56)

5. On October 13, 1980, claimant went to visit A. E. Mayner, M.D., but saw another physician in that office who prescribed some medication. (Tr. 19-20)

6. The physician in Dr. Mayner's office who treated claimant advised claimant not to work. (Admissible hearsay, Tr. 20)

7. On October 14, 1980, claimant visited the office of Frederic J. Sloan, M.D., the company doctor. (Tr. 22, defendant's exhibit F)

8. Claimant made a second and third visit to Dr. Mayner and actually saw Dr. Mayner himself. (Tr. 24)

9. On November 30, 1980, claimant signed a sick benefit plan form which indicated his arm problem was a result of sickness (as opposed to work injury); claimant understood that the form was a "non-work [injury] form" when he signed it. (Defendant's exhibit H, Tr. 34)

10. Two one-sentence reports are the only information from Dr. Mayner. Neither report recites a history, examination, or treatment by medication.

11. The record contains no other medical evidence which connects the tendinitis with claimant's work.

Issues

Under the record at the hearing, the hearing deputy awarded two weeks of compensation, payments of Dr. Mayner's bill and mileage expense under §85.27. Defendant's appeal brief recites several issues, the main one of which is that claimant did not prove an injury arose out of and in the course of his employment.

Applicable Law

Claimant has the burden to show that he sustained an injury which arose out of and in the course of his employment. *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945); *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). Matters of causal relationship are essen-

tially within the realm of expert testimony. *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 101 N.W.2d 167 (1960). In determining the validity of an expert medical opinion, the completeness of the medical history is important. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 36, 154 N.W.2d 128 (1967); *Bodish v. Fischer, Inc.*, 257 Iowa 516, 522, 133 N.W.2d 867 (1965).

Analysis

Claimant's case fails because of a lack of proof. The medical evidence supporting claimant's case consists of two short letters from Dr. Mayner which may be quoted in their entirety:

> Dear Daryld:
>
> This is to certify that you were seen 10/13/80, told to stay off work with tendonitis of the elbow, and were returned to work 10/27/80 for that disability. (7-29-81)
>
> Dear Mr. Rush:
>
> In my opinion, Mr. Lewin's work caused his tendonitis. (10-5-81)

From these letters, one can identify the diagnosis (tendinitis) but nothing of the history, examination, or treatment by medication. Considering that matters of causal relationship are in the area of medical expertise, there exists insufficient medical data upon which to make a determination. Since claimant has the burden of proof, the insufficiency of evidence defeats the case.

The real dispute in the case seems more to concern who chooses the medical care and plant procedures on determination of an employee's ability to work. In the record, claimant's attitude seems open enough: he admits he signed a sick pay form which he knew indicated that his condition was not work related (Tr. 34). As claimant himself put it, he is not a doctor (Tr. 46) and could not know exactly what caused his problem.

Without more information than is contained in the record, one could not make a legal determination of the medical source of the problem.

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

Costs of this action are taxed against defendant.

* * *

Signed and filed at Des Moines, Iowa this 30th day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

PAULINE L. LONG,

Claimant,

vs.

GRINNELL COLLEGE,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Pauline Long, the claimant, against her employer, Grinnell College, and the insurance carrier, Insurance Company of North America, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on August 21, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on August 31, 1981. The record was considered fully submitted on September 16, 1981.

An examination of the industrial commissioner's file reveals that a first report of injury was filed January 26, 1981. There are no other official filings.

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $113.85. There was no stipulation as to the time off work because of the alleged injury. There was a stipulation as to the fairness and reasonableness of the medical charges, but no agreement that they were causally related to the alleged work injury.

The record in this case consists of the testimony of the claimant, and Pat Moore; claimant's exhibits 1 and 2 (claimant's exhibit 2 being the deposition R. Michael Collison); defendants' exhibits A, B and C inclusive (exhibit C is the deposition of Paul From, M.D.); and the transcript of the proceedings.

The issues to be determined are whether the claimant sustained an injury which both arose out of and in the course of her employment with this defendant; the existence of a causal relationship between that injury and the resulting disability; the extent of the temporary total disability. There is no issue of permanency. There is an issue of the appropriateness of certain medical expenditures under Section 85.27 of the Code. The parties stipulated that this was a scheduled injury case.

Findings of Fact

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

Claimant is a 57 year old widow. She began her employment with the defendant Grinnell College on March 1, 1980 in the housekeeping department. Specifically, she worked as a floating maid. Mrs. Long assisted the other maids in cleaning the dormitories on campus. Her duties included vacuuming of carpets. In connection with her position as a floating maid, the claimant was, on occasion, required to carry the vacuum cleaner from one floor to another. Defendants' exhibit B is a photograph of the vacuum cleaner in question. The claimant testified that she carried the canister portion of the vacuum in her right hand and the nozzle attachment in her left with the vacuum hose running behind her legs. The basis of her allegation in this case is that the banging of the hose against her legs while carrying the vacuum is the cause of the deep vein thrombosis later diagnosed.

Defendants' exhibit A, the records of Dr. H. R. Light, indicate that in April 1980 claimant was examined by him and expressed complaints of a swollen right foot. This condition appears to have later dissipated.

In August 1980 the claimant noted swelling and discomfort in the right leg and came under the care of Michael Collison, M.D., a family practitioner.

Dr. Collison testified on direct examination that claimant first came under his care on August 21, 1980 with a complaint of pain and swelling in the right calf. A preliminary diagnosis of deep vein thrombosis was made by this physician. The claimant was hospitalized from August 21 through September 2 at the direction of Dr. Collison. On August 28, 1980 a lower extremity venogram was performed which confirmed Dr. Collison's diagnosis of deep vein thrombosis on the right.

He testified on direct examination:

Q. Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to what caused the condition that you found in her that you have described?

A. At the time that Mrs. Long was seen she attributed her discomfort in her leg to the trauma resulting from carrying vacuum cleaners up steps multiple times and having the various attachments of the vacuum cleaner strike her in the calf region of both legs.

Q. Doctor, if she indicated that to you, did you form an opinion yourself, assuming that history that she gave you to be true, as to whether there was any causal relationship between what she related happened to her, what you have described in her history, and her condition you have treated her for?

A. On the basis of the history of that trauma, my initial feeling of a deep vein thrombosis was intensified, and was, in fact, proven out.

Q. Now, Doctor, can you state the reason for your opinion as to the causal relationship between what she described and the injury that you found in her?

A. In most cases of venous thrombosis there is either a history of prolonged stasis involving the venous system or a trauma to the venous system in which the intimal lining of the vein becomes injured. In this case there was no history of prolonged stasis, but there was history of trauma, and because of that I felt the trauma was the most likely cause of it.

Q. I don't know what stasis means. Maybe you could explain.

A. Stasis means a sludging of the blood flow.

Q. Doctor, then she incurred some medical bills as a result of the treatment for the condition you described, is that correct?

A. Yes.

On cross-examination this physician testified:

Q. What was the trauma that was described by Mrs. Long?

A. She described to me carrying a vacuum cleaner up a stairs and having apparatus strike her in the calf muscles, and it would depend on which arm she was carrying the cleaner in as to which calf muscle would be struck.

Q. Did she describe to you the number of times that this would occur during a week or a particular day?

A. She stated that it would happen repeatedly each time that she would go up the stairs.

Q. Did she say that she carried the vacuum sweeper up the stairs ten times or fifteen times, or did she give you any history in that regard?

A. I had the impression that it was several times a night. I had the impression that she was working in the evenings.

Q. Well, in your opinion in making the connection, what was your impression as to the number of times that this was striking her legs?

A. My impression was that there would be in the tens of times of trauma, maybe sixty times an evening. That was my impression, assuming that there were twenty steps and that she would do it ten times a day. It would strike her each time that she would ascend one step.

Q. What was your understanding as to what was striking her?

A. I believe my initial understanding was that it was a canister type vacuum cleaner that was striking her calf, but later in review of the records, or I'm not real sure when the idea came, that it was the hose that was striking her on the leg.

My initial impression, though, was that it was the machine itself striking her in the leg.

Q. In expressing your opinion of causation in this case, are you assuming that it was the hose that was strik-

ing her leg or are you assuming that it was the canister that was striking her leg?

A. I am assuming only that some part of the machine was striking her leg, whether the hose or the canister.

Q. Would it be significant as far as your opinion is concerned as to the force or the weight of the vacuum sweeper that was striking her leg as being a causative factor in her condition?

A. The heavier the material striking her leg the higher the probability of it causing significant injury.

* * *

Q. Could tight knee-high hosiery be a contributing cause to this stasis that was mentioned by you?

A. Yes, I believe anything that would be constrictive around only a portion of the leg could be a contributing factor, certainly.

Mrs. Long was released to return to work on November 28, 1980 with continuing anticoagulant therapy through December 29, 1980.

The claimant testified that she was in good health prior to commencing her employment with defendant and had no prior leg or circulatory problems. The claimant presently works as a waitress and has had no difficulties with her legs in this position.

Claimant's exhibit 1 indicates she traveled 540 miles for treatment.

Pat Moore testified on behalf of the defense. She is an employee of Grinnell College and holds the position of foreman over the maids. She has held that position for six years. She indicates the claimant worked for her for five or six months. She describes the claimant's duties as requiring vacuuming, mop dusting and cleaning bathrooms in dormatories. She indicates that prior to the date of injury, claimant would have only worked in one dormitory. This witness indicates that in April 1980 the claimant indicated Dr. Light told claimant she had a blood clot. This statement is not supported in the record. This witness indicates that any of the maids could have been carrying the vacuum up and down stairs and that it would not necessarily always be the claimant. It is indicated that prior to the summer of 1980 claimant did extensive vacuuming in the dormitories. However, during the summertime the work schedule was different in that the rooms themselves were being washed, cleaned and mopped in addition to vacuuming. She indicates that the maids would clean in groups and that the cleaning equipment would remain on individual floors and not be taken to the basement on a daily basis.

Claimant was examined at the request of the defendant by Paul From, M.D., a specialist in internal medicine. He has had some experience in treating thrombosis. He agrees with Dr. Collison's diagnosis of deep vein thrombosis and indicates that the claimant will not sustain any permanent partial disability as a result. With the respect to the issue of causation, Dr. From testified:

Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to the causal relationship between the history given to you by Pauline Long of the trauma from the hose from the vacuum sweeper and the condition that you found in her deep venous system?

A. Yes, I have an opinion.

Q. What is that opinion?

A. Well, I have explained to you that there are two systems of veins, superficial and deep. The deep system is protected by thick muscular tissue in the calf of the leg itself.

The superficial system is fairly close under the skin and subcutaneous tissue and doesn't have that muscular protection.

If something were banging against your leg lightly or moderately, it would appear to me it would aggravate the superficial system much more likely than it would aggravate the deep system. I felt, therefore, that the history she gave me of banging a hose against her leg repeatedly a number of times, and this hose was on a vacuum cleaner, it was not heavy, it wasn't filled with any material at the time other than dust or air, whatever is in a vacuum cleaner, if that aggravated anything it would aggravate the superficial system, yet it was the deep system that was involved here both by Doctor Collison's physical impression, diagnostic impression and borne out by the venogram. I thought that although that is not an impossibility that something like that could occur, because trauma is known to cause thrombophlebitis, it would be less likely to have caused it in the deep system than in the superficial system. I, therefore, thought that there was probably little connection between the historical trauma and what we actually found.

Q. The type of trauma that you anticipate in causing problems with the deep venous system, what would that trauma be?

A. You would have to get down there and really compress or contuse those veins themselves. Some contusion to the leg, some striking with great force, fracture of a bone so that the bone then irritates the vein itself, getting irritating solutions into the venous system by giving intravenouses into the lower extremity rather than in the upper extremity where they seem to be tolerated much better, but if it were traumatic force it has to be pretty good force or it has to come from within such as a bone fracture, you know, irritating the vein directly.

On cross-examination by counsel for the claimant, Dr. From indicates:

Q. Doctor, again referring to your report, if we could zero in on page four, in the next to the last paragraph

you give some conclusions there. I am now talking about the report of November 4, 1980 signed by Paul From, M.D.

A. Yes.

Q. I think you have said there, as you did here in your testimony, it is within the realm of possibility that there could be a causal connection between the described incident and thrombophlebitis, is that correct?

A. Yes, sir.

Q. When you are talking about the described incident, you are talking about her history of the vacuum cleaner?

A. Yes. That is what she told me, right.

* * *

Q. She did mention to you that she did have to go up and down stairs in carrying on her job?

A. Yes, sir, she did.

Q. She, I think, in some earlier history said she had had this job for about six months and in about three months she was troubled the first time with the left leg and then the right. Might the going up and down the stairs be a contributing factor to her phlebitis condition?

A. That is a possibility, yes, sir.

Dr. From notes in his report of November 4, 1980:

The patient gives a historical and causal relationship at work with her injury. Although it would seem that the injury she described would affect more the superficial system than the deep system, it is within the realm of possibility that there could be a causal connection between the described incidents and thrombophlebitis. However, in some people with a propensity to thrombophlebitis, many acts such as walking, stooping, sitting, lifting, squatting, etc., can aggravate the underlying condition and help bring about thrombophlebitis. However, whatever might be the causal relationship, there appears to be little, if any, impairment to Mrs. Long at this time from the previous episode of thrombophlebitis.

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).

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 21, 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).

Analysis

There appears to be no dispute that on the date of the alleged injury, August 21, 1980, the claimant was an employee of the defendant.

The claimant began work for the defendant in March 1980 as a maid. That position required, among other things, that claimant do extensive vacuuming. In the course of that vacuuming, she carried the vacuum cleaner up and down stairs. The record clearly indicates that during the school year the claimant did extensive vacuuming and may have done a variety of other functions in connection with vacuuming for the period of two or three months prior to August 21, 1980.

It is the uncontroverted testimony of the claimant that prior to commencing her employment with the defendant she had no prior health problems and, specifically, no preexisting thrombophlebitis or circulatory difficulty.

The records of Dr. Light are in evidence and reflect a complaint of a swollen right foot in April 1980. There is no evidence in this record to show any preexisting condition. Nor is there any evidence in this record to support the statement made by Pat Moore that the claimant was told she had a blood clot.

Dr. Collison establishes a causal relationship between the work activity and the medical condition noted. In light of the fact that the claimant was somewhat equivocal in terms of the number of times she carried the vacuum and the amount of trauma experienced at work, the minor discrepancies in Dr. Collison's testimony concerning the number of incidents is given little consideration. He remains of the opinion that there is a causal relationship. As Dr. From's testimony unfolded, particularly on cross-examination, he appeared to move off his position of no causal connection. He took the position that it could be in the realm of possibility. This testimony, coupled with the lack of any evidence of prior

circulatory ailments, assists in establishing a causal relationship.

Conclusions of Law

That the claimant was an employee of the defendant on August 21, 1980.

That the claimant sustained a personal injury which both arose out of and in the course of her employment with the defendant on August 21, 1980.

That there exists a causal relationship between the injury and the resulting temporary disability.

THEREFORE, IT IS ORDERED:

That the defendants shall pay the claimant temporary total disability benefits at the rate of one hundred thirteen and 85/100 dollars ($113.85) for the period of August 21, 1980 through November 28, 1980, a period of fourteen and two-sevenths (14 2/7) weeks.

That the defendants shall pay the claimant as mileage one hundred eight dollars ($108) as outlined on claimant's exhibit 1.

That pursuant to the terms of Section 85.38, the group insurance plan shall be reimbursed by the employer for the following medical bills subject to a reasonable attorney fee for claimant's counsel. Proof of such fee shall be submitted within fifteen (15) days and the fee will be set at that time.

Maxwell County Hospital	$2,082.28
Dr. Michael Collison	249.00
Drs. Austin and Stewart	161.00
Medication	21.88

That interest shall accrue pursuant to Section 85.30.

That the costs of this action are taxed to the defendants pursuant to Industrial Commissioner Rule 500—4.33.

That defendants shall file a final report upon payment of this award.

* * *

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

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

THOMAS J. LOPEZ,

Claimant,

vs.

CARTER CONSTRUCTION CO.,

Employer,

and

HAWKEYE SECURITY INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision filed March 19, 1981 wherein claimant was awarded permanent partial industrial disability, healing period benefits, and was found to be entitled to an additional exemption.

The record on appeal consists of the stipulation of the parties; the transcript of the hearing which contains the testimony of the claimant; claimant's exhibit 1; defendants' exhibits A and B; and the briefs and exceptions of all parties on appeal.

At the time of the hearing the parties stipulated to the following:

1. that claimant sustained an injury in the course of and arising out of his employment with defendant-employer on May 18, 1979;

2. that at the time of the injury claimant had worked for defendant-employer for 7 weeks at an hourly rate and had received $994.50 gross earnings;

3. that claimant's weekly rate of compensation at $88.98 was based on one exemption;

4. that claimant since has been determined to be the father of a child born on November 11, 1979;

5. that claimant, still in a leg cast, returned to high school on August 29, 1979 and has been attending high school to date;

6. that claimant was released by his doctors on May 29, 1980 with a 33 percent permanent partial disability rating to the right lower extremity; and

7. that claimant has received $5,617.62 in weekly benefits of which the defendants claim $4,346.56 as a credit toward permanency.

The issues on appeal are enumerated in the defendants' brief of June 1, 1981 as follows:

1. Whether claimant's healing period terminated when he returned to high school;

2. Whether defendants are entitled to credit for overpayment of healing period if the first issue is determined in the affirmative; and

3. Whether claimant is entitled to an additional exemption based on the court determination that claimant was the father of a child born after the date of injury.

Because the facts are uncontested by stipulation, the task on appeal is to determine the legal effect of those facts.

Issue I

WAS CLAIMANT'S HEALING PERIOD TERMINATED WHEN HE RETURNED TO HIGH SCHOOL?

Termination of healing period essentially is a medical determination unless there actually is a return to work. Industrial Commissioner's 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 occurs first.

Defendants argue that claimant removed himself from the labor force by returning to high school in August of 1979 and therefore terminated his healing period. Defendants rely heavily on the case of *Richard Patrick Dawson v. Julian T. Clark d/b/a Clark Brothers Construction Company* an arbitration decision filed April 24, 1979.

The decision in *Dawson* is not precedential in this appeal. The decision of the deputy in *Dawson* was not appealed and therefore became the final agency decision in that case. It is not, however, an agency rule or determination on which this commissioner must rely. A determination in a contested case is specifically exempted from the definition of a rule. Section 17A.2(d), Code of Iowa. While the decision in *Dawson* was dispositive of the issue in that case it was based upon the facts of that case, and of applicability only to that case.

It must be emphasized that Iowa Industrial Commissioner's Rule 500—8.3 indicates "* * * employment *substantially similar* to that which the employee was engaged at the time of the injury . . ." (Emphasis added.)

Iowa Industrial Commissioner Rule 500—8.3 was intended to implement and clarify the legislative intent behind Iowa Code section 85.34(1). This section was intended to define when an individual had attained maximum recuperation from an industrial injury. By the terms of section 85.34(1), this may be done either with medical determinations of recuperation, or by the claimant's own actions illustrating recovery by a return to work. If a claimant engages in training, enrolls in an educational activity, or accepts less physically demanding employment, it would be by no means conclusive that the individual has reached maximum recuperation. See for example *Jonathan Benson v. Allan Machine Company*, arbitration decision filed November 25, 1980, affirmed on appeal May 15, 1981. Twenty-two year old full time college student awarded healing period while attending school.

To say that one who enrolls in an activity designed to improve their job marketability while they have still not reached maximum recuperation intentionally removes themselves from the job market is to work against the intent and rationale behind Iowa Workers' compensation law. Such a statement would serve to reward the malingerer and penalize the ambitious. Moreover, by not financially penalizing those who seek to increase their job marketability, eases the burden upon employers and insurance carriers by reducing the degree of permanency of an industrial disability.

The mere fact that a claimant enrolls in or returns to an education program does not in and of itself constitute a voluntary removal from the labor market such as to terminate healing period benefits.

Issue II

ARE DEFENDANTS ENTITLED TO CREDIT FOR OVERPAYMENT OF HEALING PERIOD BENEFITS PAID IF THE HEALING PERIOD WAS TERMINATED BY CLAIMANT'S RETURN TO SCHOOL?

As noted in the deputy's decision of March 19, 1981, defendants could not specify on what date they transformed benefits from healing period to permanent partial disability. Because it has been found that claimant is entitled to healing period benefits up to the May 29, 1980 work release, payments made by defendants until that date are not at issue.

Iowa Code section 85.34 reads in part:

> *Permanent disabilities.* Compensation for permanent disabilities and during a healing period for permanent partial disabilities shall be payable to an employee as provided in this section. 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.

As defendants' brief points out, this agency has consistently disallowed the crediting of healing period benefits against permanent partial disability benefits. As recently as the decision of the undersigned in *Ardith Caputo v. Unified Concern for Children*, appeal decision filed August 29, 1980, it was stated:

> 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 disability benefits. Since the legislature specifically provided for such a credit when a permanent total disability is involved [section 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.

Until this agency is overruled, the policy of this agency to interpret the legislative intent of Iowa Code section 85.34 as disallowing the crediting of healing period benefits against permanent partial disability payments must be considered as proper.

As the healing period was not terminated by returning to school, however, this issue is moot.

Issue III

IS CLAIMANT ENTITLED TO AN ADDITIONAL EXEMPTION BASED ON A COURT DETERMINATION THAT CLAIMANT WAS THE FATHER OF A CHILD BORN AFTER THE DATE OF INJURY?

The compensation rate for permanent partial disability benefits pursuant to Iowa Code section 85.34(2) is determined by the spendable weekly earnings of the claimant. "Spendable weekly earnings" is the amount remaining after payroll taxes are deducted. See Iowa Code section 85.61(11). "Payroll taxes" are determined by the maximum number of exemptions to which a claimant is entitled on the date he or she is injured. See Iowa Code section 85.61(10). Given the above, the rate of claimant's compensation must be determined as of the date of injury. On May 18, 1980, claimant did not yet have a child. Claimant's rate of compensation based upon one exemption is, therefore, correct.

In the decision of March 19, 1981, claimant was held entitled to an additional exemption because claimant's child had been conceived, although not born, at the time of injury. It was concluded that since a child not yet born may be considered as a dependent for the purposes of Iowa Code section 85.42, that similar intent may be inferred when determining dependency for other types of benefits. Iowa Code section 85.42 is not applicable, however, in that the section expressly limits itself to dependents of deceased employees. It does not affect the rate of compensation but only establishes that a child conceived but not born at the time of an employees death is one who is entitled to share in benefits as a dependent of the decedent. Exemptions for dependency when establishing the rate of compensation must be determined at the time of injury. Section 85.61(10)(a) and (b), Code.

Conclusions of Law

That claimant's return to high school did not terminate his right to healing period benefits.

That defendants are not entitled to a credit for any overpayment of healing period benefits against permanent partial disability payments as there was no overpayment of healing period benefits.

That a child of claimant conceived but not born at the time of claimant's injury does not qualify as an exemption to increase the claimant's rate of compensation.

WHEREFORE, it is found:

That the deputy's findings of fact and conclusions of law in the decision filed March 19, 1981 are adopted in part and reversed in part.

THEREFORE, it is ordered:

That the defendants pay the claimant seventy-two point six (72.6) weeks of permanent partial disability at the rate of eighty-eight and 98/100 dollars ($88.98) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of May 30, 1980.

Defendants are ordered to pay the claimant healing period benefits from the date of injury through May 29, 1980 at the rate of eighty-eight and 98/100 dollars ($88.98) 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. However, defendants are not entitled to credit for any overpayment of healing period against the permanent partial disability award.

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner's Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendants when this award is paid.

* * *

Signed and filed this 24th day of July, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

KENNETH MALONE,

Claimant,

vs.

HUNT TRANSPORTATION, INC.,

Employer,

and

GREAT WEST CASUALTY CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Kenneth Malone, the claimant, against his employer, Hunt Transportation, Inc., and the insurance carrier, Great West Casualty Company, to recover benefits under the Iowa Workers' Compensation Act on account of an alleged injury he sustained on January 18, 1980. This matter came on for hearing before the undersigned at the Woodbury County Courthouse in Sioux City, Iowa on June 24, 1981. The record was considered fully submitted on August 20, 1981.

On June 24, 1981 defendants filed a first report of injury (Nebraska form) concerning the alleged injury. Subsequent to the hearing, the parties stipulated that the applicable rate of compensation is $189.66. (See July 23, 1981 letter from defense counsel, and July 29, 1981 letter from claimant's counsel.)

The record consists of the testimony of the claimant; the deposition testimony of Denver Johnson; the deposition testimony of Ralph H. Bauer; the deposition testimony of David Marc Tan Creti, M.D. (including three deposition exhibits); the deposition testimony of Thomas C. Tintsman,

M.D.; claimant's exhibit B, varied medical reports with identifying cover sheet; defendants' exhibit 1, June 9, 1980 note from Dr. Tintsman to defendant carrier, defendants' exhibit 2, claimant's records from Bishop Clarkson Memorial Hospital; and defendants' exhibit 4, claimant's daily log from January 1, 1980 to January 14, 1980. Defendants objected to medical bills offered by the claimant (Tan Creti deposition exhibits 1 and 2 and itemization in letter filed July 20, 1981 from claimant's counsel) on the ground that they were irrelevant and immaterial insofar as they were for treatment of a condition that was not causally related to claimant's employment with defendant employer. (See July 23, 1981 letter filed by defense counsel.) Said objection is sustained in light of the findings and conclusions made below.

Issues

According to the pre-hearing order and the parties at the time of the hearing, the issues to be determined include whether there is a causal connection between the alleged injury and the disability and the nature and extent of the disability. Review of the evidence, thrust of questioning by the parties and focus of defendants' objections to the medical bills indicates that the matter of whether claimant's injury arose out of his employment is also in issue. There is also a question as to whether this case falls under Iowa Code Chapter 85 or 85A.

Recitation of the Evidence

Claimant, age 63, has a sixth grade education and employment history including farm work, road construction and truck driving (hauling livestock). Claimant testified that he began working for defendant employer sometime in the late 50s, but not continuously until 1963. He recalled transporting only paper a few weeks during his employment with that defendant employer — otherwise he hauled cattle and hogs. Claimant explained that his job included loading and unloading the trailers. He described how the animals would disturb the dirt and dust in the stockyards and alleyways and how his clothes would be covered with dust by the time he was through loading or unloading. Although claimant remembered experiencing difficulty breathing in such conditions for quite a few years, he thought this problem became more noticeable during the last three years. He attributed such development to the fact that he hauled more hogs during that period of time. According to the claimant, whenever he was able to get away from the hogs and cattle his condition would improve.

Denver Johnson testified that he was employed by defendant employer as a livestock dispatcher from May 22, 1978 to June 4, 1981. He identified the claimant as one of the defendant employer's owner-operators who hauled livestock. He remembered three to four occasions in late 1979 and in 1980 when the claimant was panting and sweating after unloading hogs. Johnson observed that the working conditions were dusty and dirty. He advised the claimant to quit hauling hogs, not cattle, since hog hauling entailed a lot more dust.

Ralph H. Bauer, a dispatcher for defendant employer for the last two years, testified that he previously hauled hogs and cattle. He verified that hog dust caused one to cough and was worse during loading and unloading operations. Bauer knew the claimant and that the claimant had hauled both hogs and cattle. He also noted that the claimant coughed when loading hogs.

The course of events that resulted in the present action occurred in early 1980. According to logs kept by the claimant (defendants' exhibit 4), he was off duty from January 1 to January 7 of 1980 for lack of work. Then on January 8, 1980, he drove to Omaha, Nebraska. On January 9, 1980, he loaded his trailer with cattle, drove to his destination in Rockport, Missouri, unloaded the cattle and drove back to Omaha. On January 10, 1980, claimant drove to Oklahoma City where he loaded cattle bound for Illinois. On January 12, 1980, he arrived in Illinois and unloaded the cattle. He was off duty on January 13, 1980 and returned home on January 14, 1980. Shortly thereafter, claimant was hospitalized for chest congestion and shortness of breath under the care of David Marc Tan Creti, M.D.

Dr. Tan Creti, board certified in family practice, testified that he first saw the claimant in July of 1974 for a skin condition, then in April of 1975 for a physical examination for an ICC driving certificate, in 1976 for a wrist injury, and in April of 1977 for another ICC examination. In May of 1979 Dr. Tan Creti's partner performed claimant's ICC physical and found claimant fit. When Dr. Tan Creti saw the claimant eight months later, on January 7, 1980, claimant was wheezing audibly and reported having a cold accompanied by a lot of coughing. Dr. Tan Creti initially treated the claimant with antibiotics and a bronchodilator choledyl.

On January 18, 1980, Dr. Tan Creti hospitalized the claimant at the Crawford County Memorial Hospital in Denison, Iowa. Claimant suffered from wheezing, chest congestion and shortness of breath and reported that he had contracted his cough from driving his truck and working in the cold. As part of the hospital history, Dr. Tan Creti noted that the claimant had pneumonitis in 1972, previous back problems, an appendectomy in the 1970s and a hernia operation. Dr. Tan Creti recalled that he initially thought the claimant had acute infectious bronchitis and treated him with another antibiotic, the bronchodilator, respiratory therapy and intermittent positive pressure breathing treatments with an aerosol medication. Dr. Tan Creti reported that claimant stabilized the first few days but then grew worse, to the point of respiratory failure on January 28, 1980, at which time a temporary breathing tube was inserted into claimant's trachea and claimant was placed on a mechanical respirator. (See also claimant's exhibit B, item 1.) Thereupon, claimant was transported via helicopter ambulance to Clarkson Memorial Hospital in Omaha, Nebraska, where he remained until February 25, 1980. The discharge summary states:

DISCHARGE DIAGNOSIS:

1. Obstructive sleep apnea.
2. Corpulmonale complicated by mild left ventricular failure as well.

CASE REVIEW:

Mr. Malone is a 61 year old truck driver who presented upon transfer from Denison, Iowa in acute respiratory failure. He was transferred by lifeline helicop-

ter from Denison on January the 28th when he sustained a respiratory arrest. He had been evaluated by Dr. Tan Creti over the previous several weeks with progressive congestion and shortness of breath. He had had progressive deterioration of his respiratory status and required intubation several hours prior to transfer.

His PMH was remarkable for morbid obesity, was not a smoker and had not smoked for several years prior to the onset of his acute illness. He had a bout of pneumonitis in the past.

Physical exam at the time of admission revealed a massively obese gentleman with an endotracheal tube in place, in obvious respiratory distress. BP 105/80, pulse 80 and regular, no spontaneous respirations were noted. Skin was moist and smooth. There was obvious chemosis of both conjunctiva. He was lethargic and unresponsive. Thyroid was not grossly enlarged. Breath sounds bilaterally revealed scattered diffuse inspiratory and expiratory rales. Heart sounds were difficult to hear, although an intermittent S3 was heard in the mid-epigastric area. There was pitting edema of the ankles and calves bilaterally. JVD could not be appreciated due to his massive obesity. Abdominal exam was remarkable only for no tenderness (massive obesity prevented good exam).

Admission chest x-ray revealed cardiomegaly and increased pulmonary vascular markings consistent with a mild left sided failure.

LABORATORY:

WBC was 12,200 with normal diff. Hb. 15.8 gm.%. Platelets were normal. Protime, PTT normal. SMA-6 which includes serum electrolytes was normal.

Diffuse elevation of liver function studies (attributed to apoxia) was also noted. Thyroid panel was normal with a T-7 of 2.4 (1.5-4.5). Serum cortisols were normal. UA was negative on admission.

EKG was remarkable for sinus rhythm with changes consistent with cor pulmonale as well as mycardial ischemia in the anterior inferior leads.

EEG was performed and was normal. Sleep apnea study was performed and was strongly suggestive of obstructive sleep apnea with chronic and acute CO2 retention, as well as marked arterial desaturation as a result of obstructive sleep apnea.

HOSPITAL COURSE:

Mr. Malone was admitted with acute repiratroy [sic] failure of uncertain etiology. Careful review of the case with the family revealed he had had difficulty with staying awake over the previous month and had never been able to sleep well. He was given ventilatory support for several days. He was treated aggressively for cor pulmonale and right sided heart failure with good result. He was eventually weened off the respirator within the first week of his hospital stay.

Because of the suspicion of obstructive sleep apnea, he was given a sleep study by Dr. Tinstman. This was strongly suggestive of obstructive sleep apnea. Tracheostomy was recommended. This was performed by Dr. Randy Ferlic on 2/8/80. There was no difficulty.

He had one difficulty post-op with a catheter induced UTI with fever. He was treated aggressively with I.V. Ampicillin and this cleared well. There was no recurrence of symptoms or fever when his Foley catheter had been pulled.

After several days of gradual adjustment to his tracheostomy tube and manipulations in regards to size and so forth, he was felt to be in adequate shape to go home.

He was discharged home to the care of Dr. Tan Creti. Medications as the time of discharge include Theo-Dur 300 mg. p.o. q. 12 hours, Lasix 20 mg. p.o. daily. KCL 25 mEq. p.o. t.i.d. Nitropaste one inch q.i.d. He was given careful instruction as to tracheostomy care.

Prognosis is fair in that much of the strain induced by his obstructive sleep apnea has been resolved and there is no immediate threat of respiratory failure. However, it is uncertain how much reversible function there is as far as his cor pulmonale is concerned. Time will tell. (Claimant's exhibit B, item 5.)

Dr. Tan Creti testified that claimant was seen numerous times in the emergency room at the Crawford County Memorial Hospital for repeated blockage of the tracheostomy tube following his discharge from Clarkson Memorial Hospital in April of 1980. (According to Dr. Tan Creti's records, claimant was hospitalized for respiratory problems in April, May, and July of 1980 and in February and April of 1981. See also claimant's exhibit B, items 6, 7 and 8.) Dr. Tan Creti explained the function of the tracheostomy tube:

> The tracheostomy tube allows air to enter directly into the windpipe or trachea and bypasses the normal pathways through the nose and mouth and the esophagus or lower pharynx and the vocal cords.
>
> The purposes would be to allow the direct flow of air when there's a problem above this area. It also reduces the amount of air that is rebreathed with each respiration. Ordinarily when a person takes a breath the first air to reach the lungs is the air that's already breathed out, the old, stale air in the mouth and back of throat. And we can avoid with each breath taken in and rebreathing this same air by putting a direct tube into the neck.
>
> So in Mr. Malone's case this was another reason that this would allow a little better oxygen and a little surer respiratory airway.
>
> Another factor that the doctors considered down there was a diagnosis of sleep apnea. This is a condition when apparently healthy people with no other particular problems will during their sleep block their airways and this is — I don't think the specialists or experts have come to a complete conclusion as to why this happens. It's a fairly new syndrome that a lot of attention has been given to in the last couple years.

And in Mr. Malone's case I understand that the specialists were concerned about this as a problem in addition to his lung — general lung state and condition that possibly during the nighttime the trachea tube would be blocked and that this would lead to sudden death during sleep. And a tracheostomy tube is one treatment for this. It does allow an open passage of air.

Q. It was a treatment that was given, I take it, in conjuction [sic] with his problems that started in January of 1980?

A. Yes. But the sleep apnea was not the reason he had the tube put in. He had it put in because of his respiratory distress. (Tan Creti deposition, pages 9-10.)

Claimant's counsel asked Dr. Tan Creti to assume the veracity of claimant's testimony that he had hauled livestock over a period of years and had been engulfed in livestock dust from time to time which caused him to cough and stop work on occasion and which became increasingly harder for the claimant to tolerate. Based on such hypothetical, the history he received from the claimant, his treatment of the claimant and his personal knowledge of claimant's case, Dr. Tan Creti expressed his opinion regarding the relationship between claimant's exposure to livestock dust and the condition in which he found claimant in January of 1980:

> I feel that there's no question that Mr. Malone's problems were aggravated and brought on by the work environment that he was exposed to. The type of asthma and bronchitis and lung conditions that he has can occur at any time during a person's lifetime, but knowing his past history, having done examinations on him over a number of years, and seeing the development of his lung problems with this course in January of 1980, leaves no doubt in my mind that environmental dust and exposure contributed primarily to his condition. (Tan Creti deposition, page 17.)

Upon cross-examination Dr. Tan Creti testified that exposure to hog dust caused both permanent damage and temporary aggravation in claimant's case. He attempted to explain why it was impossible to measure the damage caused by any one exposure:

A. Again on an individual basis it's a very minute process, a little bit at a time, so I don't think you could measure one instance. But over a period of time, yes, there are pulmonary and lung function tests that do differentiate the temporary spasms and temporary infection from permanent damage.

Q. But they wouldn't show necessarily what was the aggravating factor, would they? They would show the condition of the lungs; not necessarily what caused the condition?

A. That's correct. We would have to depend on history and other things to delineate what the cause was.

Q. We have no way of testing in Mr. Malone's case whether his lung condition is the result of any particular aggravant; is that correct?

A. I would say not as any certain scientific way. There are some allergy tests that would again shed light on it, but I would have to agree or say that there's no way to come up with a scientific or chemical way of saying, you know, this did it. We pretty much have to take Mr. Malone's word for it and the words of his coworkers as to what the circumstances were.

Q. So in that regard are you saying to us that certainly hog dust — exposure to those kinds of dusts would cause the kind of condition you saw in Mr. Malone? Can you say with certainty that in his case that's what did it?

A. I believe that based on talking to Mr. Malone over the years and knowing the circumstances that there's no question in my mind that this is what's caused the problem. (Tan Creti Deposition, pages 19-20.)

Dr. Tan Creti disputed any suggestion that sleep apnea accounted for claimant's present problems. He opined that sleep apnea can exist with or without respiratory disease and, similarly, may or may not be associated with heart disease. He agreed that obesity creates ventilation difficulty in chest infection or pneumonia cases. He was not aware of the degree of severity of claimant's 1972 pneumonitis nor did he know if claimant was smoking at that time. Dr. Tan Creti did report that claimant was not a smoker at present.

With regard to the onset of claimant's respiratory problems in January of 1980, Dr. Tan Creti knew that the claimant blamed truck driving and working in the cold, but was not aware of how long claimant had suffered with the cold and cough. He explained why he could accept an influenza virus as only a precipitating factor of the manifestation of the underlying condition:

A. It would be possible, as I say — The precipitating factor that finally pushed him over the edge — If he had deteriorated lung function, the final thing that got him into trouble, so to say, or pushed him over the edge could have been just a common cold that he would have picked up going through a supermarket or down the street.

Q. Okay.

A. But the fact — The severe lung function, changes in this, were not consistent with that, and the fact that he went on ahead into respiratory arrest and subsequently developed the wheezing and asthma picture and all this, this is not consistent with a virus infection or cold having caused all the rest.

* * *

A. The condition that he entered into at this time was called respiratory insufficiency. That is to say the lung mechanism has been impaired and is not moving or ventilating enough air to support bodily functions and to rid the body of the waste products of metabolism, carbon dioxide. Normal waste product was building up in his blood and this causes a poisoning of the system, produces somnolence and changes the mental state as well as the physical state. And once you have this process starting, then it will further deteriorate and go downhill and eventually

can be life threatening. (Tan Creti Deposition, pages 27-28.)

Dr. Tan Creti recalled that claimant demonstrated a twitching at that time which was a sign of claimant's impending respiratory failure. He defined such symptomatology as Pikwickian syndrome which "is a sematical association. People with overweight, somnolence, the development of congestive heart failure and the resulting lack of sufficient ventilation of the air exchange are the usual hallmark features of this syndrome." (Tan Creti Deposition, page 29.) Dr. Tan Creti agreed that x-rays taken immediately before claimant's January 1980 hospital admission revealed probable congestive heart failure and those taken immediately after claimant's admission displayed diffuse infiltration of both lungs consistent with pulmonary edema and respiratory failure. (Only the latter radiology report is in evidence, and it states:

> "PA and right lateralviews [sic] of the chest were done and revealed a diffuse infiltration thru out [sic] both lungs, consistent with a pulmonary edema congestive failure. A bronchopneumonia may also cause such changes. The heart is enlarged.
>
> IMPRESSION: Probably congestive failure." [Claimant's exhibit B, item 1, page 4.])

In a letter dated June 18, 1980 and addressed to defendant carrier, Dr. Tan Creti opined:

> As I indicated on other reports, Mr. Malone has been totally disabled due to a severe lung condition. At present, he is suffering from acute and chronic recurring asthma, as well as sleep apnea and chronic hypoxemia. It would be difficult to state with certainty the cause and all of the precipitating factors of Mr. Malone's condition, though it is certain that they were precipitated and made worse by the exhalation of dusts including hog dust that he was exposed to at work. He is quite overweight at the time his respiratory status decompensated; however, since then he has lost a great deal of weight, although he has made some improvement and now has no longer required a tracheostomy. He still has his adult onset asthma and requires constant medication and treatment for this. (Tan Creti Deposition, exhibit A.)

In an effort to identify the other precipitating factors, Dr. Tan Creti and defense counsel engaged in the following exchange:

Q. In the report in the middle of the body there you say it's difficult to state with certainty the cause and all of the precipitating factors in Mr. Malone's condition. What kind of other precipitating factors are we talking about other than just the dust that you've talked about?

A. Well, there are hundreds of kinds of dust. As I say, moldy basements, air conditioning equipment can cause this, and without knowing every detail of someone's life. As I said, there would be other exposures that would be possible.

Q. Anything other than dust?

A. As I say, pollens, molds. A lot of people are bothered in the summertime.

Q. Allergies?

A. Allergies to foods and many things like this.

Q. Do you know as a part of Mr. Malone's chart have you ever done any allergy test on him?

A. I don't believe he's had skin allergy testing done.

Q. We do know he had a skin —

A. He may have had this done in Omaha but I don't know.

Q. I believe you treated him for a dematitis condition?

A. Yes, that was from an insect spray at the time we thought possibly had caused it.

Q. Smoking, could that be a precipitating factor?

A. It can. Generally the problem with smoking is that it contributes more to the risk of a cancer forming in the lung or to repeated bronchitis infections and thereby increases the risk of emphysema. But as a cause of asthma itself I would say that it would be on the list but not necessarily as high as things like animal dander, hog dust or molds.

Q. Mr. Malone has had repeated attacks apparently since his initial hospitalization in 1980; is that correct?

A. Yes, that's correct.

Q. And to our knowledge, and I suppose to yours, has not been around hog dust or animal dust since that time.

A. I wouldn't know. Living in a windy farm community there are always allergens or dusts around. Once the condition sort of, so to speak, lights up or is started, then any number of things again can precipitate it or cause problems.

Q. If he has not been around dust, hog dust or cattle dust and continues to have attacks, would that indicate that perhaps there are some of these other factors you've talked about, either allergens or pollen or whatever, that are causing him difficulty?

A. Yeah, there's no question that at this stage with the deterioration that he's gone through with his lungs, that anything could set him off, you know. So as part of his medical treatment we told him he should live in a very clean environment and certainly have to stay away from anything else. (Tan Creti Deposition, pages 30-32.)

Thomas C. Tintsman, M.D., board certified in general internal medicine and pulmonary diseases, testified that his practice is limited to pulmonary diseases. He is the associate director of respiratory therapy at Bishop Clarkson Memorial Hospital. His division deals with pulmonary rehabilitation and with investigative studies. Dr. Tintsman first saw the claimant in early 1980, at which time he diagnosed claimant's condition as acute respiratory failure associated with corpulmonale described as right-sided congestive heart failure due to hypoxemia or low blood oxygen. After testing the claimant for awhile, Dr. Tintsman further noted claimant

had a history of life-long snoring and progressive hypersomnolence and, after subsequent study of these factors in claimant's case, made a diagnosis of obstructive sleep apnea which is loss of control of the tongue muscles during sleep resulting in blockage of the airway and, in turn, possible decrease in the blood's oxygen level.

Dr. Tintsman testified that congestive heart failure may be the product of either chronic obstructive pulmonary disease or obstructive sleep apnea. The cause of the latter problem is unknown and, in Dr. Tintsman's opinion, the cause of the former condition is impossible to determine in an individual who has a past history of smoking. Dr. Tintsman testified that smoking, asthma (which disease he thought is probably inherited) or anything causing chronic bronchitis could bring about chronic obstructive pulmonary disease. Based on his experience in the area of pulmonary disease, Dr. Tintsman reiterated the opinion he gave in a letter dated June 9, 1980 and addressed to defendant carrier (defendants' exhibit 1) — that it is impossible to state the etiology of claimant's apnea or the secondary heart failure. (Dr. Tintsman's deposition was taken July 16, 1981. He had continued to treat the claimant intermittently [about eight times] throughout 1980 and referred the claimant back to Dr. Tan Creti on December 16, 1980.)

Dr. Tintsman was aware of claimant's history of exposure to dust and dirt from hauling livestock almost twenty years and conceded that he could not say such history had nothing to do with the development of claimant's present condition. However, he again emphasized to claimant's counsel that chronic obstructive pulmonary disease is almost never found in absence of a history of childhood asthma or lung disease or in absence of a history of smoking. He knew of no study concerning the effects of hog dust in people who are non-smokers. Dr. Tintsman had not seen such a patient in his practice nor could he say he had seen other individuals in claimant's particular occupation for as long as claimant had been so employed. He and claimant's counsel then engaged in the following exchange:

A. I certainly see patients who are exposed to hog dust because they raise hogs, with a fair degree of frequency. I have not seen a person who has developed chronic obstructive pulmonary disease solely from hog dust and that is from patients who have daily exposure in raising hogs.

Q. Are you saying that daily exposure to hog dust or any kind of dirt and filth that comes from driving a truck day after day would not tend to either aggravate or cause a flare-up in this area — in the lung area?

A. You did not previously say aggravate or cause flare-up of —

Q. I'm saying that now.

A. Exposure to dust and irritants in anybody who has an underlying lung disease will make them worse.

Q. Aggravate them?

A. Aggravates them. By aggravation it will give them temporary irritability of their bronchial tubes, usually manifested by coughing, shortness of breath which resolves after the exposure has ended. I know of no information to suggest that dust that one picks up over the highway or hog dust causes permanent, irreversible damage by themselves.

Q. Even though it might be constant over a period of years?

A. I'm sorry. There isn't that — as you said it's an inexact science. I don't have that kind of information. Stated quite simply, if I may restate my opinion —

Q. Just before you do that, could we substitute the word light-up in place of aggravate?

A. You can substitute any word you like.

Q. Would it mean the same thing?

A. I would think that light-up is getting fairly inexact.

Q. You think aggravate is a better word. Go ahead and state your opinion.

A. I think that in people who have smoked cigarettes and have chronic obstructive pulmonary disease it is impossible, unless they have been tested during this period of smoking, to determine with any degree of reliability whether smoking is the cause of their lung disease or whether something else is the cause of their lung disease.

Q. Okay. Would it help you in your diagnosis of the patient, doctor, if you had been that person's doctor over a period of a substantial number of years and maybe given annual examinations?

A. No. There is no information available on chest x-rays or physical examinations that would allow you to detect those kind [sic] of diseases.

Q. There are no warning signs of any kind that you would know of on physical examination?

A. It would depend on the expertise of the examiner.

Q. Well, that's not very helpful, not to me and I don't think it will be to the person that will read this. What does that mean?

A. A sophisticated, well-trained examiner can estimate, roughly, pulmonary function from a physical exam. Most people do not do that when they do a physical exam.

Q. What kind of a test would they have to give?

A. They would have to give pulmonary function studies. (Tintsman Deposition, pages 15-17.)

The record is devoid of evidence that the claimant underwent pulmonary function studies prior to January 23, 1980. Studies conducted on that date revealed an FVC of 2.1 liter [43% predicted] and an FEV I of 1.7 liters [50% predicted]. [Claimant's exhibit B, item 2, p. 1.])

Claimant testified that he had no health problems growing up but did undergo an appendectomy in 1939 and was medically discharged from the service in the 1940s due to a double rupture and ulcers. He recalled being hospitalized a

few days in 1972 for a bout of pneumonia. Claimant acknowledged being a smoker up until that time, but seemingly disputed that he was ever a heavy smoker. Claimant also recalled having some back problems in 1975. Claimant, 5'11", admitted that he has been encouraged to loose weight by his doctors and that he tries to do so all of the time. He blames one of the medications he takes for his difficulty losing weight. He weighs 260 pounds today compared to 313 pounds in January of 1980. He was down to 218 while hospitalized at Clarkson Memorial Hospital. Claimant concluded he had more physical problems when he was thinner.

Claimant's present complaints include difficulty breathing when walking or climbing or in humid weather. He felt faint upon trying to pull some wiring. He has not attempted to stand for a long period of time. Sitting does not bother him. He drives his auto on occasion. He takes six different medications. Claimant testified he still had the tube in his throat. He has not returned to work of any kind. He is receiving total disability benefits from Social Security. He denied any problem of falling asleep during the day or with his memory prior to January of 1980. He acknowledged that people have told him he snores. Claimant noted that he had no difficulty breathing at home before January of 1980, but now he does. That is, claimant contended, whereas, his breathing difficulty previously would clear up when he was not around hogs or cattle, since January of 1980 he has had breathing difficulty regardless of the absence of livestock dust. At age 57 he moved to a trailer home in the countryside. A veterinary facility, where small animals and livestock are kept, is nearby.

Applicable Law

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 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).

Preponderance of the evidence means the greater weight of evidence, the evidence of superior influence or efficacy. *Bauer v. Reavell*, 260 N.W. 39, 219 Iowa 1212 (1935). A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. *Burt v. John Deere Waterloo Tractor Works, supra.*

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 other disclosed facts and circumstances. *Bodish v. Fischer, Inc., supra*. 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, supra.* 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.*

Expert testimony stating that a present condition might be causally connected to claimant's injury arising out of and in the course of employment, in addition to non-expert testimony tending to show causation, may be sufficient to sustain an award but does not compel an award. *Anderson v. Oscar Mayer & Co.*, 217 N.W.2d 531, 536 (Iowa 1974).

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 (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. * * * *

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 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.

Iowa Code section 85.61(5)(b) states that "[t]he words 'injury' or 'personal 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." The Iowa Supreme Court in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 190 (Iowa 1980) stated that:

> the concepts of occupational disease and injury cannot be used interchangeably....
>
> On the other hand, to prove causation of an occupational disease, the claimant need only meet two basic requirements imposed by the statutory definition of occupational disease, given in section 85A.8. First, the disease must be causally related to the exposure to harmful conditions of the field of employment... Secondly, those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations.

Analysis

Claimant has failed to establish that his obstructive lung disease and congestive heart failure were caused by exposure to livestock dust. The opinion of Dr. Tintsman — that such exposures amounted, at best to temporary aggravation of an underlying disease process of unknown etiology — is given greater weight that Dr. Tan Creti's conclusion that claimant's deterioration resulted from such contact.

Dr. Tintsman clearly has greater expertise in pulmonary related matters. His explanation of the interplay and individual effects from claimant's past history of smoking, past and present overweight condition and sleep apnea symptomatology on claimant's pulmonary system was most plausible. His concession to claimant's counsel that medicine is an inexact science is not deleterious to the weight afforded his opinion. Indeed, Dr. Tintsman similarly emphasized the importance of past clinical data and objective testing in determining the cause of obstructive lung disease and congestive heart failure, particularly in case of a former smoker.

Dr. Tan Creti based his opinion that claimant's condition was brought about by his job exposure to livestock dust essentially on claimant's history. Yet in the seven years Dr. Tan Creti treated the claimant, he did not mention any complaints claimant may have had with regard to breathing livestock dust or in general. (Nor is such exposure mentioned in the hospital histories.) There is no evidence of examination or treatment of any respiratory condition until January 1980. Rather, less than a year before claimant experienced respiratory failure, he successfully passed an ICC physical. Dr. Tan Creti acknowledged the diagnostic usefulness of plumonary function tests and allergy tests yet apparently never conducted any of those procedures prior to claimant's January 1980 hospitalization in Denison. He did not perform any allergy tests on the claimant in 1974 when he treated claimant's skin condition (nor did he demonstrate awareness of claimant's episode of contact dermatitis while hospitalized at Bishop Clarkson Memorial Hospital. [Claimant's exhibit B, item 3, page 3.]) He conceded that smoking could play a role in respiratory degeneration but did not have any knowledge of when claimant quit smoking. He agreed that being overweight adds to breathing difficulty, especially in instances of chest infection. His dismissal of any causal connection between claimant's sleep apnea and the chronic obstructive lung disease and congestive heart failure was not based on any intense study of the subject.

Claimant has failed to establish that the cold and cough for which he saw Dr. Tan Creti on January 7, 1980 and for which he initially was hospitalized on January 18, 1980 amounted to an injury in the course of and arising out of his employment activity. Neither Dr. Tan Creti's testimony (he indicated claimant could have contracted the virus elsewhere) nor the fact that claimant had been off work a week prior to January 7, 1980 (Dr. Tan Creti did not know how long the claimant had the cold and cough) would support finding that claimant's condition as of January of 1980 was directly traceable to his employment activity. Even if it were, the cold and cough were not material aggravations of the underlying problem. Rather they amounted to a vehicle for the manifestation of such underlying condition.

Findings of Fact and Conclusions of Law

WHEREFORE for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant, age 63, had been transporting livestock (including loading and unloading the trailers) for defendant employer almost continually since 1963. Claimant noticed difficulty breathing when exposed to livestock dust.

Finding 2. Claimant was hospitalized on January 18, 1980 for wheezing, chest congestion and shortness of breath. On January 28, 1980 he suffered respiratory failure and underwent a tracheostomy on February 8, 1980.

Finding 3. Weight of the medical evidence indicated that claimant's obstructive pulmonary disease and congestive heart failure were of undeterminable etiology due to claimant having been a smoker in the past, due to claimant being overweight and due to claimant's sleep apnea symptomatology. Exposure to livestock dust only temporarily aggravated the underlying condition essentially for the length of such exposure.

Conclusion A. Claimant has failed to establish that his obstructive lung disease and congestive heart failure were caused by exposure to the livestock dust found in his working environment — he has failed to establish an occupational disease as defined in Code section 85A.8.

Finding 4. The medical evidence does not support finding that the conditions for which claimant was hospitalized initially in January of 1980 amounted to an injury and were work related (nor that they materially aggravated the underlying condition).

Conclusion B. Claimant has failed to establish that he sustained an injury in the course of and arising out of his employment as contemplated by Code chapter 85.

Order

THEREFORE, it is ordered that the claimant take nothing from this proceeding.

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner Rule 500—4.33.

* * *

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

LEE M. JACKWIG
Deputy Industrial Commissioner

Appealed to Commissioner; Dismissed.

CAROL MARTIN,

Claimant,

vs.

L. A. STRUCTURAL,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 6, 1982 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 arbitration decision.

The record consists of the depositions of Jon Surber, Niel E. Holmes, Carol Martin, John Thomas Collins, Larry Lustgraaf, and Michael Grosvenor. The record also consists of the evidence given in the case of *State of Iowa v. Thomas M. Kane*: Ronald L. Shaw pp. 207-256, Arthur Sciortino, pp. 156-201, Jack Bonebrake, pp. 44-165, and Thomas Kane, pp. 408-459.

The result reached will be the same as that of the hearing deputy. The findings of fact are adopted but somewhat revised.

Findings of Fact

1. Claimant's decedent, Lloyd Martin was vice-president of L. A. Structual, Inc., and chief owner thereof on October 6, 1980 and October 7, 1980.

2. On October 6, 1980 claimant's decedent was active in his employment in the supervision of the business. Decedent had lunch at Sam's Paradise and returned to work. Two employees were bringing a truck back to Council Bluffs from Kansas City that afternoon and the truck broke down, necessitating repairs. The truck was disabled on the interstate highway south of Council Bluffs and decedent and Niel Holmes drove to the disabled vehicle and were able to get it back to defendant employer's garage without a tow. The truck was scheduled to return to Kansas City the following day and repairs needed to be made prior to that journey. Five people remained at the garage: Jon Surber, Niel Holmes, Larry Lustgraaf, John Collins and decedent. Surber's nephew, Mike Grosvenor, a mechanic, was called to assist in the repair of the truck. Grosvenor was ordinarily shop foreman for another trucking company and his duties for other concerns was ordinarily on a "moonlight" basis. Grosvenor arrived at L. A. Structural sometime in the early evening on October 6, 1980 and found that the rear end of the truck had gone bad and Grosvenor and Surber went to Grosvenor's place of regular employment and picked up a rear end. Decedent went to the International Harvester dealership to obtain other parts. Lustgraaf and Collins were sent home inasmuch as they were scheduled to leave for Kansas City at about 3:30 a.m. on October 7, 1980. Collins and Lustgraaf left for home at 9:30 p.m. Repairs continued and were completed at 12:30 or 1:00 a.m. on October 7, 1980. In the intervening time period between the acquisition of parts and repair, some sandwiches, pop and beer were brought in. The truck was test driven before anyone departed. Decedent went to the Hi-Way Inn, a tavern, arriving between 12:00 midnight and 1:00 a.m. He had previously called his wife at about 11:00 p.m. and rather than having her prepare food he stated that he would pick something up. Jack Bonebrake, the owner-bartender of the Hi-Way Inn testified that decedent arrived at his establishment at about 12:30. Decendent had a sandwich in addition to beer. Decedent drank between four and six beers and no one else was in the bar except Bonebrake until 2:00 a.m. when Thomas Kane and Lavina Baker arrived. They each had drunk about a drink and a half before Kane left to take Baker home. Decedent and Bonebrake remained and had one or two more beers before Kane returned. Kane was drinking bourbon and water. By about 3:40 a.m. claimant's decedent had consumed about 10 beers (p. 98, Bonebrake testimony). Decedent apparently made a remark about Kane's wife to the effect that Kane would be better off being at home taking care of her. Kane made a remark about decedent's wife whereupon Kane and decedent went out the rear door and the altercation continued and Lloyd Martin was shot 3 times by Kane and died from the shooting.

3. Roger Von Rudden, Larry Lustgraaf and John Collins drove to Kansas City on the following day. In a circumstance where a disabled truck was to be dispatched early, John Collins would have expected to find a note or the presence of the decedent at the garage assuring him that the repairs had taken place. Since no note indicating that the repairs were done was with the truck, the inference that decedent expected to return to L. A. Structural is present and it is so found. Kane's responsibility was decreased but not enough to be irresponsible.

Issues

The issues are whether decedent's death arose out of and in the course of his employment and if the street risk or positional risk doctrine applies to the case.

Analysis

As demonstrated in defendants' superior brief, claimant must show that the employee's death arose out of and in the course of the employment. Section 85.3(1). *Crees v. Shel-*

dahl Telephone Co., 258 Iowa 292, 139 N.W.2d 190 (1965). The arising-out-of requirement has to do with the question of whether or not the employment caused the injury. See *Casey v. Hansen*, 238 Iowa 62, 26 N.W.2d 50 (1947). Thus, in a case involving a shooting, compensation was granted where one employee shot another. *Cedar Rapids Community School v. Cady*, 278 N.W.2d 298 (Iowa 1979). In the instant case, however, the exposure presented by the tavern situation did not emanate from the employment as in *Cady*. For other cases on the arising out of issue, see *McClure v. Union, et al., Cos.*, 188 N.W.2d 283, 287 (Iowa 1971); *Musselman v. Central Telephone Company*, 261 Iowa 352, 154 N.W.2d 128, 130 (1967); and *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402, 68 N.W.2d 63 (1955).

Likewise, decedent's death was not in the course of the employment, which has to do with the time and place of the injury and requires that the employee be within the time period of the employment, at a place where he can reasonably perform his duties, and in the process of fulfilling those duties, or something incidental thereto. See *McClure, supra.* Here, whether or not decedent had intended to return to the employer's premises, his presence in a bar that was closed, drinking and arguing personal matters with an acquaintance, were outside the employment.

Claimant argues that decedent was in the course of his employment because of the street risk or positional risk doctrine and cites cases. (These doctrine may more correctly come under the issue of "arising out of," but claimant's position is clear.) *Cady, supra,* is an example of that line of cases. Application of either of those doctrines, however, requires that the employment itself be a factor in placing the employee in danger. Thus, even in the instant case, for example, had decedent merely gone to the tavern to eat and been injured while leaving to return to the employment premises, the employment might have been found to have been a factor in placing decedent in danger. But that was not the case; decedent stayed on, even past the time when Lustgraaf and Collins were due to leave in the truck and it was activity of a personal nature and his overstayed presence in the tavern which placed him in danger.

Conclusions of Law

The death of claimant's decedent, Lloyd Martin, did not arise out of and in the course of his employment.

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

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 16th day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

WAYNE R. MARTS,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed from a proposed arbitration decision in which it was determined that he failed to establish by a preponderance of the evidence that his injury arose out of and in the course of his employment.

The record on appeal consists of the testimony of claimant and of James Lennie and Richard Pinegar; claimant's exhibits 1 through 5; defendant's exhibits A through M, N and N1, P and Q; the deposition of Jerome G. Bashara, M.D.; and appeal briefs of both parties.

The issues on appeal as stated by claimant are as follows:

> The first issue on appeal is whether or not there is substantial evidence to support the Deputy's findings and conclusions that the claimant did not meet his burden of establishing an injury which arose out of and in the course of his employment. The second issue on appeal is the rate of workers' compensation benefits of the claimant. The third issue is whether the notice requirement of Section 85.23, The Code, had been met.

Claimant is presently fifty-four years of age, married and has three minor children. He has worked for defendant employer for the past twenty-seven and one-half years performing various duties; however, for the ten years prior to May 15, 1979, claimant was classified as an operator on a four-roll calendar.

Claimant testified that his duties as a calendar operator required him to "maintain production records, maintain speed and gauge, check to make sure that everyone else is doing his right job and assist in all delays." (Transcript, page 6.) Claimant stated that the physical requirements of the job involve pushing buttons from three to six feet above his head (transcript, page 21); assisting in making cord splices two to three times per hour (transcript, page 22); changing the shell two to three times per hour (transcript, pages 23, 74 and 77); and helping "batch off" rubber approximately three or four times a day (transcript, page 24).

Changing the shell and the bar which runs through it is a two-person operation and involves lifting up one end of the shell, which can weigh from fifty to one hundred forty-five pounds (transcript, pages 75, 77 and 80), and the bar, which

weighs thirty-two pounds (transcript, page 76), removing the shell from the bar and placing the shell in a hamper (transcript, page 23). Claimant testified that the weight of the shell and bar varies from ninety to over two hundred pounds, whereas the figures noted above are based upon actual figures computed by James Lennie, manager of plant services with defendant employer, when he weighed the apparatus. The slight discrepancy in weights referred to by claimant and Mr. Lennie may be explained by the fact that, as claimant testified, scraps of fabric or rubber may be wrapped around the shell even though it is supposedly empty when it is changed. (Transcript, pages 41, 46.) Claimant testified that he has had occasion to weigh the shell and bar himself. (Transcript, page 40.)

According to claimant he helped lift the 200 pound shells approximately once or twice a shift (transcript, page 42), and the 125 pound shells about six times per shift (transcript, page 42). When a shell is changed, the individuals must reach up to one of two levels, either eye level or over the head (transcript, page 24, 84), and about two feet from the body (transcript, page 84).

"Batching off" rubber involves using a mill knife to "cut the rubber down or slab rubber off the mill." (Transcript, page 24.) This process requires an individual to extend his arm to approximately a height of four feet and cut through a slab of rubber to the surface of the roll, an action which claimant testifed places a strain on your entire arm. (Transcript, pages 24, 25 and 87.)

Claimant testified that he had first noticed that he was having problems with his right arm about thirty days prior to May 15, 1979. (Transcript, page 12.) This problem gradually worsened until May 15 when claimant attempted to help an individual "batch off" some rubber, but was unable to perform this job because of pain in his right elbow. (Transcript, page 11.)

Claimant was examined by his family doctor, Dr. Herman, who periodically gave him a shot of cortisone in his elbow. Dr. Herman subsequently referred claimant to Jerome G. Bashara, M.D. who first examined claimant in July 1979. Dr. Bashara's diagnosis at that time was "[r]heumatoid versus degenerative arthritis involving both elbows, the right greater than the left with an acute and chronic synovitis of the right elbow." (Bashara deposition exhibit 1.)

Claimant was then admitted to the hospital and underwent a partial synovectomy of the right elbow on July 25, 1979. (Bashara deposition, page 8.) Dr. Bashara's diagnosis following the surgical procedure was "[m]oderately advanced degenerative arthritis of both elbows, right worse than left; [c]hronic synovitis, right elbow, lateral compartment..." (Bashara deposition exhibit 1.) After the surgery claimant participated in physical therapy and, according to Dr. Bashara's progress notes, claimant showed slow, steady improvement. Dr. Bashara's final diagnosis is revealed in his progress notes dated January 23, 1980, as "1. Degenerative arthritis, both elbows, work related. 2. Inflammatory arthritis, generalized, particularly his neck, hands and elbows." On January 24, 1980, Dr. Bashara sent a letter to defendant employer which stated that claimant could return to work in a light duty capacity on February 4, 1980. This letter also indicated that Dr. Bashara believed that claimant's condition was work-related.

Claimant testified that he inquired about light duty positions on January 18, 1980 and was told by defendant employer that none were available. (Transcript, page 16.) Claimant also stated that it was when he was released to return to work that he first became aware that his elbow condition was job-related and that he immediately informed his employer. Richard Pinegar confirmed that defendant employer received notice of the work-related nature of claimant's claim in January 1980. (Transcript, page 13.)

Dr. Bashara examined claimant again on April 9, 1980. Claimant had "developed fairly persistent numbness of the little fingers of his hands and some increased aching in his elbow. His right elbow motion and stiffness was about the same." The diagnosis at that time was "bilateral tardy ulnar nerve palsies, the right much worse than the left." (Bashara deposition, page 13.) Dr. Bashara testified that a direct relationship existed between claimant's condition in April of 1980 and the condition he had previously treated claimant for. (Bashara deposition, pages 13, 14.)

As a result of claimant's further problems, an ulnar nerve transposition in his right elbow was performed on May 27, 1980. (Bashara deposition exhibit 1.) Following that procedure claimant's condition in his right extremity improved significantly. (Bashara deposition, page 14.)

In discussing degenerative arthritis, Dr. Bashara stated that:

> * * * the only thing that degenerative arthritis means to a doctor is that the joint is wearing out. And it will progress, it will get worse, and it will eventually wear out. And any process that can start that or any process that can keep that going, like repetitive activities, can either cause or start the process going or aggravate or accelerate the disease process, the wearing out process.

Dr. Bashara testified that he had "a very strong opinion" that claimant's arthritis was aggravated by his work. (Bashara deposition, pages 32, 33.) Although Dr. Bashara initially thought that claimant had a rare form of degenerative arthritis of the elbows, his later opinion, based upon subsequent knowledge of the type of work claimant performed, in addition to his consideration of the facts set forth in the hypothetical question he was asked, was that claimant's work "aggravated a process that was probably already started." (Bashara deposition, pages 34, 35.)

The facts given Dr. Bashara in the hypothetical specifically related that "batching off" was a duty performed by claimant only once or twice a day. In addition, the hypothetical provided a description of the physical requirements of claimant's job which is virtually identical to the testimony given at the hearing by claimant and James Lennie.

With regard to healing period, Dr. Bashara stated that it is difficult to fix a healing time period in a progressive problem, but that an individual would probably reach maximum healing period after a synovectomy between three and six months. (Bashara deposition, page 11.) Dr. Bashara released claimant to return to light duty work on February 4, 1980. The recuperation period following the ulnar nerve transposition was estimated at three months.

Dr. Bashara specifically stated that "[t]aking into account

all of the information that I've had up to the present time, it's my opinion that Mr. Marts most likely had a preexisting condition in his body and in his elbow which was aggravated and may have been actually initiated by his work in some way and that the process or disease is accelerated by his work." (Bashara deposition, page 18.)

Based upon Dr. Bashara's last examination of claimant on April 2, 1981, he concluded that claimant has a fifty percent permanent partial impairment disability of his right upper extremity. (Bashara deposition, page 19.) Dr. Bashara, however, was unable to estimate what portion of claimant's disability was related to his preexisting condition as distinguished from that related to his job. (Bashara deposition, page 20.) Although claimant at one time had radiculopathy from the cervical area into his arm and still has problems with his neck, Dr. Bashara stated that the radiculopathy problem was resolved and that neither the previous radiculopathy nor the neck abnormality was taken into consideration as a portion of the fifty percent impairment rating. (Bashara deposition, page 41, 42.)

G. Charles Roland, M.D., examined claimant at the request of the insurance carrier and in a letter dated May 23, 1980 stated that:

> The patient has degenerative arthritis of the right elbow. Apparently for twenty years he has been doing heavy work which required excessive elbow motion. In addition, he has been using a knife for several years as well. A question arises as to whether this could be job related. Repetitive trauma to the joints is known to cause premature degenerative arthritis, and I would have to say if the patient indeed did heavy work with his elbows primarily on the job, that one could state this was a job related injury.

Although Dr. Roland reported the physical findings of his examination, he did not rate claimant's physical impairment based upon these findings.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 15, 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). 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. *Bodish v. Fischer, supra*. The opinions of experts need not be couched in definite, positive, or unequivocal language. *Dickinson v. Mailliard*, 175 N.W.2d 588 (Iowa 1970).

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 * * * *

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).

Dr. Bashara was claimant's primary treating physician. He specifically stated that he had discussed what claimant did at his job with claimant. This is reflected in Dr. Bashara's discharge summary in which he stated claimant was a Firestone employee and that claimant's job "consisted of bench pressing several hundred pounds of steel rod everyday." Although Dr. Bashara's technical description of claimant's job duties may be somewhat inaccurate, he was aware that claimant did lift weight during the course of his job each day.

This information does not conflict with claimant's testimony in which claimant stated "I don't remember as I told him exactly what I did." Later during the same line of questioning claimant stated that after the operation in response to a question from Dr. Bashara about whether he lifted weights at Firestone he answered "Yes, some."

Dr. Bashara clearly was aware that claimant's job involved some heavy lifting. Claimant himself told Dr. Bashara that he did engage in "some" lifting.

In addition, Dr. Bashara was given a list of claimant's job requirements which were part of the record to assist him further in evaluating causal connection between claimant's job and his elbow condition. Although the facts given Dr. Bashara do not specifically state what percentage of claimant's time was spent performing these duties, it is obvious they were performed only periodically during the day. The facts specified that claimant helped "batch off" only "once or twice a day" and that the procedure took only four or five minutes. The process of changing the shell was also described in sufficient detail and the number of times per day it was performed was appropriately noted in order to enable Dr. Bashara to infer that only a small percentage of claimant's work day was spent performing this task. The same is true for claimant's responsibility for making cord splices, pushing buttons and trimming bad edges.

Dr. Bashara specifically stated that he based his opinion of causal relationship between claimant's condition and his job

upon *all* the information he had up to the time of the taking of his deposition. It is determined after a review of all the evidence that Dr. Bashara had sufficient information about claimant's job upon which to base an opinion that claimant's right elbow problems were aggravated by his job.

While it is true that Dr. Bashara apparently did not know that claimant also had a farming operation, access to this information was not crucial. Claimant's testimony indicated that the farm work was done "mostly" by his wife and son. There is no evidence to the contrary.

Based upon the above evidence it is determined that claimant has established by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment.

The next issue to be determined is whether the notice of claim requirements of Iowa Code section 85.23 were satisfied.

A claimant must provide the employer with notice of an injury pursuant to Iowa Code section 85.23 which provides:

> *Notice of injury — failure to give.* Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

In *Robinson v. Department of Transportation*, 296 N.W.2d 809, 811 (Iowa 1980), the Iowa Supreme Court stated that the actual knowledge alternative is not satisfied unless the employer has information putting him on notice that the injury may be work-related. The court went on to say that:

> 'It is not enough, however, that the employer through his representatives, be aware [of claimant's malady]. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.' *Id.*, [citing 3A *Larson, Workmen's Compensation* §78.31(a) (1976)].
>
> * * *
>
> '. . . The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease.' *Id.*, [citing Larson at §78.31(a)]. This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's conduct is to be judged in the light of his of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work-connected, but positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability. *Id.* 812.

Defendants contend that claimant's treatment for a period in excess of six months was a longer period of time than a reasonable person would find necessary to recognize the nature, seriousness and probable compensable character of the injury. It is clear, however, that claimant did originally believe that his elbow problem was job-related and discussed this with his employer. Included in defendants' exhibit P is a form entitled "Weekly Report on Disability Claim"; which reads "Cause of Disability — thought job aggravated — Cortisone in rt elbow — arthritis — *advised not caused by job* —." (Emphasis added.)

It can be reasonably inferred that initially claimant did believe his injury was job-related, but was informed by his family physician that it was not. This determination by Dr. Herman prompted claimant to file for accident and benefits and to check "No" with regard to work-relatedness on subsequent reports.

A reasonable person, upon being informed by his physician that a condition was unrelated to his job, would have no reason to pursue the question. As a result, claimant was unaware that his right elbow problem was job-related until he was released to return to light duty work by Dr. Bashara in January 1980. At that time Dr. Bashara notified defendant employer in a report dated January 24, 1980 that claimant's condition was work-related. In addition, claimant at this time notified his employer of the work-relatedness of the condition. Thereafter, claimant consistently noted on the accident and sickness form that his condition was related to his employment. Prior to releasing claimant to work Dr. Bashara never indicated whether the condition was job-related or not. However, the fact remains that when Dr. Bashara finally informed claimant of the relationship, claimant immediately notified his employer. Based upon the above evidence, it is determined that the notice requirements of Iowa Code section 85.23 were met by claimant.

The next issue raised is that of the rate to be used to compute claimant's benefits. Defendants contend that the rate should be computed on the "basis of 40 hours per week at the hourly rate of $8.643." However, pursuant to Iowa Code section 85.36(6), claimant's rate is 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." Calculations made pursuant to section 85.36(6) indicate that claimant is entitled to compensation based upon a weekly rate of $229.99.

The final issue to be addressed is that of healing period. Iowa Code section 85.34(1) states:

> *Healing period.* If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Claimant's injury occurred on May 15, 1979. He was treated without success until surgery was performed on July 25, 1979. Dr. Bashara estimated that recuperation would occur within approximately six months and released claimant to return to light duty work as of February 4, 1980. At that time defendant employer had no light duty positions available.

Claimant experienced further job-related right elbow problems for which he was examined on April 9, 1980. To alleviate these problems a right ulnar transposition was performed May 27, 1980. Dr. Bashara estimated maximum healing would occur after three months following this second surgical procedure. According to claimant's testimony, however, his condition stabilized within two months and he was released to work in July 1980 although no light duty position was available until October 5, 1980.

Based upon the above facts, claimant is entitled to healing period compensation for the period beginning on May 15, 1979 and ending on February 4, 1980 when Dr. Bashara released him to return to light duty work, thereby indicating that claimant had reached maximum medical recuperation. Claimant is also entitled to healing period compensation for the period of time beginning on April 9, 1980 when he experienced further work-related right upper extremity problems until he reached maximum medical recuperation on July 27, 1980, two months after the second surgical procedure.

Dr. Bashara estimated claimant's impairment of the right upper extremity as fifty percent. Pursuant to Iowa Code section 85.34(2)(m) claimant is therefore entitled to permanent partial disability compensation for a period of one hundred twenty-five weeks.

Findings of Fact

1. Married claimant is 54 years of age and has three minor children.

2. Claimant had been employed by defendant employer for twenty-seven and one-half years and had been classified as a calender operator during his last ten years of employment.

3. Claimant's job duties consisted of maintaining production records, maintaining the machine's speed and gauge, supervising the other workers operating the machine, pushing buttons located three to six feet above his head, assisting in making cord splices two to three times per hour, changing a shell, which, together with the bar, weighed from approximately eighty to two hundred pounds, two to three times per hour, and helping "batch off" rubber three to four times per day.

4. "Batching off" placed a strain on claimant's right arm.

5. Claimant lifted, with the aid of another person, the 200 pound shells only once or twice per shift, the 125 pound shells about six times per shift and the lighter shells the remainder of the time.

6. Claimant spent approximately eighty percent of his day engaged in monitoring functions.

7. On May 15, 1979 claimant experienced pain in his right elbow while attempting to "batch off" and was unable to complete the process.

8. Claimant had first noticed pain in his right elbow while working about thirty days before May 15, 1979, during which time the pain gradually worsened.

9. Claimant's last day of work was May 15, 1979.

10. Claimant was initially treated by his family physician, Dr. Herman, who subsequently referred claimant to Dr. Bashara.

11. Dr. Bashara first examined claimant in July 1979 and performed a partial synovectomy of the right elbow on July 25, 1979.

12. Claimant was released to return to light duty work on February 4, 1980, at which time he had reached maximum medical recuperation, but at that time defendant employer had no suitable positions.

13. Claimant initially thought his condition was work-related and so informed his employer but was advised otherwise.

14. Claimant first became aware of the causal relationship between his job and the aggravation to his right elbow condition in January 1980, at the time Dr. Bashara released him.

15. Claimant immediately notified defendant employer that his elbow condition was work-related.

16. Claimant's duty to give notice arose when he reasonably recognized the nature, seriousness and probable compensable character of his injury when Dr. Bashara informed him of the work-relatedness in January 1980.

17. Claimant subsequently experienced further problems, for which he was examined by Dr. Bashara on April 9, 1980, and underwent an ulnar nerve transposition of the right elbow on May 27, 1980.

18. A causal relationship existed between claimant's May 15, 1979 injury and the problems which resulted in the second surgical procedure on May 27, 1980.

19. Claimant was again released to return to light duty work in July 1980.

20. Claimant's condition stabilized two months after the surgery.

21. After union negotiation claimant returned to work in a light duty position on October 5, 1980.

22. Claimant was paid an hourly rate of $8.643 and periodically was scheduled to work more than forty hours per week.

23. Claimant's average wage for the thirteen weeks preceding his injury was $372.60.

24. Claimant has a 50 percent permanent partial impairment of his right upper extremity.

25. Claimant's neck and left arm problems are unrelated to his right upper extremity condition.

26. The parties stipulated to the fairness and reasonableness of the medical bills and services. Claimant's exhibit 2 summarizes these expenses and includes:

Dr. Bashara	$ 1,300.00
Iowa Methodist Medical Center	1,541.52
Northwest Community Hospital	468.52
Northwest Community Hospital	973.85
	$ 4,283.37

Conclusion of Law

1. Claimant has proven by a preponderance of the evidence that he sustained an injury on May 15, 1979 which aggravated his preexisting right upper extremity arthritis condition and which arose out of and in the course of his employment.

2. The notice requirements of Iowa Code section 85.23 were met by claimant.

3. Claimant sustained a permanent partial disability of his right upper extremity and is entitled to weekly compensation for a period of one hundred twenty-nine and 99/100 dollars ($229.99).

4. Claimant is entitled to healing period compensation at the weekly rate of two hundred twenty-nine and 99/100 dollars ($229.99) for a total period of fifty-three and four-sevenths (53 4/7) weeks, the periods beginning May 15, 1979 until February 4, 1980 and April 9, 1980 until July 27, 1980.

THEREFORE, it is ordered:

That defendants pay claimant for a period of one hundred twenty-five (125) weeks a weekly benefit amount of two hundred twenty-nine and 99/100 dollars ($229.99).

That defendants pay claimant healing period compensation for fifty-three and four-sevenths (53 4/7) weeks at a rate of two hundred twenty-nine and 99/100 dollars ($229.99).

That defendants pay claimant the following medical expenses less a credit for any expenses previously paid:

Dr. Bashara	$ 1,300.00
Iowa Methodist Medical Center	1,541.52
Northwest Community Hospital	468.52
Northwest Community Hospital	973.85
	$ 4,283.37

That amounts previously accrued be paid in a lump sum.

That interest shall accrue pursuant to Iowa Code section 85.30.

That a final report shall be filed upon payment of this award.

That costs of the proceeding are taxed against defendants.

. . .

Signed and filed this 27th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

BRADLEY S. MARY,

Claimant,

vs.

TIM FOSTER AND SQUIRE E. FOSTER d/b/a SQUIRE FOSTER & SONS,

Employer,
Uninsured,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Bradley S. Mary, against Tim Foster and Squire E. Foster d/b/a/ Squire Foster & Sons, uninsured, for benefits as a result of an injury on October 29, 1981. On April 13, 1982 this case was heard by the undersigned. This case was considered fully submitted on the completion of the hearing.

The record consists of the testimony of claimant, Mark L. Mary, III, Squire D. Foster, and claimant's exhibts 1 through 11.

Issues

The issues presented by the parties at the time of the hearing are whether defendants had an employer-employee relationship with claimant; the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; the rate of his weekly benefits. The parties agreed that if an employee relationship existed claimant's injury arose out of and in the course of his employment.

Facts Presented

Claimant testified that on October 29, 1981 he was 17 years old and had been informed by his brother that the place where he worked erecting a building needed more help. Claimant stated he understood he would be paid at the rate of $4.50 an hour and would work until the building was finished. Claimant stated that on the morning of October 29, 1981 he reported to Squire Foster's house and rode in Tim Foster's car to the job site.

Claimant stated that this was his first day at work for defendants. Claimant indicated they were at the job site at 8:00 a.m. and when work started he hadn't talked to anyone about what to do and was told to help assemble arches. Claimant stated he did what Tim Foster said and did that work for 30-45 minutes. Claimant indicated he then helped

bolt the arches to the rest of the building. Claimant testified that Squire Foster told him to wrap up a few things in the bus owned by Squire and straighten up the bus. Claimant stated he later was bolting on support beams at the direction of Tim Foster when a tractor being driven by Tim Foster came into contact with the scaffolding on which claimant was standing, knocking claimant to the ground. Claimant testified his right foot and leg hit the ground first and was the only part of his body injured in the fall. Claimant was taken to the hospital and surgery was performed on his right ankle by R. L. Emerson, M.D.

Claimant states he has no feeling in the top of his right leg and numbness in his first toe. Claimant does not now have any restrictions on his activities.

On cross examination claimant stated Squire Foster told him what to do, where to go and how to do it. Claimant indicated it was up to Tim Foster as to how long he and the other men worked. Claimant disclosed that he felt he could have gone back to employment as of January 12, 1982. Claimant revealed that he got paid for his work by a personal check from Squire Foster.

Mark L. Mary, III testified that he is 22 years old and was told by a friend, Todd Wise that he could work for defendants erecting a steel quonset building. Although he had no personal contact with either of the defendants, he was told by Mr. Wise that he would be paid $4.50 an hour and would work weekends until the building was completed. Mr. Mary stated that Squire Foster had a bus full of tools on the farm where the building was being erected. Mr. Mary indicated he did not provide any of his own tools but used those of Squire Foster. Mr. Mary testified that Tim Foster told him what to do and said he was the boss. Mr. Mary stated that Tim Foster said they would be paid $4.50 per hour and work 8 to 10 hour days until the building was completed. Mr. Mary testified that Squire Foster was present part of the time. Mr. Mary indicated that although he had no written agreement of employment, he thought he was an employee and felt that defendants could fire him. Mr. Mary stated that all the materials were there when he arrived at the site. Mr. Mary testified he did not work on Tuesday but worked 8 hours on Wednesday, October 28, 1981. Since someone said they were short a few men, Mr. Mary said he would bring his brother (the claimant) the following day.

Mr. Mary indicated that on October 29, 1982 they met at Squire Foster's home and rode to the job site which was approximately 100 miles away in Tim Foster's car. Mr. Mary disclosed that Tim Foster or Squire Foster paid for the gas. Mr. Mary stated that Tim Foster and Squire Foster told everyone what to do. Mr. Mary stated that Squire Foster was responsible for the work done.

Mr. Mary testified that he was up on the scaffolding with claimant when Tim Foster hit it with the tractor. Mr. Mary indicated claimant fell 12 to 15 feet before hitting the ground. Mr. Mary revealved that an ambulance came and took claimant to the hospital in Ames and then later to Mason City.

On cross examination Mr. Mary disclosed that he was paid by Squire Foster.

Squire D. Foster testified that on October 29, 1982 he was employed by Clear Lake Bakery and at the same time had a business operated under the name of Squire Foster & Sons. Mr. Foster stated that his son Tim Foster and Todd Wise were to get together some independent contractors to erect the building where claimant was injured. Mr. Foster said that he had a bus and tools at the location but the hand tools were not his. Mr. Foster said his son Tim had no interest in his business and did not have the right to hire or fire.

On cross examination Mr. Squire stated his son Tim could contact whoever he wanted to work at the sight and supposed his son could get rid of the people if he wanted to. Mr. Squire said he didn't know if he could fire anyone but could have refused to pay them.

The medical reports state that claimant suffered a severe fracture dislocation of the right ankle as a result of his fall. The reports of R. L. Emerson, M.D. disclose claimant had a trimalleolar fracture of the right ankle which required open reduction and internal fixation.

In a report dated March 1, 1982 Dr. Emerson stated:

> I last examined Mr. Mary on January 1, 1982. At that point he had no pain, and demonstrated full range of ankle motion. At this point in time he has no permanent impairment. The only possible problem that may occur in his future regarding this ankle, is the onset of early arthritis. This development can alway occur after an injury to a joint such as the ankle.

Dr. Emerson's notes indicate that the last time he saw claimant was on January 12, 1982. In a report dated January 12, 1982 and also dated March 23, 1982 Dr. Emerson stated:

> IMPRESSION:
>
> 1. Hypoesthesia, very small patch over the dorsal medial aspect of the foot either related to the injury and/or surgery.
>
> 2. First metatarsal discomfort of the unknown etiolog
>
> PLAN:
>
> I think we will just wait and see what times [sic] does regarding the metatarsal discomfort. I suspect it will subside in time. He still has had a very good result following his severe injury. With the mild amount of hypoesthesia, if this does not improve then he would have some temporary impairment of a samll degree. This would be approximately 1% of whole body.

Applicable Law

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

Iowa Code section 85.61 defines the terms "worker" or "employee" as "a person who has entered into the employment or works under contract of service, express or implied, or apprenticeship, for an employer..."

Claimant has the burden of showing an employer-employee relationship. However, once a claimant has established a prima facie case the defendant then has the burden of going forward with the evidence and overcoming or

rebutting the case made by claimant. The defendant must establish an affirmative defense, such as independent contractor, by a preponderance of evidence. *Nelson v. Cities Service Oil Co.*, 295 Iowa 1209, 146 N.W.2d 261 (1967). Should it be found that claimant has made a prima facie showing that he is an employee it will be incumbent upon the defendant to establish by a preponderance of evidence that claimant is an independent contractor.

The Iowa Supreme Court has recognized five factors in determining whether or not an employer-employee relationship exists. (1) The right of selection or to employ at will. (2) Responsibility for the payment of wages by the employer. (3) The right to discharge or terminate the relationship. (4) The right to control the work. (5) Is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. The court has also looked to the intentions of the parties, but this criteria is viewed only in conjunction with the above criteria and serves as an aiding rather than a determinative element. *Nelson v. Cities Service Oil Co., supra.*

The following are the recognized tests for an independent contractor: (1) The existence of a contract for the performance by a person of a certain kind of work at a fixed price; (2) The independent nature of the person's business or of the person's distinct calling; (3) The person's employment of assistants with the right to supervise their activities; (4) The person's obligation to furnish necessary tools, supplies and materials; (5) The person's right to control the progress of the work, except as to the final results; (6) The time for which a person is employed; (7) The method of payment, whether by time or by job, and; (8) Whether the work is part of the regular business of the employer. *Nelson v. Cities Service Oil Co., supra.*

Section 85.36(7) states:

> In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his weekly earnings shall be computed under subsection 6, taking the earnings, not including overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked when work was available to other employees in a similar occupation.

Analysis

The greater weight of evidence clearly indicates that claimant was an employee of the defendants at the time of the injury. Defendants had the right to employ anyone they wanted and, as shown by the evidence, were responsible for paying for the work done. The greater weight of evidence also indicated that Squire Foster and his son not only had the right but did control how the work was performed and when it was performed. Mr. Foster and his son supervised the work and determined how long work was done each day. The work which claimant was doing also appeared to be under the authority of defendants and was for their benefit.

Although Squire Foster states he did not intend to make the workers his employees, the people who worked for him evidently were not aware of this fact. Both claimant and his brother Mark thought they were employees and thought they could be fired by either Squire or his son. The greater weight of the evidence would indicate that the parties intended claimant to be defendant's employee.

Defendants have failed to meet their burden in proving claimant was an independent contractor. No written contract exists and claimant was to be paid on an hourly basis. Defendants' business was that of seeing buildings were constructed while claimant was just working as a laborer. No evidence was received that would indicate claimant had the right to hire assistants or had any supervisory activities. Claimant did not supply his tools or any of the materials used in the construction of the building. The evidence is overwhelming that defendants controlled the progress of the work not the claimant. Squire Foster disclosed that after the completion of the building he would give the workers an opportunity to work for him again on other buildings. The evidence is uncontradicted that claimant was paid by the hour and defendant's business is to see that these buildings were erected.

Claimant's exhibit 11 would appear to be an attempt by defendant to make a contract with claimant after the fact. It is obvious that even if the parties had a contract, which they did not, that contract would not be controlling in this case because of the overwhelming weight of evidence which indicates claimant was not an independent contractor.

The greater weight of evidence discloses that claimant was temporarily totally disabled from October 29, 1981 until January 12, 1982. At no time has Dr. Emerson said claimant would have any permanent impairment. Even in this report of January 12, 1982 Dr. Emerson indicates claimant would only have a temporary impairment of 1% of the whole body. Claimant's own statements as well as observing him at the time of hearing also support a finding that he has no permanent disability.

The evidence presented indicates this was claimant's first day on the job. The evidence also revealed that the workers were paid $4.50 an hour and would work until the building was completed. As disclosed by Mark Mary, Tim Foster told him that they would work from 8 to 10 hours a day. It is determined that claimant's rate of weekly compensation should be figured as per section 85.36(7), The Code. With a gross weekly wage of $283.50 claimant would have a rate of $165.54.

During the hearing the issue of whether or not Tim Foster was a partner of his father was also raised. Although Squire Foster denied that his son Tim was his partner, the greater weight of evidence would indicate otherwise. The business name Squire Foster uses is Squire Foster & Sons. Both claimant and his brother agreed Tim Foster was their boss and Tim Foster's own statement to Mark Mary indicated he was a boss. It is also noted that defendant Tim Foster did not testify.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the

principles of law previously stated the following findings of fact and conclusions of law are made:

Finding 1. On October 29, 1981 claimant had an injury when he fell from a scaffold while working for defendants.

Finding 2. Defendants hired anyone they wanted and paid their workers four and 50/100 dollars ($4.50) an hour.

Finding 3. Squire Foster and his son Tim Foster told the workers what work to do, and when to do it.

Finding 4. Squire Foster and Tim Foster supervised the workers and determined how long they would work each day.

Finding 5. Claimant's work was for the benefit of Squire and Tim Foster.

Finding 6. Claimant thought he was the employee of Squire and Tim Foster.

Finding 7. Squire Foster and Tim Foster could have fired claimant.

Finding 8. Claimant, Squire Foster, and Tim Foster intended claimant to be their employee.

Conclusion A. Claimant met his burden in proving he was defendants' employee.

Finding 9. Claimant had no written contract with defendants.

Finding 10. Defendants' business was that of seeing buildings were constructed.

Finding 11. Claimant worked as a laborer and was not hired because of any specialized skill.

Finding 12. Claimant had no right to hire assistants.

Finding 13. Defendants supplied claimant with his tools.

Finding 14. Defendants controlled the progress of the work.

Conclusion B. Defendants failed to prove claimant was an independent contractor.

Finding 15. Defendants admitted that if an employer-employee relationship existed claimant's injury arose out of and in the course of his employment.

Finding 16. As a result of his injury claimant missed work from October 29, 1981 until January 12, 1982.

Finding 17. Claimant has no permanent impairment as a result of his injury.

Conclusion C. Claimant is entitled to temporary total benefits for the period he missed work as a result of his injury.

Finding 18. Claimant is single.

Finding 19. Claimant was to be paid four and 50/100 dollars ($4.50) per hour.

Finding 20. Claimant was to work eight to ten (8 to 10) hours per day seven (7) days a week.

Conclusion D. Claimant's rate of weekly compensation is one hundred and sixty-five and 54/100 dollars ($165.54).

Finding 21. Squire Foster uses the business name of Squire Foster & Sons.

Finding 22. Claimant thought Tim Foster was his boss.

Finding 23. Tim Foster made statements that he was a boss and had power to fire the other employees.

Conclusion E. Tim Foster was one of claimant's employers as well as Squire Foster.

THEREFORE, defendants are to pay unto claimant ten and 6/7 weeks of temporary total disability benefits at a rate of one hundred and sixty-five and 54/100 dollars ($165.54) per week.

Defendants are also to reimburse claimant for the following medical expenses:

Mary Greeley Memorial Hospital	$ 338.70
St. Joseph Mercy Hospital	2,245.86
Radiologists Mason City, P.C.	36.00
Surgical Associates	794.50
Wilfrido Reyes, M.D.	374.00
McFarland Clinic	50.00

Defendants are to remimburse claimant one hundred and fifteen and 94/100 dollars ($115.94) in mileage.

Defendants are to also pay the costs of this action which include but are not limited to the following:

Defendants are to reimburse claimant twenty dollars ($20) for medical reports.

Defendants are to reimburse the Iowa Industrial Commissioner's office ten dollars ($10) for rental of court space for the hearing.

All benefits have accrued and are to be paid in a lump sum with statutory interest.

Defendants are to file a final report when this award is paid.

* * *

Signed and filed this 2nd day of June, 1982.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DANIEL J. MC NEIL,

Claimant,

vs.

GROVE FEED MILL,

Employer,

and

IGF INSURANCE COMPANY and
IOWA KEMPER INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a proposed arbitration decision in which he was denied compensation benefits.

The record on appeal consists of the transcript and the testimony depositions of Ronald W. Schope, M.D., and Dennis R. Rajtora, M.D.; court exhibit 1 (a sketch-map of the work area); claimant's exhibit 1 (the deposition of David L. Morris, M.D.); claimant's exhibit 2 (a photocopy of a page from the American Medical Association Guides to the Evaluation of Permanent Impairment); IGF exhibit 1 (a report by Dr. Schope); and IGF exhibit 2 (notes from the Gunderson Clinic).

The issues on appeal are stated in claimant's brief:

1. The claimant has established a right to recover on the basis of industrial disability arising out of and in the course of his employment.

2. The claimant has established a connection between his medical problems and his employment.

3. There was sufficient evidence to support the conclusion that there was reasonable probability claimant's condition, whatever it is labeled, was caused by or contributed to by his employment and it arose out of his employment.

4. The claimant has established that his condition followed naturally from an injurious exposure occasioned by his work and he established that his condition originated and resulted from a risk connected with his employment and constituted an occupational disease.

A review of the record discloses the deputy's findings of fact and conclusions of law are proper except that there will be a slight change of wording in finding of fact three and conclusion of law A.

WHEREFORE, the arbitration decision filed June 11, 1981 is adopted as the final agency decision.

Findings of Fact and Conclusions of Law

Finding 1. Claimant, who worked in defendant-employer's feed mill from 1970 through 1978, mainly as a bookkeeper and salesman, suffers from a preexisting obstructive lung disease probably caused by a thirty (30) year history of smoking.

Finding 2. The weight of the medical evidence failed to demonstrate that claimant's condition was caused by an allergic reaction to the grain dust found in his working environment.

Finding 3. Claimant's preexisting disease is aggravated temporarily while exposed to dust, smoke, cold, and other similar irritants but once removed from the environment, his condition returns to the same state as prior to the exposure.

Conclusion A. Claimant has failed to establish that his obstructive lung disease was caused by exposure to grain dust found in his working environment and therefore has failed to establish an occupational disease as defined in Code section 85A.8.

Conclusion B. Claimant has not sustained an injury in the course and arising out of his employment as contemplated by Code chapter 85.

Finding 4. Claimant alleged a December 1978 date of injury on his petition which was filed November 9, 1979.

Finding 5. Claimant was advised by Dr. Morris on May 21, 1976 that the breathing difficulty was related to the work environment.

Finding 6. The record is not clear as to when, or if, claimant advised defendant-employer his condition was work-related.

Conclusion C. Had claimant otherwise been entitled to benefits, the affirmative defense of notice would have failed due to defendants' failure to sustain their burden of proving such defense by a preponderance of the evidence.

Finding 7. Claimant is still able to perform bookkeeper and salesman duties.

Finding 8. Claimant's search for employment has been extremely self-limited.

Conclusion D. Had claimant otherwise been entitled to benefits, he would have failed to establish a disablement as defined by Code section 85A.4.

Finding 9. The medical evidence failed to establish that claimant's thirty (30) year smoking history amounted to a drug addiction.

Conclusion E. Had claimant otherwise been entitled to benefits, defendants' defense pursuant to Code section 85A.7(4) would have been deemed to be without merit.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

DANIEL J. MC NEIL,

Claimant,

vs.

GROVE FEED MILL,

Employer,

and

IGF INSURANCE COMPANY and IOWA KEMPER INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

The appeal decision filed September 29, 1981 omitted the order clause.

THEREFORE, it is ordered that the claimant take nothing from this proceeding.

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner's Rule 500—4.33.

* * *

Signed and filed this 1st day of October, 1981.

ROBERT C. LANDESS
Industrial Commissioner

JOHN W. MERRIFIELD,

Claimant,

vs.

IOWA DEPARTMENT OF PUBLIC SAFETY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 16, 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. On August 27, 1981, defendants appealed the review-reopening decision of August 7, 1981; on September 4, 1981, claimant filed a "cross appeal."

On appeal the record consists of the transcript of the testimony taken in a hearing of July 19, 1977 and the testimony taken April 27, 1981; the depositions of Roger Marquardt, and John T. Bakody, M.D.; the exhibits from the hearing of April 27, 1981, namely claimant's exhibits 1, 2, and 3 (exhibit 2 is the Bakody deposition and exhibit 3 is the 1977 hearing transcript); and defendants' exhibits 1 through 6, inclusive. The hearing deputy's review-reopening decision will be modified somewhat in that the weekly benefit payments paid subsequent to July 21, 1980 will be credited toward the permanent partial disability. The findings of fact of the hearing deputy are adopted with some revision of the final two findings and additional findings by the undersigned deputy industrial commissioner.

Claimant hurt his low back in an injury of March 2, 1976. Defendants filed a memorandum of agreement and compensation payments were made. On September 1, 1977, a deputy industrial commissioner awarded claimant a running healing period in a review-reopening decision. Defendants made payments pursuant to that award. On April 14, 1978, defendants filed a petition for review-reopening claiming *inter alia*, that claimant had reached a maximum recovery which would justify termination of healing period benefits. The hearing of the case was delayed by claimant's need of further surgery. Defendants continued to pay weekly compensation benefits.

On August 7, 1981, the hearing deputy ruled that claimant's healing period ended July 21, 1980 and that payments after that time were not to be credited as permanent partial disability payments; the hearing deputy also allowed a partial credit on an overpayment of benefits caused by an erroneous compensation rate; and she found that claimant had a 45% permanent partial disability to the body as a whole.

The issues presented by the appeal of defendants are (1) whether the weekly benefits paid subsequent to July 21, 1980 should count as permanent partial disability payments, and (2) whether a further credit should be allowed because defendants paid 156 weeks compensation at a rate $15.00 higher than the correct rate of $112.96. The "cross appeal" presents the issue of the extent of claimant's disability; claimant maintains his disability is permanent and total instead of partial.

In *McCombs v. Mercy Hospital, 34th Biennial Report of the Iowa Industrial Commissioner*, the industrial commissioner ruled that where defendants *voluntarily* pay healing period benefits beyond the point they are owed, the "law does not specificially provide for credit for overpayment of healing period benefits against permanent partial disability benefits" (p. 196).

The instant case may be distinguished from the *McCombs* case in that defendants were hardly making such payments voluntarily. First, they were under the constraint of the review-reopening award of Sepotember 1, 1977 which ordered them to make such payments. Second, subsequent to that time and after defendants had filed their petition for review-reopening, claimant needed surgery for a condition that defendants apparently believed to be connected to the injury. Thus, defendants had two alternatives: to keep on paying weekly benefits, or to decline to pay them which might be construed as a harassment of claimant.

Except for the *McCombs* case, the law in Iowa is virtually silent. However, the correct principle is that claimant should receive exactly what he has coming under the compensation law, no more and no less and that he should not be allowed windfalls. See 30 *Drake Law Review* 917 (1981),

especially pp. 920-924. The credit will be allowed.

The same result will not be reached for the overpayment because of the mistake in rate. From February 8, 1977 through February 4, 1980, a period of 156 weeks, defendants paid claimant at the rate of $127.96 per week, $15.00 per week above the rate, resulting in an overpayment of $2,340. The hearing deputy allowed a credit of only $450. because the review-reopening decision of September 1, 1977 clearly announced the correct rate. The result of the hearing deputy is obviously correct; to make a mistake in a rate computation is one thing but to continue to pay the wrong rate for an additional 126 weeks after a decision clearly announces the correct rate amounts to a voluntary payment which this agency has no authority to order repaid. See *Comingore v. Shenandoah Artificial Ice, Etc. Co.*, 208 Iowa 430, 226 N.W. 124 (1929). Whether a cross appeal may be filed after the time for appeal has gone by is questionable. However, since this is a final agency decision, all aspects of the matter should be examined. A review of the record and the hearing deputy's decision discloses that the findings of fact and conclusions of law as to the disability are correct.

Findings of Fact

That claimant was injured on March 2, 1976 as he removed equipment from a patrol car on the defendant-employer's premises.

That claimant was hospitalized for surgery following an automobile accident and after two on the job falls prior to his injury of March 2, 1976.

That claimant has an ulcer.

That claimant had additional back surgery in April of 1979.

That claimant has not returned to work since his injury of March 2, 1976.

That claimant is presently 63 years of age.

That claimant has an eighth grade education.

That claimant has taken a six week course in small engine repair.

That claimant has work experience as a truck driver, welder and security guard.

That claimant's motivation for returning to work is low.

That claimant views himself as "pretty well retired."

That a rehabilitation counselor found claimant incapable of returning to competitive employment.

That claimant achieved maximum recovery on July 21, 1980.

That claimant has a permanent partial physical impairment of 20 to 25% of the body as a whole.

Defendants paid weekly benefits from February 8, 1977 through February 4, 1980, a period of 156 weeks at the rate of $127.96 (the correct rate being $112.96), resulting in an overpayment of $2,340.00.

In a review-reopening decision of September 1, 1977, the deputy industrial commissioner ordered defendants to pay a running healing period.

Defendants filed a petition for review-reopening on April 14, 1978; subsequent to that time claimant had surgery and a prolonged recuperation.

Weekly benefits, presumably benefits intended as healing period payments, were paid beyond July 21, 1980.

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of his employment on March 2, 1976.

Defendants' payment of weekly benefits after July 21, 1980 should be credited toward the permanent partial disability.

Defendants are entitled to a credit of one hundred fifty dollar ($150) for the overpayment occasioned by an incorrect weekly rate.

As a result of the injury of March 2, 1976, claimant has a permament partial disability to the body as a whole of forty-five percent (45%) for industrial purposes.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from the time of his injury until July 21, 1980 at the rate of one hundred twelve and 96/100 dollars ($112.96) per week, said payments having already been made.

Defendants are further ordered to pay weekly compensation benefits unto claimant for a period of two hundred twenty-five (225) weeks at the same rate for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest, defendants to receive a credit toward the permanent partial disability for all payments made subsequent to July 21, 1980.

Defendants are further ordered to pay mileage expenses unto claimant in the amount of seventy-three and 80/100 dollars ($73.80).

That a four hundred fifty dollars ($450) credit be allowed to defendants for benefits paid at the wrong rate prior to September 1, 1977.

Defendants are ordered to pay costs.

Defendants are ordered to file a final report when this award is paid.

* * *

Signed and filed at Des Moines, Iowa this 26th day of January, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

BERT MILLER, JR.,

Claimant,

vs.

FUNK BROS. SEED CO.,

Employer,

and

THE HARTFORD INS. GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

This is a proceeding brought by claimant appealing a proposed ruling dismissing claimant's petition for arbitration and review-reopening.

On July 24, 1971 claimant suffered a skull fracture as the result of a fall from a truck while a detasseler for defendant-employer. A memorandum of agreement was filed and benefits were paid for 15 weeks and 1 day.

On April 24, 1981, almost nine and one-half years from the date of the last payment of compensation, claimant filed a petition in arbitration and review-reopening alleging further injuries and medical expenses. Claimant asserts in a brief of November 4, 1971 that an examination in September of 1980 revealed a 30 percent hearing loss caused by a previously undiscovered middle ear fracture with dislocation of ossicles. Claimant further asserts that a portion of the hearing loss has been restored through surgery, but that a permanent hearing loss still remains as a result of the July 24, 1971 injury.

Defendants moved to dismiss, setting up Code of Iowa section 85.26(2) as a bar to recovery. Although it is debatable whether the bar to recovery would be section 85.26(2), Code 1981 or section 86.34, Code 1970, it is of little consequence as both sections set up a bar to recovery of additional disability benefits unless the action therefor was maintained within three years of the last payment of weekly compensation benefits. See *Secrest v. Galloway Co.*, 239 Iowa 168, 30 N.W.2d 793 (1948) as to the retroactivity of limitation statutes.

Although it is recognized that reopening proceedings can be maintained on a proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence as expounded in *Gosek v. Garmer and Stiles Company*, 158 N.W.2d 731 (1968), it is not shown that such an action may always be maintained after the expiration. *Freemen v. Luppes Transport Company, Inc.* 227 N.W.2d 143, 149 (1975); *Bergen v. Waterloo Register Company*, 151 N.W.2d 469, 472 (1967); *Secrest v. Galloway, supra*, 173, ____, *Tebbs v. Denmark Light & Telephone Corp.*, 230 Iowa 1173, 1176 (1941).

In *Orr v. Lewis Central School District*, 298 N.W.2d 256 (Iowa 1980), the court discussed the interpretation of Iowa Code sections 85.23 and 85.26 with regard to "occurrence of an injury" and the legislature's enactment of an amended section 85.26 in 1977. The court held that under Iowa Code section 85.26, the limitation period begins to run when the employee discovers or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the "injury causing... death or disability for which benefits [were] claimed." *Id.* at 216.

However, the court went on in *Orr, supra*, to address the issue of whether the amended statute was intended to apply to all injuries discovered after the amendments' effective date or only to those injuries caused by events occurring after that date. Only four of nine justices concurred on each of the divisions of the opinion which established two different theories which would allow a claim for an injury which occurred before July 1, 1977, the effective date of the amendment to Iowa Code section 85.26, to be commenced within the two years of the time when a claimant "discovered" the possible compensable nature of the injury. Since the 1977 amendment to Iowa Code section 85.26, the "discovery rule" is applicable, but it does not give retroactive effect for those injured before July 1, 1977, as only four justices agreed on each of two theories propounded to allow retrospectivity.

Thus, because claimant's injury occurred on July 24, 1971, the former interpretation of Iowa Code section 85.26 applies to bar claimant's renewed application for benefits.

Medical benefits which are causally related to the injury, on the other hand, or not barred by either section 86.34, Code 1970 or section 85.26(2), Code 1981 when an award for payments or agreement for settlement has been made. Section 85.27, Code 1970, pertains to the ongoing duty of the employer to provide medical care to an employee determined to have received an injury arising out of and in the course of employment. That section indicated that no statutory period of limitations shall be applicable to the obligation to continue to provide reasonable and necessary medical care related to the injury. Section 85.26(2), Code 1981, were it determined to be applicable, is even more specific regarding the obligation to provide benefits of a continuing nature pursuant to section 85.27.

WHEREFORE, defendants' motion to dismiss must be sustained.

It is found that a memorandum of agreement was entered into on February 7, 1971 with the last payment of weekly compensation having been made on November 24, 1971 and that the present petition for arbitration and review-reopening was filed on April 24, 1981, which is far in excess of three years from the last payment of compensation.

It is further found that the defendants' obligation to provide benefits pursuant to Iowa Code section 85.27, which are related to injury, is ongoing.

THEREFORE, claimant's application for arbitration and review-reopening as it pertains to disability benefits is dismissed. As to benefits pursuant to Iowa Code section 85.27, defendants' motion to dismiss is overruled.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

DAVID C. MILLER,

Claimant,

vs.

IOWA ELECTRIC LIGHT AND POWER COMPANY,

Employer,
Insurance Carrier,
Defendant.

Appeal Decision

By order of the industrial commissioner filed August 5, 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. Defendant appeals from an adverse review-reopening decision.

On appeal the record consists of the transcript of the testimony; the deposition of Charles G. Wellso, M.D.; claimant's exhibits 1 — 43, inclusive; and defendant's exhibits 1 and 2.

The result of this final agency decision will differ somewhat from the review-reopening decision by the hearing deputy in that the number of weeks of compensation will be reduced and one medical bill will not be allowed.

While working as an apprentice lineman for the employer on July 8, 1977, claimant, while up a pole, felt pain in his right groin. That same day he was hospitalized and had a large infected lymph node excised. After a few weeks, he returned to light duty and in late April and early May 1979, he worked again as an apprentice lineman. He was unable to continue in that capacity and resigned from the employer's payroll. Thereafter, he tried various occupations but was not satisfied with his prospects.

His groin continued to be swollen, and as time went by, he became depressed.

The testimony of a psychologist and a psychiatrist show that the depression, as well as the groin swelling, is a serious matter.

Defendant claims the hearing deputy erred in six different respects.

At the conclusion of the hearing on September 10, 1980, the hearing deputy ordered the defendant to "renew the offer of [a job as a] draftsman." In a letter dated March 30, 1981 addressed to claimant's lawyer, defendant's attorney stated that, since a position as draftsman was a union job and that the employer must live up to its collective bargaining agreement with that union, claimant could not be given an unequivocable offer of the position at that time.

The hearing deputy deemed that response unsatisfactory and concluded it was a refusal to provide employment to claimant under the principles announced 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).

As statement D, defendant claims "The deputy commissioner's directive to Iowa Electric to rehire claimant was in excess of his statutory authority, and his conclusion that Iowa Electric refused to rehire Mr. Miller was factually and legally in error."

One must agree with defendant that the hearing deputy exceeded his authority by ordering defendant to offer claimant a job. Such an order is a kind of entrapment; if claimant wishes to prove defendant refused to offer claimant any kind of work after the injury, it is up to claimant to present such proof.

As statement A, defendant claims "The deputy commissioner erred in concluding that claimant sustained a major aggravation on May 9, 1979, of the original July 8, 1977 injury and in awarding claimant healing period payments for the period May 9, 1979 through June 21, 1979, based upon the report of Reuben B. Keegan."

Again, one would agree with defendant's assessment of the evidence. Although Dr. Keegan characterized the incident as an "aggravation" (claimant's exhibit 18), he also said that the incident was not a new injury and that the six hours work on the pole was not extensive. To constitute a new injury, an aggravation such as found by the hearing deputy would have to accelerate, worsen, light up or materially aggravate a prior condition. *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 374-375, 112 N.W.2d 299 (1961). An analysis of Dr. Keegan's response in this matter does not show any material aggravation; rather, it simply shows that claimant, because of his original injury, was unable to do the work of a lineman. Therefore, claimant will not be awarded healing period benefits for the period May 9, 1979 through June 21, 1979.

Statement B by defendant says, "The deputy commissioner erred in concluding that claimant's groin injury resulted in a functional impairment of 25% of the body as a whole based on the lymph node involvement." Since the overall finding will be changed in this final agency decision, the effect of the deputy's conclusion will be also changed, so no specific discussion of the question is necessary. The same conclusion pertains to the statement C which states that "The deputy commissioner erred in finding that claimant sustained a 40% functional psychological disability." Statement E by the employer says "The deputy commissioner erred in concluding that claimant had sustained an industrial disability of 75% of the body as a whole."

The question, then, is the extent of claimant's permanent disability. Claimant has the burden of proof. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). Claimant's disability is industrial — reduction of earning capacity, and not mere functional disability. Such disability includes considerations of functional disability, age, education and relative ability to do the same work as prior to the injury. *Olson v. Goodyear Service Stores, supra; Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). Whether an injury is permanent or the future effects of such an injury in some cases may be inferred from the nature of the injury alone. *Kaltenheuser v. Sesker*, 255 Iowa 110, 121 N.W.2d 672 (1963).

Matters of causal relationship are essentially within the realm of expert testimony. *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 101 N.W.2d 167 (1960). Claimant is a young man who should be able to use his youth to his advantage. On the one hand, he has a very serious physical

impairment, but on the other hand he has a good education and work background. The psychological problems suffered by claimant are perhaps more troublesome than the physical impairment when considering the matter of loss of earning capacity. It is true that the opinions of Charles G. Wellso, M.D., the psychiatrist, and Thomas Sannito, Ph.D., the psychologist, are somewhat in conflict.

Yet, it is clear both doctors attribute claimant's depression to the injury and its after-effects. Dr. Sannito's opinion is somewhat more valued here because of his method of objective testing as opposed to Dr. Wellso's subjective approach. Conversely, claimant probably should receive some psychiatric treatment if he is to improve at all. The parties are urged to work with one another to achieve this end.

On the whole, then, claimant's industrial disability is substantial, but it is not 75% of total, which would indicate someone barely able to cope. Claimant is ambulatory and lucid. He should be able to find employment and succeed in life. All this is not to say, however, that claimant is all right. He has two chronic conditions, one physical and one mental, both of which are serious indeed and which provides the basis for his loss of earning capacity.

The final statement by the employer is that "The deputy commissioner erred in ordering Iowa Electric to pay certain medical expenses." Pages 51-53 of the transcript concern the disputed bills. First, the one by Thomas J. McIntosh, M.D., does not seem to have been ordered paid by the hearing deputy, so that question is moot. The employer's position as to Dr. Sannito's bill is correct, claimant not having shown that the expense is one authorized by the employer as required by §85.27.

Findings of Fact

1. Claimant was age 27 at the time of the hearing. (Transcript, p. 9)

2. Claimant attended college for one year. (Transcript, p. 40)

3. Claimant started work for the employer on November 5, 1973. (Transcript, p. 9)

4. Claimant worked as a utility man, truck driver-groundman, and apprentice lineman. (Transcript, p. 10-11)

5. Claimant hurt himself at work on July 8, 1977 when he strained his right groin while climbing a pole. (Transcript, p. 12)

6. Climbing the pole on July 8, 1977 caused a hemorhage into an enlarged lymph gland. (Claimant exhibit 4; claimant exhibit 11)

7. Claimant's physical condition is acute lymphadenitis secondary to acute mononucleosis. (Claimant exhibit 25)

8. The groin swelling is a permanent condition. (Claimant exhibit 15)

9. On July 8, 1977, claimant had excision of a large right groin lymph node. (Claimant exhibit 2)

10. Claimant has back pain and pain in his groin. (Transcript, p. 50)

11. Claimant wears a partial body stocking (a Jobst hose) to minimize swelling in his groin and leg. (Transcript, p. 19)

12. Claimant saw Dr. Sannito, a psychologist, on May 21, 1980. (Transcript, p. 85)

13. Claimant has problems with depression, hysteria, hypochondriasis, and anxiety. (Transcript, pp. 90-91, 93)

14. Claimant suffers from post-traumatic neurosis, depressive type, (Transcript, p. 99) or a depressive neurosis (Wellso depo., 10, 15)

15. As a result of the neurosis, claimant suffers from a "slowdown behaviorally," "a slowdown mentally," and "emotionally [he is] just not the same." (Transcript, p. 99-100)

16. These conditions are chronic. (Transcript, p. 101; claimant exhibit 32)

17. Claimant did not hurt himself again at work on May 8, 1979. (Transcript, pp. 25-26; claimant exhibit 18)

18. The employer gave claimant employment after the injury. (Tr., pp. 15, 25; claimant exhibit 33)

19. Claimant returned to work as an apprentice lineman on April 23, 1979 and worked in that capacity until May 9, 1979. (Claimant exhibit 18)

20. Claimant resigned on June 19, 1979 from employment with Iowa Electric. (Tr., p. 37)

21. Since resigning, claimant attempted to work as an insurance salesman and as a real estate salesman. (Tr., pp. 39-40)

22. Claimant tried to get work with his brother-in-law in the construction business. (Tr., p. 42)

23. Claimant worked briefly for his brother doing stock work in a sporting goods business. (Tr., p. 42)

24. Claimant made $6,000. in 1980; $12,362. in 1975; $13,483. in 1976; $12,285. in 1977; and $8,160. in 1978. (Tr., pp. 43-44)

25. Claimant missed work on account of the injury for a period of 39 weeks. (Claimant exhibit 34)

The medical and allied bills ordered paid by the hearing deputy were not objected to by the employer (with the exception of Dr. Sannito's bill) and therefore will be included in the order in this case.

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of his employment on July 8, 1977.

Said injury caused permanent partial impairment to the right groin and thigh in the form of chronic swelling.

Said injury caused permanent partial impairment because

it produced a mental depression.

Claimant's proper healing period is thirty-nine (39) weeks.

Claimant's permanent partial disability for industrial purposes is fifty percent (50%).

The proper rate of weeks compensation is one hundred sixty-three and 54/100 dollars ($163.54).

Claimant did not sustain an injury which arose out of and in the course of his employment on May 8, 1979.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of two hundred fifty (250) weeks at the rate of one hundred sixty-three and 54/100 dollars ($163.54) for the permanent partial disability and for a period of thirty-nine (39) weeks at the same rate for the healing period, accrued payments to be made in a lump sum together with statutory interest.

Credit is to be taken for previous payments made for the healing period and for any payments made for the permanent partial disability.

Defendant is further ordered to pay claimant the following medical expenses incurred as necessary to treat the injury.

Montague S. Lawrence, M.D., P.C.	$ 135.00
John J. Bergan, M.D. and James S. T. Yao, M.D., P.C.	10.00
Radiologists of Mason City	24.00
St. Joseph Mercy Hospital	399.50
Surgical Associates	70.00

Costs are charged to defendant and shall include an expert witness fee payable to Thomas Sannito, Ph.D., in the sum of one hundred fifty dollars ($150) contemplated by §622.77, Code.

Defendant is ordered to file a final report on completion of payments in this matter.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

RUSSELL MILLER,

Claimant,

vs.

JOHN DEERE WATERLOO TRACTOR WORKS,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Russell Miller, claimant, against John Deere Waterloo Tractor Works, self-insured employer, defendant, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of his employment. It came on for hearing with six companion cases on September 24, 1981, at the Black Hawk County Courthouse in Waterloo, Iowa. It was considered fully submitted on January 4, 1982.

A first report of injury was received on April 11, 1980.

The record in this matter consists of the testimony of claimant and of Pam Miller; joint exhibit 1, wage and rate information; joint exhibit 2, medical records from defendant; joint exhibit 3, a letter from Arnold D. Delbridge, M.D., dated March 21, 1980; joint exhibit 4, a letter from Dr. Delbridge dated August 31, 1981; and joint exhibit 5, a drawing of a pneumatic air hammer and chisel. Portions of the testimony presented in the companion cases were also considered in this case. No briefs were submitted.

Issues

The issues in this matter are whether or not claimant's injury arose out of and in the course of his employment; whether or not there is a causal relationship between claimant's injury and his present disability; and whether or not claimant is entitled to permanent partial disability.

Statement of the Case

Right handed married claimant, father of two children, testified that he is a high school graduate with no other training. Prior to commencing work for defendant he worked as a welder. In April of 1974 he began work as a chipper and grinder.

Claimant who knows the Buss brothers and Randy Shepard and who had met the other claimants at the doctor's office, described chipping and grinding as follows: A tool 14 inches long and 3 ½ inches in diameter run by air pressure is operated by using the thumb against the trigger. The blade of the chisel is held against a metal casting which has rough parting edges and gates of excess metal ranging from an inch and a quarter down to 1/2 inch. Other extensions known as fins range from 1/8 to 3/8 inches. The tools vibrate hard so that the chisel gets hot. The excess metal is removed in from 3 to 30 seconds. The grinder which is sized by the measure of the stone is about 2 feet long, weighs about 12 pounds and is driven by air. Its purpose is to smooth. The machine vibrates "a lot."

Claimant said that at first he worked on rock shafts. Later he moved to axle housings. Rock shafts had more sand and necessitated the use of a chisel that was blunt. He worked with an incentive rate. He claimed that he did 170%. His wage was $13.00 per hour when he left chipping and grinding to move to a new job paying $9.40 per hour. His work at the time of hearing was that of a welder.

Claimant asserted that he had trouble; i.e., cramps, soreness, numbness, and swelling. He stated that the problem was worse on the right than on the left and that his wrists and elbows were wrapped. Blanching occurred in October of

1974 and was accompanied by a lack of coordination, loss of sensation, and an inability to distinguish what he was holding if he was in cold for an extended period. The condition eventually affected the whole left hand. Only the finger and the thumb were numb on the right, but loss of grip strength extended into both.

Claimant, who alleged no problems with his hands prior to beginning work for defendant, reported that he talked to Hester J. Hursh, M.D., and was given a padded glove; however, because it was hard to grip, the glove was not used. Claimant recalled being taken off chipping and grinding in August of 1979.

As to his present condition, claimant listed complaints of a lack of coordination when cold, loss of grip, and whiteness at 45 to 50 degrees even with protection. Accompanying the whiteness is difficulty holding small objects and pain. Claimant related that as the temperature goes down the faster the whiteness occurs. He testified that his entire left hand becomes white while his right hand varies. He had observed no change in the duration of the episodes or in the time necessary for them to resolve.

Claimant denied the use of vibrating tools and smoking. He acknowledged he had ridden a motorcycle in high school and had helped a friend with sawing.

Pam Miller, claimant's spouse who has known him for 10 years, collaborated claimant's testimony that he had no problems with his hands prior to beginning work for the defendant-employer. She listed his current problems as the whiteness, dropping things, difficulty in driving, and the loss of sensation. She had seen claimant hit his hands after stating they tingled and hurt. She believed there has been a change in physical appearance. On comparing claimant's condition at present to his condition when he quit chipping and grinding, she found it unchanged.

Hester J. Hursh, M.D., occupational hand surgeon, who is employed by defendant and in addition has a private practice, testified that since leaving training, her practice has been exclusively devoted to hand surgery.

She reported that when she became interested in the complaints of the chippers and grinders, she took more detailed histories, did more extensive examinations, visited the work area, watched the employees, and worked with the safety department to design tools and develop a screening test. Evenutally she attended the Second International Symposium On Hand/Arm Vibration where she met a number of persons working in the field of vibratory injuries including Dan Wasserman who was with NIOSH.

Dr. Hursh recalled that NIOSH came to the plant in 1978 to do a cross-sectional study which proceeded by taking persons not exposed to vibration and using them as controls. At the same time NIOSH was doing studies, Dr. Hursh was pursuing longitudinal studies where the same group of persons are studied over a period of time and their test results compared with their prior test results.

While in the course of her work, Dr. Hursh said she looked for an accurate and reproducible test for the measurement of blood flow to the hands as the test considered most reliable was an arteriogram which is an invasive procedure and deemed by the doctor as inappropriate for the work situation. Finally, she came in contact with Dr. J. S. Yao, a professor of vascular surgery at Northwestern University, and visited his laboratory. His technicians did testing in the plant in July of 1979 and 1980.

She explained Dr. Yao's test, referred to as the Northwestern test, which she classified as objective in nature, as follows: The worker to be tested is taken at the beginning of the shift, placed in a controlled environment of sixty-eight degrees for about thirty minutes, and not permitted to smoke. A history is taken. Blood flow is measured in both upper extremities beginning with the brachial artery at the elbow. A Doppler ultrasonic device is used. The blood pressure in each digit is measured separately. According to the doctor, comparison of the pressure in the arm with that in the finger would produce an assessment of the capability of profusion of the artery. She said there is a necessity for pressure in the arteries to increase from the proximal or closer to the center of the body to the distal or fingertip. In white finger cases, the pressure in the finger is lower.

The temperature of each digit is then recorded by a telethermometer with resting temperatures affected by vascular problems in the hand and by the nerves as well as by blood flow. The temperature probes are left taped to the fingers which are immersed in an ice water bath of thirty-two degrees for twenty seconds. The hands are removed from the bath and temperature readings are taken every five minutes. At the end of twenty minutes, the temperature should be normal. If a return to the resting temperature has not occurred, two additional readings are taken. Dr. Hursh described the test as a predictor of betterment as the test results show improvement prior to the time the patient speaks of a decrease in symptomatology. After the testing, the doctor then talks with the worker about the symptoms experienced and reviews the testing results.

The doctor recalled she had first believed white finger was a unilateral problem and that whiteness was present only in the fingers of one hand. It was her experience that whiteness first developed in the fingers of the nondominant hand of the chippers as that was the hand which controlled the chisel. Several methods were tried to decrease the contact with the chisel. Retainers were used with some hammers, but production problems resulted. Dr. Hursh was under the impression that as the workers' symptoms increased, their productivity by their assessments decreased. The doctor was impressed by the fact that the workers with the greatest symptoms were those with the highest rate of production. First men who attacked the majority of the problem areas on the production teams had shorter latent periods than those who did the finishing up. Sand was found to increase the duration of hammer use.

Dr. Hursh distinguished Raynaud's disease from Raynaud's phenomenon thusly:

> Reynaud's [sic] Disease is considered a primary illness, which is apparently hereditary or tends to follow families and occurs in the population without any external causative factor being identified.
>
> * * *
>
> Raynaud's Phenomenon can occur as an isolated experience associated with other diseases such as

scleroderma or Buerger's disease. And it can also occur as a result of external injury.

The doctor said that injury could be intermittent or as the result of trauma such as a crushing injury.

The doctor did not argue with the causation effect between vibratory white finger and chipping and grinding.

As to the parts of the body which are damaged in vibratory white finger, the doctor testified:

A. There is some disagreement or lack of knowledge amoung the experts, and I think that we are — I would say we are not all in total agreement. But we have come to the point where we think that there is injury to the arteries, which —

Q. That's vascular?

A. The vascular system. Which, by the way, develops collateral circulation to protect itself. And then we also think that maybe there is something occurring with the nervous system. It might — the nervous system problems might be a result of the collateral circulation problems. Or I shouldn't say "collateral"; just "the circulation problems."

But the ultimate decision of what is underlying this problem is made by examining the injured part under a microscope. And the problem with that is that the part is only affected on and off, so we can't take it off and look at it under a microscope. Nobody has donated us any parts.

* * *

A. So we really have very little microscopic information about the injury. We are trying to use non-invasive tests to give us much information as we can get.

Q. All right. But it's generally considered right now that this is a problem with the vascular structure and the neurological structure, the nerves and the arteries?

A. That's what is generally accepted.

Although she had no evidence to refute Dr. Taylor's opinion, she disagreed with his supposition of neurological damage to persons with vibratory white finger. The doctor was asked in the following exchange to comment on a study by Lindstrom:

Q. And in her paper, she refers to the fact that nerve function disorders exist in persons who have complained of numbness with or without Vibratory Whitefinger disorders. Do you know what she — do you understand that one? She is saying she's found some problems with nerve functions with people who have worked with vibrating tools who have complained about numbness and they may or may not have Vibratory Whitefinger disorders, the blanching and such things as that?

A. That's right. Yes.

Q. That they can have nerve damage without the symptomatic indications of blanching and things such as that?

A. Well, I think what we are saying is they are having symptoms, but what we don't know anatomically is, is the nerve damaged or is the nerve having difficulty because it is having poor internal circulation. This is something that is a great possibility, but we have no way of getting the nerve out and looking at it under the microscope. We may be able to do some of these things with computers as they become more useful in looking internally without invasion of the body.

And further:

Q. It says [Lindstrom's paper] this: 'This involved determining the magnitude of the temporary threshold shift —" She used the initials, I used the words — "for vibration perception following exposure to vibration. It has been established that there is a difference to reaction to vibration exposure in the case of persons with clear symptoms of vibration injury, and this reaction change must therefore be interpreted as an objective sign of derangement of the nervous system."

So what she is saying, if you have somebody with objective signs of vibration injury, that would be Vibratory Whitefinger, would it not? It wouldn't have to be, but —

A. I think Taylor in his testimony stated that it would be more accurate to call it vibration syndrome. Then you are not — you are including more things than just the whiteness which occurs.

Q. All right. But what my point is, what Doctor Lindstrom is saying is that if you have a person with clear symptoms of vibration injury, and then you expose them to vibration, that their threshold — their perception of the vibration will be at a much lower level; they will notice it very, very quickly, more quickly than an average person?

A. No.

* * *

A. Now, at this point we need to say that in Europe, symptoms are accepted as objective. And in the U.S. it's not accepted. This is subjective. You see, symptoms are what the patient tells you. Signs are what you see. That is accepted as objective. And we have a difficulty across the countries because of that. And I think that may have something to do with why we are not as advanced as they are in looking at the problem.

* * *

A. It's saying that there is a difference. Now, what you just read me does not say whether it's a quicker reaction or slower reaction. But there is a difference from normal, yes. It does say that.

Q. Yes. Would you want to guess whether it would be a quicker reaction or —

A. Yes. From my understanding of these patients, they are feeling less — all of them are saying they are feeling less than what is being presented to them.

Q. Okay.

A. They are not saying they feel more. They are not saying that they are hypersensitive. They are complaining of not feeling quite as much as what is presented.

Q. All right. But she's indicating that whatever — that it's abnormal, it's different than the norm?

A. Right.

* * *

Q. And that difference from the norm indicates that there is what she calls an objective sign of derangement of the nervous system. You don't necessarily agree with that?

A. No, I wouldn't say it is objective, but it is a sign that the nervous system needs to be followed, examined.

Q. But Doctor Lindstrom, who's also an M.D. and an engineer, considers it objective.

A. But I just explained that. She's in the European system.

Q. Oh.

A. Which U.S. physicians do not accept. And I might add that the European researchers are coming to more objective tests, and this is Doctor Pyykko in Finland. He and his group of several doctors are being very objective. And they will be accepted, I believe, over here.

Dr. Hursh agreed that exposure to a cold environment would cause more physical discomfort and blanching than an ice bath. She also referred to a refractory period as a time in which an episode of white finger has occurred in the preceding hour and another could not be stimulated. Similar to the refractory period, according to the doctor, is the temporary threshold shift or point at which a person can recognize a stimulus. Another time frame is a latent period which is the time between the exposure to vibration and actual blanching. A short latent period could suggest that a patient is more susceptible to vibration.

Dr. Hursh presented a paper at the Third International Symposium on Hand/Arm Vibration in May of 1981 entitled *Vibration-Induced White Finger Reversible or Not?* discussing reversibility. Her testing was based on forty-six patients who were either State II or III according to Dr. Taylor's assessments to be discussed below. After the initial staging, only the Northwestern tests were used. At the time of the second testing, seventy-eight percent of all the workers who had been removed from vibratory exposure at their jobs, showed "chemical and laboratory improvement" with fifty percent of the improvement occurring within the first two years away from vibration. More specifically, thirty-one patients had symptoms, based on their verbal complaints and comments, less frequent, less severe, shorter in duration, involving less fingers, and occuring more distally on the fingers. Eleven reported no change in symptoms and four complained of increased symptoms. Digital pressure tests improved in thirty-six, showed no change in five, and decreased in five. Temperature responses improved in nine, worsened in nine, and were unchanged in twenty-eight. The doctor noted that more than half of those studied were exposed to vibration outside their employment and also smoked a significant amount. The surgeon was asked:

> Based on all of your experience and your studies which you have previously testified to, and based upon your medical expertise and reasonable medical certainty, do you have any opinion as far as the prognosis of improvement or reversibility of a workman who is in Stage II, Stage I, or even Stage III of VWF, future improvement?

She responded:

> I believe that it's important to remove the patient from exposure to all vibration. That is not only at work, but in his social life. It would be better if he did not ride his motorcycle and did not run his chain-saw during the time that he is trying to recuperate. If he is removed from all vibration, as I have said, I believe that he will make a definite return to normal through gradually decreasing symptoms.
>
> I would like to say probably that the first symptom that will be decreasing is the frequency of episodes of whitefinger and the number of fingers involved.

Dr. Hursh said that the vascular system is the one which shows improvement because it has the ability to develop collateral circulation. If a blood vessel has been impaired in a nerve then it, too, would be repairable.

Dr. Hursh disagreed with Dr. Taylor in that she did feel people could improve to the point of no impairment. She felt that the testing done indicated the worker's status was not conclusive. The doctor agreed that her testing was limited and that more time was needed to draw conclusions.

She stated that her testimony in regard to the claimants in these companion cases was based on "their entire history... in the medical department, which started out with history and physical exam; the typical hand examination, which involves checking circulation, tendons, motor function; the entire function of the upper extremities."

Dr. Hursh did not recommend the workers' return to chipping.

Arnold Eugene Delbridge, M.D., is an orthopedic surgeon who specializes in hand surgery. He characterized vibratory white finger as manifested by intermittent pallor of the fingers or hands precipitated by an external stimulus which causes spasm of the artery. The doctor stated that there is discussion as to whether the condition is purely vascular or

both vascular and neurogenic. He acknowledged that there could be a neurological element to the malady as a person may have decreased sensation, two point discrimination, and pressure sensation. According to the doctor, problems resulting from vibratory white finger are loss of sensation, difficulty gripping, and loss of fine working ability. Dr. Delbridge examined claimant and took a history including an occupational history, which was augmented by records from defendant, and the workers' statements regarding problems with everyday activities, recreational pursuits, and complaints.

He then attempted to exclude other causes for claimant's symptomatology such as cervical disk syndrome, thoracic outlet syndrome, cubital tunnel syndrome, carpal tunnel syndrome, rheumatoid arthritis, scleroderma, systemic lupus erythematosus, or dermatomyositis. His examination procedure included the Allen's test, which is done by manually occluding either the radial or ulnar artery and noting whether or not an adequate blood supply is coming from the other; thoracic outlet test whereby an attempt is made to decrease the space which the artery and vein occupy as they come over the first rib and behind the scalene muscles through the use of the Addison test wherein the shoulder is abducted to ninety degrees, the elbow flexed to ninety degrees, and the head is turned to see if there is a tingling or numbness in the hand; Tinel's sign or tapping over the median nerve; Phalen's sign which is accomplished by acutely flexing the wrist for a period of time and seeing if the patient experiences numbness or tingling; light touch wherein all digits are touched with a cotton wisp; two-part discrimination, a test performed in 1981 with a German-made instrument to determine whether or not the subject can tell whether one or two points are touching with a normal of two millimeters and with high numbers on that test indicating difficulty with fine work; pain sensation; ice bath which was done for one minute with ice in the water at all times, removing the hand, seeing which fingers were pale, and checking the capillary fill; and x-rays. Additionally, the doctor had the claimants move their hands. He said:

> And the reason I did that is because many times in these people you will find crepitation in their palms as their tendons slide through the sheaths. Or when you feel their palms you will find that their palms are edematous. And this is a person who has been steadily doing vibrating work. Their palms feel doughy. And you have them make a fist and there is crepitation in their tendons. These people that I examined had been off chipping and grinding for a long time. They did not have necessarily the palmar consistency of somebody who has been doing it right now, and their motion was unimpaired. So I didn't include that because it didn't differentiate anything. Virtually all of these people had motion that was normal or else they had some other reason why it wasn't.

He claimed that no loss of motion contributed to the impairments. There was no specified waiting period in the doctor's office until the testing was begun.

The doctor recognized temperature tests of the digits as an appropriate test; however, he felt that as they were more complex, there was more opportunity for inconsistencies. He was also aware of pressure testing although he had not done it himself. The doctor had consulted some medical literature in an attempt to learn more about vibration white finger.

In arriving at a percentage of disability, the doctor considered the difficulties claimants had with everyday and recreational pursuits as well as his objective findings. Ratings to individual fingers were "based to a certain extent on what the tests showed as far as the cold tests, two point discrimination, the light touch, the pain sensitivity, that type of thing." He then testified: "Most of the time employment factors were not considered. In other words, I recorded on some of them that his wages went from here to here. But I didn't really inquire as to his job problems. I inquired more to his everyday living problems." He did consider ability to work in the cold and with vibrating equipment. He made an attempt to assess the severity of the complaints and did not discount them because they were intermittent. Regarding relative weight, the doctor said:

> Well, as mentioned, if he is having no problems in his everyday life, then it doesn't mean as much that his two point discrimination was four millimeters. On the other hand, if they are all consistent, in other words, if he is having trouble in general life and he is having cold sensitivity, he is having vibratory sensitivity, he has had to change his habits, then all of these factors would support the data and would in my opinion warrant a higher impairment rating. And as to exactly a different point system, where I gave five points for immersion and five points for this and five points for that, no, I didn't. All I will say is that I put all of the data in front of me, I considered everything that I had available, and then came up with an impairment figure for each individual digit.

After assessing the impairment for each digit, he applied the AMA Guides to determine a value for the hand, upper extremity, and finally, the patient as a whole. The doctor cited the AMA Guides for the following proposition:

> "Evaluation of permanent impairment is an appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficiency in one or more of the activities of daily living. These activities are self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized hand activities."

And further that "[e]valuation of cardiovascular impairment is usually possible through sound clinical judgment based on a history, examination and a minimum of laboratory aid." He asserted that his assessment was based on his own testing as he was unsure what NIOSH tested.

> My personal opinion is that I consider this a disability of the extremity, because I don't think one can confine it to the hand. And, yes, I chart it on out to include the

body as a whole for number purposes. But I really consider it an upper extremity impairment.

He continued that the impairment cannot be confined...

to the fingers, because certainly there can be compromise in the ulnar and radial arteries long before they get to the fingers. So now we are at least above the hand. We are proximal to the hand. Certainly it's not impossible that this would involve the arteries or the nerves in the forearm. So we are certainly above the hand and the fingers. I don't see it involving the spinal cord or the brain, but I do see it involving the peripheral nerves and the peripheral vessels. Therefore my conclusion is that this is an upper extremity impairment rather than a hand or finger impairment.

Dr. Delbridge was questioned about reversibility. He testified that he had gone over the data collected by Dr. Taylor and the conclusions he had reached. His own conclusion was that "there is not definite evidence of reversibility. There isn't definite irreversible longitudinal evidence that there is worsening, but there is no definite evidence of reversibility."

As to this claimant and the others, he said:

A. I feel that the situation is that these gentlemen over 30 or 40 years could conceivably improve, but in 30 or 40 years these gentlemen are going to be retired. Well, could they improve in 20 years? I'm not going to say that these gentlemen couldn't possibly improve in 20 years, but their working life is going to be almost over in 20 years. Therefore, for most practical purposes their disability is essentially permanent.

Q. So then it is your testimony that you do not believe there will be substantial improvement in the short run?

A. That's essentially correct, yes.

While the doctor thought some change might occur in the workers over the years, he did not think it would be enough to make a difference in their life styles. The doctor agreed that persons might change after an impairment evaluation is done; however, he assumed neither that the employees would get better nor that they would get worse as he had no way of predicting. The following exchange occurred with defendants' counsel:

Q. Okay. You have gone on the assumption that their conditions as presented to you will remain the same, substantially, in the future?

A. In my opinion most of the conditions had not really changed that much in the year interval, and there is no reliable way that I know of that I can make a prediction that they will change either for better or for worse.

Q. So your ratings are based on your assumption and belief that their conditions are stable, basically?

A. Yes.

William Taylor, M.D., a retired professor of occupational medicine with a Ph.D. in chemistry who has been engaged in vibration research since 1967 and who was involved in survey work with NIOSH in the United States and in various research in other countries, testified regarding three international conferences dealing with vibration which had as an objective free interchange of research data and the discussion of reducing vibration and of setting safe vibration limits. The doctor acknowledged being in constant communication with Dr. Hursh since 1978.

Dr Taylor said Raynaud's disease was easily distinguishable from secondary Raynaud's phenomenon in that the disease is usually bilateral and symmetrical and includes cold feet and a history of blanching attacks before coming to industry.

A table of the stages of Raynaud's phenomenon including conditions of the digits and work and social interference has been developed and is reproduced below:

Stage	Condition of Digits	Work & Social Interference
0	No blanching of digits	No complaints
OT	Intermittent tingling	No interference with activities
ON	Intermittent numbness	No interference with activities
1	Blanching of one or more fingertips with or without tingling and numbness	No interference with activities
2	Blanching of one or more fingers with numbness. Usually confined to Winter.	Slight interference with home and social activities. No interference at work.
3	Extensive blanching. Frequent episodes Summer as well as Winter.	Definite interference at work, at home and with social activities. Restriction of hobbies.
4	Extensive blanching. Most fingers; frequent episodes Summer and Winter.	Occupational changed to avoid further vibration exposure because of severity of signs and symptoms.

NOTE: Complications are not used in this grading.

Dr. Taylor explained the staging process as beginning with tingling in the hands and fingers followed by numbness. After an interval of months or years, depending on the vibration stimulus, continuity of exposure or grip force, blanching or whitening occurred in the fingertips. Greater damage would occur with shorter latency periods because the worker was absorbing more energy.

If the vibration is continued, the blanching progresses from a fingertip to other digits. The sufferer may begin to complain of interference with home and social activities. Interference could take the form of blanching, spasms, and attacks brought on by cold stimulus. Other difficulties would be the inability to do fine work and difficulty picking up or recognizing small objects. He concurred that persons who had no loss of sensation prior to the use of vibrating tools, but who after use of vibrating tools, had loss of sensation, could attribute the loss to use of vibrating tools. Dr. Taylor also recognized loss of grip. He said that it is coupling between the hand and the vibrating tool which is the key to the amount of damage done to the hand. Further progression leads to the involvement of all digits on both hands and interference with work, domestic duties, and leisure and hobby activities.

According to the doctor, an automatic Stage II would be given if there was no evidence of white finger during the summer as only a Stage III would have summer involvement. He expected an improvement in a Stage II withdrawn from further vibration both occupationally and otherwise. In determining staging, Dr. Taylor said that emphasis would first go to the clinical degree of blanching and then to a description of what the patient could and could not do. He disagreed that emphasis should go to light touch or point discrimination, but he agreed with the statement:

> "A history of clumsiness due to loss of touch sensitivity in the fingers and a loss of sensitivity to temperature have been noted in chain saw operators whose VWF assessment has reached stage three. In the future, sensory tests may herefore prove more valuable than assessment of VWF by stages since loss of sensation to pinprick and light touch often precedes trophic skin changes or even stage three assessments."

He gave the impairment rating for a Stage III as three to five percent, Stage II as two to three percent, and a stage I as one percent of the body as a whole.

Included with Dr Taylor's deposition were two published articles dealing with his work and a paper documenting his research. Those articles discuss the first description of white finger in 1911 in Italian workers using pneumatic tools.

Dr. Taylor described his work with chain saw operators predominantly forty-five to fifty-five years of age in 1981 and the introduction of low vibration saws to the forestry industry in England. Some of the study dealt with determination of reversibility defined as "improving, referred to a diminuation in stage, a reduction in stage back to stage zero." Out of sixteen men classified as Stage III in prior evaluations, only one remained in Stage III in January of 1981. Of twenty-eight people in this study, twenty were found stationary, four were improving, and four were deteriorating. Checks were performed in the same week each year.

The doctor's conclusions as to reversibility were that Stage II cases reversed to zero and fifty percent of Stage III cases will improve. Dr. Taylor explained that there is evidence from brachial arteriography of attempts to recanalyze vessels blocked by mechanical trauma and that there is more expectation of recanalization in younger workers. The doctor did not believe tissue necrosis would occur after a worker was withdrawn from vibration absent some artery disease.

Dr. Taylor made comment regarding the Injuries Advisory Counsel which he said had been unable to decide the percentage of impairment and which he thought would set the impairment at a low percentage. Dr. Taylor testified:

> at the Ottawa Conference we are nearly convinced, but we have no good evidence to present to you, that we are dealing with two distinct phenomena here, namely vibration effect on nerves on one hand and the vibration effect on the arterial system on the second hand, admitting there is a relation between those two and that the nerves themselves may be regulating — in fact, they do, we know they regulate the amount of spasm. But it's becoming clear that we mustn't now consider this to be a simple pathological process as we assumed in the past.

As to what part of the body is impaired, the doctor testified:

> I am convinced... [attacks of numbness at night] are due to a restriction in blood supply and not a neurological complaint. But this area is not separated into two different entities. There's a combination, and I couldn't say that the nervous system wasn't involved in that. But that you can get it from the blood supply restriction alone is well known in subjects without vibration.

He asserted that blanching "is an indication of damage done from the vibration stimulus to the nerve separately or the artery separately or both together..." And again, "It's a slow, progressive process" resulting when "you have sensitized the arteries and... these have contracted down and the blood supply has gone from the subcutaneous vessels and the veins, giving you a white picture." Although the condition is presently referred to as vibration white finger, Dr. Taylor cautioned that later evidence may substantiate involvement of the wrist, elbows, and shoulder.

Dr. Taylor stated that brachial arteriography showed a physiological adaptation going on. Other adaptation could take the form of refusing to do a task done before, avoiding exposure to cold, and wearing protective devices. However, the doctor observed that even using thick gloves to insulate the hand could be countered by exposing the entire body to cold. As to blanching, which he stated occurred when the arteries, vein, and the subcutaneous tissue close off, he said:

> But we make a distinction between the numbness and the absence or presence of white finger for the following reason: That the ischemia, the bloodlessness, the damage to the arteries is the primary factor in that evening feeling of numbness and deadness of the hands, whether there be white finger or not.

And he agreed with claimant's counsel in the following interchange:

Q. Well, but if this individual, if he says, "Look, my fingers blanch, but for a year they haven't blanched but I haven't exposed them to cold, either, I've had enough of that they hurt so damn much," something to this effect, "I wasn't going to expose them to cold and I kept them very, very warm" —

A. Agreed.

Q. — we don't know then whether he was going to have occasional winter blanching or not, do we?

A. No, we would not. Agreed.

Blanching of the thumb, according to the doctor, would indicate an advanced case as the blood supply to the thumb is three times that of the supply to the digits.

More specifically, the doctor was questioned and responded:

Q. And so if we have an individual who says he could do anything out in the open, you know, summer, winter — you know, everybody's hands get cold — but without the blanching, without the numbness and these unique problems prior to coming to work, and then he had interference with gardening and the like, would that lead you to a conclusion?

A. It would.

Q. And what conclusion is that?

A. That the vibration has caused the sensitivity of the arterial system to a cold stimulus.

Dr. Taylor's testimony about the claimant was based on his own examination in 1978, defendants' medical records, Dr. Hursh's testing, Northwestern testing, NIOSH testing, the reports from Dr. Delbridge, and the testimony of claimant at the time of hearing. Dr. Taylor was unable to understand the testing done by Dr. Delbridge.

Medical records from defendant relating to claimant show he was seen on October 3, 1974 with an aching right wrist. He was given a wrist support. In 1976 claimant had a shallow avulsion and laceration of the right middle finger. In that same year he was found to have mild vascular insufficiency of his long and ring fingers on his left hand. He reported blanching and numbness. Norgesic was prescribed and he was restricted to chipping with a padded glove. Later he was taken off chipping because of an arthritis or arthralgia of the elbow. He suffered a contusion in June.

Slightly less than a year later, or May 26, 1977, claimant received a grinder burn on his left forearm.

Claimant was seen April 5, 1978 for soreness in his left palm and pain in his left wrist. Swelling was present over the volar aspect of the left wrist; friction was found along the flexor tendons; and there were nodules and crepitus in the flexor tendons of the long and ring fingers. Claimant was given a splint, Sterazolidin, and a one handed job. Another grinder burn to his left forearm occurred the following month.

On August 21, 1979 claimant complained of episodes of whiteness of all fingers of both hands over the previous two to three years. Cold testing was done the following day and claimant was provided with a permanent restriction from chipping and grinding.

In 1981 claimant twice participated in upper extremity blood flow examinations. Sluggish temperature return was noted in March. Temperature and pressure tests were normal on June 30 1981.

Dr. Hursh interpreted the test results as indicating claimant would gain improvement in his condition if he stayed away from vibration.

Dr. Delbridge examined claimant on February 27, 1980 and on March 19, 1980. The doctor found no evidence of thoracic outlet syndrome, no typical pattern of lower ulnar or median nerve compression, and no muscle atrophy of the thenar eminence or the interosseous muscles. Two point discrimination was 4 mm. on the left small finger, the right ring and small fingers; 3.5 mm. on the left thumb and long fingers; and 5 mm. on the remaining digits. Decreased sensation was present. On one minute immersion the index and middle fingers on the right hand and the index, middle, and ring fingers on the left blanched to the distal interphalangeal joint. The doctor's rating was 8% of the left hand, 7% of the left upper extremity, 9% of the right hand, 8% of the right upper extremity for a total man impairment of 9%.

Dr. Delbridge next saw claimant on August 26, 1981. X-rays of the hand and wrist showed slight cystic changes of the lunate on both wrists. The Allen's test, the Tinel's, the Phalen's and the thoracic outlet syndrome were all negative. Claimant had mild decreased sensation in all fingers and the thumb of both hands. Two point discrimination was 4 mm. in his left thumb and small finger, 6 mm. in his right long finger and 5 mm. in the remaining digits. Pain was present in both hands on immersion with whiteness in the fingers and hand. the physician's ratings on the left were 10% of his thumb and 4% of the hand, 15% of the index finger or 4% of the hand, 15% of the middle finger or 3% of the hand, 15% of the ring finger or 2% of the hand, and 10% of the small finger or 1% of the hand for a total of 14% of the hand, 13% of the left upper extremity or 8% of the whole man. The ratings on the right were 15% of the thumb or 6% of the hand, 15% of the right index finger or 4% of the hand, 20% of the middle finger or 4% of the hand, 15% of the ring finger or 2% of the hand, 15% of the small finger or 1% of the hand for a total of 17% of the hand or 15% of the upper extremity or 9% of the whole man. The combined value was 16% of the whole man.

The physician expressed the opinion that claimant's "complaints were as a result of vibratory white finger syndrome, brought on by the cxhipping and grinding at Deere and Company." Dr. Delbridge said the difference in his ratings was due to the deterioration in claimant's two point discrimination.

Dr. Taylor stated that claimant was rated at a Stage III on the original NIOSH test in which the physician had examined him.

Findings of Fact

WHEREFORE, IT IS FOUND:

That claimant is 27 years of age.

That claimant has a high school education.

That claimant commenced work for defendant in April of 1974 as a chipper and grinder — a job he held for more than five years.

That laboring with a classification of chipper and grinder required use of an air powered hammer and chisel and an air powered grinder.

That claimant was given a permanent restriction from chipping and grinding on August 22, 1979.

That claimant now is working as a welder.

That claimant had no problems with his hands prior to starting work with defendant.

That claimant's non-work exposure to vibration included riding a motorcycle in high school and helping a friend saw.

That claimant currently complains of a lack of coordination in the cold, loss of grip strength, and whiteness accompanied by pain and difficulty holding small objects.

That claimant's spouse observed a change in the physical appearance of claimant's hands.

That Northwestern testing, according to Dr. Hursh, has been done on three occasions with the most recent testing resulting in normal temperature and pressure.

That according to Dr. Delbridge, claimant has a fourteen percent (14%) impairment of the left hand and a seventeen percent (17%) impairment of the right hand for a total of sixteen percent (16%) of the whole person.

That Dr. Taylor ranked claimant as a Stage III.

Applicable Law and Conclusions of Law

The first issue to be determined is whether or not claimant has suffered an injury arising out of and in the course of his employment.

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.23, 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 of all the body. * * * *

Because of the broad definition of injury found in *Almquist*, a condition such as vibratory syndrome falls within the purview of the Act.

In order to receive compensation for an injury, an employee must further establish that the injury arose out of and in the course of his employment. Both conditions must exist. *Crowe v. DeSoto Consolidated School Distr.*, 246 Iowa 402, 405, 68 N.W.2d 63 ___ (1955).

In the course of relates to time, place and circumstance 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 duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *McClure v. Union County*, 188 N.W.2d 283, 287 (Iowa 1971).

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 353, 154 N.W.2d 128 (1967).

Dr. Hursh was asked, "You don't argue with the causation effect between Vibratory White Finger in a chipper and grinder?" She responded, "No." Dr. Delbridge stated that claimant's "complaints were as a result of vibratory finger syndrome, brought on by chipping and grinding at Deere and Company." Lay testimony also establishes claimant's claim. Considering both the expert and lay evidence, one must conclude that the claimant's condition arose from the work.

THEREFORE, it is concluded that claimant has suffered an injury arising out of and in the course of his employment.

The second issue to be considered is whether or not there is a causal connection between claimant's injury and his disability.

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

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. 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.2d 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). Expert medical evidence must be considered with all other evidence introduced bearing on causal connection. A possibility is insufficient; a probability is necessary. *Rose v. John Deere Ottumwa Works*, 247 Iowa 910, 76 N.W.2d 756 (1956).

The testimony of the medical experts set out immediately above and in the statement of the case establishes claimant's present disability is causally connected to his injury.

THEREFORE, it is concluded that there is a causal connection between claimant's injury and his disability.

The final issue to be considered is claimant's entitlement to permanent partial disability.

There is much testimony in the record regarding the reversibility of claimant's condition. Although the Iowa Supreme Court has not defined "permanent" in a strictly workers' compensation context, it has explained the term as it applies to other insurance. The opinion in *Garden v. New England Mutual Life Insurance Co.*, 218 Iowa 1094 (1934) states at 1104: "The word 'permanent' as used in the policy does not mean forever. It does not embrace the idea of absolute perpetuity, or lasting forever, or existing forever. It means for the indefinite and undeterminable period. Its meaning must be construed according to its nature and its relation to the subject matter contract in which it appears." [Citation omitted] See also, *Wallace v. Brotherhood of Locomotive Fireman and Engineers*, 230 Iowa 1127 (1941). Claimant had been out of chipping and grinding for two years at the time of Dr. Delbridge's most recent examination. His symptoms persist. Dr. Hursh's testing shows some abnormality up until his most recent testing. Thus considering these facts in light of the authorities cited above, the greater weight of the evidence establishes claimant has some permanency.

Testimony is also contained in the record regarding the location of that permanency. The opinion of the supreme court in *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 290 110 N.W.2d 60, ____ (1961) states: "The injury is a producing cause. The disability, which generally determines the extent of compensation payments, is the result of the cause (injury) upon the human body as it bears upon the ability of the injured person to earn wages." The medical testimony discusses potential injury to the circulatory and neurological systems. Many other injuries involve those systems, but compensation is limited to the scheduled member. Dr. Delbridge provides ratings for the fingers, hand, upper extremity, and the body as a whole. The lay testimony in combination with the medical evidence in the opinion of the undersigned places the disability in the hand.

As claimant has had an injury to both hands, he is entitled to compensation under Iowa Code section 85.34(2)(s). The right of a worker to receive compensation for injuries sustained which arose out of and in the course of his employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. *Soukup v. Shores*, 222 Iowa 272, 268 N.W. 598 (1936). That a worker sustaining one of the injuries for which specific compensation is provided under this statute might, because of such injury, be unable to resume his employment and, because of his lack of education or experience or physical strength or ability, might be unable to obtain other employment, does not entitle him to be classed as totally and permanently disabled. *Id.*, at 278, 268 N.W. at ____.

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 60, ____ (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).

Larson, in 2 *Workmen's Compensation*, Section 58 at 10-165 discusses the nature of scheduled benefits and points out that "payments are not dependent on actual wage loss" and that they are not "an erratic deviation from the underlying principle of compensation law — that benefits relate to loss of earning capacity and not to physical injury as such." The theory, according to Larson, is unchanged with the only difference being that "the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage loss experience."

Dr. Delbridge's most recent examination provides a rating of fourteen percent (14%) impairment to the left hand and seventeen percent (17%) impairment to the right hand which converts to sixteen percent (16%) of the whole person. Dr. Taylor has classified claimant as a Stage III. In view of the improvements which have recently been noted, Dr. Taylor's rating will be placed at the lower end for Stage III.

THEREFORE, it is concluded that claimant has a nine and one-half percent (9½%) impairment which entitles him to forty-seven and one-half (47½) weeks permanent partial disability payments.

Order

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant forty-seven and one-half (47½) weeks of permanent partial disability at a rate of two hundred eighty-seven and 34/100 dollars ($287.34).

That defendant pay the accrued amount in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30

That defendant pay costs pursuant to Industrial Commissioner's Rule 500—4.33.

That defendant file a final report within thirty (30) days.

* * *

Signed and filed this 30th day of March, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

JERRY MORRILL,

Claimant,

vs.

EATON CORPORATION,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed January 11, 1982 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. No memorandum of agreement is on file. A petition in arbitration was filed July 24, 1979 and hearing was held on February 26, 1981. The arbitration decision was issued October 28, 1981, and defendant appeals from an adverse result.

The record consists of the transcript; the depositions of Barry Bengston, Jerry Morrill, Jay Trachte, Derrell Schebaun, Bill Dixon, Michael T. O'Neill, M.D. (two depositions, dated July 14, 1980 and March 6, 1981), and Maurice P. Margules, M.D.; claimant's exhibits 1 and 2; and defendant's exhibits 1, 2, 5, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26.

The result reached will be the same as that of the hearing deputy.

Findings of Fact

Claimant worked for some seven years for the employer as a laborer in various capacities. On or about March 19, 1979, he strained his low back while lifting a steel rail weighing about 30 pounds. Also on or about that date, claimant attempted to lift a cart with four employees on it, and struck his head with a board in an attempt to break the board. As a result of lifting the steel rail, claimant was treated by D.W. Burney, M.D., who did low back surgery on June 13, 1979.

Claimant's difficulties continued, and he saw Maurice P. Margules, M.D., a neurosurgeon, in October of 1979. At that time there existed a defect at L4/5. Claimant's pain was caused by scar tissue from the operation or residual compression.

Claimant continues to have pain in his back, legs and feet, and his prognosis for recovery is not good.

Issues

As a result of the record made at the hearing and the exhibits, the hearing deputy found that claimant was injured arising out of and in the course of his employment and ordered temporary total disability benefits to be paid.

The issues are whether claimant sustained an injury arising out of and in the course of his employment; if so, whether there is a causal relationship between that injury and the present disability; and whether claimant is still temporarily totally disabled.

Applicable Law

Claimant has the burden to prove that he sustained an injury arising out of and in the course of his employment. *Lindahl v. L. O. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945); *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). Further, claimant must show that the health impairment was probably caused by his work; possible cause is not enough. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W.2d 732 (1956). *Ford v. Goode Produce Co.*, 240 Iowa 1219, 38 N.W.2d 158 (1949); *Almquist v. Shenandoah Nurseries, supra*. Matters of causal relationship are essentially within the realm of expert testimony. *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 101 N.W.2d 167 (1960).

Analysis

The issues of claimant's alleged injury and causal connection between an injury and disability may be considered together. On the one hand is claimant's version of hurting himself while lifting. This version finds some support in the testimony of Dr. Margules. On the other hand, defendant presents two other possible situations wherein claimant could have been injured. In one, claimant attempted to break a board by hitting himself in the head. In the other, claimant attempted to lift a cart bearing four large men. Neither situation was shown to be the genesis of claimant's *low* back trouble. As Dr. O'Neill remarked, claimant would more likely hurt his head than his low back in the board incident. A greater chance of injury would stem from the lifting attempt, but nothing seems to have come from it.

Of course, claimant must prove his case, and, although defendant may introduce evidence of alternate ways claimant could have hurt himself, their's is not the burden. Claimant's version has the continuity, even though the trauma was not dramatic, as in a fall. One accepts his version because one believes him and believes Dr. Margules, whose testimony establishes the necessary causal connection. (It is not necessary to disbelieve defendant's witnesses; the events they described actually happened.)

With respect to the qualifications of the doctors, it is true that the opinion of a non-board certified physician (Dr. Margules) is taken over that of a board certified physician (Dr. O'Neill). However, Dr. Margules has sufficient experience and was a *treating* doctor; Dr. O'Neill, experienced and board qualified, only examined claimant. In this case, one prefers experience. (Like the hearing deputy, one wonders why the partner [O'Neill] testified instead of the original treating doctor [Burney].)

The nature and extent of claimant's disability provides the greater problem. Unfortunately, Dr. Margules, whose testimony one accepts, last saw claimant in the fall of 1979, at which time the prognosis was not good. The poor prognosis plus claimant's testimony of pain in his low back and legs are sufficient to uphold the hearing deputy's conclusion that

claimant continues to have temporary total disability. However such disability should be limited. If claimant has a permanent partial disability, and that appears likely, the parties should work together to start weekly payments for such disability and see if any rehabilitation potential remains. Failing that, either party may file in review-reopening to have the permanent partial disability determined.

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of his employment on or about March 19, 1979. As a result, claimant had low back surgery. Also as a result of the work injury, claimant sustained temporary total disability beginning May 12, 1979 and continuing to the present time.

The rate of weekly compensation is $142.63.

There is no dispute over the medical and hospital bills.

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits beginning May 12, 1979 at the rate of one hundred forty-two and 63/100 dollars ($142.63) for a temporary total disability under §85.33, so long as said disability shall last, accrued payments to be made in a lump sum together with statutory interest.

Costs are taxed against defendant.

Finally, defendant is ordered to file an interim report of payments made.

* * *

Signed and filed at Des Moines, Iowa this 23rd day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

KYLE C. MORRIS,

Claimant,

vs.

DES MOINES GOLF & COUNTRY CLUB,

Employer,

and

TRAVELERS INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed arbitration decision in which the deputy concludes that claimant's injury arose out of and in the course of his employment and that defendant employer had notice of the injury.

The record on appeal consists of the testimony of claimant, Brooke Byers, Bill Byers, John C. Cran, Mike Shackleford and Shelby Swain, claimant's exhibits A, B and C; defendants' exhibits 1 and 2 (defendants' exhibit 2 being a copy of the original notice and petition); and the appeal briefs of both parties.

The issues on appeal are whether claimant's injury arose out of and in the course of his employment and whether defendant employer received timely notice pursuant to Iowa Code section 85.23.

Claimant, who is presently nineteen years old, was employed as a groundskeeper by the Des Moines Golf and Country Club. His normal working hours were from 7:00 a.m. to 3:00 p.m. Monday through Friday and 6:00 a.m. until 10:00 a.m. on Saturdays.

On June 13, 1979 claimant finished work at 3:30 p.m., went home and then went on to baseball practice. Upon discovering that baseball practice had been cancelled, claimant returned home.

At approximately 5:00 p.m. claimant phoned Bill Byers, the golf course superintendent, in order to request time off so that he could attend his sister's wedding the following Saturday. Claimant spoke with Bill Byers' daughter Brooke who informed claimant that her father was not home.

Between 7:00 and 8:00 p.m. claimant went to the Byers' residence, which is located on the grounds of the Des Moines Golf and Country Club in order to speak with Bill Byers about time off for his sister's wedding and football camp. Bill Byers was not at home so claimant talked with Brooke Byers for a few hours while he waited for her father to return. Claimant testified that he specifically told Brooke he was there to speak to her father. (Transcript, page 11.) Brooke testified that, although she could not recall the exact conversation, she remembered talking about claimant's sister's wedding. (Transcript, pages 27-28.)

Since his motorcycle headlight was not working claimant left the Byers' residence when it began to get dark. (Transcript, page 11.) A collision occurred on the country club premises between a tractor which Bill Byers was driving and claimant's motorcycle. As a result, claimant was hospitalized.

Claimant testified that he never spoke about the accident with Bill Byers at any later date. He never mentioned that he was filing a workers' compensation claim.

Bill Byers testified at the hearing that claimant was leaving the house after visiting his daughter Brooke. My. Byers made this same statement to a representative of the insurer on June 18, 1979. The record does not indicate whether the insurer ever spoke with Brooke Byers; however, the record does reflect the fact that the insurer never spoke with claimant after the accident.

John C. Cran, vice president of State Auto & Casualty Underwriters, testified as an expert witness that it is very common that accidents will involve claims for more than one type of liability. (Transcript, page 42.) Mr. Cran stated that if he received a file on a liability claim involving an employee who was injured on the premises of his employer, both a workers' compensation and a liability file would be opened and the investigation would proceed from that point. (Transcript, pages 44-45.)

Mike Shackleford, a special representative with Travelers

Insurance Company, testified that he investigated the accident at issue, primarily focusing on the statement given by Bill Byers. (Transcript, page 50.) His only contact with claimant was through claimant's parents, and that was to inform then that the insurance company would only make a payment under the medical payments provision, since they felt there was no liability on their part. (Transcript, page 51.) Defendant insurer accordingly issued a draft for $2,000.00, pursuant to a medical payments rider on the general liability policy.

Section 85.61(6) provides:

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

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.

"Arising out of" employment refers to the cause and the origin of the injury, while "in the course of" employment refers to the time, place and circumstances of the injury. *McClure v. Union County*, 188 N.W.2d 283, 287 (Iowa 1971).

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).

> [a]n injury occurs in the course of 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. *Farmers Elevator Co., Kinglsey v. Manning*, 286 N.W.2d 174, 177 (Iowa 1979), quoting *Bushing v. Iowa Railway & Light Co.*, 208 Iowa 1010, 1018, 266 N.W. 719, 723 (1929).

An employee, although not at his regular place of employment and outside customary working hours, is within the course of his employment while performing some special service or errand or duty incidental to the interest of his employer, and also while on his way from his home to perform, and on his way home after performing such service, errand or duty. *Pohler v. T. W. Snow Construction Co.*, 239 Iowa 1018, 1022, 33 N.W.2d 416 (1948).

Claimant went to the employer's premises to request time off work. The employer sought advance notice from employees when days off were requested in order to facilitate scheduling. (Transcript, page 10, 24, 32.) As a result, claimant's injury followed as a natural incident of his work.

Furthermore, claimant was merely fulfilling his duty to inform his employer, in advance, of requested time off work. This was certainly an act which benefits his employer. Although claimant might have notified defendant employer of his intention to take some days off during his normal working hours, for whatever reason, he chose to do it on the evening of June 13, 1979. The fact is, claimant's advance request was only to benefit his employer. Therefore, claimant's injury occurred in the course of his employment.

Iowa Code section 85.23 provides:

> *Notice of injury — failure to give.* Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

According to the court in Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (1980), the actual knowledge alternative of notice is satisfied if the employer has information which puts him on notice that the injury may be work-related. The court stated that "[t]he purpose of section 85.23 is to alert the employer to the possibility of a claim so that an investigation of the facts can be made while the information is fresh." *Id.* at 811. The standard to which the employer is held in suspecting the possibility of a potential compensation claim is that of a reasonably conscientious employer. *Id.*

Defendant employer knew the accident occurred on the employer's property. Although it was long past claimant's usual working hours, a reasonably conscientious employer would have conducted some investigation into the possibility that claimant was present on the employer's property for work-related reasons. There is no evidence which demonstrates that the employer ever asked claimant why he was there at that hour. Neither did representatives of defendant insurer question claimant about the facts surrounding the accident. Therefore, it is concluded that proper notice was given.

Findings of Fact

1. Claimant was employed by Des Moines Golf and Country Club on June 13, 1979.

2. Claimant finished his normal work day at 3:30 p.m.

3. Claimant called Bill Byers at approximately 5:00 p.m. to request time off for his sister's wedding on June 16, 1979.

4. Brooke Byers told claimant Bill Byers was not home.

5. Claimant drove to Bill Byers house, on the country club's grounds, to make the request for time off at approximately 7:00 p.m. on June 13, 1979.

6. Brooke Byers, Bill Byers' daughter, told claimant her father was not home.

7. Claimant stated the nature of his visit to Brooke.

8. Claimant visited with Brooke for a few hours until it became dark.

9. Bill Byers' tractor collided with claimant's motorcycle on the employer's property as claimant was leaving.

10. Claimant never discussed the facts of the accident with Bill Byers.

11. Claimant never specifically told Bill Byers or any supervisory personnel at the club that he was filing a workers' compensation claim.

12. Reasonably conscientious investigation of the facts would have indicated to the employer that a possibility of a workers' compensation claim was present.

13. Defendant insurer did not feel that this was a workers' compensation claim and accordingly issued a $2,000.00 draft pursuant to a medical payments rider on the general liability policy.

Conclusions of Law

1. Claimant's injury arose out of and in the course of his employment.

2. Defendant employer had adequate notice of claimant's workers' compensation claim.

THEREFORE, it is ordered:

That this case be placed in the ready to assign category for hearing regarding claimant's entitlement to compensation.

That costs of this action be taxed against defendants.

* * *

Signed and filed this 4th day of November, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court;
Dismissed for Settlement.

JOHN R. NAZARENUS,

Claimant,

vs.

OSCAR MAYER & CO.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed December 9, 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. Defendant appeals from an adverse review-reopening decision wherein the claimant was awarded a permanent partial disability to the body as a whole of 40%.

On appeal the record consists of the transcript; claimant's exhibits 1 and 2; defendant's exhibits 1, 2, 3 and 4; and a letter report from Robert W. Cofield, M.D., dated January 30, 1981.

The result of this final agency decision will be the same as that reached by the hearing deputy. The findings of fact are revised.

Considering the various elements of industrial disability and including them in her findings of fact, the hearing deputy made an award of 40% permanent partial disability to the body as a whole. Defendant appeals, stating that the award was too high. Defendant filed a request to introduce new evidence which was refused by the industrial commissioner. Then, the undersigned deputy industrial commissioner was appointed to write the final agency decision. In the meantime, however, defendant had filed an application to reconsider defendant's request to introduce new evidence. This second request was refused on the theory that, to permit the application, there might be no end to the taking of evidence.

The issue on appeal, as stated by defendant, is the extent of claimant's permanent partial disability.

An injury to the shoulder is an injury to the body as a whole. *Alm v. Morris Barick Cattle Co.,* 240 Iowa 1174, 38 N.W.2d 161 (1945). Industrial disability measures loss of earning capacity, not mere functional impairment. Such disability includes considerations of functional impairment, of course, as well as age, education and relative ability to do the same type of work as prior to the injury. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963), *Martin v. Skelly Oil Co.,* 252 Iowa 128, 106 N.W.2d 95 (1960).

See also *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).

Rule 500—4.28, I.A.C., states that the commissioner should decide an appeal upon the records submitted to the hearing deputy, "unless the commissioner is satisfied that there exists additional material evidence, newly discovered, which could not with reasonable diligence be discovered and produced at the hearing."

With respect to the issue of industrial disability, the evidence showed that claimant had a severe injury to his left rotator cuff. F. Dale Wilson, M.D., a qualified surgeon, put the permanent partial impairment as a result of the injury at 56% of the arm; Robert W. Colfield, M.D., a qualified orthopedic surgeon, put the permanent partial disability to the left arm at 30%. Thus, claimant's injury is severe. Considering that he is 50 years old, has a ninth grade education, served as an enlisted man in the infantry, has experience in both skilled and unskilled endeavors, and has not returned to work since his injury, a rating of 40% industrial disability seems right on the mark.

With respect to the question of whether new evidence should be taken, from the wording of defendant's second application to introduce new evidence (filed November 30, 1981) it appears the evidence arose after the hearing. It is obvious, therefore, that rule 4.28 does not include the possibility of considering evidence which actually arose after the hearing, as opposed to evidence newly discovered after the hearing. Although the proposed agency decision is certainly not res adjudicata in the sense mentioned in *Stice v. Consolidated Ind. Coal Co.*, 228 Iowa 1031, 291 N.W. 452 (1940), there must be an end to the taking of evidence sometime.

Here, defendant claims new evidence that claimant has been working vigorously enough that he could not have a 40% industrial disability. If defendant's request to take the evidence was granted, one cannot guess the outcome of another hearing; however, it is distinctly possible that the outcome would be the same as in this case. Claimants, including those quite seriously injured, *should* make attempts to work within their capabilities. Those capabilities, which come within the definition of industrial disability, are largely qualitative, not quantitative. In other words, our supreme court has given this agency the heavy responsibility of reaching a numerical result from largely non-numerical standards. In so doing, the agency can consider only so much evidence and no more.

The benefits here appear to be accrued. In a case where the benefits were not accrued, it would appear defendant might have a remedy by itself filing an action in review-reopening to show an improvement in claimant's condition. *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731 (Iowa 1968).

Finally, defendant appears to misconstrue *Alm, supra.* Defendant states in that case, "there clearly was an injury to the entire shoulder plus internal injuries plus two hernias which certainly amounts to more than an injury not only to the scheduled member but also to other parts of the body not included in the schedule the Court properly held that an award could be made based on a percentage of the body as a whole." (Defendant's brief, 2) On page 1177 of the Iowa Report, the Court states that the assumption that an injury to a shoulder is an injury to an arm is unwarranted. From that statement, one can only conclude that claimant's injury is to the body as a whole.

Findings of Fact

1. That on February 14, 1978 claimant slipped on ice on defendant employer's parking lot and fell on his left shoulder.

2. That claimant had a series of surgeries and various modalities of treatment after the injury.

3. That claimant's injury is to his rotator cuff.

4. That right-handed claimant has atrophy and loss of motion in his left upper extremity.

5. That claimant is fifty years old.

6. That claimant has a ninth grade education.

7. That claimant served with the infantry and earned the rank of sergeant first class.

8. That claimant's work experience for defendant employer consists of packing skins and operating an electric mule and an elevator.

9. That claimant is a self taught carpenter, electrician, and plumber.

10. That claimant has not returned to work since his injury.

11. That claimant is unable to use his left arm with force above trunk level. (Cofield report, January 30, 1981)

12. That claimant has a serious permanent partial impairment to his left arm as a result of the work injury. (Claimant's exhibit 1 and Cofield report of January 30, 1981)

There appears to be no dispute over the weekly compensation rate, so it will be adopted as the proper weekly rate. Likewise, there is no dispute as to medical and allied bills.

Conclusions of Law

Claimant sustained an injury arising out of and in the course of his employment which resulted in a permanent partial disability to the body as a whole for industrial purposes of forty percent (40%).

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant for a period of two hundred (200) weeks at the rate of one hundred eighty-eight and 30/100 dollars ($188.30) per week, accrued payments to be made in a lump sum together with statutory interest, defendant is to receive a credit for those amounts of permanent disability previously paid.

Costs of this action are taxed against defendant.

Defendant is hereby ordered to file a final report upon payment of this award.

Signed and filed at Des Moines, Iowa this 24th day of February, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

HAROLD NEAL,

Claimant,

vs.

DUBUQUE PACKING COMPANY,

Employer,
Self-Insured,
Defendant.

Arbitration Decisions

These matters came on for hearing at the Fischer Building (Juvenile Court) in Dubuque on March 25, 1981. The record was closed on May 6, 1981. The exhibits were left in the possession of the court reporter and these were received on July 2, 1981, at which time the record was closed.

This case involves two actions:

1. **File 623150** is an action for compensation for an alleged injury on September 25, 1979 which resulted in a hernia. A First Report of Injury was filed on December 22, 1980.

2. **File 655832** is an action for compensation for an alleged shoulder injury in early 1980. An Employers First Report of Injury was filed on March 5, 1981.

The cases were heard together. The record consists of the testimony of the claimant, Melvin Kiebel, Mrs. Harold Neal; the deposition of R. Scott Cairns, M.D.; claimant's exhibits 1-16; and defendant's exhibits A & B.

The issues for resolution are whether both injuries arose out of and in the course of employment and if so, what compensation is payable therefor.

Findings of Fact

1. Claimant, presently age 51, has been employed by defendant since 1952. He spent some 22 years loading canned meats and most recently, was a "beef vatter". His duties while loading involved lifting weights up to 88 pounds. His more recent duties as a vatter involved lifting front-quarter of meat from a rail into a vat. The weights lifted varied from 30 to 150 pounds.

2. On September 25, 1979, claimant was employed as a vatter and while lifting, had a pain in his groin and reported this to the medical department (See employer's exhibit A). Since no specific incident mentioned, the employer indicated that this was not to be considered as a workers' compensation claim.

3. Claimant was treated by his family physician, S. C. Schueller, M.D., who admitted claimant to the hospital on September 26, 1979 through October 3, 1979. Bilateral inguinal hernias were repaired. It appears that claimant had been diagnosed as having a right inguinal hernia a month prior to the hospitalization (Neal exhibit 1 — Discharge Summary).

4. Claimant was disabled from acts of gainful employment through December 17, 1979 although claimant took vacation through December 31, 1979.

5. The greater weight of the evidence indicates that both inguinal hernias were caused by employment (Neal exhibit 4 — Scheuller reports "the heavy lifting...is probably a cause of both his left and right inguinal hernias").

6. Claimant has no permanency and was paid by a health and accident insurance policy contributed to by his employer.

7. Upon his return to work in January, 1980, claimant experienced left shoulder and arm pain while lifting.

8. Again, claimant reported this to the medical department (Employer's exhibit B) and did not work after January 23, 1980.

9. Claimant sought medical treatment and was hospitalized after outpatient treatment. On November 14, 1980, a repair of a torn right rotator cuff was performed. Claimant's treating physician was R. Scott Cairns, M.D., a Dubuque orthopedist. Before this, in August, 1980, claimant had been admitted for the same procedure, but this was not conducted for a chest lesion.

10. Claimant had had previous shoulder problems which were well documented by defendant.

11. Dr. Cairns' opinion that the rotator cuff injury was caused by employment was unrebutted.

12. Claimant is still in the healing process (Cairns' deposition p. 29) although Dr. Cairns later testified that claimant's healing was substantially complete and that healing had slowed (as of February 11, 1981). Claimant has not returned to employment and is unable to return to substantially similar employment. The claimant's shoulder injury is permanent, but the extent thereof is presently unknown.

13. The rate of compensation in the event of an award has been stipulated at $266.28 per week.

Conclusions of Law

1. 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.

A. The September 25, 1979 hernia injury. Based upon the principles enunciated above, it is found that claimant has established his claim. Although there was evidence that Dr. Schueller detected a hernia in advance of the treatment, his testimony gives us the necessary causal connection.

B. The January, 1980 rotator cuff injury was also caused by employment. The testimony is unrebutted in that this was caused by employment even though claimant had prior left shoulder problems.

2.A. **The September 19, 1979 injury** has no evidence with regard to permanency. By exclusion, the injury was temporary in nature entitling claimant to temporary total disability compensation from September 26, 1979 through December 17, 1979, a period of 11 6/7 weeks. See Section 85.33, Code of Iowa.

B. The January, 1980 shoulder injury has some permanency as shown above. Claimant, by virtue of this finding, is entitled to both healing period and permanent disability compensation. Inasmuch as the nature and extent of the permanency is not ripe for decision, the only issue to be discussed is claimant's entitlement to healing period compensation. Section 85.34(1), Code of Iowa, provides for the payment of healing period from the beginning on the date of injury until he has either returned to work or recuperated from the injury, whichever comes first. Rule 500—8.3 of the industrial commissioner defines recuperation as that point when it is medically indicated that either no further improvement is anticipated or that claimant is capable of returning to "substantially similar" employment. Since Dr. Nemmers indicates that claimant is unable to return to similar work the test must be whether claimant has reached that point where no further improvement is anticipated. Claimant reached that point where no further improvement in a medical sense was reached after February 10, 1981. Healing period compensation will be awarded from January 23, 1980 through February 10, 1981 a period of 55 weeks.

3. Claimant submitted medical expenses which should be paid pursuant to Section 85.27, Code of Iowa.

4. Section 85.38, Code of Iowa provides a credit for sickness and accident payments made by an employer and credit therefore will be allowed.

IT IS THEREFORE ORDERED that defendant pay unto claimant eleven and six/sevenths (11 6/7) weeks of temporary total disability compensation at the rate of two hundred sixty-six and 28/100 dollars ($266.28) per week.

Defendant is to receive credit for insurance benefits paid pursuant to Section 85.38, Code of Iowa.

IT IS FURTHER ORDERED that defendant pay the following medical expenses, to wit:

Xavier Hospital (10-79)	$1931.70
Stephen Schueller, M.D.	835.00
Charles J. Schueller, M.D.	275.00
Tri-State Anesthesia Associates, P.C. (9-28-79)	220.00
R. Scott Cairns, M.D.	697.00
Mercy Health Center	2051.25
Tri-State Anesthesia (11-13-80)	220.00

Mileage expenses in the amount of nineteen and 71/100 dollars ($19.71) are to be paid unto claimant by defendant.

Costs, to include twenty-five and no/100 dollars ($25.00) for Dr. Stephen Schueller's report and one hundred and no/100 dollars ($100.00) for Dr. Nemmer's report, are taxed to defendant. See Rule 4.33. The cost of obtaining hospital records will not be taxed as costs.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Code Section 85.30.

* * *

Signed and filed this 11th day of August, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

BYRON JAMES NICOL,

Claimant,

vs.

WAYNE ENGINEERING CORPORATION,

Employer,

and

MARYLAND CASUALTY COMPANY,

Insurance Carrier,

WAYNE ENGINEERING CORPORATION,

Cross-Claimant,

MARYLAND CASUALTY COMPANY,

Insurance Company,

vs.

DOERFER-DIVISION OF CCA,

Cross-Petition Defendant,

BYRON JAMES NICOL,

Cross-Claimant,

vs.

DOERFER-DIVISION OF CCA,

Cross-Claim Defendant.

Appeal Decision

By order of the industrial commissioner filed March 9, 1982 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 and defendant Doerfer-Divisions of CCA (hereinafter referred to as Doerfer) appeal a decision by the hearing deputy.

The record on appeal consists of the transcript; claimant's exhibits 1-23; defendants' exhibits A, B and C; the depositions of Arnold L. Schroeter, M.D., Mary Jane Schaefer, Dale Nelson, Roy Glessner, Tom Boose, and Richard L. Zeuhlke. Claimant's exhibit 23 and defendants' exhibit C were identical; the depositions of Schaefer, Nelson, Glessner, and Schroeter were marked as exhibits 17, 18, 19 and 20.

The result of this final agency decision will be somewhat different from that of the hearing deputy in that the award will be increased. The findings of fact are revised and expanded but in great part taken from the hearing deputy's decision. The references to the record in parenthesis are those of the undersigned.

Summary

Claimant brought an action against Wayne Engineering Corporation (hereinafter referred to as Wayne) and Maryland Casualty Company, Wayne's workers' compensation insurance carrier to recover benefits for a dermatitis he allegedly incurred at work. Those defendants were granted leave to file a cross-petition against a former employer, Doerfer. Claimant then filed a cross-claim against Doerfer. The hearing deputy took evidence and issued an award for claimant against Doerfer for 50 weeks permanent partial disability and certain medical and allied expenses.

Issues

Claimant's appeal brief states four issues, including the three issues recited by Doerfer:

1. Did claimant Byron Nicol's contact dermatitis arise out of and in the course of his employment at Wayne Engineering Corporation?

2. Where was claimant Byron Nicol "last injuriously exposed" to the hazards of contact dermatitis?

3. Did defendant Doerfer receive adequate and timely notice from claimant Byron Nicol?

4. What is the nature and extent of claimant Byron Nicol's present disability?

Applicable Law

Claimant must show that his dermatitis is connected to the employment within the terms of the occupational disease law which is found in Chapter 85A, The Code. Section 85A.8 states as follows:

> 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 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.

Further, our supreme court said in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 188 (Iowa 1980):

> Section 85A.10 imposes liability upon the last employer in whose employment the claimant was injuriously exposed to the hazardous condition of employment. It does not require that the claimant prove that his disease was actually caused by that exposure. Rather, we believe it is sufficient that he show that the hazardous employment condition which at some time caused his disease existed to the extent necessary to possibly cause the disease at his last employer's place of employment.

With specific respect to notice, §85A.18 states:

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

to the employer within ninety days thereafter. (Emphasis supplied)

In workers' compensation cases the notice provision is found in §85.23:

> 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.

Lack of notice is an affirmative defense, and the burden of proof is upon the defendants. *DeLong v. Highway Commission*, 229 Iowa 700, 295 N.W. 91 (1940); *Reddick v. Grand Union Tea Co.* 230 Iowa 108, 296 N.W. 800 (1941).

Industrial disability consists of consideration of such elements as functional impairment, age, education, and relative ability to do the same work as prior to the injury. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963), *Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). A claimant should make a bona fide attempt to find work. *McSpadden, supra*, at 192.

Analysis

Claimant worked for Wayne from February to June 1978 and, after leaving Wayne, for Doerfer until July 31, 1978. His work at Wayne involved being in a great deal of contact with a coolant, with metal, and with cutting oil. He developed a serious contact dermatitis which, as was later shown, was caused by contact with those substances. At Doerfer, he was much less in contact with irritants but did have *some* contact with them. Claimant's testimony that he had contact with coolant and cutting oils at Doerfer along with the testimony of Dr. Zuehlke (that those irritants caused the dermatitis) is sufficient to meet the requirement of §85.8, especially in the light of the above quoted passage from *McSpadden* where the court stated claimant need only to show the disease "existed to the extent necessary to possibly cause the disease at his last employer's place of employment." Further, Dr. Schroeter (p. 14) says the work at Doerfer would cause further trouble, assuming claimant had contact with irritants. That contact is shown in the evidence.

The record quite possibly shows that the exposure to irritants at Wayne was much greater than at Doerfer. Thus, the result reached may not seem fair. However, the law provides for the last-exposure rule. Applying that rule to the facts, it is clear that claimant was exposed to irritants at Doerfer and that the exposure was sufficient to be injurious.

Citing §85A.18, Doerfer's brief states: "The burden is on the Claimant under Chapter 85A.18 to give written notice to the Employer of the occupational disease within 90 days after the first distinct manifestation thereof." Considering that the burder *of proof* is upon Doerfer to prove lack of notice and that knowledge is sufficient to satisfy the requirement under §85.23, the above statement is not very helpful. The record clearly shows Doerfer's representative knew claimant had the condition when he was hired and that there was a possible work-connected aggravation. There appearing to have been such knowledge by Doerfer, the affirmative defense fails.

The most difficult question in the case, other than the causal issue, is the extent of claimant's industrial disbility. The hearing deputy placed heavy emphasis upon claimant's lack of motivation to return to work. Although one would agree that being precluded from working in machine shops and around metal is a serious disabling factor, whatever his motivation. Further, college potential is not always realizable and one may not have a college education as a really viable alternative. Such is the case here.

This is a situation wherein that claimant has a strong disincentive to work because he is drawing supplemental security income benefits, and the hearing deputy is certainly right that claimant's motivation needs improvement. However, the evidence shows that he is really precluded from many areas of employment because of his work-connected dermatitis. Considering all the factors of industrial disability and the law governing such disability it is concluded that claimant has a 20% loss of earning capacity for industrial purposes.

Findings of Fact and Conclusions of Law

Finding 1. Claimant worked for Wayne from February 9, 1978 until June 9, 1978.

Finding 2. While working for Wayne, claimant was in continuous contact with coolant, metals and cutting oil. (Tr. 19)

Finding 3. Prior to his employment with Wayne claimant never had a problem with dermatitis. (Tr. 19)

Finding 4. While working for Wayne, claimant developed contact dermatitis. (Schroeter 7)

Finding 5. After leaving Wayne, claimant started working at Doerfer and worked there until July 31, 1978.

Finding 6. While working at Doerfer, claimant came into contact with metals and may have occasionally come into contact with cutting oil. (Tr. 40)

Finding 6A. Claimant's dermatitis worsened while he was employed at Doerfer. (Tr. 41, 97)

Finding 6B. Claimant came into contact with coolant while working at Doerfer. (Tr. 95-96, 132-133)

Finding 6C. Claimant's dermatitis was aggravated while working at Doerfer. (Zuehlke depo., 39)

Finding 7. Claimant is allergic to some metals and to cutting oil.

Finding 7A. Claimant's dermatitis was caused by exposure of his skin to coolants, chromates and possibly nickel. (Schroeter depo., 7)

Conclusion A. Claimant contacted an occupational disease while working for Wayne and Doerfer.

Conclusion B. Doerfer is liable for claimant's compensation.

Finding 8. Claimant's superiors at Doerfer knew of claimant's condition when he was hired and knew it was possibly due to work.

Finding 9. Claimant's superiors at Doerfer knew claimant's contact dermatitis worsened after starting with them. (Nelson depo., 28-29; Glessner depo., 36-37)

Conclusion C. Doerfer had actual knowledge of claimant's occupational disease.

Finding 10. As a result of his contact dermatitis, claimant has a functional impairment of two percent (2%) of the body as a whole.

Finding 11. Claimant is thirty-one (31) years old and is a high school graduate.

Finding 12. Claimant also has taken but not completed a course in tool and dye.

Finding 13. Claimant has worked in a filling station, a cleaners, has driven in a truck and done factory work.

Finding 14. Claimant has worked in a supervisory position where he was in charge of twelve (12) employees.

Finding 15. Since leaving Doerfer he started a college education and then dropped out because he could not do the work. (Tr. 74-77)

Finding 16. Claimant should not return to a machine shop environment.

Finding 17. Claimant can work in a wide variety of jobs where he limits his contact with the things he is allergic to.

Finding 18. Claimant has a lack of motivation.

Finding 18A. Claimant is drawing social security benefits in the nature of Supplemental Security Income. (Tr. 77; claimant's exhibit 16)

Finding 19. Claimant has not attempted to find any employment since leaving Mayo Clinic.

Finding 20. Claimant was let go from Doerfer.

Finding 21. Even though claimant's condition has improved, he has made no effort in finding employment.

Conclusion D. As a result of his contact dermatitis, claimant has received an industrial disability of twenty percent (20%).

Finding 22. Claimant has been off work since July 31, 1978.

Finding 23. Claimant reached maximum recuperation on January 8, 1979.

Conclusion E. Claimant is entitled to healing period benefits from July 31, 1978 to January 8, 1979.

* * *

Certain matters were uncontested on appeal but should be recited. The compensation rate is two hundred six and 69/100 dollars ($206.69) per week; the medical and allied bills are reasonable. The hearing deputy found that claimant had been compensated for his healing period, and no appeal was taken from that finding; therefore, no new finding will be made as to healing period.

Order

Wherefore, defendant Doerfer-Division of CCA is hereby ordered to pay weekly compensation benefits at the rate of two hundred six and 69/100 dollars ($206.69) unto claimant for a period of one hundred weeks for the permanent partial disability beginning January 9, 1979, accrued payments to be made in a lump sum together with statutory interest.

Doerfer-Division of CCA is also to reimburse claimant for his outstanding medical bills in the amount of one hundred nineteen and 90/100 dollars ($119.90) and reimburse claimant fifty dollars ($50.00) for mileage.

Defendants Doerfer and Wayne equally shall pay costs of this action.

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

* * *

Signed and filed at Des Moines, Iowa this 29th day of June, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

FRANCIS NOCK,

Claimant,

vs.

A & M LAUNDRY,

Employer,

and

GREAT AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

Arbitration Decision

This is a proceeding in arbitration brought by Francis Nock against A & M Laundry, employer, and Great American Insurance Company, insurance carrier, for benefits as a result of an injury on May 13, 1980. On August 12, 1981 this case was heard by the undersigned. This case was considered fully submitted upon receipt of Mr. Berg's letter on August 14, 1981.

The record consists of the testimony of claimant; and defendants' exhibit 1.

Issues

The issue presented by the parties at the time of the hearing is the extent of permanent partial disability benefits he is entitled to. At the start of the hearing, defendants conceded that claimant's injury arose out of and in the course of his employment with defendant employer and that there is a causal connection between claimant's injury and his disability.

Facts Presented

Frank D. Edington, M.D., in a report dated May 27, 1980 revealed that claimant caught his left hand and arm in a shirt press on May 13, 1980 and suffered second and third degree burns.

Reports of John E. Anderson, M.D., and Albert E. Cram, M.D., reveal that claimant was transferred to the Burn Unit of the University of Iowa Hospitals and Clinics where he underwent skin grafts. In a report of July 17, 1980 the doctors disclosed that the burns involved claimant's left wrist as well as his hand. Claimant's first skin graft was performed on June 5, 1980, his second skin graft was performed on November 6, 1980. At the second operation the doctor released the left first web space contacture. In a report dated December 6, 1980 Dr. Cram noted that there had been burns on the lateral surface of the wrist as well as the medial surface of the wrist. Dr. Cram disclosed in a report dated May 14, 1981 that claimant lacked approximately 12 degrees of abduction in the left thumb which he considered a permanent disability.

Alfred C. Rice, M.D., who examined claimant on his behalf, stated the following in a report dated February 20, 1981:

> I examined your client, Francis Nock, in my office at 2004 N. Hwy. Blvd. on the afternoon of 19 February 1981. As you know, the patient suffered a full-thickness burn to the left thumb, posterior surface of the left hand including the long, ring, and little fingers. On physical examination this individual has definite and significant limitations in function of the left hand. Full-thickness skin grafts are present on the thumb and web of the hand. There is a deep triangular surgical scar in the skin graft at the site of a release operation for transsection of the flexor pollicis longus. Extension of the left thumb is limited to 45 degrees. Usual extension is 75-90 degrees. The left thumb cannot be flexed to oppose the base of the left index finger. There is a gap between the tip of the thumb and the proximal end of the index finger of at least 2 cm. Apposition of the thumb to the tip of the little finger is restricted. There is a space of 2.5 cm. between the tip of the thumb and the tip of the little finger when an attempt is made to oppose those two parts. Medial and lateral flexion of the index, long, ring, and little fingers is not restricted. Hyper-reactivity to coarse, soft, and pain stimuli is elicited. This is most prominent over the lateral aspect of the hand, immediately lateral to the hypothenar eminence. There is an absence of sensation over the distal and proximal phalanges and metacarpal bone of the left thumb. The patient cannot detect pin prick, soft, or firm touch on the thumb. The skin surface over the anatomic snuff box is hypersensitive. Immediate and abrupt withdrawal occurs when the anatomic snuff box is touched with the tip of the pin or with the pin head. Abrupt withdrawal even occurs when this area is touched by a wisp of cotton.
>
> Grasp in the left hand is 50% or less than the strength which is present in the right hand. The patient cannot retain my two fingers in a vise-grip in his left hand. There is a hyper-reactive response to the touch of an ice cube over the little finger. Over the skin graft on the thumb, a response cannot be elicited until the cold penetrates tissue deep to the skin graft. Again, when this occurs, the patient promptly withdraws the hand from the cold stimulus. By history, the patient can tolerate only luke-warm water adjacent to the hand.
>
> In conclusion, the patient has a loss of 50% of the strength in the grasp, he cannot oppose the thumb to the little finger, nor can he oppose the thumb to the base of the index finger. Extension is limited. The thumb skin graft is insensitive to pin prick, soft touch, and coarse stimulation. It is exquisitely sensitive to deep and penetrating cold. My estimate is that there has been a loss of at least 50% in the use of the hand. Since the patient cannot use the hand he cannot use his left upper extremity to its full capacity, equal to that of the right upper extremity. A 50% impairment of use of the left upper extremity corresponds to a 30% total body impairment according to data extracted from *Guides to the Evaluation of Permanent Impairment* published by the American Medical Association.

Claimant testified he cannot tie a shoe and cannot grasp with his left hand. Claimant indicated his hand feels cold all the time and warms it up by placing it in his shirt. Claimant stated that if he bumps his wrist area it feels like a shot and disclosed he no longer uses his left arm for much. Claimant also revealed that he cannot open a car door with his left hand anymore.

At the time of hearing, the undersigned observed claimant's hand and watched him move it in different ways as his attorney tried to demonstrate claimant's problems.

Applicable Law

An injury to a scheduled member entitles the claimant to weekly compensation for permanent disability as limited by the schedule; claimant is not entitled to industrial disability. *Barton v. Nevada Poultry*, 253 Iowa 285, 110 N.W.2d 660 (1960). *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 10 N.W.2d 569 (1943). *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W. 598 (1936).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to com-

pensation except as provided by the statute. *Soukup v. Shores, supra.*

The plaintiff has the burden of showing that while the injury which was sustained was limited to a scheduled member, there resulted an ailment extending beyond the scheduled loss. *Kellogg v. Shute and Lewis Coal Co.*, 256 Iowa 1257 130 N.W.2d 667 (1964).

Analysis

Even though Dr. Cram was claimant's treating physician, more weight is given to the testimony of Dr. Rice because it is obvious from his report what he was considering at the time he made his evaluation of claimant's hand. Furthermore, the undersigned's observation of claimant's hand supported and reinforced the determination of Dr. Rice. It does not appear that Dr. Cram actually considered all the factors used in determining permanent impairment.

Although claimant had skin grafts on his forearm, it was also clear to the undersigned that claimant's disability did not appear to go into his arm. Dr. Rice's report also supports such a finding in that he infers a loss of 50 percent of the hand equals 50 percent of the arm. Dr. Rice does not state that any actual functional impairment went beyond the hand.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On May 13, 1980 claimant burned his left hand and wrist while working for the defendant employer.

Finding 2. As a result of the injury, claimant has a permanent functional impairment of fifty (50%) percent of the hand.

Finding 3. Claimant has no permanent functional impairment to his wrist or arm.

Conclusion A. As a result of his injury, claimant has a fifty (50%) percent permanent partial disability to his left hand.

THEREFORE, defendants are to pay unto claimant ninety-five (95) weeks of permanent partial disability at the rate of one hundred and 65/100 dollars ($100.65) per week.

Defendants are to pay the costs of this action.

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to Code section 85.30.

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

* * *

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

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

JANET NOVAK,

Claimant,

vs.

LEFEBURE CORPORATION,

Employer,

and

NATIONAL UNION FIRE INSURANCE,

Insurance Carrier,
Defendants.

Review-Reopening and Arbitration Decision

This is a combined proceeding in review-reopening and arbitration brought by Janet Novak, the claimant, against her employer, Lefebure Corporation, and the insurance carrier, National Union Fire Insurance Company, to recover benefits under the Iowa Workers' Compensation Act on account of injuries she sustained on July 14, 1977 and June 28, 1978. This matter came on for hearing before the undersigned at the Linn County Juvenile Court Facility in Cedar Rapids, Iowa on August 5, 1981. The record was considered fully submitted on August 13, 1981.

On February 3, 1978 defendants filed a first report of injury concerning the July 14, 1977 injury and a memorandum of agreement indicating that the weekly rate for compensation benefits was $133.14. On April 17, 1978 defendants filed a form 5 indicating that 21 5/7 weeks (July 15, 1977 through October 19, 1977 and November 11, 1977 through January 4, 1978) of temporary total disability benefits had been paid pursuant to the memorandum of agreement. On July 19, 1978 defendants filed a first report of injury concerning a June 28, 1978 injury. On July 19, 1978 defendants filed a notice of voluntary payments indicating the weekly rate of voluntary compensation benefits was $150.31. On November 16, 1978 defendants filed a letter indicating that they were denying claimant's claim. On April 20, 1981 defendants filed a form 2A indicating that 12 5/7 weeks (June 29, 1978 through September 24, 1978) of voluntary benefits had been paid pursuant to the memorandum of agreement.

At the time of the hearing, the parties stipulated that the applicable weekly rate of compensation for the latter injury date is $150.31.

The record consists of the testimony of the claimant; defendants' exhibit A, consisting of three exhibits: 1) varied medical reports, 2) temperature charts and claimant's absence records, and 3) correspondence between defense

counsel and David A. Rater, M.D.; defendants' exhibit B, the deposition of Dr. Rater; defendants' exhibit C, four return-to-work releases; and an August 7, 1981 note from Alfred Brendel, M.D., filed August 13, 1981.

Issues

The issues to be determined include whether claimant suffered an injury in the course of and arising out of her employment on June 28, 1978; whether there is a causal connection between the alleged injuries and the alleged present disability; and the nature and extent of the disability.

Recitation of the Evidence

Claimant testified that on July 14, 1977 while performing her duties as an electronic utility person, which entailed carrying materials to and from the electronic assemblers, she began to feel clammy and dizzy. She reported her symptoms to defendant employer and was advised to go home. From her own notes taken at and since that time, claimant recalled that the temperature in the work environment on July 14, 1977 was 100 degrees and the humidity was 53 percent. (According to defendants' exhibit 2, the temperature high inside the plant was 104 degrees and 101 degrees outside on that particular day.) Claimant explained that the particular operation in which she was involved had moved its location to the top of the plant. A metal roof was overhead. According to the claimant, other employees also became ill from the heat.

Claimant reported that she went to Alfred Brendel, M.D., the following day. In a letter dated September 27, 1979 and addressed to claimant's former counsel, Dr. Brendel states:

> She was first seen July 15, 1977, with a blood pressure of 140/90. A Serum Potassium level was ordered. She was on Hydrodiuril 50mgms twice daily. Her Potassium level was 3.0; normal levels 3.5 to 5.3. She also complained of vertigo and was given Antivert 12.5mgms three times daily for this.
>
> She was seen on July 25, 1977, August 2, 1977, and August 9, 1979. A Brain Scan and EEG were ordered. She was seen several times after that and her Potassium levels were 3.1 and 3.2 and 3.1. Her blood pressure was in normal levels.

In a September 23, 1977 letter to defendant insurance carrier, Dr. Brendel attempts to explain what brought about claimant's symptoms:

> In all probability, the low potassium level was present before her involvement with the overheating at work. Probably the overheating contributed to the aggravation of her condition. The medicine that she takes for her blood pressure is capable of reducing the potassium level, and may have caused the low potassium level. If she stays on her present medication for potassium, it should not occur again.
>
> The condition probably is work related. We think that she can go back to work probably in two weeks because her present potassium level is going up.

When claimant returned to work on October 20, 1977, she bid on the position of electronic assembler. Although such position paid 10 cents an hour less than the utility spot, claimant anticipated that the sedentary assembly job, which included a fan at each station, would benefit her condition. However, on November 11, 1977 she became dizzy and passed out at work. (Defendants' exhibit 2 does not indicate what the temperature was inside the plant that day. The temperature high outside was 42 degrees. Claimant did not report any figures of her own.) In the same letter to claimant's former counsel, Dr. Brendel notes that the day preceding the incident claimant had been switched to Aldactazide to try to lessen her potassium loss.

Claimant was hospitalized from November 11 to November 17, 1977. Hospital records for that period report claimant's medical history as including a past cholecystectomy and appendectomy, hypertension for 5 years and hypokalemia since June 1977. A brain scan and EEG conducted at that time were normal. Claimant's potassium level went up to 3.6 during her stay. Final diagnosis was hypertension probably secondary to contraceptive medication. In a letter dated January 24, 1978 and addressed to defendant insurance carrier, Dr. Brendel stated that claimant's hypokalemia was due to dehydration initially "set off" by excessive heat at work. However, it was his opinion that she had recovered and would not suffer further problems unless placed in an environment that caused her to sweat excessively. He had released her to return to work on January 5, 1978. (Due to a plantwide strike, claimant did not actually return to work until January 30, 1978.)

Again, in the letter to claimant's former counsel, Dr. Brendel recalls:

> She was followed every one to two months until March 27, 1978, when she was started on Zaroxylin. Her blood pressure was 175/120. By June 3, 1978, her blood pressure was again in normal levels. On June 29, 1978, she stated it got too hot at work the day before. She remained on Zaroxylin. On July 3, 1978, her Potassium level was 3.7; in normal range. She was to see Dr. Abbo on August first.

Claimant testified that she was dizzy at work on June 28, 1978. She was off until September 25, 1978. (Defendants' exhibit 2 indicates that plant high temperatures from June 22 through June 28, 1978 ranged from 96 degrees to 101 degrees and outside temperature highs were from 79 degrees to 89 degrees. According to the claimant, other employees left work on June 28, 1978 because of the heat.)

In a letter addressed to Dr. Brendel, Fred E. Abbo, M.D., states that he saw the claimant on August 1, 1978 and her chief complaint was that of low potassium off and on over the past year. He noticed that claimant had high blood pressure for 5 1/2 to 6 years and had taken various diuretics for such condition. He opined that claimant's hypokalemia was related both to the diuretics and the heat exposure at work. However, in a discharge diagnosis for claimant's August 12 through August 25, 1978 hospitalization, Dr. Abbo reported that claimant's hypokalemia was due in part to diuretics and "in part cause undetermined." He also diag-

nosed premature ventricular contractions (PVC's), hypertension and "rule out hyperaldosteronism." (Claimant was subsequently hospitalized from September 3 to September 8, 1978 for frequency of PVC's. She was taken off Quinidine because she had a fever reaction to such medication.)

In a follow-up report to Dr. Brendel dated September 15, 1978, Dr. Abbo reports that claimant's plasma renin stimulation test came back normal and therefore he ruled out hyperaldosteronism. He noted that claimant's potassium had remained stable recently while she had been off diuretics and that her blood pressure was reasonably good without medication. He correlated an increase in claimant's Norpace dosage with noticeable alleviation of her PVC problem. His impression on that date included:

1) Hypertension, cause undetermined (essential)

2) Hypokalemia, probably related to the diuretics that she had had and also in part caused by the excessive perspiration which she experienced at work in the heat environment

3) PVCs, in part related to the hypokalemia, and in fact probably in large caused by the hypokalemia. Of course, she is not hypokalemic at this time, and she still had some PVC problems now, so that it is not the hypokalemia alone that has contributed to it. There must be some additional factor. But again, I feel quite definitely that the hypokalemia has contributed to the problem.

In a September 22, 1978 letter to defendant insurance carrier, Dr. Abbo summarized his most recent treatment of the claimant and responded to a number of defendant carrier's inquiries:

> This is a follow-up letter on my previous one on Mrs. Janet Novak. Since my last letter, I have been following her along for her medical problems. She has had a continuing problem with extra heartbeats (called PVC's). This has been her main problem in the interim. Her blood pressure and potassium have been under good control in the meantime. I have tried various medications and finally we have settled on one, called Norpace, which she is now taking four times a day. In addition, I have put her on some Inderal 10 mg three times a day.
>
> I have examined her this morning, and she reports that she is having only rare extra heartbeats. We have also done a treadmill test on her in the meantime and it was normal, which indicates then that these extra heartbeats are not serious. The only reason I am treating them, is that they are frequent and they upset and disturb the patient. I do not think they present a serious problem to her health however. But it is justified to treat them, which is what I am doing. However, in the meantime, her blood pressure has crept back up a little and I have put her on some medicine for that, the Inderal, which serves the double purpose of helping to control her blood pressure as well as the PVC's. She probably will be needing some additional medication for her blood pressure and I will supervise the administration of that medication. I will avoid giving her any medication that would tend to deplete the potassium.
>
> In regard to the questions that you asked me to answer, please be advised as follows: 1) Her last hospitalization (discharged September 8, 1978) was not necessitated or attributable to the low blood potassium. It was necessitated by her irregular heart rhythm. Her blood potassium at the time that she was admitted was normal, as far as my records indicate. 2) The patient has been off work recently, not because of the low blood potassium, but because of the irregular heartbeat. Her serum potassium has been normal since she was discharged from the hospital on the previous occasion, namely discharged on August 25, 1978. 3) Regarding the contribution of sweating to her low potssium problem, please be advised that yes, indeed, sweating does cause a loss of potassium from the body. Any sweating causes a loss of potassium. 4) Regarding the working conditions inside the Lefebure plant and whether or not they could cause the low potassium problem, this question is difficult to answer as posed. The main point is that sweating of any degree does contribute to a potassium loss. However, most people can tolerate this potassium loss without any serious, harmful effects. Whether or not the conditions at the Lefebure plant are abnormal and whether or not they contribute a high risk of serious loss of potassium from the body, can be determined only by checking the blood potassium level on the employees exposed to the particular environment in question and seeing what is the percentage of these individuals who develope [sic] a serious potassium loss. 5) As far as any contributing factors to the potassium depletion problem, the only one that I am aware of operating in this patient would be the blood pressure medicine she was taking, which tends to deplete both sodium and potassium from the body.

Claimant testified that she again missed work on September 29, 1978 and from October 24, 1978 through October 27, 1978 because of dizziness. She saw Dr. Abbo on October 24, 1978 for complaints of persistent skipped heartbeats and fatigue. Dr. Abbo's impression included only PVC's. He concluded:

> We have drawn a screening profile on her, including SMA-12 type tests, CBC, and direct Coombs test. If these give us our answer, we will adjust her medications accordingly, otherwise I have no medical explanation for her fatigue. In view of the family's concern about the continued problem here, we have agreed to allow another specialist to take care of her at a place of their choice. I will withdraw from the case as of the time that we get these blood tests back and return her to her family doctor, Dr. Brendel and the new specialist, whomever they choose. In the meantime, as I explained with the husband, I have no medical justification for her

fatigue or medical disability or inability to work unless the blood tests show an abnormality to explain the problem. However, in view of the uncertainties involved, I have advised her to stay at home until we get the results of these blood tests back.

At some point thereafter claimant bid on the position of inspector-tester which pays 15 cents more per hour than the position of assembler and 5 cents more per hour than that of utility worker. Claimant testified that with the exception of a couple of days in 1979 when she became ill from the heat and spent those days in the personnel office, she has not experienced similar episodes of dizziness to date. She attributes such fact to the ventilation and insulation improvements defendant employer has made over the past few years.

Claimant acknowledged that 60 days after she began working for defendant employer she learned during a general physical examination that she had high blood pressure or hypertension. She is not claiming that condition is related to her work. She denied being advised that medication she was taking for such problems resulted in low potassium. However, she is claiming that the PVC condition, which presently is under control by means of medication, is connected to her low potassium proclivity, which in turn relates to the 1977 and 1978 episodes of dizziness and fainting.

Claimant presently weighs 195 pounds. She is still taking four medications and undergoes periodic potassium tests. Her present complaints include being tired and experiencing skipped heartbeats. She finds that she must limit her activities in summer but generally has felt better each succeeding summer.

David Anthony Rater, M.D., whose practice is restricted primarily to cardiovascular disease, read claimant's medical records contained in defendants' exhibit A-1 (except for one sheet which he reviewed at the time of his deposition and which he indicated would not change his opinion) and the temperature records found in defendants' exhibit A-2. Thereafter, in a letter dated November 29, 1979, he responded to certain questions posed by defense counsel:

I reviewed the entire record that you sent me accompanying your letter of 22 October 1979. In response to the questions you posed in your letter of 8 August 1979, it is my impression that she has 1) essential hypertension, 2) hypokalemia, almost certainly secondary to diuretic medication used for control of her hypertension, 3) frequent premature ventricular contractions at times symptomatic which are most likely secondary to or related to her hypertension and her hypokalemia (that is, low potassium). She also has a history of obesity.

In response to question number 2, I do not believe that the work environment, that is, specifically the hot or cold temperatures have been a substantial contributive factor in causing either her hypertension or her hypokalemia or her premature ventricular contractions. Likewise, I do not believe it has in any significant fashion aggravated the above conditions. As Dr. Abbo mentioned in his letter, potassium is lost in the process of sweating normally; however, the normal body compensatory mechanisms would not ordinarily lead to abnormally low serum potassium levels by sweating under conditions described at her place of employment.

In response to question number 3, I do not believe there is any illness which I would causally associate with her work environment which would be permanently disabling. As mentioned above, I do not believe that any of the above conditions have been aggravated by her work environment. (Defendants' exhibit 3.)

During his deposition, Dr. Rater emphasized that neither he nor Dr. Abbo could specify the underlying cause of claimant's high blood pressure and thought it extremely doubtful that such condition was related to her employment environment. While he agreed that it might be conceivable the claimant would experience some weakness and fatigue from low potassium levels, he found it unlikely that claimant's hypokalemia and PVC's were related to any heat exhaustion because, if they were, such conditions should have corrected themselves in a matter of a few days rather than persisting for months. He noted that claimant's symptoms occurred year round and that neither the temperature of her working environment nor her energy output justified relating her physical complaints to her work. Dr. Rater elaborated on his assessment of claimant's condition:

A. She's had numerous serum potassium levels measured. Some normal, some low and as near as I can tell, most of the low potassium levels occurred at times she was on diuretic therapy which would not be unusual. For the most part, her potassium levels were in a range that are below the range of normal but above the range where I usually expect much in the way of symptoms other than premature contractions possibly being a little more frequent.

Q. Other than the premature contractions, did you find any evidence of symptomology that you associated causally with the low blood potassium?

A. I thought it extremely unlikely that her symptoms were secondary to the low potassium in terms to the tiredness, light-headedness, fatigue. Those are very, you know, subjective symptoms. Most people would have potassium in the range that the patient exhibited are asymptomatic other than for, perhaps, some palpitations or maybe some tiredness — of course, is very difficult to evaluate and all I can say is that the majority of individuals don't exhibit those symptoms at that level of potassium. Although, I couldn't say absolutely that some of her symptoms were not related to the low potassium.

Q. Assuming that Mrs. Novak has correctly reported her symptomology and based on your background, education, training and experience in treating patients with similar conditions and based on your review of her medical records and further based on reasonable medical probability, do you have an opinion as to the cause or causes of the symptomology that she related, including tiredness?

A. The most common reason that we see people complain of fatigability or tiredness is usually on the emotional basis rather than on a physical basis and, you know — I can't say if that indeed was the situation but it would — that is certainly a possibility. Does that full enough answer or do you want elaboration?

Q. Well, if you are able to elaborate further, if you have any other thoughts or information that you would relate to be material in the presentation of those symptoms, I would appreciate that.

A. The — As a general matter — As a group of people that have the most prematurities or palpitations that I see are one of the most common groups of individuals that have skipped beats or palpitations are individuals with high blood pressure and that is probably partially related to a little extra strain on the heart making the heart muscle a little more apt to beat irregularly or skip, and then the medications that are used to treat the high blood pressure, the diuretics lowered the potassium and again predisposed the individual to palpitations. We also see individuals with palpitations and heart skips that are unrelated to anything, that we are unable to identify. It is a fairly common problem. But she did have high blood pressure. She did take the medication so at least in part that her palpitations were related to that. Although, it may very well be that she's just an individual that has frequent palpitations or prematurities. Everyone has prematurities at some time. Some people have them more than others. Some people are with them symptomatic and others remain asymptomatic.

Q. Returning to my question of cause or causes, potentially of low blood potassium or hypocalemia [sic]. You mentioned the primary cause being diuretic therapy. Are there any other causes that you are aware of —

A. If an individual had excessive loss of potassium, we see in the hospital individuals that have surgery, that maybe have their stomach juices sucked out through a tube, that by a loss of potassium in that fashion, we can render them low on potassium. Likewise, if while we were doing that we replace only water without potassium in it, we can accelerate the lowering of the potassium. In this particular instance, the question at hand would be whether or not the sweating that she had at work when it was hot would cause an excessive amount of potassium loss through the sweat which she would be unable to compensate for. As Dr. Abbo mentioned in his letter it is certainly possible to lose potassium in a sweat. In my opinion it would be uncommon and unlikely that persons would lose sufficient potassium through sweat alone that they were not able to replace through their diet. The kidneys regulate potassium loss. If your potassium becomes low because it may be excessive loss from diarrhea, loss of body fluids from diarrhea or vommiting [sic], to a lesser extent from sweating, you don't excrete as much potassium as you would if you were taking in greater amounts of potassium and it would be going out either in the stool or the urine so that in the situation where she would sweat a lot at work because of the temperature even though she would be losing some potassium in some fashion. I think it would be quite unusual for that alone to lead to significant potassium levels. (Rater deposition, pages 8 through 11).

* * *

A. I think that her palpitations may have been related to her high blood pressure and to her medications or may have been unrelated in just what we call "idiopathic" — No known definite reason. Palpitations, of course, may be affected by a large number of factors, including ingestion of caffeine containing beverages or medications, stress, use of tobacco or alcohol, so that in terms of the palpitations it may have been also aggravated by the medication if they rendered potassium low. (Rater deposition, page 22.)

(Accordingly, Dr. Rater qualified the third point of his report by changing "most likely" to "possibly.")

Applicable Law

The claimant must prove by a preponderance of the evidence that the injuries arose out of and in the course of her 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 her injuries occurred at a place where she reasonably may be performing her duties. *McClure v. Union, et al., Counties*, 188 N.W.2d 283 (Iowa 1971).

Arising out of suggests a causal relationship between the employment and the injury. *Crowe v. DeSoto Consolidated School District*, 246 Iowa 402, 68 N.W.2d 63 (1955).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of July 14, 1977 and June 28, 1978 are 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., supra.* 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, supra.* In regard to medical testimony, the commissioner is required to state the

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

While a claimant is not entitled to compensation for the results of a 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 (1961).

Analysis

Dr. Brendel, who treated the claimant during her first two periods of alleged heat exhaustion, opined that claimant's low potassium was a preexisting condition that was temporarily aggravated in July of 1977 when she became overheated at work. (Whether he thought she became overheated again in November of 1977 is doubtful.) However, he explained in January of 1978 that claimant had recovered from the "injury" and would not suffer additional problems unless she became overheated again.

It is questionable whether claimant sustained an injury in the course of and arising out of her employment in July 14, 1977. The weight of the medical evidence indicates that her low potassium was due to the medication she was taking for her high blood pressure and not to any amount of sweating she might have been experiencing on July 14, 1977. At best, Dr. Brendel suggests that the sweating contributed to the loss. This is not the equivalent of stating that the loss of potassium responsible for claimant's symptomatology was directly traceable to her employment. Rather it is apparent that claimant's problems are directly traceable to the loss of potassium from ingestion of diuretics. It is noted that Dr. Brendel's anticipation that claimant would suffer no repeated instances of exhaustion if not exposed to a hot environment was justified by the fact that claimant did suffer such a flareup in 1978 (the subject of the arbitration) but only subsequent to repeated blood pressure problems and concomitant taking of diuretics.

Nevertheless, defendants conceded an injury in the course of and arising out of claimant's employment on July 14, 1977 when they filed a memorandum of agreement for such injury date. However, in light of Dr. Brendel's opinion regarding claimant's full recovery from the initial overheating and defendants' payment of temporary total disability benefits from July 15, 1977 to October 19, 1977 and from November 11, 1977 to January 4, 1978, claimant is not entitled to further compensation for such episode.

With respect to claimant's alleged injury in June of 1978, the undersigned must find that claimant's symptomatology is directly traceable to the preexisting condition and not to any alleged overheating at work. Dr. Abbo attributed claimant's hypokalemia to her diuretic medication for blood pressure and (on occasion) to heat exposure at work. It cannot be overlooked that the latter contributing factor was not mentioned in the August 25, 1978 hospital discharge diagnosis signed by Dr. Abbo nor that Dr. Abbo conceded that whether claimant's working condition would have caused a serious loss of potassium would depend on further investigation. Additionally, Dr. Rater, who at least on the face of the present record appears to have the greater expertise, also opines that claimant's hypokalemia was likely related to the diuretics she was taking for her hypertension and that any sweating at work was negligible. Both Dr. Rater and Dr. Abbo suggest that claimant's present complaints of fatigue and PVC's may be related to some other cause than her hypokalemia. Neither medical expert relates such complaints to either the July 14, 1977 or June 28, 1978 episode.

Parenthetically, it is noted that claimant would not be entitled to industrial disability for her voluntary bid to a lower paying job following the first period of temporary total disability. Such transfer was not required by defendants. (Had she returned to the same job and suffered further complaints, there is no indication that defendants would not have reinstated her benefits in light of the fact that they did so for the subsequent period of disability in 1977 through early 1978.) Contrast *Blacksmith v. All-American Inc.*, 290 N.W.2d 348 (Iowa 1980).

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. The weight of medical evidence indicates that the claimant experienced episodes of hypokalemia due to low blood potassium levels caused by the diuretics she took for a high blood pressure condition.

Finding 2. The weight of medical evidence indicates that claimant's premature ventricular contractions might be related to her hypokalemia.

Finding 3. The weight of the medical evidence and the record as a whole indicated that claimant's symptomatology was directly traceable to the preexisting condition and not to any alleged overheating resulting from the work environment.

Finding 4. Defendants filed a memorandum of agreement regarding the first injury date (July 14, 1977) and paid claimant temporary total disability benefits for the two episodes of alleged heat exhaustion. Defendants paid claimant voluntary benefits for the alleged period of disability following the June 28, 1978 incident of alleged heat exhaustion.

Conclusion A. Claimant has failed to sustain her burden of proving that she suffered any additional disability as a result of the July 1977 injury.

Conclusion B. Claimant has failed to sustain her burden of proving that she sustained an injury in the course of and arising out of her employment on June 28, 1978.

Order

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

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 22nd day of October, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

FREDERICK WILLIAM OHMSIEDER,

Claimant,

vs.

UNITED BRICK & TILE COMPANY OF IOWA,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Frederick William Ohmsieder, the claimant, against his employer, United Brick & Tile Company, and the insurance carrier, Fireman's Fund Compensation Act as a result of an injury he sustained on February 1, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on September 15, 1981. The record was considered fully submitted on October 7, 1981.

An examination of the industrial commissioner's file indicates that a first report of injury was filed on March 4, 1981. A form 2A was also filed on October 21, 1981 reflecting certain compensation benefits which were paid on a voluntary basis.

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $141.38. The parties agreed that the claimant had not returned to work since the date of injury, however, there was no stipulation that his failure to return to work was causally related to this alleged work incident. The parties stipulated to the fairness and reasonableness of medical bills involved herein; however, there was no stipulation as to any causal relationship between the medical services rendered and the alleged work incident.

The record in this case consists of the testimony of the claimant, Leslie M. Gregg, Marjorie L. Torrance, Parnell H. Mahoney, John D. Hill, Lawrence Newman, David C. Temple, M.D., Robert B. Stickler, M.D., Joseph M. Torruella, M.D.; claimant's exhibits 1 through 6 inclusive; and defendants' exhibits A through K inclusive.

The issues to be determined herein are whether the claimant sustained an injury which both arose out of and in the course of his employment; the existence of a causal relationship between that injury and the claimed disability as well as the nature and extent of that disability. There is an additional issue of the appropriateness of certain medical charges under Section 85.27 of the Code.

Findings of Fact

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

It is undisputed that on the February 1, 1980 the claimant was an employee of the defendant. The claimant, Frederick William Ohmsieder, is 82 years of age and began working for the defendant at age 54. The employment relationship spans a period of approximately 28 years.

On the date of injury, February 1, 1980, the claimant was pushing a kiln car at his employer's place of business when he strained himself and immediately noted a pain in the right side and groin area. The pain was accompanied by a bulging of the lower stomach. Claimant reported the incident to this employer on February 1. An examination of the employer's first report of injury confirms the claimant's testimony with respect to pushing an empty kiln car and the onset of pain in the lower right abdomen. The first report of injury, although filed March 4, 1981, was prepared on February 5, 1980, some four days after the date of injury. Because it was prepared in close proximity to the injury date, this report is particularly persuasive concerning the location of the injury.

The claimant was examined by Dr. Joseph M. Torruella, M.D., and a condition of bilateral inguinal hernia was diagnosed. This finding is confirmed by the testimony of Dr. Torruella. The claimant underwent a surgical procedure on or about February 11, 1980 for correction of the bilateral hernia difficulty. Surgery was performed by Dr. Torruella.

The record reflects that the claimant has not returned to work for the defendant.

The claimant indicates that prior to the date of injury he had no medical difficulties with his right side. At one time he had gallstones, a prostrate difficulty and high blood pressure, but during the entire course of his employment with the defendant, he would not miss more than one day of work on an annual basis.

Mr. Ohmsieder describes his present physical condition as being "ok" until he exerts himself. He then has pain and discomfort on the right side. He denies pain on the left side at the present time. He indicates that he cannot walk as well now as prior to the date of injury and notices pain after walking approximately two blocks. Stooping and bending motions also cause right side pain. The claimant also notices discomfort in the belt line area when he sits for an extended period of time.

The claimant denies having had discomfort on the right side prior to the date of injury. With respect to left side pain, he indicates that eight to ten years ago he noticed a pain in that area, but did not lose any work as a result. He indicates that the left side pain was of no consequence and he does not relate this to the work incident. The claimant indicated that he enjoyed his work for the defendant and would like to

return, but is physically unable to do the required lifting, walking and stooping motions of the job.

The claimant is presently on blood pressure medication and has a hearing problem, neither of which are related to the incident. After the claimant's initial release from the hospital, he returned for the removal of a growth under his arm and was incapacitated for about four weeks as a result. The evidence also indicates that the claimant had a knee problem due to an old work injury, but never missed work as a result of this affliction.

Leslie M. Gregg testified on behalf of the claimant. Mr. Gregg is presently employed by the defendant and has been with them for 22 years. He worked under the claimant's supervision for a number of years. This witness indicates that the claimant complained to him on February 1, 1980 that he may have incurred a hernia. Mr. Gregg describes the claimant as being an individual who is not a complainer and who rarely missed work. He also describes the claimant as being very honest.

Marjorie L. Torrence testified on behalf of the claimant. She has been employed by the defendant for three years and was employed by them on February 1, 1980 as a general office worker. She indicates that on February 1, 1980 the claimant reported an injury to her and indicated it was in his stomach area.

Parnell H. Mahoney testified on behalf of the defense. He is the president of United Brick & Tile Company and a resident of Sioux City, Iowa. He confirms the fact that the claimant has been in the company's employ since 1952 and indicates a personal acquaintance with the claimant since that date.

From 1952 through 1970 the claimant was the defendant's plant superintendent in Adel, Iowa. Mr. Mahoney indicates that in 1970 an executive decision was made to place a younger man in the position claimant held. This was partially due to the fact that new, highly technical equipment was being installed at defendants' plant. At that time claimant was in his 70's and his age as well as his physical condition was a factor in the determination.

Mr. Mahoney indicates that as the 1970's progressed, it became evident that the claimant's physical condition was deteriorating. As time progressed, the defendant scaled down the claimant's work activities. This eventually led to the claimant being put in charge of inspecting the kiln cars, a function he was performing on the date of the injury.

Mr. Mahoney indicates that as long as the claimant was physically able to perform his job, the defendant intended to keep him in their employ. He is aware of claimant's increased hearing problem, but this does not appear to have interferred with his work.

The defendant's decision not to take the claimant back was based upon the claimant's general physical condition as this witness observed it and it was not, according to Mr. Mahoney, related exclusively to the hernia situation. Mr. Mahoney felt that the claimant had reached a point physically where he would endanger his own safety if he were permitted to return to work. He based his opinion on the claimant's hearing condition as well as his general ill-being as this witness observed it. The hernia situation was not the basis exclusively for the decision not to take the claimant back except as it relates to his general health situation.

He describes the claimant as being a good employee and a personal friend for a number of years. Mr. Mahoney is sincere and totally credible in his testimony.

John D. Hill testified on behalf of the defense. He has been employed by the defendant since 1948 and holds the position of vice-president in charge of manufacturing. He has been personally acquainted with the claimant since 1952 and confirms that at one time the claimant was the plant superintendent in Adel as well as holding other managerial positions for the defendant. He had the opportunity to observe the claimant working at the Adel plant at numerous times and made it a point to visit with the claimant on all visits to the Adel plant. Mr. Ohmsieder is described as a longstanding and fine employee.

Mr. Hill describes the work generally at the defendant's plant as being hard and very physical. He indicates that complaints were received by three prior plant superintendents that due to the claimant's increasing physical limitations, it was starting to become difficult to work with him. This witness noted deterioration in claimant's physical condition over several years. He reports that early as 1970 some consideration had been given to retiring the claimant based upon his age which was 72 at the time. This, however, was not undertaken.

Lawrence Newman testified for the defense. He has been employed by them since 1966 and at the time of hearing was an assistant plant superintendent. He has known the claimant since 1968 and was at one time the claimant's supervisor. He indicates that the job of car inspector in the kiln area was tailored to fit the needs of the claimant. He also confirms prior testimony that the claimant has had a gradual physical deterioration. He describes claimant as a good employee and not an individual to complain or to malinger. This witness confirms the facts of the work incident as recited by the claimant.

David C. Temple, M.D., a specialist in internal medicine, testified in this case. Dr. Temple conducted the preoperation evaluation of the claimant on February 8, 1980 and subsequently has seen the claimant on three or four occasions. Dr. Temple's testimony confirms that of the claimant that the inguinal hernia on the left side had been present for approximately five years and had caused the claimant no problem. Additionally, the right inguinal hernia had developed recently and, according to this physician, had been painful and caused discomfort with exertion. This physician indicates that the only way to precisely determine the cause of a hernia is to rely on this history as provided by the claimant. The history claimant provided indicated a new hernia on the right.

Post surgery, Dr. Temple had occasion to see the claimant and at time he was complaining of pain in the right groin area where a substance called Marlex was inserted by the operating physician. This physician is of the opinion that the claimant would have difficulty doing any kind of heavy work which involved stooping and bending, but could function adequately at a position where these physical manuevers were not required.

Joseph M. Torruella, M.D., testified that he is licensed to practice in the state of Iowa and specializes in the area of

general and thoracic surgery. He initially came in contact with the claimant on February 2, 1980 and after examination he reached a diagnosis of bilateral inguinal hernia. The physician admitted there was an ambiguity in his notes as to which hernia was old and which was new. This physician simply relies on the claimant's history that the incident occurred at work when expressing an opinion as to causation. He confirms the claimant underwent bilateral hernia surgery on February 11, 1980 and confirms that Marlex was used on the right side. He confirms that some patients relate an uncomfortable feeling after hernia repair and that claimant indicated his movement was impaired on the right. The physician would not dispute it.

Dr. Torruella again examined the claimant on September 24, 1980 and with respect to that examination, testified:

A. "I did re-examine Mr. Ohmsieder again in my office on September 24, 1980. Careful check of both inguinal areas revealed the presence of a well-healed incision. There was no evidence of recurrent hernias. There was no significant testicular or scrotal abnormality.

"The patient's major problem relates to severe pain syndrome localized in the region of his hernia repairs. This may in part be due to the need to have placed prosthetic material in his groin. He states that this pain incapacitates him to lift, bend and stoop, and there seems to be little doubt, with his symptoms and advanced age, he should not be fit for further employment."

Well, okay. Mr. Ohmsieder stated that he did not — was not able to lift, bend and stoop, and that's his assessment of his condition; and I just found it difficult to think that a man of 81 could do vigorous employment. Based upon his symptoms and my assessment of his age and general medical condition, I felt that he should not be returning to work. His other medical problems were certainly contributory.

Q. Did you find that the main reason he should not return to work was because of the pain syndrome caused by what we now feel to be the Marlex?

* * *

A. . . . I'm not being evasive, but I recognize that 81-year-old people are a little on the fragile side, and he had had a history of stroke in the past. He did have impaired hearing, which could contribute to occupational accidents. He had a heart murmur, which Dr. Temple related to aortic stenosis; and based upon his general medical condition, his advanced age and his symptoms, I made a medical judgment that in my view he was not fit for further employment, and that that was the background for the statement that I felt he was not fit for further employment.

In the past I have recognized, based upon making similar judgments, that my word was not final. It was almost invariably some other doctor, either the State's or the insurance company's, et cetera, and it would further modify my opinion or contribute to it, so I was speaking from my vantage point as one physician that had operated on this gentleman.

Dr. Torruella confirms that he placed Marlex in the right side to repair that hernia. He reconfirms on cross-examination that the claimant has complained that he is uncomfortable on the right. There was no indication that the work-related incident in question had in any way aggravated the old left hernia condition.

Robert B. Stickler, M.D., examined the claimant on a consultation basis. Dr. Stickler specializes in general surgery. The claimant's complaint to this physician at the time of the examination was "tightness below my belt." Dr. Stickler indicates with respect to his examination:

A. . . . I am aware, however, after seeing him, that he still had some high blood pressure and some arthritis and evidences of hearing loss and aging, as one would expect of a man his age.

Q. Did he make any mention of pain in association with these hernias?

A. I asked him to define it. I said, "Is this a sharp pain?" He said, "No."

He felt that it was a distress which was aggravated by certain postures; such as when he sits down, he feels a pulling, also in an automobile or a car; and he has to kind of pull his belt down and push out his tummy to relieve this pressure, and he did say "cutting pain" at that point.

On examination he notes:

A. The obvious hearing loss, the blood pressure of 175 over 95, the healed scars in the inguinal area, evidence of arthritis of the wrist, fingers, knees, ankles; moderate obesity, and really I think that's about the only criticism I can think of in my examination of him.

Q. What were your findings with regard to the results of the hernia surgeries?

A. I though they were excellent. I thought his wounds were well healed. He had no evidence of recurrences or weaknesses. He was able to do double leg liftings for me without distress.

I had him elevate and flex his thighs upon his abdomen and knees upon his thighs, singly and together.

He did have difficulty getting up from a kneeling position on the floor, but I think that that was more from his arthritis than from any effect of surgery.

Dr. Stickler recognizes that there is continuing uncertainty as to which hernia was the old one and which was the new. After examining the records and depositions in this case, Dr. Stickler is of the opinion that the Marlex was used

on the right side and that this was the old hernia and on the left side was new, but he admits that there is confusion in the record. He does not have an opinion as to which hernia was caused or aggravated by the work incident. He is also of the opinion that the claimant had a fine result from the surgical procedure. He is of the opinion that the claimant suffers from disabilities relating to his age, blood pressure, hearing and joint difficulties.

As a specific finding of fact based upon the testimony of the claimant as confirmed by the first report of injury and confirmed by the testimony of Dr. Temple, the new hernia, which is substantial in size, is found to be on the right side and the old hernia is found to be on the left. It is also specifically found, based on the record as a whole, that the claimant sustained an injury which arose out of and in the course of his employment with the defendant.

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).

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 1, 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).

In *Christopher B. Becke vs. Turner-Bush, Inc. and American Mutual Liability Insurance Company,* Appeal Decision filed January 31, 1979, the industrial commissioner pointed out:

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

Analysis

It is undisputed that on February 1, 1980 the claimant was an employee of the defendant.

Based upon the claimant's testimony as confirmed by co-employees, the first report of injury and the medical testimony, it is determined that on that date he sustained a personal injury as contemplated by the Iowa Workers' Compensation Act. Additionally, it has been determined that this injury both arose out of and in the course of his employment with his defendant.

The cutting issue in this case is the extent of claimant's disability and the effects of age on this consideration. This is a hernia injury and, as a consequence, an injury to the body as a whole and the industrial disability considerations apply.

At the time of hearing the claimant was 82 years of age. He has been employed by the defendant since 1952. The record clearly reflects that this gentleman was a good and loyal employee for the defendant. He was closely observed by the undersigned at the time of hearing and is found to be credible in his testimony.

The claimant had been consistently productive since 1952. The record reflects that as the years progressed, the job description and job responsibilities which were assigned to the claimant were adjusted to fit his declining general health situation. The employer is to be complimented for their efforts to maintain a position for the defendant for all these years. In return for this, it is clear that they received the services of a good and loyal employee. The claimant may attribute his long life to the opportunity to continue working after many people would have retired.

It is indeed unfortunate that after so many years of employment activity and opportunity which worked to the benefits of all parties, this relationship should culminate in a litigated dispute before this forum.

The record reflects that the claimant suffers from a variety of other physical maladies which are not of a compensable nature. There is no claim that these other physical problems were in any way related to the work injury.

An analysis of the medical data reflects that it is the combination of the hernia, other medical problems and age which brought about Mr. Ohmsieder's present inability to return to work for the defendant.

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, 245 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 act 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. * * * *

As the Iowa Industrial Commissioner pointed out in the case of *Christopher B. Becke, supra*:

> 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 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. . . .
>
> How to apply age as a factor when a person is nearing the end of his normal working life is a dilemma. When considering the age factor, it is apparent that the scope of employment for which claimant is fitted is narrowed simply because of the reluctance of employers to initially employ persons of advanced years. Therefore, the advanced age alone without the combination of an injury is limiting. . . .

It has been found that the claimant's work-related hernia was to the right side. From the medical data, this hernia appears to be of sizable proportion. Marlex was used in the repair procedure. The claimant testified continuing pain and discomfort in the right side which prohibits him from bending and stooping and prohibits him from doing the activities that he once was able to perform. It appears, based upon the testimony of Dr. Torruella, that there is some degree of permanency attached to this condition and that it contributed to his inability to work, a function he was able to perform until February 1, 1980.

Based upon the record as a whole and based upon the industrial disability considerations previously outlined, it is determined that the claimant has sustained a permanent partial impairment as a result of this incident of 15 percent of the body as a whole for industrial purposes. The record is unclear as to the length of healing period as contemplated under Section 85.34(1) and Iowa Industrial Commissioner Rule 500—8.3, and no award will be made.

Conclusions of Law

That on February 1, 1980 the claimant was an employee of the defendant.

That on February 1, 1980 the claimant sustained a personal injury which both arose out of and in the course of his employment with this defendant.

That the claimant has sustained a permanent partial disability for industrial purposes of fifteen (15) percent of the body as a whole and that this disability is causally related to the work incident.

THEREFORE, IT IS ORDERED:

That the defendants shall pay the claimant seventy-five (75) weeks of permanent partial disability benefits at the agreed upon rate of one hundred forty-one and 38/100 dollars ($141.38).

That the defendants have previously paid all medical and hospital charges related to this incident and will not be directed to pay anything further.

That costs of this action are taxed to the defendants pursuant to Industrial Commissioner Rule 500—4.33.

That interest shall accrue pursuant to Section 85.30.

That defendants are given credit for benefits previously paid.

That defendants shall file a final report upon payment of this award.

. . .

Signed and filed this 29th day of January, 1982.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

JOHN W. O'MEARA,

Claimant,

vs.

DUBUQUE PACKING COMPANY,

Employer,
Self-Insured,
Defendant.

Ruling

Now on this day the matter of defendant's special appearance and claimant's resistance thereto come on for determination.

Claimant filed a petition in review-reopening on November 12, 1981 relating to an injury on October 31, 1978. Defendant filed a special appearance on November 3, 1981 alleging that claimant's original notice and petition were not timely filed, that claimant was last paid weekly benefits on November 10, 1978, and that Iowa Code section 85.26(2) provides a review-reopening must be commenced within three years from the date of the last payment of weekly benefits, and asking that the industrial commissioner's file be examined to determine the timeliness of the filing. Attached to the special appearance is an affidavit by Melvin Kiebel, claim representative of Dubuque Packing Company and a copy of a check which Kiebel swears is a "duplicate of the check that was issued to John O'Meara on November 10, 1978 in payment of sum of $220.58, said sum being the workers' compensation benefit representing the last payment of weekly benefits under agreement relating to an injury that occurred on October 31, 1978." The attached check showed a date of November 10, 1978.

On December 3, 1981 claimant filed a notice of intention to respond to the special appearance. A resistance was filed on December 29, 1981 to which an affidavit of claimant is attached. The resistance asserts that special appearance is an inappropriate means of raising the claim and that the special appearance "is in fact a combination Special Appearance and Motion to Dismiss." Claimant's affidavit swears that Dubuque Packing Company did not cooperate in proving information to claimant, that he is "absolutely positive" he received a payment after November 10 and in the neighborhood of November 30, and that the November 10, 1978 payment would not have been received by him until "two or three" days later.

The industrial commissioner's file contains a memorandum of agreement relating to an injury of October 31, 1978 which was received on November 13, 1978. A form 5 received on the same date shows the last weekly payment on November 10, 1978.

Iowa Code section 85.26(2) and (3) are applicable here. They provide:

> 2. Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement. Once an award for payments or agreement for settlement as provided by section 86.13 for benefits under the workers' compensation or occupational disease law has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination for appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27.
>
> 3. Notwithstanding the terms of chapter 17A, the filing with the industrial commissioner of the original notice or petition for an original proceeding or an original notice or petition to reopen an award or agreement of settlement provided by section 86.13, for benefits under the workers' compensation or occupational disease law shall be the only act constituting "commencement" for purposes of this statutory section.

The industrial commissioner dealt with this situation similar to the one here presented in *Hulen v. S. S. of Iowa, Ltd.*, (Appeal Decision filed March 15, 1979). He discussed the issue as follows:

> The issue in this proceeding is the meaning of the word *payment* within section 85.26(2), Code of Iowa. The deputy industrial commissioner found that *payment* meant the date of issuance of the benefit draft and therefore claimant's action was barred by the statute of limitations in that it had not been filed within three years from the date of the last payment of weekly benefits. Claimant appeals this determination.

In *Stroupe v. Workmen's Compensation Commissioner,* 151 W. Va. 415, 152 S.E.2d 544 (1967), the court held that the period for reopening began to run on the day of the last payment which was the day the check was first received by the claimant. The word *payment* in a workers' compensation limitation statute is the receipt of the instrument of payment by the workman. *Sturgill Lumber Co. v. Maynard,* Ky., 447 S.W.2d 638 (1969) [sic].

An employer cannot be allowed to issue a draft for workers' compensation benefits, hold onto that draft, thus tolling the statute of limitations, and thereby deprive a claimant of the right to reopen his claim; nor can an employee be allowed to delay the running of the statute after the draft has been received by refusing to accept it. Based upon these considerations and the applicable law, the date of *payment* within section 85.26(2), Code of Iowa, is the date on which a claimant receives the instrument of payment for workers' compensation benefits.

In the case *sub judice,* affidavits indicate the benefit draft was issued on February 18, 1975 and forwarded to claimant on February 19, 1975. The affidavit of the claimant indicates the draft was received on February 21, 1975.

Claimant's original notice and petition in review-reopening was filed on February 20, 1978. Thus, the review-reopening proceeding was commenced within three years from the date of the last *payment* of weekly compensation benefits.

Opinions by 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); *Jansen v. Harmon,* 164 N.W.2d 323, 326 (Iowa 1969); *Tice v. Wilmington Chemical Corporation,* 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.*, 253 N.W.2d 721, 725 (Iowa 1977); *Tice, supra; Great Atlantic & Pacific Tea Co. v. Hill-Dodge Banking 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 position was again presented in *Douglas Machine and Engineering Co. v. Hyflow Blanking Press Corp.*, 229 N.W.2d 784 (1975).

Claimant's affidavit raises the possibility that payment was received by him "two or three days" after November 10, 1978. That allegation is not controverted by defendant.

Nothing herein should be interpreted as barring defendant from raising the statute of limitations in further proceedings in this matter.

THEREFORE, IT IS ORDERED:

That defendant's special appearance is hereby overruled.

That defendant should answer or otherwise plead within ten (10) days from the signing and filing of this order.

* * *

Signed and filed this 6th day of January, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

BRIAN D. OWENS,

Claimant,

vs.

GRIFFIN PIPE PRODUCTS,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed August 5, 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. Defendant has appealed an adverse review-reopening decision.

The record on appeal consists of the transcript of the testimony at the hearing; claimant's exhibits 1, 2, 3 and 4; and employer's exhibit A.

The result of this final agency decision will be the same as that reached by the hearing deputy.

Claimant was working as a spout man for the employer on November 23, 1978 when he received a spatter burn across his back and right arm. He was off until January 7, 1979 and was discharged from his employment for refusing to work overtime in August of 1980.

The dispute in this case concerns whether or not claimant sustained any permanent industrial disability because of his employment injury.

Claimant has the burden of proof. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). Claimant's disability is industrial which is reduction of earning capacity, and not just functional disability. Such disability includes considerations of functional impairment, age, education and relative ability to do the same type of work as prior to the injury. *Olson v. Goodyear Service Stores, supra; Martin v. Skelly Oil,* 252 Iowa 128, 106 N.W.2d 95 (1960) and cases cited.

The finding of a 12% permanent partial industrial disability by the hearing deputy is not excessive and is adopted herein. The hearing deputy, considering that two doctors' opinions of permanent impairment varied between 20% and 0%, found a functional impairment of 12% of the whole man. Such a finding is perhaps an unnecessary quantification; however, claimant does have a permanent impairment which at least one qualified dermatologist, Stephen C. Papenfuss, M.D., believed to be 20%, which is quite substantial.

On the other hand, a qualified general surgeon who was claimant's treating physician, Ralph L. Hopp, M.D., stated claimant sustained no permanent disability. Although Dr. Hopp's opinion is appreciated, Dr. Papenfuss' opinion is somewhat preferred because he is a dermatologist and more likely to be experienced in claimant's specific problem than would Dr. Hopp.

Claimant is a young man and is getting along well with his disability. However, he must bear with the impairment for the rest of his working life. To a person doing active work outdoors, sensitivity to heat, light, and cold may prove troublesome. Also, claimant's discomfort when stretching and flexing his torso may be somewhat disabling. Considering also that he is a bright person, his overall industrial incapacity was correctly assessed by the hearing deputy.

Findings of Fact

1. Claimant was age 20 at the time of the hearing. (Tr., 29)

2. Claimant has a high school education. (Tr., 5)

3. Prior to working for the employer, claimant worked as a truck driver, warehouseman, and meat cutter. (Tr., 5)

4. Claimant worked as a spout man for the employer. (Tr., 6)

5. Claimant was hurt at work on November 23, 1978 when steam and hot iron spattered on to his back and right arm. (Tr., 9)

6. Claimant was treated by doctors and admitted to the hospital for two days. (Tr., 10)

7. The burn was second degree. (Claimant exhibit 1)

8. Claimant was off work until January 7, 1979. (Tr., 11)

9. Claimant was discharged by the employer for refusing to work overtime in August of 1980. (Tr., 27)

10. At work, claimant has problems with carbide particles in the air causing sores in the burned area and working around heat and cold. (Tr., 15)

11. The areas of hypopigmented scar are hypersensitive to heat and light and claimant has some discomfort in flexing and stretching the torso. (Claimant exhibit 1)

12. Claimant has permanent partial impairment at the area of the burn. (Claimant exhibit 1)

The parties stipulated that the rate of weekly compensation should be $156.40.

Conclusions of Law

Claimant sustained an injury which arose out of and in the course of his employment on November 23, 1978 and which caused second degree burns on his back and right arm.

Said burn caused permanent partial disability for industrial purposes of twelve percent (12%).

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant for a period of sixty (60) weeks at the rate of one hundred fifty-six and 40/100 dollars ($156.40), payments to begin at the end of the healing period, accrued payments to be made in a lump sum together with statutory interest.

Costs of this action are taxed against defendant.

Defendant is ordered to file a final report of payments upon completion thereof.

* * *

Signed and filed at Des Moines, Iowa this 28th day of September, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ANTHONY E. PALMER,

Claimant,

vs.

NORWALK-COMMUNITY SCHOOL DISTRICT — LAKEWOOD ELEMENTARY SCHOOL,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed October 23, 1981, 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 an adverse arbitration decision made upon rehearing.

On appeal the record consists of the transcript, the depositions of Ellen Knickerbocker, Paul From, M.D., Donald John Tesdall, M.D., Richard Wooters, M.D., Emmanuel Lacsina, M.D., and John C. Garfield, Ph.D. Also a part of the record were claimant's exhibits 1 through 5 inclusive and defendants' exhibits A through Q inclusive.

The result in this appeal decision will differ from that of the hearing deputy in that no award will be made.

This is the sad case of a 31 year old woman, married and with a family, who worked part-time at the employer's school and who was found dead near a flag pole on the school premises. She had gone to the school with her little boy to do her customary work, had been frustrated in her attempt to enter the building, had gone to the flag pole and there expired. The little boy, Steven Scott Palmer, who was four at the time, testified at the hearing by which time he was age seven; the critical factor of his testimony appears to be that his mother was frustrated by her inability to enter the building and struck the door in anger. The boy's testimony seems credible. Claimants are the surviving spouse and children of the employee (hereinafter called claimants). Claimants' argument is that the employee died from a coronary artery spasm caused by increased adrenalin and that she had a preexisting mental depression which was aggravated by stress on the job.

There is no doubt that claimant was in the course of her employment at the time of her death. The issue is whether the death arose out of the employment, or, put in another way, whether there was a causal relationship between the employment and the death.

Claimant has the burden of proof. *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). See also cases sited at page 905. Iowa very liberally defines a work injury as a health impairment which arises from the employment. *Almquist v. Shennandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). Claimant must show a causal relationship between something in the employment and the death. That causal relationship is in the realm of expert testimony and is a question "with respect to which only a medical expert can express an intelligent opinion." *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375 (383), 101 N.W.2d 167 (1960).

In Iowa, a claimant with a preexisting heart condition may recover under two concepts of causation: (1) work ordinarily requiring heavy exertions which, "superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in a compensable injury;" (2) a case may be compensable where "the medical testimony shows an instance of unusually strenuous employment exertion,

imposed upon a preexisting disease condition," resulting in a heart injury. *Sondag v. Ferris Hardware, supra.*

"The opinion of experts need not be couched in definite, positive or unequivocal language." Sondag v. Ferris Hardware, supra. However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag, supra,* page 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 Iowa 516, 521, 133 N.W.2d 867, 870 (1965). See also *Musselman v. Central Tel. Co.,* 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).

One premise which can not be determined is whether or not the employee had a preexisting heart condition. Thus, although the *Sondag* case may not be a clear precedent, it is useful in seeking the solution to the instant case in that it directly concerns the area of heart conditions. In this case the evidence of the experts is severely divided as to quality.

First, the only medical testimony supporting claimant's case is that of a possibility, which was given by Donald John Tesdall, M.D., a family practitioner. Dr. Tesdall testified that claimant's frustrations could have resulted in an increased flow of adrenalin which in turn caused a heart stoppage. There is no further evidence or explanation as to how the adrenalin would work on the heart or whether it would be in evidence at the postmortum examination. This testimony of a possibility is contrasted to that by Paul From, M.D., a qualified internist, and Emmanuel Lacsina, M.D., a qualified pathologist and autopsy surgeon, who both testified that there was no way of knowing the cause of death of the employee. The testimony of Drs. From and Lacsina are taken over that of Dr. Tesdall because, in the case of Dr. From, he is an internist whose specialty involves a greater knowledge of the heart than that of Dr. Tesdall (who is admittedly highly qualified), and in the case of Dr. Lacsina, he is a clinical pathologist whose specialty involves determining, when possible, the causes of death.

Second, the other evidence of compensability comes from a clinical psychologist, not a medical doctor. John C. Garfield, Ph.D., testified that these circumstances of claimant's death constituted a precipitating cause therefor. Dr. Garfield's testimony is in the psychologist's lexicon and although an expert's language need not be couched in technical terms, some greater explanation of the psychological forces at work would be helpful. Perhaps evidence by a Ph.D. would be more convincing were it clinically based. One notes again that the *Bradshaw* case says "only a medical expert can express an intelligent opinion" in the matter of the causal relationship. *Bradshaw, supra.* The psychologist can empirically diagnose and treat certain problems of the mind. They can help people in today's fast paced world; however, their expertise does not necessarily extend to clinical pathology in case of death.

Findings of Fact

1. The employee, age 31, worked part-time as a school custodian for the employer. Transcript, page 110.

2. The employee did work which involved vacuuming the floors, emptying waste baskets, and cleaning restrooms. Transcript, page 140.

3. The employee had received such complaints for such things as items being missing from teachers' desks, erasing writing on the blackboards, knocking a plant off a teacher's desk, as well as other matters. Transcript, page 91, 92, 93, 94, 95; Knickerbocker deposition.

4. On November 29, 1977, the employee and her son Scott, age four, went to the employer's premises. The employee was frustrated in being unable to unlock the door, struck the door, went to the flag pole to lower the flag and died before doing it. Transcript, page 6.

5. At about 11:00 p.m. on November 29, 1977, the employee was found dead at the school, near the flag pole, and none of her duties had been done. Transcript, page 15, 151.

6. John C. Garfield, Ph.D., is not a medical doctor. Garfield deposition, page 3, 32-33.

7. The employee was under psychological stress because of family finances, her husband's health, and her job. Garfield deposition, page 21-26; Tesdall deposition, page 9-10.

7A. Claimant had been treated for depression since 1975. Claimant's exhibit 1, defendants' exhibit A, Tesdall deposition, page 5.

8. The employee did not die from an overdose of Elavil. Wooters deposition, page 10.

9. The cause of claimant's death is unknown. Lacsina deposition, page 19, 19-20.

10. It can not be determined from the record whether or not the employee had a preexisting heart condition.

Conclusion of Law

Claimant did not sustain an injury on November 29, 1977 which arose out of and in the course of her employment and which caused her death.

WHEREFORE, claimants must be and are hereby denied recovery of compensation benefits.

Costs of this action are taxed against defendants.

* * *

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

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

CHERYL ANN PAULSEN, Individually, and CHERYL ANN PAULSEN, as Mother, Next Friend and Natural Guardian of HEATH DAVID PAULSEN and HENRY HAGLER PAULSEN,

Claimant,

vs.

CENTRAL STATES POWER, LTD.,

Employer,

and

WESTERN CASUALTY & SURETY CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 6, 1982 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 commutation decision.

The record on appeal consists of the transcript; claimant's exhibit 1; defendants' exhibits A, B, C, D, and E; and claimant's answer to defendants' interrogatory #1 dated August 25, 1981.

David W. Paulsen was killed in a work accident on May 9, 1979. The workers' compensation insurance carrier admitted liability, filed a memorandum of agreement and has continued to make indemnity payments at the rate of $216.31 per week. These payments are made to the surviving spouse, Cheryl Ann Paulsen who takes on her own account and on that of Henry and Heath, the children of David and Cheryl by their marriage. (Section 85.43 provides such payments may be made to the surviving spouse.)

On November 21, 1980, claimant petitioned for a full commutation of *all remaining benefits.* The case was heard by the hearing deputy on August 31, 1981, and on October 20, 1981, he wrote a decision which granted a *partial* commutation. The record contains evidence of the surviving spouse's ability to handle money, her expected income, and the nature of the trust, as well as expert opinions on investment potential.

The issues are raised in defendants' superior brief: (1) that claimant failed to prove that the commutation would be in her best interest; (2) that producing a greater income through investment of a lump sum during an inflationary period is not a sufficient basis for a commutation to take the place of periodic payments; (3) that claimant applied for a full commutation, and, in the event the commutation is granted, the full commutation should be limited to the length of time that it takes for the claimant's youngest child to reach the age of 18.

Section 85.45, in essence, states that a commutation may be granted when the period during which compensation is payable "can be definitely determined" and when it appears that the lump sum payment is "for the best interest of the person or persons entitled to the compensation."

Section 85.47 provides a form of penalty, calculated at 5% per annum, for taking a lump sum payment in lieu of weekly payments. Section 85.48 provides for partial commutation. A full commutation provides a full and final release to the employer and insurance carrier, but a partial commutation does not provide such a release.

Defendants cite many cases and make forcible arguments against the granting of a commutation in this case. However, the case of *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964) appears to control and to be a very forceful precedent in favor of commutations. It states that buying an apartment house is in the best interest of the employee even though claimant's plans might not become as profitable as hoped. The test appears to be whether or not the plans are reasonable. Defendants argue that claimant is not a prudent investor, that she cannot afford to take any financial risks, and that a conservative investment from weekly indemnity payments would ultimately be better than the plan presented. That plan, a trust agreement with the Omaha National Bank, divides the investment responsibility between the trustee and claimant and provides that claimant may withdraw no more than 10% per annum from the principal.

The record shows that claimant received approximately $63,000 in various benefits upon the employee's death. She spent some $8,000 on three quarter horses, lent $10,000 to J & C Fertilizer Company, and bought a money market certificate for $20,000. She also paid off miscellaneous debts while mortgage insurance of $18,000 (included in the $63,000 total) virtually paid off the home loan.

Her present total income from non-workers' compensation resources at the time of the hearing was $1,600 per month, whereas her expenses were about $1,700 per month.

Of her actions since the employee's death, three investments might be questionable. First, she lent $10,000 to two uncles of the deceased who operate J & C Fertilizer. The loan produces an adjustable interest rate but is unsecured. Second, she bought three quarter horses for $8,000 which, she testified, had risen in value. Finally, she carries rather a lot of life insurance on her children.

Of these, the unsecured loan shows some defect in financial judgment. The investment in the quarter horses was mainly for the pleasure of her and her children, a not unreasonable desire, assuming moderation. The payment of life insurance premium presently will save higher premium costs later and does yield some present earnings (Tr. 34).

On the whole, then, claimant has not shown herself to be a spendthrift, and the trust arrangement appears to be a solid enough investment under the *Diamond* case.

Defendants second main argument, that producing a greater income through investment of a lump sum during an inflationary period is not a sufficient basis for a commutation, is based on an assumption which does not appear in the statutes or the *Diamond* case. That is, defendants equate claimant's best interest with need. Of course, the equation may work in some cases but not in others. Thus, if one needs

a thing, the obtaining of it is in one's best interest; however, if one does not need a thing, it does not follow that the obtaining of it is *not* in one's best interest.

One would agree with defendants that the legislature which drafted the early workers' compensation law probably did not contemplate double-digit inflation and investment yields of 13-15%. Even so, under the *Diamond* case the test of claimant's best interest seems to be met, and it is up to the legislature or the courts to deal with the present interpretation of the statute.

Claimant petitioned for a full commutation. However, the deputy reasoned (properly we think) that use of a life and remarriage expectancy table for the widow would not give a very determinable period. Therefore, the hearing deputy ruled that a definitely determinable period would be from the date of the commutation until the youngest child reaches age 18 (which, excepting death, would be the shortest period compensation would be payable under §85.42). Further, since the spouse might well not remarry or die, or since the child might go on to college and retain entitlement, the deputy reasoned that the commutation should be partial instead of full. The deputy's exercise of discretion in providing the partial instead of the full commutation does not seem excessive and will be adopted.

Finally, interrogatory answer #1 which was entered into evidence shows that the attorney's fee will be as follows:

> The attorney fees will be 20% of the commuted amount, less $4,500.00, unless notice of appeal to the Iowa Supreme Court is filed, in which event the fees will be 30% of the commuted amount, less $4,500.00.
>
> With regard to payment of the fees, the excess over $100,000.00 of the commuted amount will be paid toward the fees; and any remaining unpaid fees will be paid in three equal annual installments, with 10% interest, the first installment due one year after the date the commuted sum is received.

Under §86.39, the industrial commissioner has power to approve such fees at the agency level.

There is a real question as to whether a commutation proceeding should be governed by a contingent fee arrangement, since the liability is admitted and the only question is whether the payment will be on a weekly basis or by lump sum. It appears claimant would have sufficient money to pay the lawyer on an hourly basis. On the other hand, if the commutation is in fact in claimant's best interest, then the attorney's effort in securing a lump sum payment is needed and valuable. The question of the fee is not directly presented and will not be ruled upon at this time. The important point is that this decision is not to be taken as approval of the fee arrangement mentioned.

Findings of Fact

1. David W. Paulsen sustained an injury arising out of and in the course of his employment on May 9, 1979 which resulted in his death.

2. A memorandum of agreement admitting compensability was filed on August 17, 1979, showing a weekly compensation rate of $216.31.

3. The surviving spouse is Cheryl Ann Paulsen, who was born July 3, 1951, and who has had three years of college education. (Tr. 22)

4. The surviving children of the marriage of David and Cheryl Paulsen were Henry, born February 8, 1978 and Heath, born July 25, 1975.

5. Claimant plans to put the commuted amount into trust with the Omaha National Bank. (Tr. 9)

6. Under the proposed trust agreement, claimant may withdraw no more than 10% of the principal of the trust each year. The trust is irrevocable. (Claimant's exhibit 1)

7. After the employee's death, claimant received approximately $63,000 in various benefits. (Tr. 35-37)

8. Of these amounts, $10,000 was used to make a loan to J & C Fertilizer and $20,000 to buy a money market certificate. Claimant also paid off her car loan, had the house painted, installed central air conditioning, paid off debts to her mother, grandmother and the employee's grandparents, carpeted the upstairs of her home, bought new beds for her children and other items. (Tr. 37) The mortgage insurance was valued at over $18,000 and paid off all but one payment on claimant's home loan. (Tr. 35)

9. Claimant spent $8,000 on three registered quarter horses. (Tr. 17, 49)

10. Claimant carrier a life insurance policy on each of her sons for $50,000, plus two other policies for $70,000 and $500 respectively.

11. The loan to J & C Fertilizer of $10,000 was unsecured. The company is owned by two uncles of the deceased. (Tr. 14-15, 41)

12. Claimant's present income includes a money market certificate for $20,000 at 13.8% ($2,760 per year); interest from a loan to J & C Fertilizer of $10,000 at 15%. (Tr. 14)

13. Claimant's total non-workers' compensation income is $1,600 per month. (Tr. 15) Claimant's total expenses are $1,700 per month. (Tr. 16)

14. With reasonable advice, claimant is capable of participating in the trust agreement.

Conclusions of Law

A period for which compensation is payable is determinable.

A partial commutation would be in claimant's best interest.

THEREFORE, defendants are ordered to make payment of the partial commuted value as calculated under §85.48 for the period beginning with the final date of this order and ending February 8, 1996, when Henry Paulsen becomes eighteen (18) years of age.

Costs of this action are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 15th day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Remanded for Settlement.

DARLENE S. PLAIN,

Claimant,

vs.

FRANKLIN MANUFACTURING COMPANY,

Employer,

and

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 16, 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 decision of August 24, 1981.

On appeal the record consists of the transcript of the hearing; the depositions of claimant, Ardith Gillespie, and Bruce Miller, M.D.; claimant's exhibit 1, 3, 3A, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24; and defendants' exhibits A, B, C, D, E, and F. It should be noted that claimant's exhibit 16 is the deposition of Ardith Gillespie; defendants' exhibit A is the deposition of Dr. Miller; defendants' exhibit D is the transcript of claimant's testimony in a 1979 hearing, and defendants' exhibit F is the deposition of claimant. The result of the 1981 review-reopening decision will be modified in that a somewhat greater award will be made. Certain of the findings of fact are adopted from that decision (see below) and other findings of fact are by the undersigned deputy industrial commissioner.

Claimant filed an arbitration action in 1979 and that same year was awarded benefits of 150 weeks permanent partial disability to the body as a whole for industrial purposes and 33 weeks 3 days healing period. That decision found claimant's winged scapula to be compensable and ruled out disability caused by two possible thoracic outlet syndromes. At the time of the 1979 arbitration hearing, claimant had just obtained a brace which, it was hoped, would help her to return to work for the employer. Accordingly, claimant did work from February 13, 1980 to July 24, 1980; however, because of the winged scapula, she could not continue to perform the work. Claiming a change of condition, she filed for reopening and a hearing was held on August 24, 1981. As a result of that hearing, the hearing deputy awarded 5% additional permanent partial disability to the body as a whole for industrial purposes; this extra compensation was based upon the fact that the shoulder brace did not help claimant as much as hoped. Claimant in her appeal brief states two basic issues: (1) that claimant's inability to continue working was not contemplated at the time of the arbitration decision in 1979 and that the inability to continue to work caused a further loss in earning capacity; (2) that claimant in fact lost her job in spite of the hearing deputy's comment that implied claimant might some day again work at the employer's plant.

Section 85.46(2) states, in part:

> Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement.

Claimant has the burden to prove the extent of her disability. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963). Claimant's disability is industrial, reduction of earning capacity, and not mere functional disability. Such disability includes considerations of functional impairment, age, education and relative ability to do the same type of work as prior to the injury. *Olson, supra* and *Martin v. Skelly Oil,* 252 Iowa 128, 106 N.W.2d 95 (1960).

The above quoted statutory provision contains no limits upon the number of times a claimant may reopen a case. The principle of *res judicata* would prevent the same case from being heard again. Also, pronouncements by our supreme court in two cases indicate a limit upon the issues which may be heard in subsequent hearings. *Stice v. Consolidated Ind. Coal Co.,* 228 Iowa 1031, 291 N.W. 452 (1940); *Gosek v. Garmer and Stiles Co.,* 158 N.W.2d 731 (Iowa 1968). In *Gosek,* the court states:

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

"An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under §85.26(2) and 86.14(2)." *Blacksmith v. All-American, Inc.,* 290 N.W.2d 348, 350 (Iowa 1980) Thus, claim-

ant may recover without a change in physical condition if she can meet the requirements of *Gosek*.

The hearing deputy in the 1979 arbitration decision made the following findings of fact:

> Based upon the medical findings by Dr. Miller that the claimant has a 30% limitation of loss of motion to the shoulder; the claimant's inability to perform the task of lifting, removing and stacking of the heavier machine parts, such as the cabinet panels; the requirement of wearing a protective brace; and the lack of any significant medical improvement of her condition, it is found that the claimant has sustained and met her burden of proof by the preponderance of evidence that she suffered an industrial accident arising out of and in the course of her employment, thereby entitling the claimant to a determination of her disability to the body as a whole, as referred to in §85.34(2)(u).
>
> Additionally, claimant's educational background (high school education) with no special training or skills plus working as a laborer or factory worker the bulk of her working career increases the claimant's extent of permanent disability.
>
> Further, it is found that the claimant had recovered from any previous physical condition arising from the November, 1977 thoracic outlet surgery and the 1975 auto accident prior to the latest industrial injury.

Both sides filed able briefs, although claimant's affecting not to understand why the hearing deputy in the 1981 decision cited the *Gosek* case is unconvincing. Nevertheless, the undersigned deputy industrial commissioner agrees with the main arguments of claimant. That is, the change which occurs subsequent to the 1979 arbitration hearing is claimant's inability to do factory work and, as a corollary, an increased lack of ability to work in other, less strenuous, types of labor.

Her inability to continue factory work is shown to some extent by the testimony of Ardith Gillespie, the safety coordinator at the employer's plant (Gillespie depo., p. 18). Second, the report of the vocational rehabilitation agency is not optimistic that claimant can work without modification of the job because of her shoulder.

These two increased elements of industrial disability could not have been known or discovered at the time of the first hearing, for at that time, there was a more hopeful outlook for claimant's future, as shown in claimant's testimony at the 1979 hearing:

> A. But then I have called and talked to Ardie about different things and asked about light duty jobs. I went over to the plant one day and talked to Ardie, and she said her and Blaine were going to go through all the jobs in the plant and see what they could come up with for the light duty. And I checked various times, and they didn't find anything.
>
> Q. What are your feelings about going back to work there at Franklin?
>
> A. I want to go back very much.
>
> Q. Do you think you would be able to do work — We referred to bench work earlier. — sitting where you are assembling things, mini parts for these machines?
>
> A. Hopefully with the brace I will be.
>
> Q. When you are wearing the brace, are you able to extend your arm?
>
> A. Yes. It gives support, and I have more control over my arm with the brace on.
>
> Q. Do you get tired as easily with the brace?
>
> A. No. But to be truthful I haven't really had it that long to give it a good try.
>
> Q. You have only had it a couple weeks?
>
> A. I just got it last Wednesday back from Sioux City (Tr. 1979 hearing pp. 43-44).

A rating of industrial disability thus requires a reasonable prediction into the future of how claimant will fare. In 1979, things looked better than they turned out to be in 1981. The hearing deputy's 1979 decision was a reasonable one but not sealed in cement. See *Meyers v. Holiday Inn*, 272 N.W.2d 24 (Iowa App., 1973).

Considering the elements of industrial disability as they apply to claimant's case here, it is found that claimant has more than 5% industrial disability over and above the 30% already awarded. A total of 15% further industrial disability over the 30% heretofore awarded is more reasonable.

Defendants are to be highly commended for their efforts to re-employ claimant after the original arbitration hearing.

Findings of Fact

1. That claimant sustained an injury arising out of and in the course of her employment in October 1978.

2. Claimant's original arbitration case was heard October 22, 1979.

3. Claimant has a permanent partial impairment of 15-25% of the body as a whole as a result of the injury. (Claimant's exhibit 8, claimant's exhibit 20; Dr. Miller's depo.)

4. Claimant's permanent partial impairment has not changed since October 22, 1979. (Defendants' exhibit C; claimant's exhibit 17)

5. Claimant's right shoulder problem was caused by the injury. (Decision by Deputy Moeller, 11-26-79; claimant's exhibit 3; claimant's exhibit 5; claimant's exhibit 6; Dr. Miller depo., pp. 3-4)

6. Claimant will have recurrent trouble with her right shoulder if she attempts to continue factory work or work involving raising her right hand above shoulder level. (Defendant's exhibit B; claimant's exhibit 17)

7. That claimant returned to work February 13, 1980 at a job rewiring motors.

8. That claimant ceased working on July 24, 1980 and has not returned to work.

9. That claimant has gone through testing with vocational rehabilitation.

10. That claimant has applied for work.

11. Claimant has average intelligence and shows aptitude for several types of occupations. (Defendant's exhibit E)

12. The vocational evaluator found claimant motivated to work and her main limitation was her physical restriction.

13. That claimant is unsuited for further academic training.

14. That claimant has a number of positive attributes which should make her attractive to prospective employers.

15. That an interviewer for job services testified there had been no change in job opportunities for claimant since the prior hearing.

16. Even those jobs which claimant can do "will require some modification on the part of the employer"; that is, even those jobs which claimant can perform may have to be modified. (Defendant's exhibit E)

17. Claimant could not have known on October 22, 1979 that she would fail in her attempt to return to work at the employer and that her permanent partial impairment would restrict her entry into even less demanding occupations such as selling shoes.

18. The shoulder brace claimant used upon her return to work in 1980 did not help her and caused blisters and sores. (Tr. 63)

19. That work available to claimant in defendant-employer's plant is limited by the restrictions placed on her by the doctor and the restrictions placed on the company by the union contract.

20. That claimant is 47 years of age.

21. That claimant is right handed. (Tr. 70)

22. There are no positions at the employer's plant which claimant can physically handle. (Gillespie depo. 18)

23. That claimant has a high school education with no other training or courses.

24. That claimant has work experience as a waitress, assembly line worker, and grocery store checker.

25. That claimant's assembly line work has included inspection, general production, silk screening and machine operation.

Conclusions of Law

That claimant's inability to successfully return to work at the employer's plant subsequent to the 1979 hearing and further inability to compete in lighter occupations results in a further disability for industrial purposes of fifteen percent (15%) over and above the thirty percent (30%) already awarded.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of seventy-five (75) weeks at the rate of one hundred thirty-three and 58/100 dollars ($133.58) per week, to commence upon completion of the prior permanent partial disability payments, accrued payments, if any, to be made in a lump sum together with statutory interest.

Costs of this action are taxed against defendants.

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

* * *

Signed and filed at Des Moines, Iowa this 27th day of January, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

GENE PULLEN,

Claimant,

vs.

BROWN & LAMBRECHT,
EARTHMOVING, INCORPORATED,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 13, 1982 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.

No memorandum of agreement is on file. The petition was filed April 2, 1981 and hearing was held on November 16, 1981. The hearing deputy issued the arbitration decision on November 30, 1981.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 11; and defendants' exhibits A, B, C, D, E and F. The result of this final agency decision will be the same as that reached by the hearing deputy.

Findings of Fact

1. Claimant began work for the employer in April 1979. (Tr. 6)

2. His work was as an operator of an earth mover, and he earned $13.80 per hour as of May 7, 1979. (Tr. 6)

3. On May 7, 1979, while driving an earth mover, the machine hit a rut and jarred claimant's back and right shoulder. (Tr. 9)

4. As a result of the work injury, claimant has atrophy of the lower rhomboid muscle, right, and a slightly winged scapula, right, said conditions being permanent. (Claimant's exhibits 6 and 7)

5. At the time of the hearing, claimant had a job with another employer operating a telescoping crane and was earning $14.80 per hour. (Tr. 26, 36)

6. Claimant has difficulty, because of his right shoulder impairment, in operating an earth mover and a road maintainer. (Tr. 27)

7. Claimant was age 35 at the time of the hearing. (Tr. 5)

8. Claimant went through part of the 9th grade. (Tr. 5)

9. Claimant has worked 16 or 17 years as a heavy equipment operator. (Tr. 5)

Based on the record, the hearing deputy awarded claimant four days healing period, 100 weeks of compensation for permanent partial disability and certain medical and hospital bills. On appeal, defendants state that claimant should not have been awarded industrial disability, but, if so, the amount should have been less than 100 weeks.

The fact that claimant was injured, the healing period length of four days, the weekly rate ($265, which was stipulated), and the amount and necessity of the medical and hospital bills were not contested on appeal.

Analysis

Defendants claim that claimant's disability should be restricted to the arm, whereas the hearing deputy gave an award for industrial disability. In *Alm v. Morris Barick Cattle Co.*, 240 Iowa 1174, 38 N.W.2d 161 (1949), claimant had a rating of 25-30% impairment to the *arm*, and the court, noting that the anatomical location of the injury extended from the arm into the *shoulder*, ruled that the injury was not restricted to a schedule. Thus, by law, an injury to the shoulder which produces permanent impairment entitles claimant to industrial disability. The mere fact that the rating pertains to a scheduled member does not mean that disability is restricted to a schedule.

Further, the record shows that claimant's injury and impairment are into the body as a whole. F. Dale Wilson, M.D., says:

> His shoulder girdle is remarkably muscled. A winging of the right scapula can be seen. There is a flat place medial to the lower aspect of his scapula; this is position of the right lower Rhomboid muscle. The shoulder moves well on the torso. This movement accentuates the loss of this muscle. When he attempts to reach up on a shelf as he might, this is satisfactory and he can reach as high as his left. However, when he reaches up behind his back, he lacks 4 cms. of reaching as high as he can with his left arm. This is because of local pain. This movement accentuates the winging of the scapula and the atrophy of the lower Rhomboid muscle; no trace of that muscle can be felt or seen at examination. An effort was made to check his strength on push-pull; I pushed and pulled his arm with a 200 lb. effort; this aggravated the pain at the base of his scapula.
>
> * * *
>
> Diagnosis: Strain (Tearing) and a subsequent atrophy of the right lower Rhomboid muscle. This is the interscapular muscle lower part, on the right.
>
> The injury sustained on May 7, 1979, was the causative factor with respect to the symptoms, pathology and disability found on this examination. There are no recommendations for further medical care. Simple treatment for the discomfort is appropriate. (Claimant's exhibit 6)

Based on the examination and measurements, Dr. Wilson assessed a permanent partial impairment to the arm of 14%.

Dennis L. Miller, M.D., states:

> In summary this 35 year old man sustained an injury on May 7, 1979 with subsequent pain in the right posterior mid dorsal area with subsequent definite atrophy of musculature. He does have some slight loss of motion as well as slight winging of the scapula. These I believe are objective findings and correlate with his pain and loss of function. I think it is reasonable to assume that the current findings and symptoms are causally related to the accident of May 7, 1979. (Claimant's exhibit 7)

Dr. Miller gave a disability rating of 12-15% impairment to the right upper extremity.

Although the two doctors differ somewhat in their descriptions of claimant's condition, their opinions are compatible. First, they both agree that claimant has a slightly winged scapula. Second, they both speak of muscle atrophy; in this case Dr. Wilson is more specific.

A winged scapula is a condition wherein the serratus anterior muscle is weak and allows the shoulder blade (scapula) to move away from the back, giving a winged effect sometimes known as angel's wing. The rhomboid muscles, mentioned specifically by Dr. Wilson, also attach to the scapula and extend to the vertebral margin. Thus the muscles mentioned by the doctors are well within the perimenter of the trunk and are clearly considered as part of the body as a whole when it comes to permanent partial

impairment. (Dr. Jarrett's electromyography is disregarded because it did not measure electrical activity below T1 and therefore missed part of the lower rhomboid muscle. And, although the University of Iowa examination [claimant's exhibit 5] found no neurological deficit, it did attribute claim-injury of May 1979.)

Claimant's disability, therefore, is to be rated industrially. Such disability measures the loss of earning capacity, not mere functional impairment. It includes considerations of functional impairment, age, education and relative ability to do the same type of work as prior to the injury. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963); *Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960) and cases cited. See also *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).

The hearing deputy's determination of a 20% industrial disability is not excessive. At age 35 claimant had worked his laboring life by operating heavy machinery. He testified that even though he has a good job and can operate some equipment, he cannot operate other machines, such as an earth mover and a road maintainer. Considering claimant's age, 35, his education (into the 9th grade), his permanent partial impairment (12-15% of the right arm) and his work experience, the opportunity for him to work in fields for which he is fitted has been diminished. It is true that claimant has as yet sufferered no wage loss, but it is equally true that Iowa does not measure permanent partial disability under a wage loss theory. Claimant's actual wage loss is problematical, but his ability to work and earn money, and his employability were restricted by the injury and may be compensated.

Conclusions of Law

On May 7, 1979, claimant sustained an injury which arose out of and in the course of his employment and caused industrial disability of 20%.

The correct rate of weekly compensation is $265 for the healing period and $244 for permanent partial disability.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of four (4) days at the rate of two hundred sixty-five dollars ($265) per week for the healing period and to pay weekly compensation benefits for a period of one hundred (100) weeks at the rate of two hundred forty-four dollars ($244) per week for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay the following medical and hospital bills:

University of Iowa Hospitals and Clinics	$222.00
Mercer County Hospital	673.90
Rock Island Franciscan Hospital	140.00

Defendants shall receive credit for amounts previously paid.

Costs of this action are taxed against defendants.

Defendants are ordered to file a final report upon completion of payments.

* * *

Signed and filed at Des Moines, Iowa this 23rd day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

JUANITA REBER,

Claimant,

vs.

WOOLCO-WOOLWORTH COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Statement of the Case

Defendants appeal from a proposed review-reopening decision filed January 28, 1982 wherein claimant was awarded running healing period benefits plus related medical expenses for an industrial injury occurring on April 24, 1979.

The record on appeal consists of transcript of the hearing held December 2, 1981 which contains the testimony of the claimant and LaVern Fross; the depositions of Robert C. Jones, M.D., and John H. Kelley, M.D.; a report of Donald L. Baldwin, M.D.; a portion of the decision of former deputy industrial commissioner Thomas R. Moeller (all of pages three and four, excepting the last partial paragraph on page four); the answers to interrogatories seven and eight filed December 15, 1979, and supplemental answers filed on March 18, 1980; claimant's exhibits 1 through 17; defendants' exhibits A through T inclusive; and the briefs of all parties on appeal.

Issues

Briefly put, the sole issue on appeal is whether the claimant's healing period should continue or should be terminated and a finding of permanency made accordingly.

Review of the Evidence

The decision in arbitration filed May 14, 1980 is helpful in setting the background in this matter:

Claimant testified that she is presently 40 years of age, married with 4 children living with her at the time of the alleged injury. She has an eighth grade education and has taken some GED courses but has not yet obtained her degree for equivalency of a high school education. Claimant has had a varied work history starting as a part-time waitress and elevator operator while in school. She did not work from 1956 to 1964. Claimant has worked as a barmaid and waitress from 1964 to 1969. She was a salad maker for Des Moines General Hospital in 1973 to 1974 and a cook at the Iowa Jewish Home during the same period. She has worked in housekeeping for the Bishop Drum Nursing Home in 1975 and she was a cook for the Dowell Pleasant Hill Manor nursing home in 1976. She has also worked as a cook and waitress for Taco Johns in December 1976.

* * *

She testified that on April 24, 1979 at approximately 2:00 to 3:00 P.M., she boxed and placed the pin-ticket machine, used to stamp prices on tags and affix the tags to the clothing, on a four wheel cart. She stated her back started aching and she felt tired. However, she stated she continued to stock merchandise on the shelves in the stockroom for the remainder of the work day until 10:00 P.M. Shortly before another employee, Valarie Johnson, left work at 5:45 P.M., she stated she complained to her about lower back pain and pain down the left side of her hip.

Soon after her injury, claimant sought the care of John H. Kelley, M.D. While under the care of Dr. Kelley, claimant underwent a laminectomy on August 13, 1979 for protracted intervertebral disc of the L4-L5 level. Claimant underwent a repeat laminectomy at the same level on February 19, 1980. As of the arbitration hearing of April 15, 1980, no permanency rating could be obtained. In the arbitration decision filed May 14, 1980, the deputy concluded that claimant had not yet reached maximum recuperation.

The testimony of Dr. Kelley indicates that claimant was again examined on May 12, 1980. Claimant's complaints persisted, but satisfactory progress was noted. (Kelley depo., p. 4.) Claimant was not seen again until July 14, 1980 in the emergency room of Iowa Methodist Medical Center. The record indicates that claimant was involved in an automobile accident on that date. Dr. Kelley indicated that his examination was concerned only with her lower back complaints. Dr. Kelley testified that x-rays showed no new injuries to the lumbar spine as the result of the accident of July 14, 1980, but degenerative changes as a result of surgery. (Kelley depo., p. 5.) Dr. Kelley felt claimant had sustained only a back strain on July 14, 1980. Dr. Kelley indicated that claimant's neck and shoulder complaints were the result of cervical injuries sustained on July 14, 1980 rather than in the injury of April 24, 1979. Likewise, Dr. Kelley noted that the 1975 injury incurred by claimant while employed with the Iowa Jewish Home related to head and neck complaints rather than the lower back. (Kelley depo., pp. 9-10.)

Dr. Kelley saw the claimant again on October 6, 1980 for the purpose of assessing permanent functional impairment. He testified:

> A. She thought she was getting along fairly well. She complained of some soreness in her legs after being on her feet but this did not seem to be severe. Our examination at that time revealed that she had a good range of motion in her back. She moved her back in all directions to a fairly normal degree. The reflexes were normal. The joints in the lower extremity moved well without any limitation. She did have some tightness in her leg when the leg was raised up and strength in her lower extremity was normal. (Kelley depo., p. 7.)

Dr. Kelley testified and also reported in a letter of May 8, 1981 that claimant suffered a ten percent permanent impairment of the back or seven percent of the body as a whole as a result of the injury of April 24, 1979 and two laminectomies. (Defendants' exhibits A and B.)

Dr. Kelley testified that he saw the claimant for the last time on December 29, 1980. Dr. Kelley stated that examination revealed the same results as previous examinations and that EMG testing proved unremarkable. (Kelley depo., pp. 11-12.)

As to the matter of claimant's healing period, Dr. Kelley testified:

> Q. As a result of this visit on October 6, 1980, did you in fact assign a permanency to her condition?
>
> A. Yes.
>
> Q. Doctor, what was this permanency?
>
> A. We gave her a 10 percent permanent partial impairment of her back.
>
> Q. Doctor, when did you feel that Mrs. Reber reached the end of her convalescent period after her second laminectomy.
>
> A. We felt that sometime during the month of July, approximately in the middle of that month. (Kelley depo., pp. 7-8.)

Finally, Dr. Kelley testified that he was familiar with claimant's employment duties prior to her injury. He indicated, however, that despite his assessment of claimant's impairment, he had no opinion as to claimant's ability to return to her former job.

Claimant was examined by Robert C. Jones, M.D., on March 27, 1980 for complaints of pain in the back, legs, neck and shoulders. In his deposition, Dr. Jones indicated that claimant had been treated for a cerebral concussion by his associate, Dr. Bakody, in 1974. Dr. Jones also testified that claimant's cervical complaints arose approximately one month after the automobile accident in July of 1980 and that her lumbar region was not affected by this accident. (Jones depo., p. 5.)

Dr. Jones testified as to claimant's functional limitation:

A. In examination her forward bending was restricted to about 70 degrees and the straight leg raising was positive at 80 degrees bilaterally, which means when you raise the leg up when the patient is lying horizontal, at about 80 degrees she developed pain down the leg when you raised the right leg and pain down the other leg when you raised the other leg. Deep tendon reflexes were normal throughout. The strength in the leg and the sensory examination was normal.

* * *

Q. Based upon your examination of her, the detailed history taken, did you arrive at a diagnosis with respect to the injuries that you observed?

A. I thought she had a lumbar disk syndrome, which in the business we call a fail lumbar disk syndrome, which we generally apply to people who have had lumbar disk surgery and who continue to have symptoms. (Jones depo., pp. 6-7.)

Dr. Jones referred claimant to Charles Burton, M.D., at the Sister Kenny Institute's Low Back Clinic in Minneapolis, Minnesota. In a report of July 13, 1981, Dr. Burton wrote:

> Juanita is presently 70 pounds overweight. Her chronic pain behavior has incapacitated her and amplified the problem causing her to be functionally incapacitated. Her present use of Tylenol #3 and Parafon Forte is potentially also a significant problem. Of interest is the fact that the patient's 1980 myelogram is more markedly positive than the 1979 myelogram at L4-5. Juanita has a [sic] early degenerative spondylolisthesis of L4 on L5 and the "guillotine" effect associated with continued bulging of disc material, hypertrophy of the zygo-apophyseal [sic] joints, etc. has conspired to produce a funtional [sic] "central" stenosis. This interspace is a "time-bomb" because it is probably unstable now and anything further would demand that a fusion be done at the same time. (Claimant's exhibit 6.)

Dr. Jones disputed the findings of Dr. Burton, however, since claimant had failed to report any relief after some weight loss.

The record fails to specify what other dates, if any, that Dr. Jones saw the claimant other than March 27, 1981. Regardless, Dr. Jones opined that claimant had a permanent functional impairment of 15 to 20 percent of the body as a whole. (Jones depo., p. 15.) Dr. Jones indicated that this rating did not consider claimant's cervical injury of 1975. (Jones depo., pp. 17-18.) However, Dr. Jones did not state to what extent, if any, the cervical injury of July 1980 contributed to claimant's disability rating. Dr. Jones was unable to assess claimant's ability to return to her former employment in that he was unfamiliar with her duties. (Jones depo., p. 26.)

Finally, as to claimant's healing period, Dr. Jones testified that she was still "in the treatment phase." (Jones depo., p. 24.) On cross-examination, however, Dr. Jones indicated that no further treatment for the claimant was planned other than weight reduction.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 24, 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).

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 opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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., supra.* See also *Musselman v. Central Telephone Co.*, 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

The requirements for healing period benefits are set forth in Iowa Code section 85.34(1), which states in part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable... the employer shall pay to the employee compensation for a healing period... beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

The word "recuperation" has been interpreted in Industrial Commissioner Rule 500—8.3(85), which states: "Recuperation occurs when it is medically indicated that either no further improvement is anticipated from the injury or that the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury, whichever occurs first."

By the very meaning of the phrase, a person with a "permanent disability" can never return to the same physical condition he or she had prior to the injury. Recuperation as used in Iowa Code section 85.34(1) refers to that condition in which healing is complete and the extent of the disability can be determined. The healing period may be characterized as that period during which there is reasonable expectation of improvement of the disabling condition, and ends when maximum medical improvement is reached. That is, it is the period from the time of the injury until the employee is as far restored as the permanent character of his injury will permit. Thus, the healing period generally

terminates at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury. See *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60 (Iowa App. 1981).

That a person continues to receive medical care does not in and of itself 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 also does not necessarily extend healing period particularly when the treatment does not in fact improve the condition. See *Derochie v. City of Sioux City*, Appeal Decision, March 23, 1982.

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in *Diederich v. Tri-City Railway Co.*, 219 Iowa 587, 593, 258 N.W. 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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See *Birmingham v. Firestone Tire & Rubber Co.*, Appeal Decision, July 10, 1982.

Analysis

In the proposed decision of January 28, 1982, the deputy places a great deal of weight upon the words "treatment phase" used by Dr. Jones. The deputy apparently concluded that Dr. Jones can provide further help for claimant's lumbar complaints.

As Iowa Code section 85.34(1) and Rule 500—8.3(85) provide, healing period terminates at the point when it is determined that further improvement in the claimant's condition cannot be anticipated. *Kubli, supra*, bolsters this interpretation by concluding that healing period benefits end when the attending physician determines that claimant has recovered as far as is possible.

In the matter before us, claimant had undergone two laminectomy surgeries and had returned to experiencing nearly normal flexation by mid-July 1980. While Dr. Jones reported that claimant was in continuing pain and "treatment," he does not specify what this treatment will be or at what it would be directed.

It is also noted that Dr. Jones assesses claimant's disability as permanent. It is unlikely that Dr. Jones could have anticipated further improvement in claimant's condition while concluding that claimant's 15 to 20 percent disability was a permanent condition. While Dr. Kelley did not make an assessment of permanent impairment until October 6, 1980, his testimony clearly indicates that claimant had recovered as far as was possible by July 1980. Insofar as Dr. Kelley determined claimant's condition to be stabilized and unchanged as of July 14, 1980, it is concluded that claimant's healing period ended on that date.

Given that claimant's healing period ended on July 14, 1980, the extent of her industrial disability must be considered.

Dr. Kelley was claimant's treating physician through two laminectomies. Dr. Kelley treated claimant from April 30, 1979 until December 29, 1980. He treated her only for her lumbar condition and followed claimant through the period of post-surgical recovery.

Dr. Jones did not see claimant until March 27, 1981, more than eight months after the incident of July 14, 1980. It is not clear whether Dr. Jones, a neurologist, was consulted for claimant's complaints of neck and shoulder pain or to what extent this cervical injury in July 1980 was a factor in his opinions.

Therefore, the greater weight of the medical evidence indicates that claimant suffers a permanent functional impairment of seven percent of the body as a whole.

Claimant was 41 years of age at the time of the last hearing. Although she has only an eighth grade education, she has a varied work experience which includes employment as an elevator operator, barmaid, waitress, salad maker, institutional cook and institutional housekeeper. Her record with defendant employer showed rapid advancement despite a preexisting cervical injury and emotional disturbance. Medical evidence indicates that the claimant's lumbar condition would not now permit heavy lifting. However, the functional limitations referred to by either Dr. Kelley or Dr. Jones are not so great as to prohibit claimant's return to one of her previous occupations or one of a like kind.

Despite the lack of significant functional limitation, claimant still has to contend with pain, whether real or imagined. This pain will impact upon her earning capacity. Given her impairment, her personal history, rating and the pain she now experiences, it is therefore determined that claimant suffers a permanent industrial disability of 15 percent.

It is noted that on March 4, 1980, claimant filed an application for benefits under Iowa Code section 85.27. Because the record is unclear as to the extent of claimant's medical treatment by Dr. Jones or its relationship to the injury of April 24, 1979, any finding of medical expense would be inappropriate. The parties have indicated the necessity of proceeding to another hearing on the appropriateness of Dr. Jones' treatment under section 85.27. As this particular issue has not been dealt with by the parties thus far, determination of the relationship of Dr. Jones' treatment to the injury of April 24, 1979 will likewise not be dealt with here, but reserved for separate determination. Medical expenses ordered in the decision filed January 28, 1982 are related to claimant's industrial injury and are considered proper.

Findings of Fact

1. That claimant was 41 years old at hearing and married with four children.

2. That claimant has an eighth grade education with varied work experience.

3. That claimant suffered an admitted industrial injury on April 24, 1979 to her lower back.

4. That claimant sustained injuries to the cervical area in July 1974 and July 1975 in incidents unrelated to the present matter.

5. That claimant sustained a cervical injury and strained lower back muscles in an automobile accident on July 14, 1980.

6. That claimant's cervical compliants are not related to nor caused by the injury of April 24, 1979.

7. That the injury of July 14, 1980 did not aggravate or relate to claimant's problems in the lumbar area of the spine.

8. That no medical treatment was contemplated after July 14, 1980 which had a reasonable expectation of improving claimant's disabling condition caused by the injury of April 24, 1979.

9. That as of July 14, 1980, claimant's treating physician had determined that maximum medical recuperation had been attained from the injury on April 24, 1979.

10. That claimant had undergone two laminectomies and still experiences pain in her lower back and legs.

11. That as a result of the injury of April 24, 1979, claimant suffers a permanent functional impairment of seven percent of the body as a whole.

12. That as a result of the injury of April 24, 1979, claimant has sustained a 15 percent permanent industrial disability.

Conclusions of Law

That claimant has met her burden of proof that the disabilities which she alleges are causally related to the injury arising out of and in the course of her employment on April 24, 1979.

That pursuant to Iowa Code section 85.34(1) claimant is entitled to healing period benefits from April 24, 1979 through July 14, 1980.

That any treatment contemplated did not extend the healing period beyond July 14, 1980.

That claimant is entitled to 75 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u) at the weekly rate of $143.35.

That claimant is entitled to medical expenses reasonably related to the injury of April 24, 1979.

That claimant is not entitled to compensation benefits for injuries to the cervical area.

The defendants are entitled to a credit against benefits already paid per *Wilson Food Corp. v. Cherry*, 315 N.W.2d 756 (Iowa 1982).

WHEREFORE, the finding of a running healing period contained in the proposed decision filed January 28, 1982 is overruled.

THEREFORE, IT IS ORDERED:

That defendants pay unto the claimant healing period benefits from April 24, 1979 through July 14, 1980 at the weekly rate of one hundred forty-three and 35/100 dollars ($143.35).

That defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the weekly rate of one hundred forty-three and 35/100 dollars ($143.35).

That defendants are further ordered to pay the following medical expenses already paid by claimant:

Consulting Radiologists Ltd.	$ 90.00
Neuro-Associates, P.C.	300.00
Sister Kenny Institute	347.00

That defendants are entitled to a credit for benefits already paid.

That payments that have accrued shall be paid in a lump sum with interest pursuant to Iowa Code section 85.30.

That costs of this action are taxed to the defendants pursuant to Iowa Industrial Commissioner Rule 500—4.33.

That defendants shall file a final report upon payment of this award.

* * *

Signed and filed this 23rd day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed.

CLAUDE J. REID,

Claimant,

vs.

WESTERN ENGINEERING COMPANY,

Employer,

and

WAUSAU INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Review-Reopening Decision

Introduction

This is a proceeding brought by Claude Reid, the claimant, against his employer, Western Engineering Company, and the insurance carrier, Wausau Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on September 7, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Pottawattamie County Courthouse in Council Bluffs, Iowa on July 1, 1981. The record was considered fully submitted on July 10, 1981.

An examination of the industrial commissioner's file reflects that a first report of injury was filed June 16, 1980 and a memorandum of agreement was filed January 11, 1980.

The record in this case consists of the testimony of the claimant, James Cunningham, Gene Brazil and Edward Bittner; claimant's exhibit 1 through 9 inclusive; and defendants' exhibits A through E inclusive. Judicial notice was taken of Section 148A, Code of Iowa.

The issue to be determined is the claimant's entitlement to the services of the Nebraska Pain Management Center under the terms of Section 85.27.

Findings of Fact

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

The claimant is a 55 year old male who was employed as an ironworker by the defendant, Western Engineering of Omaha, Nebraska.

In April 1973 the claimant was injured on the job while employed by defendant, Western Engineering Company. He sustained a back injury and underwent surgery for the removal of a disc (L4-L5) in his lower back. The claimant was adjudged, under Nebraska law, as having suffered a functional permanent partial disability of ten percent of the body as a whole. The matter was settled between the parties in September 1975.

On September 7, 1979 the claimant was an employee of the defendant, Western Engineering Company, and sustained an injury which according to the memorandum of agreement, arose out of and in the course of his employment when he fell eight to ten feet into a concrete swimming pool then under construction. The injury is diagnosed as a strain or sprain of the lower back.

The claimant was examined or treated by various physicians in the Council Bluffs/Omaha area and according to the briefs of counsel, Dr. Margules was of the opinion that claimant suffered a permanent partial disability of five to ten percent of the body as a whole as a result of the 1979 incident.

The claimant also received a series of massage treatments from James Cunningham, a massage technician and physical therapist.

The claimant was examined by F. Miles Skultety, M.D., Professor and Chairman of the Department of Neurosurgery at the University of Nebraska Medical Center in Omaha. Dr. Skultety, in his report, indicates that his examination of the claimant revealed complaints of pain involving the entire right side of his back as well as the right leg. Dr. Skultety reviewed with the claimant the facilities which were available at the Nebraska Pain Management Center and explained to him the aim of the program at that facility. Dr. Skultety is of the opinion that while the success rate of the pain center runs in the neighborhood in 65 percent, he feels that the claimant's chances of recovery are as good as anyone that he accepts for treatment in his facility. The general gist of his letter, introduced as claimant's exhibit 9, is that he is recommending the center to the claimant.

Various other witnesses testified to the painful condition claimant was in.

Applicable Law

Section 85.27 provides:

> 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 therefor and 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.

When an artificial member or orthopedic appliance, whether or not previously furnished by the employer, is damaged or made unusable by circumstances arising out of and in the course of employment other than through ordinary wear and tear, the employer shall repair or replace it. When any crutch, artificial member or appliance, whether or not previously furnished by the employer, either is damaged or made unusable in conjunction with a personal injury entitling the employee to disability benefits, or services as provided by this section or is damaged in connection with employee actions taken which avoid such personal injury, the employer shall repair or replace it.

Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they have access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of such information. Such information shall be made available to any party or their attorney upon request. Any institution or person releasing such information to a party or their attorney shall not be liable criminally or for civil damages by reason of the release of such information. If release of information is refused the party requesting such information may apply to the industrial commissioner for relief. The information requested shall be submitted to the industrial commissioner who shall determine the relevance and materiality of the information to the claim and enter an order accordingly.

Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for determination, and the commissioner may, in connection therewith, utilize the procedures provided in sections 86.38 and 86.39 and conduct such inquiry as he shall deem necessary. Any institution or person rendering treatment to an employee whose injury is compensable under this section agrees to be bound by such charges as allowed by the industrial commissioner and shall not recover in law or equity any amount in excess of that set by the commissioner.

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

Analysis

The claimant in this case has a history of back problems stemming initially from the work related incident while in the employ of this defendant-employer in 1973 at which time he underwent a surgical procedure at the disc space of L4-L5.

He then sustained a second work related injury to the same area of his body in September 1979. The claimant as well, as his supporting witnesses, establish his discomfort and the painfulness of his present condition.

In light of Dr. Skultety's letter contained in this record, the undersigned deputy industrial commissioner is of the opinion that the treatment offered by Nebraska Pain Management Center is reasonably calculated to treat the claimant's painful back condition.

Conclusions of Law

WHEREFORE, it is found:

That the claimant sustained an injury which arose out of and in the course of his employment.

That the services sought pursuant to Section 85.27, Code of Iowa, are reasonable in light of the present situation of the claimant.

THEREFORE, it is ordered that the appropriate appointments shall be arranged for the claimant at the Nebraska Pain Management Center in Omaha and that the costs of the claimant's attendance at that facility shall be borne by the defendants pursuant to the terms of Section 85.27, Code of Iowa.

* * *

Signed and filed this 17th day of August, 1981.

E. J. KELLY
Deputy Industrial Commissioner

No Appeal.

NORMAN E. REYNOLDS,

Claimant,

vs.

IOWA POWER AND LIGHT,

Employer,
Self-Insured,
Defendant.

Appeal Decision

BE IT REMEMBERED that on February 19, 1982 the deputy hearing the above captioned case sustained claimant's motion to compel discovery. Claimant's motion was granted

thusly: "That the claimant's motion to compel discovery should be and is hereby sustained with respect to all information requested except that data contained in the claimant's personnel file which specifically falls within the category of privileged due to the attorney/client relationship."

On February 25, 1982 claimant filed a notice of appeal pursuant to Iowa Industrial Commissioner Rule 500—4.7, but failing to allege any error in the deputy's order.

On March 2, 1982 the undersigned entered an order directing claimant, as appellant, to submit a brief by March 22, 1982 stating the issues on appeal and allowing appellee fifteen days to respond. Such a brief is yet to be filed.

Defendant, on March 31, 1982, brought a motion to dismiss claimant's appeal citing claimant's failure to comply with the order of March 2, 1981.

Rule 500—4.36 states:

> *Compliance with order or rules.* If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner *may* dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner *may* enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner. (Emphasis supplied.)

In that appellant has failed to comply with the requirements of Rule 500—4.28, the record on appeal is considered to have been fully submitted as of April 6, 1982.

The order to compel discovery filed February 19, 1982 is within the permissible bounds set forth by the Iowa Rules of Civil Procedure. As claimant fails to allege and review of the file fails to disclose any error by the deputy in the order, it is to be considered proper.

THEREFORE, it is ordered:

That claimant's motion to compel discovery is sustained as set forth in the order of February 19, 1982.

This case is therefore returned to the active docket.

* * *

Signed and filed this 14th day of April, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

TIMOTHY DALE ROBERTS,

Claimant,

vs.

PIZZA HUT OF WASHINGTON, INC.,

Employer,

and

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Timothy Dale Roberts, the claimant, against his employer, Pizza Hut of Washington, Inc., and the insurance carrier, St. Paul Fire and Marine Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on July 9, 1978. This matter came on for hearing before the undersigned at the Muscatine County Courthouse in Muscatine, Iowa, on March 23, 1982. The record was considered fully submitted on that date.

On August 7, 1981 defendants filed a first report of injury and memorandum of agreement (form 2A) concerning the July 9, 1978 injury. On August 28, 1981 defendants filed a form 2B indicating that the weekly rate for compensation benefits was $51.70. On August 13, 1981 defendants filed a final report (form 2A) indicating that 13 weeks of temporary total disability (July 10, 1978 through October 8, 1978) had been paid pursuant to the memorandum of agreement.

The record consists of the testimony of the claimant, of Raquel Gray, and of Marvin Day; claimant's exhibit 1, packet of medical records concerning the work injury (claimant referred to 27 pages but the undersigned counted 26); claimant's exhibit 2, statement regarding claimant's rate of pay while working full-time for another employer from May 15, 1978 to July 7 1978; claimant's exhibits 4 and 5, Xerox charges from the University of Iowa and Muscatine County District Court; defendants' exhibit A, a December 20, 1978 To Whom It May Concern note from B. L. Sprague, M.D.; and defendants' exhibit B, an August 13, 1981 letter from Joseph A Buckwalter, M.D. Defendants' objection to claimant's exhibit 3, a statement regarding attorney fees he had incurred in this action, was sustained at the time of the hearing. Ruling was reserved on defendants' objections to claimant's exhibits 2, 4 and 5. Objection to exhibit 2 is hereby overruled insofar as claimant's admissions establish claimant's earnings in various employments the year preceding the injury, and not whether he worked full-time in one of those employments at the time of the injury as suggested by exhibit 2. Objections to exhibits 4 and 5 are hereby sustained because costs evidenced by such exhibits are not contemplated by Industrial Commissioner Rule 500—4.33. Defendants' exhibit C, claimant's earnings while working at Pizza Hut, was not offered into evidence. Both parties filed hearing briefs.

Issues

According to the parties at the time of the hearing, the issues to be determined include whether there is a causal

connection between the work injury and the alleged permanent partial disability, and if so, the nature and extent of such disability; whether claimant is entitled to Code section 85.27 benefits; and whether the rate of compensation shown on the form 2B is correct.

Recitation of the Evidence

While cleaning up for defendant employer in the early morning hours of July 9, 1978, claimant cut his right hand when he pushed what he thought was a bag of pasta, but which contained broken glass, down into the trash container. The course of immediate care is set forth in the operation record signed by John P. Albright, M.D., and Fred J. McGlynn, M.D., of the University of Iowa Hospitals and Clinics:

> INDICATIONS: Timothy Roberts is a 19 year old white male right-handed who works at the Pizza Hut in Washington, Iowa. While taking out the garbage, the patient pushed in the garbage can, and cut his hand in the palmar region and was sent to Washington County Hospital. Dr. Nemmers placed local anesthetic in the region of the laceration as well as placing a Xylocaine block at the wrist and while exploring the wound, noted that the patient had probable flexor tendon damage. Dr. Nemmers and Dr. Tong, a general surgeon, evaluated the wound in the Emergency Room and it was noted that the patient had common digital artery and nerve severed as well as flexor tendons. For this reason he was referred to the University of Iowa Hospital and arrived at the Emergency Room approximately 4 hours post injury. The patient received tetanous toxoid and the laceration was evaluated. It was noted that the patient had transversed incision approximately 1/2 cm proximal to the distal palmar crease in the longitudinal line with the long finger. The width of the laceration was approximately 1 cm and 1/2 and had proximal component forming a "T" about 1 1/2 inches in length. The patient held thelong [sic] finger in extension and had no motor power of the flexor digitorum profundus or superficialis of the long finger. The patient had no sensation in the radial border of the ring finger in the radial or ulnar border of the long finger, and had no sensation in the ulnar border of the index finger. The patient was indicated for exploration and debridement as well as needed repairs of the right hand.
>
> PROCEDURE: The patient was taken to the operating room and was given a general anesthetic with good anesthetic result. The patient had scrubbing of the right hand for approximately 15 minutes with Betadine, and saline wash. The arm was prepped and draped in routine fashion. Exploration of the wound showed that the patient's superficial arterial arch was intact, yet the common digital artery going to the ulnar border of the long finger and the radial border of the ring finger was severed. Also, it was noted that the common digital nerve to the ulnar border of the long finger and the radial border of the ring finger was also severed. Both the flexor digitorum profundus and superficialis to the long finger were cut cleanly just proximal to the distal palmar crease. The distal tags of the tendon were easily found yet the proximal portion of the tendons had retracted to approximately the proximal palmar crease. With flexion of the wrist and milking of the tendons distally the tendons were grasped and noted to be fairly shreaded [sic]. For this reason the distal portion of the tendons were cleaned sharply at the distal fragment and tagged. Attention was paid to the thumb and digital artery and nerve supplying the ulnar border of the index and radial border of the long finger and these were intact. A Z type incision was made distally and the artery and nerve were followed just proximal to the bifurcation and appeared to be intact.
>
> A Doppler exam was performed and digital arteries to the index, long and ring finger were inspected and they all had good arterial pulsation flow. Attention was then paid to the flexor digitorum profundus and superficialis. The superficialis was cleaned and modified Bunnell stitch with No 4-0 nylon was used to reapproximate the tendon. Simple stitches were then applied around the cut ends of the tendon to further approximate the cut edges. After the superficialis tendon was reapproximated similar procedure was performed on the flexor digitorum profundus. Attention was then paid to the common digital nerve supplying the borders of the long and ring fingers. The epineurium was reapproximated with No 9-0 nylon circumferentially. The wound was then thoroughly irrigated again with saline and then neomycin. After irrigating the wound the skin was closed with 4-0 nylon. No drains were used. A compression type of dressing was applied and dorsal splint from elbow to the fingertips was modeled with the wrist in approximately 20° flexion, the MP joints in approximately 25° flexion and the PIP joints approximately 10° flexion. A Dynamic flexion assist was applied to the dorsal splint by placing heavy thread through the nail tip.
>
> The patient returned to the recovery room in satisfactory condition. The patient had received one gram of Cephadol in the Emergency Room prior to surgery and one gram intra-operatively.
>
> The patient had the tourniquet up approximately 1 hour 50 minutes prior to the nerve repair. The tourniquet was released approximately 15 minutes then reapplied to repair the common digital nerve and the tourniquet was up for approximately 20 minutes for repair of the nerve. (Claimant's exhibit 1, pages 23 and 24.)

Claimant was discharged from the hospital on July 14, 1978. (Claimant's exhibit 1, page 15.) He returned for reevaluation and removal of sutures on July 28, 1978. (Claimant's exhibit 1, page 16.) Claimant received regular follow-up care through the end of October 1978. The clinical notes for September 15, 1978 indicate that claimant had regained full range of DIP and PIP motion but that there had been no sig-

nificant return of sensation. Comments pursuant to evaluation on October 27, 1978 reveal that upon pinprick there was a tingling sensation along the ulnar aspect of the long finger and along the adjacent aspect of the ring finger. (Claimant's exhibit 1, pages 17 to 19.) In a To Whom It May Concern letter dated December 20, 1978, B. L. Sprague, M.D., states that "[t]he length of time Timothy Roberts would be unable to work from the injury involving a flexor tendon of the right long finger and digital nerve would be three months from the time of injury." (Claimant's exhibit 1, page 21; defendants' exhibit A.)

On April 27, 1979 Drs. Coleman and Sprague reported:

> On physical examination, he has excellent return of his flexor tendon function. He has almost full range of motion on flexion but does lack a little extension under extreme stress. He continues to have hypesthesia between the long and ring fingers, and hypesthesia on the radial side of the middle finger.
>
> It is our impression that the patient has obtained excellent tendon repair but has not regained full sensation for [sic] near normal sensation neurologically. We told the patient that it should improve gradually over the next three to four years but that he will never have normal sensation in those digits. We have instructed him to return to Clinic in three months for follow up evaluation in order to settle litigation that may be pending. (Claimant's exhibit 1, pages 19 and 20.)

Examination findings on July 27, 1979 included slight amount of tenderness underneath the scar with a positive Tinel's sign, decreased sensation on the radial border of the long finger and on the ulnar border of the ring finger, and full range of motion of the PIP, DIP and MP joints of both fingers. Claimant was released on a p.r.n basis. (Claimant's exhibit 1, page 20; see also defendants' exhibit B.)

Claimant's right hand was last evaluated on October 27, 1981 at which time he complained of odd sensations upon pressing the area of injury and of some limitation in extension of the long finger. In a clinical note for that date, Dr. Lindenfeld and Dr. Blair set forth their examination findings and recommendations:

> Physical exam shows his hand to be well healed. His motion shows that the MP goes from a -25° to 95°, PIP from 0-120° and his DIP from 0-60°. This versus 0-75°, at the DIP on the index and ring and at the MP he has about 45° of extension in the index and ring. Sensation shows that he has 12 mm two point discrimination on the ulnar aspect of the long and greater than 2 mm on the radial aspect of the ring. Otherwise his two point is intact. There is a small area in the hand which is somewhat sensitive, and probably represents a neuroma within the previous repair.
>
> We have discussed the possibilities for this. We feel that his extension can be improved with exercise and secondly that we would risk the protective sensation in the areas of partial loss by repairing the nerve, and unless this bothers him further we would not recommend repair at this time. If this should become more bothersome or he feels that he would like to risk a repair, we would be happy to see him again for this. * * * * (Claimant's exhibit 1, page 22.)

Claimant's present complaints include slight decreased mobility of the right hand, loss of feeling in the ring and long fingers and in half of the hand and pain radiating throughout the hand from the scar tissue area. He testified that his right hand feels heavy and weak and often becomes cold and tingly. Claimant stated that he experiences difficulty using his right hand to type, to write, to do manual labor such as farming and to engage in sports activities such as basketball, tennis and golf. He fears frostbite in that hand. He no longer shovels snow.

Upon cross-examination, claimant agreed that he worked part-time for defendant employer at the time of the injury and that his earnings for the year preceding the injury included $501.84. Claimant further acknowledged that his other earnings for the year preceding the injury were those set forth in his admissions; $1,284.00 from Dale Roberts farms; $1,518.40 from Natural Gas Pipeline of America; $280.88 from Hillcrest Dormitory and $199.06 from Northrup King. Exhibit 2 indicates that claimant was employed on a full-time basis for Natural Gas Pipeline from May 15, 1978 to July 7, 1978. Claimant testified that he was single and had no dependents on the date of the injury.

Raquel Gray, presently a resident counselor at a girl's home in Keokuk, testified that she first met the claimant in December 1977, at work for defendant employer. She and the claimant began dating three months later and subsequently became engaged until terminating the relationship in August of 1981. Ms. Gray verified claimant's complaints. She indicated that construction of defendant employer's premises at the time of the injury limited all the employee's hours to some extent.

Marvin Day, called by claimant as an adverse witness, testified that he is self-employed in a franchise with Pizza Hut. He did not know the claimant personally. His records indicated that claimant's hours (per half month periods) from December of 1977 to the date of injury varied from 6 to 44 1/2 hours. Claimant's hourly rate of pay increased gradually from $2.50 to $2.85. Mr. Day noted that there was no termination form in claimant's file.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 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).

The opinions of experts need not be couched in definite, positive or unequivocal language. *Sondag v. Ferris Hard-*

ware, 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., supra.* 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, supra.* 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.*

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). *Barton v. Nevada Poultry Company,* 253 Iowa 285, 110 N.W.2d 660, (1961). "Loss of use" of a member is equivalent to "loss" of the member. *Moses v. National Union C.M. Co.,* 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. *Blizek v. Eagle Signal Company,* 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. *Soukup v. Shores Co.,* 222 Iowa 272, 268 N.W.2d 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. *Schell v. Central Engineering Co.,* 232 Iowa 421, 4 N.W.2d 339 (1942).

Code section 85.36 provides in relevant part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> * * *
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.
>
> 7. In the case of am employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his weekly earnings shall be computed under subsection 6, taking the earnings, not inluding overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
>
> * * *
>
> 10. In the case of an employee who earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which he is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury but shall not be less than an amount equal to thirty-five percent of the state average weekly wage paid employees as determined by the Iowa employment security commission under the provisions of section 96.3, and in effect at the time of the injury.
>
> * * *
>
> b. If the employee was an apprentice or trainee when injured, and it is established under normal conditions his earnings should be expected to increase during the period of disability, that fact may be considered in computing his weekly earnings.

Analysis

The record is devoid of any evidence that claimant's alleged disability is not causally related to the work injury. Rather, the obvious dispute between the parties is over the nature and extent of the disability. Claimant contends that he is entitled to a determination of his loss of earning capacity because his scheduled injury entails neurological involvement and otherwise subjects his body to danger because of loss of sensation to heat and cold. Defendants argue that claimant's scheduled injury did not result in any permanent functional impairment.

Claimant did not establish an injury to the body as a whole, a prerequisite for a determination of industrial disability. Reliance on medical comments that he had not regained full sensation neurologically is misplaced. The hand, not the body, was being assessed. There is no medical evidence to support finding that the resultant injury has affected the body as a whole.

While it is true that none of claimant's doctors gave a specific rating with regard to the functional impairment of claimant's right hand, they likewise did not state that there was no loss of use. Furthermore, the more recent medical examinations indicated that there is some continued loss of extension and sensation and some tenderness at the scar site; however, such findings did not corroborate the degree of symptomatology to which claimant testified. That is, claimant has some functional impairment based on factors which claimant's doctors apparently found too slight to put

into specific enough terms which could be translated into a functional impairment. However, based on the severity of the injury, the necessity of surgery, and the recorded continued symptomatology, claimant is deemed to have lost 5 percent use of his right hand.

With regard to the issue of rate, claimant's arguments are blended. He maintains that he worked full time (40 hours per week) for Natural Gas Pipeline and part-time (24 to 30 hours per week) for defendant employer at the time of the injury and would have received $3,824.00 for the thirteen weeks he was disabled following the injury. Although contending he is entitled to compensation under subsection 7, and not subsection 10, of Code section 85.36, claimant cited many decisions regarding evidence of when work was available to other employees in a similar occupation and attempted to present evidence at the hearing regarding availability of work with defendant employer. (It is noted that many of claimant's cases concerned former Code section 85.36.) Defendants argue that claimant has admitted he was a part-time employee of defendant employer at the time of the injury and accordingly, Code section 85.36(10) applies.

Clearly, had claimant been injured while working for Natural Gas Pipeline on July 9, 1978, he would have been entitled to compensation based on Code section 85.36(7) since he had worked there less than 13 calendar weeks. That is, his earnings would have been divided by the actual number of weeks he had worked in that employment to arrive at his gross weekly wage.

However, claimant's admission established that he was a part-time employee for defendant employer at the time of the injury. (Mr. Day's testimony was cumulative on such point.) Hence, it is not necessary to analyze whether claimant earned less than the usual full-time adult laborer in that line of industry (defendant employer's) in which he was injured in that locality. Furthermore, while claimant's admission per se does not foreclose the possibility that he may have been an apprentice or trainee as contemplated by Code section 85.36(10)(b), the record does not support such a finding. Mr. Day did not indicate that claimant was an apprentice or trainee and the gradual increases in pay appear to be related to the number of weeks worked as a part-time employee.

Accordingly, claimant's gross weekly earnings amount to $75.68 ($3,784.18 total earnings from all employment during the 12 calendar months preceding the injury divided by 50. [Obviously if claimant had been a full-time employee of Natural Gas Pipeline for a longer period of time, his gross weekly earnings would have increased accordingly. Code section 85.36(10) is designed to compensate, as equitably as possible, for employees in circumstances like that of the claimant.]) The wage rate table for injuries occurring after July 1, 1978 indicates that a single claimant, who earns a gross weekly wage of $75.68 and has no dependents, is entitled to a weekly compensation rate of $51.70.

Findings of Fact and Conclusions of Law

WHEREFORE, for all reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant sustained a laceration of the long finger FDP and FDS and of the common digital artery and nerve to the long and ring fingers on the right when he pushed a bag of pasta, which also contained broken glass, into a trash container in the course of performing his employment duties on July 9, 1978.

Finding 2. The July 9, 1978 injury necessitated immediate surgical repair of the FDP and FDS tendons to the long finger and of the common digital nerve long and ring fingers. Claimant was hospitalized for six (6) days and thereafter received monthly follow-up care through October 27, 1978. Medical evidence indicated that recuperation from such injury required three (3) months.

Finding 3. The medical evidence indicates that claimant has some tenderness at the scar site, some loss of sensation on the ulnar aspect of the long finger and on the radial aspect of the ring finger, and essentially full range of motion except for some loss of extension for which exercises have been recommended. No specific rating of functional impairment was given.

Finding 4. Claimant's present complaints include slight decreased mobility of the right hand, loss of feeling in the long and ring fingers, pain radiating from the site of the scar, and general weakness and occasional coldness in the hand. As a result of such limitations, claimant has some difficulty typing, writing, performing manual labor and engaging in sports.

Conclusion A. Claimant has sustained five (5%) percent loss of use of the right hand as a result of the July 9, 1978 work related injury. Pursuant to Code section 85.34(2)(l), he is entitled to nine point five (9.5) weeks of compensation.

Finding 5. At the time of the injury claimant worked part-time for defendant employer and full-time for another employer. Claimant was not an apprentice nor trainee of defendant employer.

Finding 6. Claimant's total earnings from all employment during the twelve (12) calendar months immediately preceding the date of injury were $3,784.18.

Finding 7. Claimant was single and had no dependents on the date of injury.

Conclusion B. Pursuant to Code section 85.35(10), claimant's gross weekly wage is seventy-five and 68/100 dollars ($75.68). His weekly rate of compensation is fifty-one and 70/100 dollars ($51.70).

Order

THEREFORE, it is ordered that the defendants pay the claimant nine point five (9.5) weeks of permanent partial disability at the rate of fifty-one and 70/100 dollars ($51.70) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of October 9, 1978, the day after healing period benefits were terminated.

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

Defendants are further ordered to pay unto the claimant the following medical expenses:

Round trip mileage for Iowa City treatment	
6 x 70 x $.15	$63.00
(After July 1, 1974 and before July 1, 1979)	
1 x 70 x $.18	12.60
(After July 1, 1979)	
1 x 70 x $.20	14.00
(After July 1, 1980)	

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendants when this award is paid.

* * *

Signed and filed this 16th day of April, 1982.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

ARTHUR ROSINE,

Claimant,

vs.

WEBSTER CITY PRODUCTS,,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carriers,
Defendants.

Appeal Decision

Claimant appeals from a proposed arbitration decision filed March 25, 1981 wherein claimant was denied compensation benefits for failure to comply with notice requirements of Iowa Code section 85.23.

The record on appeal consists of the transcript of the hearing which contains the testimony of the claimant, Ardith Gillespie, Larry Duane Larson, Sharol Eileen Bell and Wanda Rosine; claimant's exhibits 1 through 9, defendants' exhibits C, D, E, F, G, H, K and L; the deposition of Robert Hayne, M.D.; and the briefs and exceptions of all parties. Defendant's exhibit J was stricken by the deputy pursuant to Iowa Industrial Commissioner Rules 500—4.17 and 4.18. The deputy's notes indicate that defendants' exhibit I was to be received and considered after the hearing. Such exhibit was not filed with this agency and is therefore not considered as part of the record on appeal.

At the time of hearing the parties stipulated that the claimant was earning $5.27 per hour for a 40 hour week or a gross wage of $266 per week with no dependents. The parties further stipulated that the claimant was off work from November 8, 1978 through September 7, 1979. The parties also stipulated to the fairness of medical bills involved herein.

The issues to be determined on appeal are whether the claimant sustained an injury which arose out of and in the course of his employment with this defendant-employer, the existence of a causal relationship between that injury and the alleged resulting disability as well as the nature and extent of disability. The briefs point out, however, that the primary issue on appeal is whether proper notice was given to defendant-employer as provided by Iowa Code section 85.23.

In his testimony at hearing, claimant asserted that he informed his foreman and the plant nurse of shoulder pain shortly after he first noticed it on or about November 1, 1978. The deputy's decision indicates that claimant's testimony was fully contradicted by his foreman, Larry Larson, and defendant-employer's nurse, Ardith Gillespie.

Claimant admitted that he did not seek legal counsel until after being witness to a workers' compensation hearing in Fort Dodge, Iowa on October 22, 1979.

On cross-examination of claimant by defendants' counsel:

Q. Would it be a fair statement to say you never attempted to find out whether or not your condition was work related until after October 22nd of 1979?

* * *

A. The answer would be yes.
(Hearing transcript, pages 43-44.)

The cross-examination of claimant continued as to a letter sent by claimant's counsel on January 25, 1980.

Q. So then it would be a fair statement that no one for you informed Webster City Products or your foreman that this condition was work related until the letter from Mr. Trevino was received?

A. That's true.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 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).

Section 85.23, Code of Iowa, provides:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury or unless the employee, or someone on his behalf or a dependent of 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 Iowa Supreme Court noted in the recent case of *Berle M. Robinson v. Department of Transportation, et al.*, 296 N.W.2d 809 (Iowa 1980), there are two means by which an employer may receive notice of an injury under section 85.23. One is by actual knowledge of the occurrence of the injury, and secondly, by receipt of notice of the injury from the employee or his representative, both of which must be accomplished within 90 days of the date of the incident.

The supreme court noted in *Robinson, supra:*

> * * * It logically follows that the actual knowledge has information putting him on notice that the injury may be work related.
>
> The purpose of section 85.23 is to alert the employer to the possibility of a claim so that an investigation of the facts can be made while the information is fresh. See *Knipe v. Skelgas Co.*, 229 Iowa 740, 748, 294 N.W. 880, 884 (1941). In view of this purpose, it is reasonable to believe the actual knowledge alternative must include information that the injury might be work connected.

The supreme court continues at page 812:

> Substantially the same statement of the discovery rule appears in 3 A. Larson, supra, §78.41 at 15—65 and 15—66: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work-connected, but positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability.

In his brief of June 22, 1981 claimant asserts that he did not have sufficient intelligence to understand the possible compensable nature of his condition until the November 1979 report of Robert Hayne, M.D. — after he had retained counsel. Claimant also contends that he first noticed shoulder and arm pain on or about November 1, 1978. Claimant contends that he told of this pain to a fellow employee, his foreman, and the company nurse. Finally, the claimant contends that shortly after noticing his pain, he consulted Subhash Sahai, M.D. Regardless of claimant's level of sophistication, it is difficult to believe that claimant thought his condition serious enough to undergo multiple medical consultations and undergo a major surgical procedure without describing for his physician when and how his pain occurred. If claimant did not relate the link between his pain and his work to even his physician, the necessary causation between claimant's injury and his work may not be assumed to exist under the reasonableness test of *Robinson, supra.*

In his decision, the deputy found that adequate notice had not been given to defendant-employer pursuant to Iowa Code section 85.23. The undersigned, upon review of the available record, agrees with the findings of fact and conclusions of law made by the deputy. Because claimant's action is barred by section 85.23, consideration of other issues is unnecessary.

Findings of Fact

1. That claimant, on or about November 1, 1978 spoke to fellow employee, Sharol Bell, about discomfort in his right shoulder and arm experienced during employment related activities. (Hearing transcript filed May 14, 1981, page 18.)

2. That claimant failed to notify his foreman of any work related incident or condition. (Hearing transcript filed May 14, 1981, page 13; Hearing transcript filed August 12, 1981, page 36.)

3. That claimant failed to notify defendant-employer's plant nurse of a possible work related incident or condition. (Defendants' exhibit H, hearing transcript filed August 12, 1981, page 12.)

4. That claimant gave no history to and made no inquiry of Subhash Sahai, M.D., as to a possible relationship between his work and the condition. (Hearing transcript filed May 14, 1981, page 37.)

5. That claimant gave no history to and made no inquiry of Robert Hayne, M.D., as to the possible relationship between his work and the condition until claimant's counsel made such an inquiry on November 9, 1979. (Hayne deposition, page 15.)

6. That claimant notified defendant-employer of the possible compensable nature of his injury for the first time in a January 25, 1980 letter from claimant's counsel. (Hearing transcript filed May 14, 1981, page 53.)

7. That claimant acted unreasonable in failing to make efforts to determine the possible compensable nature of his injury before October 22, 1979.

Conclusions of Law

1. That claimant failed to give proper notice of his injury to defendant-employer as required by Iowa Code section 85.23.

2. That because of claimant's failure to comply with the requirement of Iowa Code section, claimant is barred

from maintaining an action against defendants under Iowa Workers' Compensation Law.

WHEREFORE, it is found:

That claimant failed to comply with notice requirements of Iowa code section 85.23.

That the findings of fact and conclusions of law of the deputy's decision of March 25, 1981 are proper and adopted together with those in this decision as the final decision of this agency.

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That costs of this appeal are taxed to the claimant pursuant to Iowa Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 21st day of August, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT J. RUPE, JR.,

Claimant,

vs.

KELLER PATTERN COMPANY, INC.,

Employer,

and

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Robert J. Rupe, the claimant, against his employer, Keller Pattern Company, and the insurance carrier, American International Adjustment Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on March 3, 1980. This matter came on for hearing before the undersigned at the Muscatine County Courthouse in Muscatine, Iowa, on March 25, 1982. The record was considered fully submitted on that date.

On October 21, 1980 defendants filed a first report of injury concerning a March 4, 1980 injury (the same incident as that alleged on the original notice and petition). On April 9, 1980 defendants filed a memorandum of agreement and on May 12, 1981 a rate agreement indicating that the weekly rate for compensation benefits was $128.34. On March 30, 1982 defendants filed a final report indicating that 60 5/7 weeks of healing period benefits (from March 5, 1980 to May 3, 1981) and 30.8 weeks of permanent partial disability (based on 14 percent of the leg) has been paid pursuant to the memorandum of agreement.

The record consists of the testimony of the claimant; defendants' exhibit A, claimant's deposition (including 2 exhibits); defendants' exhibit B, the file contents of Ralph H. Congdon, M.D., on the claimant; defendants' exhibits C and D, January 13, 1982 and September 5, 1980 reports from Steven R. Jarrett, M.D.; and Dr. Congdon's deposition (inclusing 3 exhibits). Both parties presented closing arguments.

Issues

The issues to be determined include whether there is a causal connection between the alleged injury and the disability, and if so, the nature and extent of the disability.

Recitation of the Evidence

Claimant testified that on March 3, 1980 the steel loading plate, upon which he had his right foot, slipped causing him to fall off the 3 1/2 to 4 foot dock. Claimant recalled that he twisted 180 degrees when he fell and landed on all fours. The 6' x 6' loading plate struck his left foot. When claimant stood up he was unable to put any weight on the left leg. He was taken by ambulance to the Emergency Room of Mercy Hospital. Examination and x-ray of the left ankle revealed a comminuted fracture of the os calcis. Claimant was treated with a short leg cast, crutches and Tylenol #3. (Defendants' exhibit B, page 35; Dr. Congdon's deposition exhibit 1.)

Ralph H. Congdon, M.D., orthopedic surgeon, testified that he first saw the claimant on March 3, 1980 as a referral from Mercy Hospital. On March 26, 1980 he removed claimant's cast, prescribed TED stockings and recommended that the claimant continue to increase his weight bearing with crutches. In April of 1980 he fitted the claimant with a surgical depth shoe and acrylic insole. During May of 1980, claimant essentially was using only one crutch. By June 10, 1980, x-rays revealed healing of the fracture fragments with definite disparity in the subtalar joint. At that time Dr. Congdon recommended that the claimant give up the crutch and increase attempts at walking on irregular surfaces. He indicated the claimant should undergo vocational rehabilitation because it was doubtful that the claimant would be able to return to heavy labor. (Congdon deposition exhibit 2, pages 1 and 2.)

According to Dr. Congdon's office notes, the claimant first complained of low back pain on July 16, 1980. He testified that claimant also complained of pain going down the right leg to the knee. (Congdon deposition, page 9. [Claimant testified that he noticed back discomfort from the outset but attributed this initially to the period of bedrest with his foot elevated and later to the limp he had developed. He thought he told Dr. Congdon about his back distress shortly after the date of injury.]) Other findings on that date included encroachment on the subtalar joint, swelling and

difficulty walking without the orthosis. Dr. Congdon prescribed back exercises and Motrin, an anti-inflammatory medication. (Congdon deposition exhibit 2, page 2.) Dr. Congdon testified that examination revealed no evidence of nerve injury. He did not take x-rays at that time. He thought the claimant has a low back mechanical strain and noted that claimant was limping significantly during the first four months of treatment because the orthosis items had not been completed. Dr. Congdon opined "that there could be a relationship in the fact that he is putting undue stress on his normal gait pattern, and it will aggravate your pelvis and your pelvis musculature and structure." (Congdon deposition, page 10. [At page 14 of his deposition, Dr. Congdon stated that he thought the condition was the result of mechanical strain or degenerative-type discomfort.]) Dr. Congdon explained that while the Motrin was prescribed primarily for the ankle and foot, it also would relieve low back symptoms. He clarified that his office notation of "[t]alked to him about the problem begin [sic] present in some form continuously" referred to the ankle and foot discomfort. (Congdon deposition, page 14; Congdon deposition exhibit page 2.) Dr. Congdon apparently did not anticipate that claimant's back condition would be a lasting problem. (Congdon deposition, page 9; respondents' exhibit B, page 29.)

Dr. Congdon's office notes from September 19, 1980 to February 27, 1981 indicate that claimant's orthosis items underwent continual modification and medication was changed first to Naprosyn and then to Clinoril because Motrin caused epigastric distress. There was some improvement in claimant's gait and Dr. Congdon again suggested vocational rehabilitation. (Congdon deposition exhibit 2, pages 2 and 3.) In December of 1980 Dr. Congdon anticipated that claimant would be a candidate in the near future for some type of activity that did not require standing. (Defendants' exhibit B, page 34.) On April 17, 1981 Dr. Congdon advised the rehabilitation specialist that claimant's vocational restrictions would only apply to those activities that would cause him pain in and about the subtalar joint. (Defendants' exhibit B, page 29.) On May 4, 1981, Dr. Congdon reported:

> Still has alot [sic] of discomfort when he tries to walk with the foot out of his orthosis. He's returning his motion to the ankle joint and a bit to the subtalar joint with eversion activities. However, has no inversion and has a great deal of discomfort when we try to move the foot in a passive way. Motion in the ankle goes to about 5 degrees of dorsiflexion and plantar flexes to about 30 degrees. The patient is reticent to undergo subtalar injection. Talked to him about the possibility of subtalar fusion in the future. Plan is for him to continue to pursue vocational rehabilitation. I told him I would send in a report to the insurance company stating that he most probably has plateaued in his recovery, although he thinks he is gaining a bit of subtalar motion at present. He'll continue to adjust his orthosis; i.e., he is going to take his other arch support and have it cut down and put in a high top leather boot to see if that will substitute for the polypropelene orthosis. He does admit that it relieves him some to be in the orthosis. He'll return to see us on an as needed basis. (Congdon deposition exhibit 2, page 4.)

In a letter dated May 13, 1981, Dr. Congdon advised defendant insurance carrier that claimant's condition had likely stabilized as of his May 4, 1981 examination. (Dr. Congdon testified that claimant reached maximum recovery around June of 1981, without specific reference to the May 4, 1981 office note or the May 13, 1981 letter. [Congdon deposition, page 28.]) Based on the loss of dorsiflexion and eversion he assessed the lower extremity impairment to be between 13 and 15 percent. He noted that adaptation of the orthosis to other types of shoes and boots and the possibility of surgical fusion (arthrodesis) were discussed with the claimant. (Defendants' exhibit B, page 28.)

Dr. Congdon saw the claimant on July 17, 1981, 2 or 3 weeks after the claimant had struck his right knee when he tripped over the orthosis on the left foot. The area was still tender and the leg was still somewhat swollen. Dr. Congdon seemingly states that claimant was able to walk without much trouble but used the orthosis to relieve intense discomfort. (The July 17, 1981 office note is somewhat nebulous. [Congdon deposition exhibit 2, page 4.])

On September 1, 1981 Dr. Congdon saw the claimant and reported:

> Continues to have alot [sic] of discomfort in the subtalar portion of both sides of his left foot and ankle. Still has symptoms of back pain as was reported over a year ago. Has fatigue and ache and the pain now radiates down his right leg. The radiation, however, goes primarily to the area of the knee, more of an aching type than an electric shock. Certainly don't find evidence of radiculopathy. Has more of a positive instability type test indicating ligament strain.
>
> Lumbosacral films are taken as well as attempted special views of the subtalar joint. Subtalar joint views show the incongruency of the articulation between talus and calcaneous with sclerosis evident indicating degenerative changes. The sacral views shows [sic] some sclerosis at the fifth lumbar first sacral facet area. No evidence of spondylolisthesis. The remainder of the facet joints are preserved.
>
> I feel that the patient should have an opinion by Dr. Schnell regarding the appropriateness of his bracing attempts prior to any consideration of subtalar fusion. (Condgon deposition exhibit 2, pages 4 and 5.)

Dr. Congdon testified that he had some vague recollection of claimant mentioning the back problem in July or August of 1981 about the time he received a letter from claimant's attorney suggesting that claimant might have a body as a whole impairment. (Congdon deposition exhibit 5.)

Dr. Congdon elaborated on the x-ray findings and the cause of claimant's complaints upon questioning by defense counsel:

> Q. I am going to hand you what has been marked Respondent's Deposition Exhibits Nos. 4 through 8

inclusive and ask you to identify each of those, one by one.

A. Respondent's Exhibit No. 4 is an oblique view of Robert Rupe's lumbosacral spine. Do you want me to do more than identify them?

Q. What condition does that show in the lumbosacral spine, if you can tell from that X ray?

A. This X ray shows rather normal development of the vertebral bodies of the lumbar spine. I can see part of one of the sacroiliac joints. It looks fairly well preserved. The small facet joints at the various levels are seen — show good subchondral bone, some sclerosis around those facet joints.

Q. Now by sclerosis, what do you mean?

A. Increased whitening or thickening of the mineral content of the bone, indicative of some wear and tear. That's roughly all I see in there.

Q. Okay. Go on, then, to the next.

A. No. 6 is the other oblique, marked left oblique. Likewise shows good vertebral body development. There is more dramatic evidence of the sclerosis of the facet joints, L5/S1 particularly. I cannot see the sacroiliac joint in this particular view. Otherwise, the development looks normal. There is a small osteophyte on the anterior aspect of the vertebral body in 4.

Q. By osteophyte —

A. A small bony deposition in the ligaments. We call them osteophytes. They reflect probably degenerative changes, also.

No. 5 is a lateral view of Mr. Rupe's lumbar spine showing the junction between the thoracic and lumbar spine progressing down through L-3 and L-4 clearly. L-5 is cut off. The foramen appear to be open. There is no particular displacement of vertebral bodies. Again, a suggestion of osteophytes is seen in about L-2/L-3, very minimal amount.

And No. 7 is the continuation of the lateral examination, primarily focusing on the lumbosacral junction. It shows a continuation of normal development, good alignment of the vertebral bodies, and preservation of the disc spaces.

Exhibit No. 8 is our anteroposterior view, showing the junction of the lumbar spine with the thoracic spine and continuing down to the point that you can see the tops of the hips. We see no evidence of scoliosis. The preservation of the disc space is again noted. The right facet joint or L-5/S-1 stands out as somewhat more sclerotic than the left one. The transverse processes are horizontal, which indicates no particular spasm of the back muscles or tumors or so forth causing deviations. And the hip joints are visualized. They don't seem to show a particular amount of degenerative change.

Q. Now, you have indicated that these X rays show no scoliosis?

A. That's correct.

Q. They show no spondylolisthesis?

A. That's correct.

Q. They do show osteophytes in the region of L-2/L-3, and sclerosis in what region?

A. It's lower. It's in the L-4/5, 5/I area. That is a relative thing.

Q. Now, osteophytes, what are they and what is their cause?

A. Osteophytes are bony structures that appear in the substance of ligaments that attach between the levels of vertebral bodies, or any — not just the vertebral bodies, but ligaments occur between all bones in the joint areas, and they're probably — well, they are manifestations of wear and tear, and the wear and tear is usually on a micro-event level, most usually. It can come from a single-event injury.

Q. Now, when you say wear and tear, are you talking about the wear and tear of life or a particular wear and tear?

A. That's difficult to separate. Wear and tear of life will cause degenerative changes to appear in backs, and when you aggravate it, it can appear faster or more early in life.

Q. Is there any condition that you see in these X rays which, in any sense, is peculiar to persons who have had injuries of the kind reported by Mr. Rupe?

A. There's nothing in this series of lumbosacral films that is peculiar to his type of injury.

Q. With regard to both the osteophytes and the sclerosis which you see, are those conditions which you have seen in many patients, including patients which have not been subjected to any kind of injury or trauma?

A. That's correct.

Q. Then these are both conditions which could merely have developed spontaneously, or perhaps more accurately, as a by-product of going through life?

A. That's correct. (Congdon deposition, pages 17 through 21.)

. . .

Q. . . . In your opinion, are the conditions which you see in those X rays the conditions which are responsible for the pain which Mr. Rupe is having?

A. I think they are — the conditions I see in those X rays are merely expressions of an aging back that I don't believe necessarily they are — you can point to one and say, that's the exact case of his back pain. I think

this back pain is a mechanical strain pain and probably not ever seen — well, that's not correct. Probably not usually seen on X rays.

Q. When you say a mechanical strain pain, are you referring to his altered gait? Or what do you mean by that?

A. All right. In this particular instance, I'm referring to his altered gait, the way he must alter the way his pelvis rotates, raises and falls with walking, because of (1) the discomfort in his foot, and (2) the way it alters the use of the lower extremity. So it's a repetitive strain.

Q. Now, when we talk in terms of mechanical strain and altered gait, isn't that something that usually will be reflected in the X rays in the sense that it will show an altered pattern of vertebrae of the back?

A. I think that the evidence on X rays would take many years to develop. I think you can have mechanical strain, as in other problems such as lifting, that don't show up for many years, and I think that is the kind of thing I am talking about. It's not something that is going to show up in X rays, at least not in this length of time. (Congdon deposition, pages 23 through 25.)

When Dr. Congdon saw the claimant on October 7, 1981, he noted in part:

> Continues to have a lot of low back and right leg discomfort as well as discomfort in and about the subtalar joint on the left. Exam today shows his tenderness to be in the paraspinous muscle group as well as midline and posterosuperior iliac spines. There is not evidence of radiculopathy today, but motion in the rotational planes seems to be reduced by 50 percent. Lateral flexion causes him discomfort, both right and left.

According to the claimant, Dr. Congdon then sent him to a therapist through early December of 1981. (Claimant's deposition exhibit 2.)

Using the Orthopedic Guide and relying on claimant's subjective complaints of pain, Dr. Congdon determined that claimant's impairment to the body as a whole was between 5 and 10 percent. (Congdon deposition, pages 21 and 22.) He volunteered that "[i]f this was not a reasonable sequence of events, I would not be as willing to accept his statement of pain or his amount of pain as being at all related. It's a judgment on my part." (Congdon deposition, page 22.) He clarified that the 13 to 15 percent rating to the left lower extremity was from the AMA Guide and was based almost entirely on the loss of motion in the ankle and foot. (Congdon deposition, page 23.) He indicated that claimant would not be able to stand on that extremity and do heavy labor, unless a change in bracing or surgery altered the joints in question. (Congdon deposition, pages 26 and 29.) Dr. Congdon reported that he had referred the claimant to Dr. Schnell, a physiatrist, to determine whether more extensive bracing or surgery would be the better treatment at this stage. He explained that the claimant was not yet comfortable with weight-bearing so that it was dependable. All the modifications of the orthosis had been directed to accomplishing such feat. (Congdon deposition, pages 8 and 11; Congdon deposition exhibit 2, page 5.) In a June 22, 1981 letter directed to the claimant, Dr. Congdon indicated that an arthrodesis would raise the impairment of the lower extremity to 25 percent but might relieve the severe and incapacitating discomfort preventing him from normal employment. Claimant expressed a willingness to continue the brace treatment since the option of surgery carried no guarantee.

Steven R. Jarrett, M.D., first saw the claimant on September 5, 1980 at the request of defendant insurance carrier. He received a history of the injury and treatment that essentially was consistent with the record. Claimant's complaints were of continual pain about the posterior aspect of the left foot and the left ankle with some swelling, of inability to walk without the orthosis and of pain when walking with it, and of numbness of the left foot. Dr. Jarrett proceeded to set forth his examination findings, impression and recommendations:

> EXAMINATION: He complained of pain to palpation throughout the posterior aspect of the left foot medially, laterally and posteriorly. He had some mild swelling, especially about the medial malleolus. There was no significant discoloration. Temperature measurements of the feet were equal. Pulses were equal and physiologic. He had minimal reduction in dorsiflexion and plantar flexion and actually comparing active ranges, there was no noticeably significant reduction visually. He did, however, have no significant inversion and eversion actively. Review of X-rays taken today reveals demineralization about the ankle. No fracture or dislocation is evident. Minimal arthritic lipping is seen on the tibial margins. There is apparent flattening of the calcaneus suggesting possible previous fracture. There is demineralization of the left foot.
>
> IMPRESSION: Status post fracture of the left calcaneus.
>
> RECOMMENDATIONS: I feel at this time that Dr. Congdon is doing the appropriate post fracture care. I feel that over a period of time the pain will probably diminish but that he is probably unable to work at this time in an ambulatory capacity. (Defendants' exhibit D.)

Dr. Jarrett reported the findings and conclusions of his January 13, 1982 evaluation of the claimant in a letter addressed to defense counsel on the same date:

> He currently is still having trouble with his left foot secondary to his fracture. He is using custom-made shoes as well as a polypropylene ankle foot orthosis. He complains of pain on the medial aspect of the left foot as well as about the posterior left foot and heel and left ankle. He states also that he has back pain and indicates approximately the L5 region in the midline

and just at the left of the midline. He states he feels this may be due to his limp. When asked how long he has had the pain, he indicates ever since he injured himself but states he never paid much attention to it because he just assumed it was due to the limp. He complains of an aching in his lower leg and thigh. He denies any radicular symptomatology in the way of pain, numbness or paresthesias from the back.

EXAMINATION: On examination he had no spasm of the lumbar musculature. He had complaints of tenderness at approximately L5 in the mid-lumbar spine. His range of motion of the lumbar spine was full for flexion, extension and lateral flexion bilaterally. He had excellent rounding of the back on full forward flexion. There was no pain produced on any maneuvers. He had normal strength in the lower extremities with the exception of the left foot and ankle which had limited range. He complained of tenderness to palpation over the left calcaneous [sic] as well as over the left navicular. He had 2+ knee jerks with reinforcement bilaterally. He had flexor toe signs. His sensory exam revealed intact pinprick and position sense bilaterally in the lower extremities with absent vibratory sensation over the left great toe but intact vibratory sensation over the left metatarsal phalangeal joint. He complained of low back pain on the extremes of straight leg raising bilaterally. Review of X-rays taken today reveals flattening and deformity of the calcaneus consistent with previous fracture. The lumbar spine is essentially unremarkable.

RECOMMENDATIONS: I do not find objective evidence of injury to this gentlemen's back based on his initial accident. He does have an antalgic gait and does limp and this may be a contributing factor to his back pain. Objectively, however, based on the AMA "Guides to Evaluation of Permanent Impairment" Rating [sic], I am unable to give him a disability rating in regards to his low back. In regards to his left ankle, I found that he had essentially an ankylosis in neutral as far as inversion and eversion was concerned with a loss of 5 degrees of dorsiflexion and 20 degrees of plantar flexion when compared to the foot and ankle on the right. This would give him an impairment of the left lower extremity of 39 percent. (Defendants' exhibit C.)

Claimant is 55 years old. He obtained his G.E.D. in 1969 or 1970. When he was 16 and still in school, he worked part-time for the Rock Island Arsenal in the tool crib or mechanic shop issuing and maintaining the quality of tools, such as mills, cutters and drills. During World War II he served as a marine corporal in the pioneer battalion, an engineering and combat unit. After World War II he returned to the arsenal and was assigned a job rebuilding used weapons. He estimated the most he lifted was a box of 10 small weapons. He served during the Korean War and was given an honorable discharge for battle fatigue. Again he returned to the arsenal where he worked as an inspector of small arms and then as a supervisor during the last three years before he took early retirement in June of 1974 to avoid a wage freeze during a nationwide layoff. Claimant indicated those jobs entailed lifting boxes of small arms to table height, some loading and unloading of boxes and occasionally lifting machine guns out of fixtures to perform on-the-spot maintenance. Claimant recalled that he did some part-time work putting in farm fences and hauling loads during the latter period of time he worked for the arsenal. Claimant receives $749 per month regular pension (after deduction for taxes and insurance) and $169 per month disability pension (30 percent disability for shell shock). Both pensions receive cost of living adjustments. He applied for Social Security disability and was denied.

Claimant worked construction for Mueller Pipeline for 5 weeks before going to work for defendant employer in January of 1975. Claimant described his work with defendant employer as entailing greasing the machines and driving a truck. He estimated that the lifted core coxes weighing 150 pounds (up to 175 pounds according to his deposition), picked up sacks of core material weighing 99 3/4 pounds, and rolled metal scrap barrels weighing 250 to 300 pounds (up to 500 pounds according to his deposition). Claimant explained that he worked when defendant employer needed him — 40 to 70 hours a week in January, February and March and 30 hours or less a week the rest of the year.

Claimant has not returned to work since the date of injury. Claimant reported that he has attempted to return to work with defendant employer but nothing was available within his physical limits. Claimant indicated he has applied for work elsewhere including with a short run truck driving outfit. Claimant thought he would be able to tolerate such work because he would not have to sit a long period of time; however, when he learned lifting was required, he did not pursue the job further. He also inquired about security guard work at a couple places to no avail because presumably he could not pass the physical. Claimant was convinced he could not perform any work that required lifting, bending or a lot of walking, standing or sitting. He thought he might be able to be a machine components inspector or do bench work. Claimant acknowledged that the rehabilitation specialist secured an ordinance job for him in Burlington but he did not want the job there because he has lived in Davenport since 1938 and owns a home there. He has not applied at Job Service of Iowa because he sees other younger men have done so and have not yet been hired.

Claimant walks with a noticeable limp. He always wears either a leg brace or sole plate that fits into a specially designed shoe. On occasion he still uses crutches. Claimant's present complaints include low back and left lower extremity pain. Claimant's deposition testimony that he had done back exercises since April 30, 1980 is not reflected in the rest of the record. He was instructed in exercise in July 1980 and was referred to a therapist from October to December of 1981. He presently exercises at home using cuff and ankle weights.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 3, 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., supra*. 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, supra*. In regard to the medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. *Sondag v. Ferris Hardware, supra*.

Preponderance of the evidence means the greater weight of the evidence, the evidence of superior influence or efficacy. *Bauer v. Reavell*, 219 Iowa 1212, 260 N.W. 39 (1935). Preponderance of the evidence is greater than substantial evidence. *Wedergren v. Board of Directors*, 307 N.W.2d 12 (Iowa 1981). 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).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660, (1961). "Loss of use" of a member is equivalent to "loss" of the member. *Moses v.National Union C.M. Co.*, 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. *Blizek v. Eagle Signal Company*, 164 N.W.2d 84 (Iowa 1969).

Industrial Commissioner's Rule 500—2.4 provides:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a"-"r" of the Code. The extent of loss or percentage of permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of Iowa Workers' Compensation Act. Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.
>
> This rule is intended to implement section 85.34(2) of the Code.

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss systems created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. *Schell v. Central Engineering Co.*, 232 Iowa 421, 4 N.W.2d 339 (1942).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660, (1961); *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 10 N.W.2d 569 (1943). An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. *Barton v. Nevada Poultry Co., supra. Dailey v. Pooley Lumber Co., supra.*

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).

In *Floyd Enstrom v. Iowa Public Service Company*, Appeal Decision filed August 5, 1981, the industrial commissioner discussed the concept of industrial disability:

> There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.
>
> 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 qualifica-

tions 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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighing guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Analysis

Claimant argues that he is entitled to an industrial disability rating because his back was injured in the fall on March 3, 1980 and continues to be aggravated by the limp resulting from the injury to the leg. Defendants contend that claimant's injury resulted in impairment of the leg and point out that neither Dr. Congdon nor Dr. Jarrett made any objective findings of impairment to the body as a whole and that the relationship between any back condition and the limp was only a possibility. They emphasize the importance of the fact the claimant did not mention any back pain to Dr. Congdon until July 16, 1980 and then not again until after he secured an attorney regarding this claim in the summer of 1981. They likewise point out that it was around the time of Dr. Congdon's second office note regarding back pain that claimant's attorney corresponded with Dr. Congdon about the likelihood that claimant had a back problem as a result of the March 3, 1980 injury.

The record viewed as a whole does not support finding that claimant sustained a back injury on March 3, 1980 but does support finding that claimant sustained an injury to his left lower extremity which resulted in an antalgic gait that causes a repetitive mechanical strain on the way claimant's pelvis rotates. While Dr. Congdon and Dr. Jarrett indicate there are no objective findings with regard to the back, they agree that the antalgic gait could be the source of claimant's back discomfort. Such opinion on causal connection is persuasive when considered with the facts that (1) there is no evidence of a pre-injury back problem; (2) Dr. Congdon did not believe the degenerative changes shown on the x-ray where responsible for claimant's back discomfort; (3) claimant's performance of heavy work for defendant employer was without difficulty; and (4) claimant's first verbalized complaints of back pain occurred about 5 weeks after Dr. Congdon advised claimant to quit using the crutches and to increase weight bearing and walking on uneven surfaces.

That the medical record contains no reference to back discomfort between July 16, 1980 and September 1, 1980 and that Dr. Congdon seemingly anticipated initially that claimant's back condition was temporary (that it would respond to exercise and modification of the orthosis items) do not obviate a finding of impairment to the body as a whole. On September 1, 1981, Dr. Congdon mentions that claimant "still" had symptoms of back pain as noted a year earlier. Such office note indicates at the very least that claimant's back condition was subject to flareup even if it had not constituted a constant complaint. While there appears to be a coincidence between the documentation of this second complaint and claimant's contacting an attorney, the record indicates that claimant tripped over the orthosis sometime in late June and then complained of low back discomfort either in July or September of 1981. (The office note for July 17, 1981 mentions the incident but no complaints of back pain. Dr. Congdon had some vague recollection of claimant's complaints including back pain on that visit.) Regardless of the date of the second complaint, the likelihood of a connection between the tripping (and temporarily increased limping) and the emphasis on back discomfort is as plausible as defendants' theory. Dr. Congdon was not questioned about the effect of the June 1981 incident but voluntarily suggested that such episode impeded the progress that was being made. (Dr. Jarrett apparently was not informed about such incident.) It should be noted that he does not thereby suggest that the June 1981 injury per se resulted in any additional impairment of either the lower extremity or back problems. Had he done so the defendants would still be fully liable because the June 1981 injury was a direct result of the course of treatment for the work injury. *DeShaw v. Energy Manufacturing*, 192 N.W.2d 777 (Iowa).

Whether further modification of the orthosis or fusion of the subtalar joint will eliminate or sufficiently minimize the antalgic gait so that claimant's back discomfort will dissipate is not known. However, the fact that claimant's back discomfort might not last forever is not critical. Permanency refers to an indefinite and undetermined period. *Wallace v. Brotherhood of Locomotive Fireman and Engineers*, 230 Iowa 1127, 300 N.W.2d 322 (1941). Compare the April 17, 1980 order filed in *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980) wherein the Iowa Supreme Court found claimant had "a propensity to traumatic phlebitis."

Claimant has established that the work injury on March 3, 1980 affected the body as a whole and therefore he is entitled to have his disability rated industrially. At the onset of this analysis of claimant's loss of earning capacity, the undersigned must note that had claimant's disability been confined to the leg, she would have awarded at least the amount of functional impairment assessed by Dr. Jarrett, insofar as claimant walked with a very noticeable limp and claimant's subjective complaints with respect to the leg were otherwise corroborated by Dr. Jarrett's findings.

According to the conversion charts of the AMA guidelines, a 39 percent impairment of the leg equals 16 percent of the body as a whole. Since Dr. Congdon's impairment rating of the back was not based on the AMA Guides because of the lack of objective findings, using the combination tables of the AMA Guide with respect to the converted rating and Dr. Congdon's 5 to 10 percent rating would not be accurate.

While functional impairment ratings per se are considered in assessing industrial disability, a claimant's loss of earning capacity as a result of a work injury is better visualized when the functional limitations are made concrete. In the present case, Dr. Congdon has consistently specified that claimant's vocational restrictions are those that would cause pain in and about the subtalar joint. He stated that claimant would not be able to stand on that extremity to do heavy labor. Dr. Jarrett's findings would be consistent with these comments. Although Dr. Congdon noted on October 7, 1981 that claimant had 50 percent reduction of motion in rotational planes and discomfort upon lateral flexion right and left, he did not indicate, when deposed a couple weeks later, that claimnt had any restrictions or limitations with respect to the back problem. At the time of the January 13, 1982 examination, Dr. Jarrett found no radiculopathy, no spasm in the lumbar musculature, full range of back motion and no pain upon any maneuvers except the extremes of straight leg raising. Hence, despite claimant's testimony that both the leg pain and back discomfort contribute to his being incapable of securing or engaging in many forms of employment, the medical evidence delineates no specific loss of use of the back. Claimant's complaints of back pain are credible but of little assistance in explaining his limitations, especially when he has not actually returned to any form of gainful employment. Perhaps the testimony of a biomechanical engineer would have been useful in clarifying the loss of use to the body as a whole as a result of the antalgic gait.

While claimant appears to have been a good worker in previous employment, his present motivation to return to work is questionable. Dr. Congdon's limitations with respect to the subtalar joint presumably would and did prevent claimant from returning to work with defendant employer. However claimant's other attempts at securing employment appear to have been solely through friends and acquaintances. Either the claimant or such individuals decided he would be unable to perform all the required tasks or would not pass the physical examinations. Claimant's presentation of his limitations as he views them may have been the reason for such responses. He has not made a thorough search for employment for which he is suited. Claimant did not apply at Job Services of Iowa because he decided his age would prevent him from finding employment. He cites being a native of Davenport and owning his own home there as the reason he did not want the job in Burlington, 38 miles away. Claimant retired from full-time employment at the arsenal when he went to work for defendant employer on an as-needed basis. Finally, he presently receives over $900 per month in pension and disability benefits from the federal government.

Taking into consideration all the elements of industrial disability set forth and analyzed above, claimant's loss of earning capacity as a result of the March 3, 1980 injury is 20 percent.

Termination of healing period benefits as of May 4, 1981 was justified in light of Dr. Congdon's May 4, 1981 office note and May 13, 1981 letter to defendant insurance carrier despite his testimony regarding a plateau having been reached in June 1981, because such comment appears to have been an estimate not based upon review of his previously written determination. The episode in late June 1981 did not involve any significant change in claimant's condition. (It should be noted that insofar as claimant's back complaints were referable generally to the lower extremity problem and there is no separate medical determination of healing period with respect to the back, the healing period for the lower extremity is conclusive.) Finally, while Dr. Jarrett indicated the claimant had 20 percent plantar flexion on January 3, 1982 (as compared to 30 degrees noted by Dr. Congdon on May 4, 1980), such discrepancy was not explored by the parties and does not mandate an increase in the healing period.

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the following findings of fact and conclusions of law are made:

Finding 1. Claimant suffered a comminuted fracture of the left os calcis on March 3, 1980 when a steel loading plate, upon which he was standing, slipped off the loading dock causing the claimant to fall with it and striking the claimant's left ankle upon landing.

Finding 2. Claimant was initially treated with a cast, crutches and medication. Thereafter, he was fitted with orthosis items which have undergone modification to date in a continual effort to compensate for the permanent disparity in the subtalar joint. He presently wears a leg brace or a plastic sole plate that fit into a specially designed shoe. Further bracing and subtalar fusion are being considered.

Finding 3. Claimant's lower left extremity condition plateaued as of May 4, 1981. Claimant's treating physician rated the impairment of the leg at thirteen (13%) to fifteen (15%) percent and indicated that claimant was restricted vocationally from any activity that would cause pain in and about the subtalar joint. The evaluating physician rated claimant's leg impairment at thirty-nine (39%) percent.

Finding 4. Claimant walks with a noticeable limp. His present complaints include those of left lower extremity pain and low back pain.

Finding 5. The medical evidence indicates that claimant's antalgic gait alters the way cliamant's pelvis rotates and causes a repetitive mechanical strain of the low back. No objective findings of back injury or impairment have been made to date. The evaluating physician found no impairment of the body as a whole. Based on claimant's subjective complaints, claimant's treating physician rated claimant's impairment to the body as a whole at five (5%) to ten (10%) percent.

Finding 6. Claimant is fifty-five (55) years old.

Finding 7. Claimant obtained a G.E.D. in 1969 or 1970.

Finding 8. Claimant served as a marine corporal during World War II and during the Korean War.

Finding 9. Claimant's employment history includes work at the Rock Island Arsenal performing various jobs connected with the maintenance of small arms, greasing machines and driving a truck for defendant employer; and some part-time work installing farm fences and trucking.

Finding 10. Claimant has not returned to work since the date of injury.

Finding 11. Claimant's motivation to return to work is questionable.

Conclusion A. Claimant has established by a preponderance of the evidence that the March 3, 1980 work injury resulted in disability to the body as a whole.

Conclusion B. As a result of the March 3, 1980 work injury claimant has sustained twenty (20%) percent industrial disability.

Order

THEREFORE, it is ordered that the defendants pay the claimant one hundred (100) weeks of permanent partial disability at the rate of one hundred twenty-eight and 38/100 dollars ($128.38) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of May 4, 1981.

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

Credit is to be given to defendants for the amount of permanent partial disability previously paid by them for this injury.

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendants when this award is paid.

* * *

Signed and filed this 30th day of April, 1982.

LEE M. JACKWIG
Deputy Industrial Commissioner

Appealed to Commissioner;
Settled for Amount of Award.

LEO ST. CYR, JR.,

Claimant,

vs.

EBASCO SERVICES CO.,

Employer,

and

U.S.F. & G.,

Insurance Carrier,
Defendants.

Decision for Partial Commutation

This matter came for hearing at the Woodbury County Courthouse on January 5, 1982 at which time the case was fully submitted.

This matter was the subject of prior contested case proceedings, wherein a final agency decision awarded claimant permanent disability to the degree of 40 percent of the body as a whole. Official notice is taken of that decision. The present record consists of the testimony of the claimant; and claimant's exhibit 1.

The issue for resolution is whether claimant should be granted a partial commutation.

Findings of Fact

1. Claimant sustained an injury arising out of and in the course of his employment on January 14, 1977. Claimant sustained 40 percent industrial disability because of this injury which entitles him to be paid for 200 weeks at $160.00 per week. As of January 3, 1982, 113 weeks remain to be paid. Claimant desires to commute a substantial portion of this.

2. Although claimant had pled in his application that he desired to use any commuted award to buy a house and pay his attorney's fee, an amendment was allowed that the true reason for the commutation was to pay attorney's fees, buy a car and pay debts. Defendants moved to dismiss the action. Ruling was reserved and it is hereby determined that defendant's motion is overruled.

3. Claimant is presently unemployed. His only gainful employment since the injury has been a part-time job which has netted him little. Claimant has bills of about $2000.00 of which $550.00 represents past due rent. Claimant lives with a friend in the friend's house. Claimant has investigated the purchase of a house, but feels that a loan would not be approved. Given the present economic picture, claimant's apprehensions are well founded. Claimant's income at present is the $106.00 he nets on his weekly workers' compensation check.

4. Claimant plans to move to Amarillo, Texas and obtain work there. Claimant has relatives in the area and has been informed by a cousin who is a supervisor that work is available at the IBP packing house there.

5. Claimant desires to receive a commutation to purchase a used car for about $6000.00. He feels that he needs a decent car in order to get out to get a job. He feels that the transportation is needed for the job hunting project. Considering the evidence presented together with the past

decision, it is found as a finding of fact that it would not be in the claimant's best interest if a commutation was granted. It would appear that claimant's best interest would be served by the continuation of weekly payments in order that he may have some security at least in the short run.

Conclusion of Law

1. Section 85.45, Code of Iowa, governs the granting of commutations. It states that either the best interest of claimant *or* hardship upon the employer will be the sole determining factor in the granting of a commutation. No record was made of a hardship upon the employer. The finding that claimant's best interest would not be met in a commutation dictates the conclusion that a commutation should be denied.

IT IS THEREFORE ORDERED that claimant's application for partial commutation is denied.

Costs of the proceeding are taxed against defendants.

* * *

Signed and filed this 14th day of January, 1982.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

PAUL SAUNDERS,

Claimant,

vs.

CHERRY BURRELL CORPORATION,

Employer,

and

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendents.

Appeal Decision

By order of the industrial commissioner filed January 29, 1982 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 partially adverse arbitration decision.

On appeal the record consists of the transcript; claimant's exhibits 1 through 17, inclusive; defendants' exhibits A, B and C; and the deposition of Martin Roach, M.D. After the hearing, claimant requested certain portions of claimant's discovery deposition be admitted into evidence. The deputy who heard the case did not allow the requested portions of pages 58-59 into the record. He apparently did allow, however, the testimony contained on page 52 line 14, page 63 line 11, and page 70 lines 1-24. That ruling will be adopted in the present decision. The result of this final agency decision will be the same as that reached by the hearing deputy. The findings of fact and conclusions of law, however, are those of the undersigned deputy industrial commissioner.

Findings of Fact

1. Claimant is age 56, married and has three children. (Tr. 13-14)

2. Claimant has been involved in prior industrial incidents and had an auto accident in 1975. (Tr. 18)

3. On October 18, 1979, claimant was given the task of deburring the holes in some castings. (Tr. 23)

4. While performing that task, claimant strained his neck, right shoulder, and arm. (Tr. 24, Claimant exhibit 1, 3, 4)

5. Claimant missed work from October 19, 1979 and intermittently thereafter until January 29, 1980. (Claimant exhibit 15, Tr. 35)

6. Claimant visited Albert Coates, M.D., a qualified orthopedic surgeon, on November 5, 1979. (Tr. 27)

7. The physical injury of October 18, 1979 was of temporary duration. (Claimant exhibit 3, 8)

8. Since he returned to work on January 29, 1980, claimant has been doing basically the same type of work as prior to the injury. (Tr. 57-64)

9. At the request of Dr. Coates, claimant was examined by W. J. Robb, M.D., a qualified orthopedic surgeon, on March 17, 1981. (Claimant exhibit 9)

10. The history recited by Dr. Robb did not include the 1975 automobile accident and subsequent permanent partial impairment to the cervical spine. (Claimant exhibit 9)

11. Claimant was examined by Martin F. Roach, M.D., a qualified orthopedic surgeon, on September 22, 1981; Dr. Roach had also examined and evaluated claimant on May 9, 1978 as result of an automobile accident in 1975. (Roach depo., 5)

12. Because of claimant's 1975 automobile accident and the resulting cervical injury, he had a permanent partial impairment of 27% of the body as a whole. (Roach 8)

13. Claimant's degenerative disc condition at C-5/6 and C-6/7 did not change appreciably between 1978 and September 22, 1981. (Roach 18-20)

14. Claimant's permanent partial impairment was the same on September 22, 1981 as it was in 1978. (Roach 20)

15. Claimant became somewhat depressed between October of 1979 and January 1980. (Tr. 37)

16. Claimant visited Thomas Sannito, Ph.D., a qualified psychologist, on June 24, 1981 and July 3, 1981.

17. Since the injury of October 18, 1979, claimant has been able to do small engine repair and service at his home, which includes some lifting and starting of the machines. (Tr. 49-51)

18. Since the injury, claimant has also done repair and remodeling work around his home. (Tr. 51-53)

19. Dr. Sannito was not aware of claimant's recent work activities. (Claimant exhibit 10, Tr. 88)

Issue

As a result of the record at the hearing, claimant was awarded temporary total disability of 12 2/7 weeks at the rate of $217.10 per week plus certain hospital and medical benefits. Claimant was not awarded any psychological disability. In his appeal brief, claimant states the issue: "The deputy commissioner erred in concluding that claimant did not sustain any psychological injury because of the October, 1979 incident, and in failing to award claimant permanent partial disability benefits for said psychological injury, based upon the report of Dr. Thomas Sannito, Ph.D."

Applicable Law

Claimant has the burden of proof to show the extent of his disability. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). Matters of causal relationship are essentially within the realm of expert *medical* testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960). An expert's opinion based upon an incomplete history is not binding upon the commissioner. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967); *Bodish v. Fischer, Inc.*, 257 Iowa 516, 133 N.W.2d 867 (1965).

Analysis

The question presented by claimant's appeal brief concerns alleged psychological disability. On the one hand, there is Dr. Sannito's report, for example, that claimant "cannot even move a chair" (claimant exhibit 10). On the other hand there is a great deal of evidence concerning claimant's working around his home, and there is the most important fact that claimant is back doing basically the same work as before. Such evidence diminishes the weight of Dr. Sannito's opinion that claimant has a 25% psychological disability because it shows the psychologist was not aware of some of the most important factors in the case.

With further respect to the weight of Dr. Sannito's testimony, it was noted that claimant was not referred to the psychologist by a medical doctor or other healer listed in §85.27. Although one might concede that a psychologist has expertise in the area of the mind, the record does not reveal that he has expertise in the relationship between the mind and the body, such as would be possessed by a psychiatrist. Such being the case, Dr. Sannito's testimony, standing alone as it does, has little weight.

* * *

The rate of compensation, the award of the medical and hospital bills, and the temporary total disability award were not contested by appellant.

Conclusions of Law

Claimant sustained an injury arising out of and in the course of his employment on October 18, 1979 which resulted in temporary total disability for an intermittent period between October 19, 1979 and January 29, 1980.

Claimant did not receive a psychological injury as a result of his work incident of October 18, 1979.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of twelve and two-sevenths (12 2/7) weeks of temporary total disability at the rate of two hundred seventeen and 10/100 dollars ($217.10) per week, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay the following medical and hospital expenses:

Linn County Orthopedists	$136.00
St. Lukes Methodist Hospital	166.44

Defendants should receive credit for any collateral benefits paid pursuant to §85.38, The Code.

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

* * *

Signed and filed at Des Moines, Iowa this 26th day of April, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

DONALD A. SCHOFIELD,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Self-Insured,
Defendant.

Appeal Decision

This is an appeal by defendant of a proposed arbitration decision in which the deputy industrial commissioner made an award of compensation benefits to claimant.

The record on appeal consists of the transcript of the hearing; the depositon of Richard DeRemee, M.D., plus two depositions of Paul Steinhauer, D.O., taken February 4, 1980 and April 23, 1980, hereinafter referred to by the numerals I and II; plus claimant's exhibits A-M, inclusive and defendant's exhibits 1-4, inclusive.

Defendant's brief did not explicitly state the issues on appeal as required by rule 500—4.28(2). However, from the record and the briefs of the parties, the issues concern the problem of issue preclusion; whether claimant sustained an injury; if so, whether that injury caused claimant's impairment and subsequent disability; and the extent of claimant's disability, if any.

During 1976, claimant worked in the offal department during about five of his shift of eight hours. He worked next to a room where certain cleaning chemicals were used. He claims that exposure to these chemicals caused his chronic bronchitis.

In the companion case of *Leonard Burmeister v. Iowa Beef Processors, Inc.*, claimant was given an award. In the instant case, the deputy who heard the case decided that claimant's assertion of the doctrine of issue preclusion established the fact that claimant Schofield was exposed to sodium hydroxide at his work place during October 1976.

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 preclusion:

> The most important factors in determining availability of the doctrine of collateral estoppel [issue preclusion] notwithstanding a lack of mutuality or 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.

The various elements of successful issue preclusion appear to be present in this case, and the deputy's ruling in that regard is specifically adopted.

With respect to the injury, the testimony of Dr. Steinhauer, a qualified osteopathic physician, is accepted over that of Dr. DeRemee, a qualified internist and expert in pulmonary disease. Although Dr. DeRemee has superior professional credentials, Dr. Steinhauer was the treating physician and himself worked as a respiratory therapist for three years while in college. Further, Dr. DeRemee concedes claimant has bronchospasms (asthma) and shortness of breath. He also concedes that claimant's problem could be from a burn caused by inhalation of a chemical.

Dr. Steinhauer is quite emphatic in his opinion that the chemicals in the air at the employer's plant caused claimant's respiratory problems. The doctor is likewise of the opinion that claimant suffers permanently from chronic bronchitis and that this condition is very disabling.

It is true that claimant has a serious disability which was caused by his injury at work. Consideration may be given to the functional disability. *Olson v. Goodyear Service Stores,* 255 Iowa 112, 125 N.W.2d 251 (1963). Claimant has the burden of proof to show the extent of his disability. *Olson v. Goodyear Service Stores, supra.* Claimant's industrial disability, however, concerns more than his functional impairment and takes into consideration such matters as claimant's age, education, qualifications, experience and his inability (because of the injury) to engage in employment for which he is fitted. *Olson v. Goodyear Service Stores, supra; Martin v. Skelly Oil,* 252 Iowa 128, 106 N.W.2d 95 (1960).

Considering the above criteria, claimant has made no showing of an effort to find other employment; there is no showing of what claimant can do within the boundaries of his disability. Of course, there is evidence of what claimant cannot do, especially with reference to farming, and there is evidence of his trying to do work which he probably should not attempt. Claimant's age, education and other factors show that he has a considerable portion of his working career left. A claimant should make *bona fide* efforts to find suitable work. *McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181, 192 (Iowa 1980). His efforts should be directed not only to that portion of the farming work which he can do but also directed toward fitting himself for an occupation he can perform within the limits of physical impairment.

Findings of Fact

1. In October 1976, claimant was exposed to sodium hydroxide. (Issue preclusion)

2. Claimant had no prior lung problems. (Transcript, page 16)

3. Claimant and Leonard Burmeister worked on opposite shifts at the employer's plant. (Transcript, page 9)

4. Claimant has chronic bronchitis. (Steinhauer I, page 16)

5. Claimant's chronic bronchitis was caused by his exposure to chemicals at the employer's plant. (Steinhauer I, page 10, Steinhauer II, page 13)

6. Claimant's chronic bronchitis is permanent. (Steinhauer I, page 19)

7. Claimant ceased working for the employer in December 1976. (Transcript, page 5)

8. The claimant cannot perform his farm work at full capacity. (Transcript, page 18-19, 27-29)

9. Claimant can work as a farmer but frequently will be unable to work at all. (Steinhauer I, page 18, Steinhauer II, page 6)

10. Claimant was age 49 at the time of the hearing; claimant is a highschool graduate. (Transcript, page 3-4)

11. Claimant's work experience has been as a laborer in a gypsum mill, farming and in the employer's meat plant.

Certain matters were not disputed and will be retained as a part of this decision. These matters are the healing period, the compensation rate and the medical and hospital bills.

Conclusions of Law

In October 1976, claimant sustained an injury arising out of and in the course of his employment at the employer's plant.

The injury caused a partial disability to the body as a whole for industrial purposes of 50 percent.

The proper rate of weekly rate of compensation is $149.73.

The length of the healing period is 46 3/7 weeks.

THEREFORE, defendant is hereby ordered to pay weekly benefits unto claimant for a period of two hundred fifty (250) weeks at the rate of one hundred forty-nine and 73/100 dollars ($149.73) per week for the permanent partial disability and a healing period of forty-six and three-sevenths (46 3/7) weeks at the same rate, accrued payments to be made in a lump sum together with statutory interest.

Defendant is further ordered to pay the following medical expenses:

Manson Discount Drug	$ 58.42
Paul F. Steinhauer, M.D.	127.50
Dr. Wilson	59.25

Defendant is to receive a credit pursuant to section 85.38, Code of Iowa.

Defendant is ordered to file a first report of injury and report of final payments when made.

Costs are taxed against defendant.

* * *

Signed and filed this 28th day of August, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court;
Remanded for further findings on issue preclusion.

JOSEPH W. SCHOLLMEYER,

Claimant,

vs.

STORAGE SYSTEMS, INC.,

Employer,

and

FIREMAN'S FUND,
INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Ruling

NOW on this day the matter of defendant's motion to compel execution of patient's waiver came on for determination. No resistance has been filed by claimant.

On January 11, 1982 defendants filed a motion asserting that claimant has an action pending before the agency, that claimant has agreed to the release of medical information under Iowa Code section 85.27, that claimant has been treated by Dr. Gerald M. Besler, that defendants requested medical information from Besler, that Dr. Besler will only release information when a patient's waiver is supplied, that defendants' counsel has twice requested a waiver from claimant, and that neither a patient's waiver nor records from Dr. Besler have been received. Defendants ask that claimant be ordered to execute a patient's waiver.

The undersigned cannot sustain defendants' motion; however, claimant's position in this matter is looked on with disfavor.

Iowa Code section 85.27 includes:

> Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they have access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of such information. Such information shall be made available to any party or their attorney upon request. Any institution or person releasing such information to a party or their attorney shall not be liable criminally or for civil damages by reason of the release of such information. If release of information is refused the party requesting such information may apply to the industrial commissioner for relief. The information requested shall be submitted to the industrial commissioner who shall determine the relevance and materiality of the information to the claim and enter an order accordingly.

The law clearly contemplates the exchange of medical information. If the claimant is concerned about the relevance and materiality of information from Dr. Besler, he has the protection of submitting it to the industrial commissioner to make a determination in that regard.

Claimant should also be aware of Industrial Commissioner Rule 500—4.17 which states:

> Each party to a contested case shall serve all written doctors' or practitioners' reports in the possession of the party upon each other party at least thirty days prior to the date of hearing. A party obtaining a medical report within thirty days of a hearing immediately shall serve upon each other party a copy of the report. Notwithstanding 4.14(86), the reports need not be filed with the industrial commissioner; however, each party shall file a notice that such service has been made in the industrial commissioner's office, identifying the reports sent by the name of the doctor or practitioner and date of report. Any party failing to comply with this provision shall be subject to 4.36(86).

Industrial Commissioner Rule 500—4.36 provides:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

By taking the position he has taken, claimant ultimately may be subjecting himself to the provisions of Rule 500—4.36. It is noted that defendants would have the option of subpoenaing the doctor to testify. Subpoenaing doctors does little to promote good will and to facilitate cooperation between the medical and legal profession and is costly as well. It is in the best interest of us all to keep the cost of worker's compensation litigation low. This agency has formulated rules to aid in that regard.

THEREFORE, IT IS FOUND:

That Iowa Code section 85.27 contemplates the free exchange of medical information.

That it is in the claimant's best interest to comply with section 85.27 and the Industrial Commissioner Rules.

* * *

Signed and filed this 27th day of January, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

JACK D. SHAW,

Claimant,

vs.

CATERPILLAR TRACTOR COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

By order of the industrial commissioner filed January 11, 1982 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 appeals from an adverse review-reopening decision issued October 26, 1981.

The record consists of the transcript; the depositions of Harry Schroeder and Frank Russo, M.D.; defendant's exhibits A, B, C, D, E, F, G, H, and I; and claimant's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

The result of this final agency decision will be modified slightly to the effect that the employer will not be ordered to pay the bill of Kerin Schell, the psychologist.

Findings of Fact

1. Claimant began work for the employer on February 26, 1979. (Tr. 9)

2. Claimant had a conceded work injury to his low back on April 12, 1979.

3. As a result of the work injury, claimant had a bilateral laminectomy on May 18, 1979 at L-4/5 and L-5/S1. (Defendant's exhibit H)

4. Claimant progressed in his recovery from surgery until August and September 1979 when he developed low back muscle spasm, absent right ankle jerk, and pain in the low back and back of the left thigh. (Defendant's exhibit I)

5. Claimant was released to return to work with a 25 pound weight lifting limit on June 5, 1980. (Defendant's exhibit F)

6. Claimant returned to work (light duty) on June 9, 1980. (Tr. 25)

7. Kerin Schell, Ph.D., a psychologist, began treating claimant February 12, 1980. (Defendant's exhibit B)

8. Claimant did not have the employer's permission to be treated by Dr. Schell. (Tr. 18, 68)

9. Claimant has a bright-normal level of intelligence. (Defendant's exhibit A)

10. Claimant has had emotional and physical stress since April 1979 and his emotional disturbance contributes to his subjective pain. (Defendant's exhibit B)

11. Claimant has a paranoid personality. (Schell 79)

12. The stress of claimant's back injury precipitated marital and job problems. (Schell 74)

13. Claimant's injury caused psychological problems. (Schell 81-84)

14. Claimant was discharged by the employer on or about June 13, 1980. (Tr. 27)

15. Claimant visited the plant physician on June 13 or 14, 1980. (Tr. 28)

16. Claimant consulted with Charles E. Goodell, M.D., a neurologist, on June 12 or June 13, 1980. (Defendant's exhibit E, claimant's exhibit 3)

17. Claimant entered Moline Public Hospital August 24, 1980. (Tr. 30, claimant's exhibit 2)

18. On June 12, 1980, Dr. Goodell wrote a note that claimant was unable to work because of low back pains; this note was received by the employer on June 13, 1980. (Claimant's exhibit E)

19. Claimant has a poor memory as to when events occurred. (Tr. 31, 33)

20. Claimant was examined at the Industrial Injury Clinic in Neenah, Wisconsin May 15-18, 1980, prior to his return to work in June 1980.

21. Claimant has chronic radiculitis from the low back as a result of the injury and surgery. (Russo depo., 14)

22. Claimant has a somewhat severe permanent partial impairment of 10-25% of the body as a whole (based on the experience of the undersigned and on claimant's exhibit 7, and Russo 19, 66-70).

23. Claimant has completed his GED tests. (Tr. 12)

24. Claimant's work experience has been as a laborer, some times doing skilled work. (Tr. 12-14)

25. Claimant began working December 8, 1980 as a maintenance man at Indian Bluff Apartments. (Tr. 54)

Issues

As a result of the record made, the hearing deputy awarded two weeks healing period and 125 weeks permanent partial disability (in addition to an apparent 25 weeks of permanent partial disability therefore made) for a 30% permanent partial disability, and certain medical and hospital expenses. On appeal, the employer claims that the employee did not have the right to choose his medical care, denies that certain psychological counselling by Dr. Schell was reasonably necessary, and that the 30% permanent partial disability was too high.

The matter of the healing period is not contested on appeal nor is the weekly rate of $226.91. There appears to be no dispute over the medical bills except for the matter concerning Dr. Schell.

Applicable Law

With respect to the right to choose the care, §85.27 states in relevant part:

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

On the question of disability, claimant has the burden of proof. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). Claimant's disability is industrial which is reduction of earning capacity and not just functional impairment. Industrial disability includes considerations of functional impairment, age, education and relative ability to do the same work as prior to the injury. *Olson, supra; Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960). See also *Blacksmith v. All-American, Inc.*, 2990 N.W.2d 348 (Iowa 1980) and *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). Matters of causal relationship are essentially within the realm of expert testimony. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960).

Analysis

(1) The employer states that claimant was not denied medical benefits under §85.27 and was not justified in seeking out treatment on his own; however, the record indicates a sort of constructive denial. Under §85.27, the employer has the choice of care, a right which implies some sort of active management of claimant's case. The facts show claimant hurt his back on April 12, 1979, had two-level low back surgery, and attempted to return to work in June 1980. At this point, the record becomes confused in conflicting evidence as to whether or not claimant would have been allowed to visit the medical department because of alleged back pain. At any rate, claimant did not continue to work and on his own consulted Dr. Goodell, a neurologist. Dr. Goodell wrote a note dated June 12, 1980 to the effect that claimant was unable to work because of low back pain, and this note was stamped "received" by the employer on June 13, 1980, apparently the same date claimant was discharged. In the face of claimant's complaints and the note from the doctor, the employer evidently abandoned the right to choose the care because no employer-supervised care continued. Under such circumstances, the claimant must seek his own care, and if it is connected to the injury (it was), it is compensable.

(2) As a second issue, the employer urges that the treatment by a psychologist, Kerin Schell, Ph.D., was not reasonably necessary or caused by the injury. Although the evidence showed the treatment to be both necessary and causally related to the injury, it is nevertheless not covered. Claimant began the treatment in February of 1980, at the behest of his wife, and there is no showing on the record that the treatment was authorized by the employer. Further, §85.27 does not list psychological treatment as a service covered by the workers' compensation law. (Here it should be noted that there is no referral to the psychologist by a medical doctor or other healer mentioned in §85.27.)

(3) Finally there is the issue of the extent of claimant's disability, the employer claiming that 30% disability is too high. Claimant's physical impairment, an important part of his industrial disability has two components, the actually physical and mental. Bilateral two-level laminectomies, in this deputy industrial commissioner's experience, tend to produce residual physical impairment, which is born out by the testimony of Dr. Russo and the report of Marvin L. Skoglund, M.D. Further claimant's personality disorder, described by Dr. Schell, stems from the injury: "It seems as if the stress of the back injury, which then precipitated marital problems, which then precipitated job problems, was just one that he couldn't handle, and this was not occurring prior to his back injury. It seems to have just — like a domino effect; precipitated the entire problem." (Tr. 73-74) Claimant is a man who had surgery for a very painful condition and who did not improve afterwards as much as hoped. As a result, he developed some mental problems in a reaction to pain and frustration. Considering that he is able to perform his maintenance job, and also considering his age, education and other elements of industrial disability, a 30% permanent partial disability for industrial purposes is correct.

* * *

A word about claimant's exhibit 6, a labor arbitration award, which was admitted over defendants objection: the exhibit is admissable under the Administrative Procedure Act, §17A.14: "A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial." Even so, the exhibit has little weight, beyond describing the breakdown in relations between claimant and the employer and was, though of peripheral value, really of no substantive use in reaching the conclusion here. No harm, however, results from its admission into evidence.

Conclusions of Law

Claimant sustained an injury arising out of and in the course of his employment on April 12, 1979.

Claimant's injury caused industrial disability of thirty percent (30%).

Claimant is entitled to recover or be reimbursed for the medical, hospital and allied bills listed in the order below but not to recover for the bill of Dr. Schell.

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant for a period of one hundred twenty-five (125) weeks beginning May 2, 1981 at the rate of two hundred twenty-six and 91/100 dollars ($226.91) per week, twenty-five (25) weeks having heretofor been paid, accrued payments to be made in a lump sum together with statutory interest.

Defendant is further ordered to pay for the following bills:

Moline Public Hospital	$4,592.80
Charles E. Goodell, M.D.	610.00
Franciscan Medical Center	50.00
Charles J. Dyke, M.D.	356.00
Lutheran Hospital	2,247.15
Moline Orthopedic Associates	58.00
	45.00
Rock Island Franciscan Hospital	72.00

Defendant is ordered to pay the costs of this proceeding and to pay expert witness fees in the sum of one hundred fifty dollars ($150) each to Kerin Lee Schell, Ph.D., and Frank Russo, M.D.

Defendant is ordered to file a final report upon completion of payments.

* * *

Signed and filed at Des Moines, Iowa this 30th day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

Appealed to District Court; Pending.

JACK D. SHAW,

Claimant,

vs.

CATERPILLAR TRACTOR COMPANY,

Employer,
Self-Insured,
Defendant.

Order Nunc Pro Tunc

The appeal decision filed March 30, 1982, is hereby amended by adding the following:

Conclusion of Law

Claimant is entitled to receive an additional two weeks of healing period.

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits for a period of two (2) weeks for healing period at the rate of two hundred twenty-six and 91/100 dollars ($226.91) per week to be paid in a lump sum, together with statutory interest from the date due.

* * *

Signed and filed at Des Moines, Iowa this 31st day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

DELBERT E. SHELLEY,

Claimant,

vs.

MARVIN WHETSTONE,

Employer,
Defendant.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Delbert E. Shelley, claimant, against Marvin Whetstone, defendant, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of his employment on December 19, 1979. It came on for hearing on October 26, 1981 at the Clarke County Courthouse in Osceola, Iowa. The record was considered closed at the time.

No filings have been made with the industrial commissioner's office.

The parties stipulated that the claimant was paid $100 per week by defendant; that claimant was off work from December 19, 1979 through February 13, 1980; and that the medical charges were fair.

The record in this matter consists of the testimony of the claimant, Delbert E. Shelley, and of the defendant, Marvin Whetstone; claimant's exhibit 1, a bill from J.B. Baker, D.O.; claimant's exhibit 2, a hospital bill from Adair County Memorial Hospital; defendant's exhibit A, a 50/50 livestock agreement; defendant's exhibit B, a security agreement, note and disclosure statement dated April 3, 1979; defendant's exhibit C, a bill from Stuart Feed & Grain, Inc.; defendant's exhibit D, a sales slip dated November 26, 1979 from Stuart Sales Company; defendant's exhibit E, a sales slip dated April 30, 1979 from Stuart Sales Company; defendant,s exhibit F, a sales slip dated June 18, 1979 from Stuart Sales Company; defendant's exhibit G, a sales slip dated April 2, 1979 from Stuart Sales Company; defendant's exhibit H, sales slips dated November 19, 1979 from Stuart Sales Company; and defendant's exhibit I, sales slips dated December 17, 1979 from Stuart Sales Company.

Issues

The issues in this matter are whether or not an employer/employee relationship exists; whether or not claimant's injury arose out of and in the course of his employment; whether or not there is a causal connection between the alleged injury and claimant's disability; and whether or not claimant is entitled to temporary total and medical benefits.

Statement of the Case

Twenty-seven year old married claimant, father of three children, testified that he first discussed working with defendant at the sale barn in Stuart at which time defendant asked him if he was interested in moving closer to his home which was located four or five miles from defendant's farm. Later defendant and his spouse visited claimant and they talked of going fifty/fifty on some pigs. Claimant said he was asked to decide what he would need for income. He and his wife concluded $100 per week was necessary. Claimant was to have a house rent free, but he was to pay utilities. Within a week, claimant, who asserted he worked for no one else during this period, decided to work with defendant.

The parties signed an agreement in September of 1977. Claimant said that the document, which was drafted by the defendant, was needed to secure food stamps. Claimant stated that under the agreement each party supplied some of the capital; defendant provided the facilities; and he furnished the labor. Claimant alleged that all hogs were owned jointly and that no hogs were owned individually. Claimant testified that he was paid $100 per week by personal check from defendant. His light bill was deducted when it was due. In addition to the work with hogs, claimant asserted that he did chores for three hundred head of cattle, disked, cultivated, ran the wagon for silage, and helped harvest corn all with defendant's equipment. According to claimant, these tasks were assigned by the defendant who came out each morning and told him what to do or gave him a list of things to do during work hours which he claimed spanned the period from 7:00 a.m. to 6:00 p.m. or later. Claimant denied that he was free to choose tasks to be done after the hog chores were completed, but he acknowledged he was free to select the manner in which the work was done. Actual time spent in working with the livestock varied with the time of year. Claimant stated that in 1979 he had four stock cows with grazing and silage privileges.

Claimant recalled that he owned no hogs at the time the agreement was entered. Defendant cosigned a note to enable him to purchase bred sows which were obtained at the Stuart Sale Barn in October of 1977. The hogs were raised to feeder pig size at which time they were sold. Claimant considered these sales as the "partnership" selling the hogs. The parties then split the expenses and the profits. Some of the grain fed to the animals was raised on the farm. Claimant reported that he measured and recorded that grain and paid defendant for his share at the time of settling up.

Claimant described the circumstances at the time of his injury as follows: He had moved his family to his father's farm in July of 1979 as he was concerned about the conditions of the house on defendant's farm. More specifically, he felt that because the upstairs windows were not airtight, his utility bills were higher. He drove to work each day. On December 19, 1979, about 3:00 p.m., he was told to remove a trough from a goose neck trailer. Defendant was backing up the pickup to which the trailer was attached. Claimant's foot began to hurt. He recalled telling defendant his foot hurt, but he continued to work and ground feed for the heifers. As he left work defendant suggested he go home and soak his foot. He went to the hospital instead. He denied problems with his foot before this time and that it was his cattle which were being worked with on that day. He was hospitalized. Eventually his foot was cast. A walking cast was applied on January 9, 1980. The cast was removed on January 30, 1980.

Claimant testified that before the cast was off, he sought other employment as he believed he was fired, and he went to work as a repairperson on February 13, 1980. Claimant and defendant ended their relationship by agreement by selling stock and again dividing the bills in the proceeds. Some of claimant's stock was bought by defendant. Claimant said that he never paid back the money he was paid each week.

Marvin Whetstone, auctioneer, real estate salesperson, owner of five hundred sixty acres, and renter of two hundred forty acres, testified that he contacted claimant in September of 1977 in reference to a hog raising project as he believed he had the facilities for raising hogs and he thought claimant was good with hogs. He said that he thought both of them could profit from the hog project.

Defendant did not consult with legal counsel when he drafted the agreement, portrayed by him as "routine", which the parties signed. He felt both parties were to finance. He was to provide the premises. In addition, he supplied machinery and gas. Claimant was to furnish his labor for the hog operation and to do some related work without compensation. He claimed claimant could do the hog work whenever he wanted to and he asserted claimant "had a mind of his own." Although he acknowledged he sometimes did so, he denied talking to claimant on a daily basis about work to be done. He thought claimant also did work on his father's place. He stated the hog chores were minimal at times because the sows ran behind the cattle and at other timec gleaned in the fields. He agreed that at farrowing time greater labor was needed. Defendant saw the $100 per week as an advance against sales. Defendant alleged he discussed the paying back of the money with claimant, but the hog operation never got far enough ahead for the money to be collected. Defendant rejected the claim that he had paid self-employment tax or offered to pay social security and that the purpose of the agreement was to get around the payment of social security, unemployment, or workers' compensation.

The witness said his expectations of claimant were not met as claimant's knowledge of the hog business was not as good as he had hoped and as claimant could not manage the operation defendant had in mind. His description of the sale of the animals was much the same as claimant's description. He asserted that the two were given one check by the sale barn. The proceeds were divided and deposited in individual accounts.

Defendant recalled the incidents of December 19, 1979 as follows: Claimant's cattle were being moved closer to home in preparation for sale. Some salt boxes, a washing machine, and trough were loaded with the cattle. At the time the trough was unloaded, defendant observed claimant was "carrying his foot funny." He was unsure of what had actually happened, but he was told by claimant that his foot hurt. Claimant ground feed and then went home. Defendant was told by claimant's father that claimant was hospitalized.

The 50/50 livestock agreement entered by the parties was offered in evidence. It provided:

> 50/50 Livestock Agreement
> Beginning September 10, 1977
>
> Marvin and Vera Whetstone, land owners, hereafter called owners. Delbert and Cindy Shelley, hereafter called renters.
>
> Legal Description; West 1/2 section 19, Lincoln Township, Adair County, Iowa.
>
> Renters have the right to raise or farrow pigs on the above described real estate, which includes use of the hog buildings and hog feeding floors. (Renters to provide 1/2 of brood stock, feed, medication, veterinary fees and special equipment not already on the premises.) (Owners to provide 1/2 of the same.)
>
> Renters to provide the labor for hog operation.
>
> Owners will provide the machinery and home to live in and water.
>
> Renters may draw $100.00 per week to live on, in advance of hog or pig sales.
>
> Renters also have the right to keep 5 stock cows and their offspring on the premises, with rights to pasture, hay, and silage. (No grain) These cattle to be paid for solely by the renter. Renter agrees to feed and care for the other livestock and crops on this farm, without compensation.
>
> This agreement does not in any way create a partnership or employer-employee relationship and does not hold either party responsible for the others [sic] debts. Owner and Renter are self-employed.

Also submitted were a feed bill in the name of Whetstone and Shelley, records of sales of livestock on several occasions in 1979 with slips in the name of Whetstone and Shelley or Shelley and Whetstone, and a security agreement, note, and disclosure statement to Shelley and Whetstone signed by the parties.

A bill from J.B. Baker, D.O., lists an emergency room call, three days in hospital care, cylinder cast application to a fractured metatarsal, removal of the cylinder cast, application of a walking cast, and removal of the walking cast. A hospital bill was also offered.

Findings of Fact

That claimant is the married father of three children.

That in the late summer of 1977 claimant and defendant entered into discussions regarding going 50/50 on some pigs.

That in September of 1977 an agreement was entered by the parties.

That the agreement entered essentially provided that each party would supply one-half the stock and pay one-half the expenses; that claimant would provide labor for the hogs and other livestock and for crops without compensation; that claimant would receive $100 per week in advance of hog sales; that claimant got a home with water; that claimant had the right to have five stock cows with calves and to use pasture, silage, and hay; that defendant would furnish the facilities and the machinery; that the agreement would create neither a partnership nor an employer/employee relationship; and that the parties are self-employed.

That claimant owned no hogs at the time the agreement was entered.

That defendant co-signed a note to enable claimant to buy pigs.

That claimant was paid $100 per week by defendant's personal check.

That claimant's light bill was deducted from $100 per week advance.

That defendant and claimant sold hogs in the name of Shelley and Whetstone or Whetstone and Shelley and then divided the expenses and profits.

That the hog operation did not meet the defendant's expectations.

That the parties essentially complied with the terms of the agreement.

That on December 19, 1979 as the parties were unloading some equipment from a trailer, claimant experienced pain in his foot.

That claimant suffered a fractured metatarsal.

That as a result of the fracture, claimant incurred various medical expenses.

That the parties terminated their relationship subsequent to claimant's injury.

That claimant did not pay back to defendant any of the $100 advances which he received.

Applicable Law and Conclusions of Law

Claimant has the burden of proving by a preponderance of the evidence that he is an employee. If claimant establishes a prima facia case, the burden is on defendant to establish by a preponderance of the evidence an affirmative defense as a bar to compensation. *Nelson v. City Services Oil Co.*, 259 Iowa 1209, 1213, 146 N.W.2d 261, ____ (1967).

Iowa Code section 85.61(2) defines 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, and including officials elected or appointed by the state, counties, school districts, area education agencies, municipal corporations, or cities under any form of government, and including members of the Iowa highway safety patrol and conservation officers, except as hereinafter specified.

Before a person can come within the purview of the workers' compensation act, it is essential that there be an express or implied contract of service with the employer who is sought to be charged with liability. Common law definitions cannot be used when the legislature has expressly defined the term employed in the statute. *Knudson v.Jackson,* 191 Iowa 947, 949-50, 183 N.W. 391, ____ (1921). An employee is someone bound to the duty of service and not bound only by a duty to produce a certain result. *Pace v. Appanoose County,* 184 Iowa 498, 508, 168 N.W. 916 (1918).

The Iowa Supreme Court has recognized, on many occasions, five factors to determine whether or not an employer/employee relationship exists. They 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 and for whose benefit the work is performed?

Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429, 431 (Iowa 1970); *Hjerlied v. State,* 229 Iowa 818, 826, 295 N.W. 139, ____ (1940). Also considered and viewed as the overriding element is the intention of the party as to the relationship created. *Henderson, supra.*

The first factor discussed is the right of selection or to employ at will. The parties here entered into an agreement which is labeled as a 50/50 agreement. The parties elected to work together on the project. The agreement does not include such basic things covered by an employment contract such as salary, the hours to be worked, vacation periods, and insurance coverage. While defendant could have selected anyone he wished to take part in the project, the impression gained by the undersigned of the negotiations prior to the signing of the agreement was that the parties were entering the agreement as equals and that the claimant was not in a subservient position. The receipts from the sale barn and the security agreement include both names, a further indication of the equality of the parties.

The second factor is the responsibility for the payment of wages by the employer. The claimant was paid by personal check by the defendant on a weekly basis. The amount of the payment apparently was arrived at by the claimant and his spouse determining the amount of income they needed per week to survive. The agreement specifically says that "[r]enters may draw $100 per week to live on, in advance of hog or pig sales." Defendant testified that he had discussed the paying back of the money with claimant; however, the pig project never got far enough ahead to allow the collection of that money. Testimony of claimant does not indicate that defendant decided on a salary and then made an offer which claimant could accept or reject. Rather, claimant decided the amount of the weekly advance.

The third factor is the right to discharge or terminate the relationship. The relationship in this instance was terminated. Claimant testified that he considered himself fired and he sought other employment after he broke his foot. He also testified that the relationship ended by agreement with the sale of the stock and dividing of the profits.

The fourth factor is the right to control the work. Claimant testified that defendant provided him with a list of tasks each day. He acknowledged his freedom to select the manner in which the work was performed. Defendant's view was contrary. Although he admitted he sometimes told claimant what to do, he denied discussing the claimant's work on a daily basis. There were a number of tangential chores related to the hog work and some of them, such as harvesting decisions, were made by the defendant as the land owner.

The fifth factor is whether or not the party sought to be held as the employer was the responsible authority in charge of the work or for whose benefit the work is performed. It is clear that the labor performed in the hog operation benefited both parties. It is also apparent that much of the work performed outside the hog operation, such as the care of row crops, which produced grain which was fed to the hogs, ultimately benefited both parties as well. While defendant may have asserted some authority over tasks incidentally related to the hog operation, this deputy industrial commissioner does not feel that his authority extended to the hog operation. His testimony was that he sought out claimant because of what he believed to be claimant's expertise in an area where he himself was lacking. Claimant's testimony was that he retained control over the manner in which the work was done.

It is next necessary to examine the intention of the parties as to the relationship they were creating. The parties here have a written agreement. That agreement specifically provides that neither a partnership nor an employer/employee relationship is created. Comparison of that agreement and the testimony of the parties at the time of hearing revealed that the parties' conduct was consistent with the agreement. In light of that fact, it would be inconsistent to find that while the agreement reflected their intent for all other aspects, it did not reflect their intent as to the creation of an employer/employee relationship. Based on the record as a whole, there is not sufficient evidence of factors favorable to the claimant to establish an employer/employee relationship.

THEREFORE, IT IS CONCLUDED that claimant has failed to prove by a preponderance of the the evidence that he was an employee of defendant.

Order

THEREFORE IT IS ORDERED:

That claimant take nothing from these proceedings.

That any costs of these proceedings be taxed to defendants.

* * *

Signed and filed this 12th day of November, 1981.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

DAVID SHIFLETT,

Claimant,

vs.

CLEARFIELD VETERINARY CLINIC,

Employer,

and

AID INSURANCE COMPANY

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by David Shiflett, the claimant, against his employer, Clearfield Veterinary Clinic, and the insurance carrier, Aid Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on April 17, 1979. This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's office in Des Moines, Iowa, on January 20, 1982. The record was considered fully submitted on February 4, 1982.

On April 26, 1979 defendants filed a first report of injury concerning the April 17, 1979 injury. On May 23, 1979 defendants filed a memorandum of agreement indicating that the weekly rate for compensation benefits was $166.98. On August 17, 1979 defendants filed a form 5 indicating that 16 5/7 weeks (April 18, 1979 through August 12, 1979) of temporary "partial" disability — a total of $1,319.98 — had been paid voluntarily pursuant to the memorandum of agreement.

The record consists of the testimony of the claimant; the testimony of claimant's wife; the testimony of Marilyn Terrell; the deposition testimony of Stephen G. Taylor, M.D.; claimant's exhibit 1, various medical records; claimant's exhibit 2, summarization of medical expenses; claimant's exhibit 3, medical statements; claimant's exhibit 4, February 5, 1981 letter from defendant insurance carrier to claimant's counsel; defendants' exhibit A, note regarding claimant's earnings from defendant employer for the year preceding his injury; and defendants' exhibit B, February 3, 1981 letter from claimant's counsel to defendant insurance carrier. Defendants' objection to claimant's exhibit 5 (and subsequent offer of proof testimony) was sustained. Claimant withdrew this objection to defendants' exhibit A by letter filed February 1, 1982. Both parties filed briefs.

Issues

The issues to be determined include whether there is a causal connection between the alleged injury and disability; the nature and extent of the disability (according to the briefs); and whether Dr. Taylor's care was authorized or otherwise qualified under Code section 85.27; the rate of compensation; and whether defendants are entitled to credit for the temporary "partial" payments they voluntarily paid pursuant to the memorandum of agreement. According to the pre-hearing order, whether claimant received an injury which arose out of and in the course of employment was also in issue. However, as indicated above, a memorandum of agreement was filed in this matter and has not been challenged by either party. Hence, it is established, as a matter of law, that claimant's injury arose out of and in the course of employment.

Recitation of the Evidence

On April 17, 1979 claimant was participating in the castration of a one thousand pound, 2 year old quarter horse in the course of his duties as a veterinarian assistant. While he was attempting to hold the horse down, the animal's head struck against his left extended leg at the lateral side of the knee. Claimant experienced immediate pain in the inside of the knee and found his left leg would buckle if he placed any weight on it.

Claimant was treated by a Dr. Marfatia at the Ringgold County Hospital that same day. X-rays were taken. Dr. Marfatia diagnosed a lateral ligament sprain of the left knee and treated the claimant with a brace and crutches. He further indicated that if claimant's condition was not improved in a week, casting would be considered. (Claimant's exhibit 1, page 47.) (According to the claimant, a cast was not discussed.) Dr. Marfatia saw the claimant again on June 7, 1979 and noted slow improvement. (Claimant's exhibit 1, page 49.) The claimant testified that Dr. Marfatia did not release him to return to work at that time.

Claimant was seen next by Marshall Flapan, M.D., on July 12, 1979 at the request of defendant insurance carrier. Dr. Flapan received a history from the claimant that included mention of the work injury and indication of no prior knee problems. Dr. Flapan set forth his examination findings, diagnosis and recommendations:

> OBJECTIVE: Well developed gentleman in no distress. He has obvious atrophy of the quadriceps on the left. There is 2" of circumferential difference of the mid thigh on the left compared to right. Range of motion of the left knee is full and complete. There is laxity of the tibial collateral ligament on the left but it is intact. There is no drawer sign present. He does have tenderness at the medial joint line. There is no McMurray sign.

X-RAYS: Two views of the left knee are within normal limits.

ASSESSMENT: Sprain of the left tibial collateral ligament; possible tear of the medial meniscus.

PLAN: He needs to be on a program of progressive/resistive quadriceps exercises and I instructed him in doing these. I will reevaluate him in 3 to 4 weeks. If the symptoms persist will proceed with an arthrographic evaluation. (Claimant's exhibit 1, page 43.)

Dr. Flapan saw the claimant again on August 9, 1979 and reported:

> SUBJECTIVE: David is coming along fairly well following the injury to his left knee. He is getting along well at this time without any limitation. The strength is returning in his quadriceps and he states that he is lifting 30 pounds.
>
> OBJECTIVE: No effusion. He has a full range of motion of his left knee. Slight laxity of the collateral ligament medially is present. Slight anterior drawer sign. No joint line tenderness.
>
> ASSESSMENT: Sprain of the left knee with stretch of the tibial collateral ligament.
>
> PLAN: Continue resistive quadriceps exercises. Return to work on 13 August 1979 to unrestricted activities. Does not have to see me again unless he is having problems. (Claimant's exhibit 1, page 43.)

Claimant testified that from the date of injury until his return to work for defendant employer, he was unable to work his own farm because of the knee condition and had to rely on his wife and part-time employees. (Claimant apparently helped supervise corn planting on his father-in-law's farm on May 22, 1979. Claimant explained that he did no physical work but merely watched from the pickup.) Claimant stated that when he returned to work for defendant employer on August 13, 1979 his left leg lacked full mobility which prevented him from doing any kneeling and made squatting and side movement difficult.

Claimant recalled that his left leg gave way about a month later as he was stepping off a portable panel on his farm. Although his knee was swollen for 2 weeks, he did not seek medical care at that time. Claimant also remembered his leg giving way as he stepped over a gate and as he got out of a truck. His knee swelled for a few days after both episodes but he continued to work, both for defendant employer and on his own farm. On the latter occasion, he sought care from Natu Patel, M.D., at the Clearfield Medical Clinic. Claimant indicated that he had been dissatisfied with Dr. Flapan's earlier care and expressed his concern to defendant employer who suggested he seek another opinion. Accordingly, claimant saw Dr. Patel who had been associated with Dr. Marfatia and with the hospital where claimant's wife worked. In turn, Dr. Patel referred the claimant to Stephen G. Taylor, M.D. (Claimant's exhibit 1, page 48.)

Dr. Taylor saw the claimant on July 1, 1980, at which time he received a history of the work injury and indication that the knee had buckled on 4 or 5 subsequent occasions resulting in pain and swelling. (Claimant's exhibit 1, pages 28 and 41.) Upon examination and review of x-rays, it was Dr. Taylor's impression that claimant suffered from "[o]ld tear anterior cruciate ligament, left knee with anterior cruciate instability." (Claimant's exhibit 1, pages 28, 29, 41 and 42.) He recommended anterior cruciate reconstruction if the instability symptoms continued and an arthroscopy to ascertain the integrity of the medial and lateral meniscus. (Claimant's exhibit 1, pages 28 and 41.)

Dr. Flapan saw the claimant on July 24, 1980 and reported:

> SUBJECTIVE: Since last seen, in August of 1979, approximately one year ago, he has had four different episodes of his knee tending to give out and recurrent swelling. He was seen by Dr. Taylor at the request of his family doctor. He comes in now for re-evaluation by me. He has been working but still feels quite unstable with his right knee.
>
> OBJECTIVE: No effusion. He has full normal range of motion of his knee without any limitation. There is no medial lateral laxity but there is a continued slight anterior drawer sign. Internal and external rotation movements of the tibia on the femur are negative. He does, however, have a positive pivot shift test.
>
> ASSESSMENT: Anterior cruciate ligament insufficiency, and anterior-lateral instability.
>
> PLAN: Told him that eventually, he may have to have reconstructive procedure on his anterior cruciate ligament. This is especially true if he is so active in his work. Right now, it is inconvenient for him to undergo any type of surgical procedure. He is to return to see me when he decides to have something done. (Claimant's exhibit 1, page 44.)

Claimant testified that he did not feel ready for surgery in July of 1980 for emotional and financial reasons. However, he did not return to Dr. Flapan but instead pursued surgery under Dr. Taylor's care in March of 1981 because he lacked confidence in Dr. Flapan and better understood the surgery described by Dr. Taylor. Claimant so advised defendant insurance carrier of his desire to undergo surgery by Dr. Taylor without discussing what he deemed to be the difference between the two methods. He recalled that he was informed that the defendant insurance carrier would not approve of surgery by Dr. Taylor. (On February 3, 1981 claimant's counsel wrote the following to defendant insurance carrier:

> Upon the advice of Dr. Taylor my client has decided to proceed with surgery on his knee and would like to have the surgery performed by Dr. Stephen Taylor as soon as possible. Unless we hear from you to the contrary we will assume that the choice of medical care is acceptable and that he is authorized to proceed with the surgery. [Defendants' exhibit B.]

On February 5, 1981, defendant insurance carrier responded as follows in a letter addressed to claimant's counsel:

> In regard to your letter of February 3, 1981, we would like to remind you that there is a dispute on this claim as to the present disability of Mr. Shiflett and whether it related to our injury. Mr. Shiflett had agreed orally to a Compromise Special Case Settlement in October, 1980, before this agreement was drawn up and sent to him. The basis of that contention was that he had additional, more severe injuries in his own business, that were not related to the injury for which we were responsible in April, 1979.
>
> We are sorry therefore that we will not confirm authorization for Mr. Shiflett to have surgery at our expense, nor can we agree to pay any disability during the time he may be off work.
>
> As for the choice of physician, while Dr. Taylor is not unsatisfactory, the original treating physician who is authorized to treat the injury of April, 1979 would be the Des Moines Orthopedic Office Group at 1045 — 5th Avenue. There has been no reason to indicate dissatisfaction with that group and we see no reason to change.
>
> If you have any questions on this matter, you are welcome to get in touch with us when you return to your office. Your Secretary [sic] informs us you would be out at least until next Tuesday, February 19, 1981. [Claimant's exhibit 4.]

Claimant was hospitalized at the Iowa Methodist Medical Center from March 3, 1981 through March 9, 1981. On March 4, 1981 he underwent an "arthroscopy and anterior cruciate reconstruction with semitendinosis and extra-articular iliotibial band transfer and partial medical menisectomy [sic] left knee." (Claimant's exhibit 1, page 20.) Claimant's post operative course has been good and without complications. (Claimant's exhibit 1, page 1.)

Claimant was released to return to work on August 31, 1981. (Claimant's exhibit 1, page 2.) Claimant testified that he still experiences pain and difficulty in using his leg. He continues to wear a knee brace which limits his activity. Claimant no longer runs nor participates in sports leagues.

Claimant's wife verified claimant's complaints.

Stephen G. Taylor, M.D., orthopedic surgeon, opined that claimant's original injury in April of 1979 caused the anterior cruciate ligament tear and resulting instability. He indicated that it was unlikely that subsequent episodes of the knee giving out or popping caused the tear. He emphasized that in the final analysis it was a matter of severity. Dr. Taylor noted that early evaluation (and diagnosis) of such a condition is difficult because examination of the knee immediately after the injury is impossible without a general anesthetic. According to Dr. Taylor, this could explain the initial diagnosis of a sprain to the knee. He observed that the x-rays taken on April 17, 1979 revealed normal bony structures and a fluid shadow in the suprapatellar pouch which were consistent with his diagnosis.

Dr. Taylor indicated that when he last saw claimant, in December of 1981, the knee condition was satisfactorily stable for most activities. Although he felt ligamentous reconstruction requires a full year before a maximum result is achieved, Dr. Taylor did not expect significant change and assessed claimant's present permanent impairment at 25 percent of the leg using the Manual for Orthopedic Surgeons. He explained that 20 percent was based on the repaired cruciate ligament and 5 percent on the meniscectomy. While Dr. Taylor acknowledged he did not perform a complete meniscectomy, he did not adjust his rating of impairment to the leg and suggested that the two surgical procedures had a combined effect on the knee that was greater than an additive analysis.

Claimant testified at the time of the injury he was married with one dependent child. He worked between 20 to 50 hours a week for defendant employer at $3.53 per hour. Claimant stated he earned $13,238.96 during the year preceding the injury. He thought $4,797.00 was wages from the clinic and the remainder was income from his farming operaton. (Defendants' exhibit A, which consists of a request by defendant insurance carrier to defendant employer for claimant's total earnings for the year preceding his injury and defendant employer's response, indicates that claimant earned $4,386.00 from April 1978 to April 13, 1979. By letter filed February 1, 1982, claimant's counsel withdrew objection to the exhibit and agreed that such amount was correct.)

Marilyn Terrell, claims superintendant of defendant insurance carrier's workers' compensation division, testified that defendant insurance carrier did not consider claimant to be temporarily totally disabled from gainful employment in general from the date of injury through August 13, 1979, the date upon which claimant returned to work for defendant employer. However, defendant insurance carrier wished to compensate the claimant for temporary "partial" disability. Since the Workers' Compensation Act does not provide for such benefits, the benefits paid to the claimant in this matter were labeled "voluntary." She explained that the weekly amounts varied and therefore only a lump sum was stated on the report of benefits paid.

Ms. Terrell testified that rough figuring was employed in trying to determine what rate would be appropriate under the circumstances. She noted that computation of claimant's rate of $166.98 took into consideration both his earnings with defendant employer and his farm income divided by 50. In determining the temporary partial disability payment, defendant employer looked at the loss of earnings from the veterinary and the amount expended by the claimant for hired help to do the work he normally performed on the farm and then apparently decided 60 percent of the rate figure would be appropriate. Ms. Terrell testified that in the interim defendant insurance carrier has reevaluated the basis for computing the weekly rate and now contends that the new rate should be based solely on claimant's earnings with defendant employer during the year preceding his injury.

With regard to the issue of authorized medical care, Ms. Terrell testified that defendant insurance carrier has never withdrawn authorization of Dr. Flapan's care and has refused to authorize that of Dr. Taylor both in phone conversations and by letter. (Claimant's exhibit 4.) Ms. Terrell explained that knee cases are intricate, and she was

familiar with Dr. Flapan's expertise, whereas Dr. Taylor was new in town. She also noted that Dr. Flapan treated the claimant soon after the injury and accordingly would be in a better position to assess the impact of any subsequent injuries.

Applicable Law

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

The opinions of experts need not be couched in definite, positive or unequivocal language. *Sonday 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., supra*. 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, supra*. 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*.

When a worker 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).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). *Barton v. Nevada Poultry Company*, 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. *Moses v. National Union C.M. Co.*, 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than provided for in the schedule. *Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).*

Industrial Commissioner's Rule 500—2.4 provides:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a"-"r" of the Code. The extent of loss or percentage of permanent impairment may be determined by use of this guide and payment of weekly compensation for permanent partial scheduled injuries made accordingly. Payment so made shall be recognized by the industrial commissioner as a prima facie showing of compliance by the employer or insurance carrier with the foregoing sections of the Iowa Workers' Compensation Act. Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide.
>
> This rule is intended to implement section 85.34(2) of the Code.

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the sceduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. *Schell v. Central Engineering Co.*, 232 Iowa 421, 4 N.W.2d 339 (1942).

Code section 85.27 provides in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and 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.

Code section 85.36(10) states in relevant part:

> 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 not be less than an amount equal to thirty-five percent of the state average weekly wage

paid to 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.

Analysis

Claimant contends that his time off work from the date of injury to August 13, 1979 and from March 3, 1981 to August 31, 1981, the need for surgical intervention and his 25 percent functional impairment of the left leg are directly traceable to the April 17, 1979 work injury. Defendants argue that those subsequent incidents of knee buckling, which occurred while claimant was not working for defendant employer obviate a finding of causal connection between the work injury and the alleged present disability.

While it is true that Dr. Taylor was not the original treating physician, his opinion on causation is corroborated by the record viewed as a whole. His explanation of why a diagnosis of anterior cruciate ligament tear is difficult to make at the time of injury is plausible, and the Ringgold County Hospital x-rays were consistent with his eventual diagnosis. (Dr. Flapan's were taken almost 3 months after the initial injury. Dr. Flapan's report merely indicates that the x-rays were within normal limits, which was true of the hospital x-rays, at least with respect to bony structures. He made no notation regarding any fluid shadow.) Likewise, Dr. Taylor's description of the instability that results from an anterior cruciate ligament tear, coupled with his emphasis on the severity of the trauma being a determinative factor in resolving causation, compels finding that the subsequent episodes of instability and any ensuing disability were proximately caused by the April 17, 1979 work injury which constituted, by description, the most severe trauma to the left leg. Finally, Dr. Flapan's reports per se neither establish nor defeat a finding of causal connection.

Dr. Taylor's rating of functional impairment to the left leg will be adopted. Claimant's testimony regarding pain, discomfort and limitation of motion otherwise appear to be mirrored in that rating. Claimant also is entitled to healing period benefits for the two periods he was off work — April 17, 1979 to August 13, 1979 and from March 3, 1981 to August 31, 1981. (Although claimant did not seek medical care from August 9, 1979 to June 26, 1980, did not pursue surgery until March of 1981 and continued to work between August 13, 1979 and March 3, 1981, claimant undoubtedly had a potential permanent impairment at the outset in light of Dr. Taylor's analysis. However, Dr. Taylor's functional impairment rating was based only on the claimant's condition after surgery. There was no indication given as to what claimant's impairment might have been during the first period of time he returned to work. Hence, for the purposes of determining when permanent partial disability benefits shall begin, the second return-to-work date will be used.)

With regard to the issue of authorization of Dr. Taylor's care and care rendered pursuant to his direction, claimant's position is that defendant employer agreed to alternate care when defendant employer told the claimant to seek a second opinion, or that defendant insurance carrier medically abandoned the claimant when they refused to authorize surgery because of the causation question raised by the subsequent injuries. Defendants maintain that they repeatedly advised the claimant that only Dr. Flapan's care was authorized. They emphasize that when defendant insurance carrier learned that claimant was going to see Dr. Taylor on July 1, 1980, an appointment with Dr. Flapan was scheduled immediately thereafter. Defendants further contend that claimant's request for surgery by Dr. Taylor did not indicate why the claimant was dissatisfied with Dr. Flapan. In any event, defendants argue that their documented refusal to authorize surgery by Dr. Taylor specified that Dr. Flapan's services remained the only authorized care and invited further communication.

Code section 85.27 unnumbered paragraph 4 clearly states that it is the employer who has the right to choose the medical care. If the employee is dissatisfied with the offered care, he must so advise his employer, in writing when required. If the employer and employee cannot agree on alternate care, a request for such care may be submitted to the industrial commissioner for determination. While claimant's first visit to Dr. Taylor will be allowed insofar as the claimant apparently relied upon defendant employer's suggestion that he seek another opinion if he was dissatisfied with Dr.Flapan, such action on the part of defendant employer is not viewed as carte blanche authorization. Obviously, there was a communication problem between defendant employer and defendant insurance carrier, which the latter took immediate steps to correct by scheduling the claimant for another examination by Dr. Flapan after claimant's examination by Dr. Taylor. Defendant insurance carrier's action was sufficient to squelch any doubt that Dr. Flapan was still the treating physician. Indeed, claimant did not return to Dr. Taylor until March of 1981 for surgery. Despite defendant insurance carrier's efforts at clarifying what medical care was authorized, claimant's counsel's letter of February 3, 1981 presumes Dr. Taylor's surgery will be authorized. Defendant insurance carrier hurriedly responded to the contrary. The emphasis and reliance claimant places on the paragraph stating the defendant insurance carrier will not authorize surgery, in support of his contention that defendants abandoned their right to choose the medical care, is not persuasive. Defendant insurance carrier's letter must be read as a whole and in conjunction with claimant's counsel's notice. Defendant insurance carrier once again stated that Dr. Flapan's care was authorized. While the phrasing "[a]s for the choice of physician" arguably might be read in support of the contention that defendant insurance carrier was both denying surgery and denying Dr. Taylor's care, the circumstances suggest that defendant insurance carrier was attempting to make certain that claimant would not pursue surgery with anyone other than Dr. Flapan. It must be remembered that Dr. Flapan had discussed with the claimant the possible need for surgical intervention, and it should be noted that defendant insurance carrier attempted to elicit further discussion on the matter. Insofar as no emergency situation existed, claimant's remedy would have been to file a formal request for alternate care before this agency.

With regard to the applicable rate of compensation, claimant does not appear to dispute that Code section 85.36(10) is otherwise appropriate but argues that

defendants are bound by their arbitrary computation that resulted in the rate indicated on the memorandum of agreement. Defendants contend that they incorrectly computed the rate of compensation by including claimant's earnings from his farm operation with those from his employment with defendant employer. They cite *Diane Rose Winters v. John B. Te Slaa and American Mutual Insurance Companies*, Appeal Decision filed February 12, 1981, wherein the commissioner held that only wages earned as an employee, not income from self-employment, should be used to compute an employee's gross weekly wage. Defendants also cite *Freeman v. Luppes Transport Co., Inc.*, 277 N.W.2d 143 (Iowa 1975) in support of their contention that they are not bound by the rate of compensation appearing on the memorandum of agreement.

A contested rate is a determinable issue despite the existence of a memorandum of agreement. As stated in the *Freeman* case, such filing establishes that an employer-employee relationship exists and that claimant sustained an injury arising out of and in the course of his employment. It is not conclusive with regard to the rate of compensation.

In the present case Code section 85.36(10) applies because claimant earned less than the usual weekly earnings of the regular full-time veterinarian assistant. Additionally, his wages from defendant employer for the year preceding the injury were the only earnings he received as an employee. As noted by defendants, the industrial commissioner has determined that income from self-employment, such as claimant's farm operation, is not to be included in the computation of earnings. Hence claimant's weekly earnings are $4,386.00 divided by 50 or $87.72. Claimant was married and entitled to 3 exemptions on the date of injury. Accordingly, the applicable weekly rate of compensation is $65.59.

Finally, claimant argues that defendants should not be entitled to credit for the the $1,319.98 they previously paid the claimant because defendants attempted to pay this amount as "voluntary benefits" under Code section 86.20, without filing a notice to voluntary payments in compliance with such statutory section and despite the existence of a memorandum of agreement. Defendants contend that the "voluntary" payment of "temporary partial payments" was made pursuant to the memorandum of agreement.

The fact that defendants paid benefits pursuant to the memorandum of agreement is determinative of the credit issue. Claimant's challenge appears to have arisen from the use of the word "voluntary" to explain defendants' position regarding paying claimant some benefits even though they did not consider him to be temporarily totally disabled because he continued to supervise his farm operation and, in their opinion, otherwise was not incapable of engaging in gainful employment. Obviously, it would be inappropriate to file a notice of voluntary benefits when paying pursuant to a memorandum of agreement. From the record, it appears that neither party at any time has contemplated challenging the memorandum. Claimant's argument that defendants sought to use Code section 85.26 to their advantage is obfuscating. The purpose behind Code section 85.26 is to encourage early payment of benefits to a claimant while a case is under initial investigation — before the defendants are willing to concede any liability by filing a memorandum of agreement. Defendants filed the memorandum of agreement on May 13, 1979 and paid benefits until the claimant returned to work on August 13, 1979. Hence, defendants are entitled to credit for the $1,319.98 paid over 16 5/7 weeks. That is, under the facts of this case, defendants are entitled to credit for the amount paid and not merely for 16 5/7 weeks at the corrected rate. See *Wilson Food Corporation v. Hollie C. Cherry*, 315 N.W.2d 756 (Iowa 1982) wherein the Iowa Supreme Court held defendants are entitled to a credit for overpayment of healing period and commented:

> Employers may generally recover payments made by mistake in workers' compensation matters. (Citatations)
>
> * * *
>
> It is argued that it is unfair to allow the employer to recoup for his own error at the inconvenience to the claimant. We think not. We think the public interest will be better served by encouraging employers to freely pay injured employees without adversary strictness...

Contrast *John W. Merrifield v. Iowa Department of Public Safety and State of Iowa*, Appeal Decision filed January 26, 1982, wherein defendants were denied credit for weekly $15.00 overpayment of benefits even after a review-reopening decision had stated the correct rate.

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. On April 17, 1979 claimant's left knee was struck on the lateral side by the head of a one thousand (1000) pound, two (2) year old quarter horse which the claimant was helping to hold down in the course of his duties as a veterinarian assistant.

Finding 2. The record viewed as a whole indicates that the injury on April 17, 1979 entailed an anterior cruciate ligament tear which resulted in subsequent episodes of instability. On March 4, 1981 claimant underwent anterior cruciate reconstruction and a partial medial meniscectomy of the left knee. As a result of such surgical intervention, claimant has sustained twenty-five (25%) percent loss of use of his left lower extremity.

Finding 3. Claimant was off work from April 17, 1979 to August 13, 1979 and from March 3, 1981 to August 31, 1981.

Conclusion A. Claimant has sustained his burden of proving that as a result of the April 17, 1979 work injury he has suffered a twenty-five (25%) loss of use of the left lower extremity.

Conclusion B. Pursuant to Code section 85.34(2)(o), claimant is entitled to twenty-five (25%) percent of two hundred and twenty (220) weeks or to fifty-five (55) weeks of permanent partial disability.

Conclusion C. Claimant is entitled to healing period benefits from the date of injury to August 13, 1979 and from March 3, 1981 to August 31, 1981.

Finding 4. Relatively soon after the date of injury, defendant insurance carrier tendered the care of Marshall Flapan, M.D., pursuant to Code section 85.27 unnumbered paragraph 4. At some point thereafter, claimant expressed dissatisfaction with Dr. Flapan's care to defendant employer and defendant employer allegedly recommended that claimant seek a second opinion. Claimant saw Stephen Taylor, M.D., on July 1, 1980. Defendant insurance carrier subsequently reestablished that only Dr. Flapan's care was authorized and scheduled a follow-up appointment.

Finding 5. When claimant's counsel advised defendant insurance carrier in writing that claimant desired surgery by Dr. Taylor, defendant insurance carrier responded in writing that they would not authorize surgery, that Dr. Flapan's services remained the only authorized care and that further discussion was welcome. (Dr. Flapan had suggested the possibility of surgical intervention.)

Finding 6. Claimant pursued surgery with Dr. Taylor apparently without additional contact with defendants and without application to this agency for alternate medical care.

Conclusion D. With the exception of the July 1, 1980 visit to Dr. Taylor mentioned in Finding 4, defendant insurance carrier's authorization of Dr. Flapan's medical care was never withdrawn. Claimant is entitled to reimbursement for Dr. Taylor's July 1, 1980 examination but not for the subsequent surgery and follow-up care.

Finding 7. Claimant earned less than the usual weekly earnings of the regular full-time veterinarian assistant.

Finding 8. Claimant's earnings as an employee for the year preceding his work injury amounted to four thousand three hundred eighty-six and 00/100 dollars ($4,386.00).

Finding 9. Claimant was married with one (1) dependent child on the date of injury.

Conclusion E. Pursuant to Code section 85.36(10), claimant's weekly earnings amount to eighty-seven and 72/100 dollars ($87.72). The applicable weekly rate of compensation is sixty-five and 59/100 dollars ($65.59).

Conclusion F. The rate of compensation shown on the memorandum of agreement was incorrect, because it was computed using an earnings figure that included income from claimant's farming operation. The filing of the memorandum of agreement was not conclusive as to the issue of rate.

Finding 10. Defendants paid claimant one thousand three hundred nineteen and 18/100 dollars ($1,319.18) for what they deemed to be temporary "partial" disability benefits from the date of injury to August 13, 1979. Such benefits were paid pursuant to the memorandum of agreement.

Conclusion G. Defendants are entitled to credit for the full amount paid against the award granted.

Order

THEREFORE, it is ordered that the defendants pay the claimant fifty-five (55) weeks of permanent partial disability at the rate of sixty-five and 59/100 dollars ($65.59) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of August 31, 1981.

Defendants are ordered to pay the claimant healing period benefits from the date of injury to August 13, 1979 and from March 3, 1981 to August 31, 1981 at the rate of sixty-five and 59/100 dollars ($65.59) per week.

Compensation that has accrued 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.

Defendants are further ordered to pay unto the claimant the following medical expenses:

Stephen Taylor, M.D. (July 1, 1980)	$35.00
Mileage 185 miles × $.20	37.00

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendants when this award is paid.

* * *

Signed and filed this 26th day of March, 1982.

LEE M. JACKWING
Deputy Industrial Commissioner

No Appeal.

MARVIN SHILLING,

Claimant,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Employer,

and

AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision in which claimant was awarded temporary total disability benefits and medical expenses. Defendants were further ordered to provide and pay reasonable surgical and

hospital expenses for a gastric bypass operation which is to be performed prior to the laminectomy recommended by Drs. Neiman and Howe.

The record on appeal consists of the testimony of claimant and his wife, Joanne M. Shilling; claimant's exhibits 1, 2 and 3 and defendants' exhibits 1 through 6; the depositions of William D. Maixner, M.D., Richard F. Neiman, M.D. and William R. Boulden, M.D.; and the appeal briefs of both parties. It should be noted that, although claimant's exhibits 4 and 5 were entered into evidence at the hearing and were considered a part of the deputy's record, they were not available during the hearing and were never received by this office after the hearing. The parties stipulated that the rate of claimant's weekly compensation benefits, in the event of recovery, would be $146.24.

The issues on appeal as stated in defendants' appeal brief are as follows:

1. Whether a causal connection exists between the accident of May 23, 1978 and Mr. Shilling's current complaints?

2. Whether Mr. Shilling had obtained the maximum benefit of medical assistance as of September 11, 1978 at which time he was released to work thus terminating his entitlement to temporary disability or healing period benefits and whether or not he is entitled to such benefits in view of his failure to follow reasonable medical advice.

3. Whether Defendants are responsible for charges rendered by a physician to which Mr. Shilling was referred without notification to or consent of such Defendants and for expenses made necessary by the Claimant's own failure to follow reasonable medical advice.

Claimant's statement of issues on appeal is essentially the same as defendants'. However, claimant did state that the nature and extent, if any, of his permanent partial disability was an issue raised by defendants which should be disregarded at this point in the proceedings.

Claimant is presently 33 years old, married and has three dependent children from a previous marriage. Claimant had completed the ninth grade when he quit school to go to work. He has since earned his GED, but has received no further formal training, vocational or otherwise. Claimant worked for a number of employers before he was hired by defendant employer on April 1, 1978. Each job, with the exception of his job with defendant employer, involved loading and unloading the cargo as well as driving the truck. His only responsibility with defendant employer was as a truck driver.

On May 23, 1978, while driving a truck owned by defendant employer, claimant was injured when a bridge he was crossing collapsed, allowing the dump truck, which was carrying a 5,000 pound load, to fall approximately thirty feet into a creek bottom. (Transcript, pages 23-24.) When the truck fell, claimant grabbed the steering wheel and hung on to it until the truck hit bottom. As the truck fell, claimant swung across the seat and hit the three-quarter inch steel gearshift lever with his left leg with such force that the lever snapped off. Claimant also hit the front of his head on the windshield. When claimant and the truck hit bottom he was still clutching the steering wheel and , at that point, the superstructure fell on the truck, causing the claimant to hit the back of his head. When "things quit crashing" claimant lowered himself out of the windshield to the ground and managed to walk up the creek bank to the road. Claimant testified that at the time "it [his back] was hurting, felt like — just felt like someone had torn me in two. I was hurting all over." (Transcript, page 27.)

Claimant was taken to the Ottumwa Hospital where Sidney Brody, M.D., the company physician, examined him. Dr. Brody stitched claimant's head lacerations and x-rayed his left arm and leg. Claimant testified that he was hospitalized for two days and that during this time he complained to Dr. Brody about pain in his back. (Transcript, pages 28-29.) When claimant was released from the hospital, he was sore all over. He returned to see Dr. Brody in a week and testified that "[i]t felt like somebody was trying to tear me in two. I couldn't walk right or nothing." (Transcript, page 29.)

Two weeks later claimant returned to Dr. Brody complaining of pain in the lower left part of his back. (Transcript, page 30.) According to claimant's testimony, Dr. Brody told him this pain would work itself out when he returned to work. (Transcript, page 30.)

Three weeks after the accident occurred claimant returned to work. Claimant testified that he drove a mixer truck, a job which required that he climb the truck's ladder to reach the controls and fold and unfold the chutes. After approximately four hours of working, claimant's left leg was swollen three times its normal size and his back hurt. Claimant stated that his leg was the main problem. (Transcript, page 31.)

Claimant's supervisor suggested that he see the company nurse, who explained that Dr. Brody was out of town. Claimant told her that he would like to see his own family physician, William D. Maixner, M.D., a board certified family practitioner.

The following day claimant was examined by Dr. Maixner who admitted claimant to the hospital on June 27, 1978 for one week. Claimant stated that, although he still had back and leg pain, he felt better after receiving physical therapy and being placed in traction. (Transcript, page 33.)

On September 11, 1978, Dr. Maixner released claimant to return to work. Claimant testified that at that time he continued to have constant back pain. Claimant stated that Dr. Maixner told him defendant employer was "driving him crazy" and had promised Dr. Maixner that claimant would only be required to drive a truck. Dr. Maixner denied this, stating that, regardless of what pressure an employer might place on him, he never released an employee to return to work until he was sure the employee was ready. (Maixner deposition, page 20.) Furthermore, Dr. Maixner denied that defendant employer had ever pressured him to release claimant to work.

Claimant returned to work, but since business was slow, only worked three non-consecutive days and then was laid off. Claimant has not worked since that time.

Claimant testified that he continues to have back pain every day, that he finds it difficult to drive more than thirty-five miles at a time, and that he is unable to lift things or walk more than a couple of blocks. He complained of pain which

radiates down the back of his left leg from his hip to his heel. Claimant is unable to sit for very long and can no longer play ball, hunt or fish.

Claimant noted that Dr. Maixner told him to lose weight in December of 1978. Since July of 1979, claimant has eaten only one meal per day which consists of meat, salad, vegetables and two or three slices of Hollywood diet bread. (Transcript, pages 47-47.) Claimant denied snacking in between meals.

At the time of the hearing claimant weighed approximately 260 pounds, whereas, when the accident occurred he was about twenty to thirty pounds lighter. Dr. Maixner placed claimant on a 1200 calorie diet in the hospital, but claimant failed to continue on the diet when he was released. Claimant also found the back exercises prescribed by Dr. Neiman too painful to perform and ceased doing these after one month.

Dr. Maixner examined claimant on June 23, 1978. Dr. Maixner's diagnosis at that time was, that claimant "suffered acute back strain, that he had findings that were suggestive of possible early degenerative disc disease of the back or herniated disc at the level of L-5." (Maixner deposition, pages 6-7.)

X-rays were taken; the x-ray report indicated "some disc impression on the inferior plate of L-1 and on plates L-4 and L-5 are the same as seen in 1973." Dr. Maixner testified that this notation made by the radiologist would "probably mean that he [claimant] has had some degeneration or some disc problem at that time which... he was not aware of... until the accident." (Maixner deposition, pages 7-8.)

Dr. Maixner admitted claimant to the hospital on June 27, 1978 for back pain and an ankle sprain which claimant received at home. During the hospitalization, Dr. Maixner did not attempt to determine whether claimant had a herniated disc. He assumed by claimant's symptomatology that was a problem. Furthermore, claimant was reluctant to undergo a myelogram. (Maixner deposition, page 21.) The discharge diagnosis was "acute back strain and sprain of the left ankle." Dr. Maixner stated that claimant had "apparently improved" by the time he was discharged.

Dr. Maixner next saw claimant on September 11, 1978 after claimant failed to keep a scheduled appointment on July 26, 1978. After examining claimant on September 11, 1978, Dr. Maixner concluded that:

> [claimant] had adequate motion on bending and flexion in all directions. The spine was straight. Abduction and adduction of the spine was normal. Rotation of the spine is satisfactory and his spinal column was straight.... his deep tendon reflexes seemed to be normal.... The Babinski's were negative.... Straight leg raising from flexion at the hips and the knees were normal or negative... abduction and adduction of the lower extremeties were negative. (Maixner deposition, page 10.)

Dr. Maixner testified that there were no clinical findings from the September 11, 1978 examination which would indicate a herniated disc. Although claimant complained of back pain, Dr. Maixner could not demonstrate it on the examination. (Maixner deposition, page 24.)

Dr. Maixner released claimant to return to work on September 11, 1978 since claimant did not seem to be having too much difficulty. Claimant had told Dr. Maixner that he'd been fishing and gardening, a fact Dr. Maixner's notes reflected. (Maixner deposition, page 11.)

Dr. Maixner next examined claimant, who was complaining of back pain, on November 13, 1978. At that time Dr. Maixner went through an extensive history to assure himself that there was no emotional basis for claimant's problems. He also performed an extensive examination which included a neurological examination. The findings were negative. (Maixner deposition, page 12.) Dr. Maixner's notes showed that claimant had been operating a combine for approximately four hours and that he had been riding on a tractor. Claimant also told Dr. Maixner that he worked one day from seven a.m. to three a.m. the next day "getting beans out." Dr. Maixner's final entry with regard to claimant was a notation on November 28, 1978 that claimant had failed to keep a scheduled appointment.

On cross-examination Dr. Maixner indicated that he has seen a number of people with herniated discs and that claimant had no clinical symptoms of herniated disc other than the "distribution of his pain to treatment." (Maixner deposition, page 16.) Dr. Maixner noted that a primary treatment of a disc is conservative treatment, and that he did not feel that claimant was cooperating with the treatment. (Maixner deposition, page 21.)

On redirect examination, Dr. Maixner stated that the muscle spasms, positive straight leg raising and radiation of pain down the lower extremities which claimant experienced, were consistent with back strain symptoms. He also noted that if these symptoms were due to back strain, they will usually be resolved with physical therapy, bed rest and heat packs.

Claimant was initially examined, at his attorney's request, by Richard F. Neiman, M.D., a board certified neurologist on December 15, 1978. Dr. Neiman's examination revealed:

> The patient was obese, his weight 245 pounds, heighth of five foot eight. At that time the patient was intact neurologically. There was no loss of extension or flection [sic] or any motor weakness. He had some minor limitation of movement of the neck. I thought mainly we were dealing with sort of a cervical whiplash. As far as the back sort of a back strain at that time. (Neiman deposition, page 6.)

Dr. Neiman assumed that claimant's condition, which he observed, was related to the May 23, 1978 accident. (Neiman deposition, page 7.) However, according to Dr. Neiman, claimant's back was not much of a problem at that time, rather, his neck was the problem. (Neiman deposition, page 7.)

Claimant was next examined on February 20, 1979. At that time, Dr. Neiman noted that claimant was experiencing increasing difficulty with his lower back. The examination revealed that straight leg raising was negative and that claimant noticed no loss of sensation, reflex changes or atrophy and had full back mobility. Dr. Neiman testified that

he continued to diagnose "cervical, lumbosacral strain." (Neiman deposition, page 9.)

Further examination on March 20, 1979 revealed that claimant had increased back pain and that straight leg test of the left leg was "mildly positive suggesting a ruptured disc." Dr. Neiman suggested that claimant lose "a considerable amount of weight" and continue with the anti-inflammatory medicine. Claimant was sent to a dietitian and was given a diet to follow. Dr. Neiman testified that he did not believe that claimant followed these diet instructions. (Neiman deposition, page 10.) According to Dr. Neiman, although claimant's weight did not cause his injury, the excess poundage claimant carried aggravated his condition considerably.

Claimant was next seen by Dr. Neiman on April 20, 1979. His weight remained unchanged and, as a result, conservative treatment was continued. Due to claimant's continued back pain, he was hospitalized on April 20, 1979. At that point, the straight leg test was a "little more positive on the left side." (Neiman deposition, page 11.)

An EMG study was performed on September 1, 1979 which was abnormal and showed evidence of denervation, which Dr. Neiman felt suggested a possibility of a ruptured disc. A myelogram was also performed. This revealed "a subtle abnormality in the L5 region." (Neiman deposition, page 13.) Dr. Neiman testified that he felt this result, along with the EMG, would be compatible with a ruptured disc at L4-5. At this time, Dr. Neiman diagnosed a ruptured disc, a diagnosis he felt was consistent with claimant's history and injury.

After a consultation with Jerry Howe, M.D., an orthopedic surgeon, Dr. Neiman recommended that claimant lose a minimum of forty pounds before surgery intervention would even be considered. Claimant again talked with a dietitian who provided him with diet instructions.

Claimant was again examined on December 10, 1979. He continued to have the same degree of pain; the examination results were also unchanged since the previous examination. Claimant was last seen by Dr. Neiman in February 1980, at which time Dr. Neiman felt claimant was still totally disabled.

Dr. Neiman referred claimant to Cliffton Anderson, M.D., who performs gastric bypass operations at Mercy Hospital. Dr. Neiman was unsure that claimant's overweight problem was substantial enough to meet Dr. Anderson's criteria to perform the bypass. However, unless claimant's weight is reduced, Dr. Neiman stated that positive benefits from back surgery would be considerably lessened.

Dr. Neiman did testify that the accident claimant was involved in would be consistent with a ruptured disc.

Claimant was examined by William R. Boulden, M.D., a board certified orthopedic surgeon, on March 27, 1980. The results of a neurological and lumbar spine range of motion examination showed no neurological deficit, although there was a "loss of motion of the lumbar spine and a lot of diffuse tenderness throughout the lower back area." (Boulden deposition, page 6.)

Dr. Boulden testified that through his clinical evaluation and examination he was unable to confirm a diagnosis of a herniated disc. According to Dr. Boulden, a person can have a subtle abnormality in a myelogram, as in claimant's case, and still not have a herniated disc. This subtle abnormality must be clinically correlated. Clinical correlation was absent in claimant; both his straight leg raising and Lasegue's test results were negative.

Dr. Boulden did not view claimant's previously taken myelogram, but he did state that since claimant had no clinical correlation of a herniated disc, he would not have recommended that one be taken. Furthermore, Dr. Boulden testified that he would not operate on an individual unless there was clinical correlation of a herniated disc. According to Dr. Boulden numerous individuals have abnormal myelograms. X-rays of claimant's lumbar area taken by Dr. Boulden showed no disc space narrowing or any osteofied formation, and no malalignment or congenital defects of the spine. (Boulden deposition, page 10.)

Dr. Boulden stated his impressions of claimant's medical condition at the time of the examination as follows:

> he had a chronic back pain which is most likely due in this gentleman's case to very tight ligaments in his lower lumbar spine including the lumbosacral ligaments, the sacroiliac ligaments, which caused him pain to do different types of movement in the spine and sometimes these can mimic and cause pain down the leg; but since his clinical examination revealed no evidence of a disk problem, I felt it was all due to the chronic ligament irritation. (Boulden deposition, page 12.)

According to Dr. Boulden, ligament irritation can cause symptoms of leg pain. Ligament irritation is differentiated from herniated disc through straight leg raising and Lasegue's test. These were negative, indicating ligament irritability rather than a herniated disc. Dr. Boulden stated that with a truly ruptured disc, an individual would consistently show a positive straight leg raising; the results would not vary from test to test. (Boulden deposition, page 12-13.)

Dr. Boulden felt that claimant's obesity was highly detrimental and if claimant would lose weight and properly exercise, his back would become more mobile and the ligament would loosen up, thereby enabling the back to improve. He also recommended use of a TENS unit to decrease the back pain in an effort to regain mobility.

When Dr. Boulden was told that claimant apparently operated a combine and rode a tractor in November 1978, he stated that, in his opinion, the fact the claimant was able to engage in those activities would indicate that "he would have been resolved from that accident [May 23, 1978] and the present problems he is experiencing now could be due to inactivity and obesity and other factors." In addition, Dr. Boulden felt that claimant's obesity was an irritating factor which aggravated claimant's ligament problem.

According to Dr. Boulden, the accident was not the type which would cause a ruptured disc since there was no vertical compression force. He did state that the accident could have caused claimant's ligament problems, but that he did not believe the accident was affecting claimant's back problem when he examined him.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 23,

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

Claimant has sustained his burden of proving that the injury of May 23, 1978 is the cause of his claimed disability. The evidence indicates that after the injury claimant suffered from back pain which he did not experience prior to the injury. Claimant did have numerous other medical complaints immediately following the accident which apparently masked the severity of the back problem itself. As the other complaints were resolved, claimant's back problem stemming from the accident become more apparent.

Although claimant continued to complain of back pain he was released to work on September 11, 1978 by Dr. Maixner. That claimant continued to experience back pain after September 11, 1978 is reflected in the evidence. Claimant's continued physical discomfort due to his pain resulted in the referral of claimant by his lawyer to Dr. Neiman in Iowa City.

Dr. Neiman was the only physician who examined and/or treated claimant who performed a myelogram. This test, as well as the EMG which was administered by Dr. Neiman, demonstrated objective findings suggestive of a herniated disc.

Each physician who examined claimant noted that claimant's obesity definitely aggravated his back problems. Dr. Boulden suggested that weight loss, in combination with an exercise program, could protentially restore claimant's back mobility. Dr. Neiman testified that, prior to any back surgery, claimant must lose a considerable amount of weight. Furthermore, even if back surgery could be performed at claimant's present weight, Dr. Neiman stated that such surgery would not benefit claimant unless claimant's excess poundage was lost. According to Dr. Neiman and Dr. Boulden, excess weight places a strain on the back, thereby aggravating any existing back problems.

Clearly, any treatment of claimant's back problems requires prior treatment of his obesity, regardless of whether the diagnosis of claimant's problem is back strain or a herniated disc. It is possible that weight loss alone in conjunction with physical therapy will alleviate claimant's back problems. But, in the event that weight loss together with physical therapy do not relieve claimant's back symptoms, and surgical intervention is necessary, claimant must still shed his excess weight.

Both claimant and his wife testified that he had attempted to reduce his weight and was unable to do so. The necessity for claimant to lose a considerable amount of weight in order to relieve his back problems which are causally related to the injury of May 23, 1978 is clear from the record. This agency strongly urges claimant, in a cooperative effort with his physicians, to exhaust all conventional means of weight loss before any drastic measures are undertaken to effect this weight reduction. Only as a last resort should surgical intervention be utilized as a means of alleviating claimant's obesity. However, should surgery become necessary in order to force claimant to reduce so that his injury-related back problems can be resolved, such a remedy will be considered reasonable and necessary medical treatment in the course of remedying claimant's back problems. *See, e.g., Henry v. Lit Brothers*, 193 Pa. Super. 543, 165 A2d 406 (1960); *Decks, Inc. of Florida v. Wright*, 389 So.2d 1074, 1076 (Fla. App 1981).

This agency, however, does not want to go on record as ordering a specific surgical weight loss procedure. In light of continual advancements in modern medical science, some previously acceptable surgical procedures become less attractive as alternatives than they once were. As a result, if it becomes absolutely necessary to surgically intervene in order to facilitate claimant's weight loss, the procedure utilized must be chosen by claimant's physician in light of the then current medical knowledge.

Defendants object to claimant's consultation of and treatment by Dr. Neiman since they were given no prior notification of claimant's change of physicians. Defendants were aware of claimant's change of physicians at least as early as February 15, 1980 when Dr. Neiman notified defendants about claimant's condition. Defendants never communicated their dissatisfaction with claimant's choice of physicians. Therefore, it is concluded that defendants impliedly acquiesced in claimant's change and choice of physician. Furthermore, defendants entered into a stipulation with claimant concerning Dr. Neiman's bills, in addition to submitting into evidence medical records obtained from Dr. Neiman.

Findings of Fact

1. That claimant sustained an admitted industrial injury on May 23, 1978 when a bridge upon which he was driving collapsed, causing the dump truck he was driving to fall approximately thirty-five (35) feet to a creek bed.

2. That claimant began experiencing back pain after the accident.

3. That claimant was released to return to work as of September 11, 1978, but still complained of back pain at that time.

4. That claimant continues to experience back pain.

5. That claimant was obese at the time of the accident and continues to remain so.

6. That claimant must reduce his weight in order to alleviate his injury related back problems.

7. That claimant may require surgical intervention in order to lose excess weight.

8. That claimant has been unable to perform acts of gainful employment due to back pain since the accident.

9. That defendants impliedly acquiesced in claimant's choice of Dr. Neiman.

Conclusions of Law

1. That claimant's back problems are causally related to the accident which occurred on May 23, 1978.

2. That medical treatment of claimant's obesity is reasonable and necessary as anticipated by Iowa Code section 85.27.

3. That defendants are responsible for the medical treatment and expenses of Dr. Neiman.

4. That claimant is entitled to temporary total disability compensation for the period of his disability beginning from the date of the injury, May 23, 1978.

THEREFORE, it is ordered:

That defendants pay claimant's temporary total disability compensation at a rate of one hundred forty-six and 24/100 dollars ($146.24) beginning on May 23, 1978 and continuing until the terms and conditions of Iowa Code section 85.33 (1977) have been met, less any amounts previously paid.

That the accrued benefits be paid in one lump sum together with statutory interest pursuant to Iowa Code section 85.30.

That defendants provide and pay reasonable expenses related to claimant's weight reduction, including any necessary surgical and hospital expenses.

That defendants provide and pay any reasonable surgical and hospital expenses rendered in connection with claimant's back problems.

That defendants pay the following medical expenses:

Richard F. Neiman	$446.00
William D. Maixner	49.00

That costs are charged to the defendants and shall include the cost of preparation of the evidentiary deposition of Richard F. Neiman, M.D., together with the payment of an expert witness fee of one hundred fifty dollars ($150) as contemplated by Iowa Code section 622.72.

That defendants file a final report upon payment of this award.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MARGARET JANE SIMBRO,

Claimant,

vs.

DELONG'S SPORTSWEAR,

Employer,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a review-reopening decision in which claimant was awarded four percent permanent partial disability benefits to the body as a whole based upon the provisions of section 85.34(2)(s), Code of Iowa.

The record on appeal consists of the transcript of the review-reopening proceedings together with claimant's exhibits 1, 2, 3, 5 and 6 and defendants' exhibit A. Objection to the admission of claimant's exhibit 4 was sustained and it is therefore not considered as part of the record on appeal.

Claimant states the issues on appeal:

1. The primary issue is whether an injury to two arms, constituting less than total disability, is a scheduled disability to be evaluated from the functional disability standpoint only or is to be evaluated from an industrial disability standpoint.

2. The secondary issue is whether or not a finding of 4 percent functional disability is compatible with the uncontroverted medical evidence.

ISSUE NO. 1

Prior to 1974, Iowa Code section 85.34(2)(s) read:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal a permanent total disability, and shall be compensated as such.

Iowa Code section 85.34(2)(u), unnumbered paragraphs one and two, read and still reads:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole.
>
> If it is determined that an injury has produced a disability less than that specifically described in said schedule, compensation shall be paid during the lesser

number of weeks of disability determined, as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation.

Prior to 1973, Iowa Code section 85.34(3), unnumbered paragraph one, regarding permanent total disability, read:

> Compensation for an injury causing permanent total disability shall be upon the basis of sixty-six and two-thirds percent per week of the employee's average weekly earnings, but not more that a weekly benefit amount, rounded to the nearest dollar, equal to forty-six percent of the state average weekly wage paid employees as determined by the Iowa employment security commission under the provisions of section 96.3 and in effect at the time of the injury provided that no employee shall receive as compensation less than eighteen dollars per week, then the weekly compensation shall be a sum equal to the full amount of his weekly earnings; said weekly compensation shall be payable during the period of his disability for a period not to exceed five hundred weeks.

When a claimant has suffered specific injuries, the statutory provision as to compensation controls. When the injuries consist of general bodily injuries, the percentage of disability must be computed and fixed, and should be evaluated from an industrial and not exclusively a functional standpoint. *Martin v. Skelly Oil,* 252 Iowa 128, 106 N.W.2d 95 (1960). Industrial disability is the reduction of earning capacity, not merely functional disability. *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961). It appears that if the disability is encompassed by a specific scheduled injury, the disability is to be determined from a functional standpoint. If the disability is not scheduled, the disability is determined from an industrial standpoint, where consideration may be given not only to functional impairment but also to injured employee's age, education, experience and inability because of the injury to engage in employment for which the employee is fitted. *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963).

Under the old law all three sections quoted above must be considered together in relating an injury to both hands caused by the same accident to an industrial disability. Under section 85.34(2)(s), prior to 1974, an injury to both hands "shall equal a permanent total disability." Iowa Code section 85.34(2)(u) provided that if the actual disability was less than the total disability provided for in specified sections of the Code, the disability could be proportionally diminished. Thus, a proportionate share of permanent disability under section 85.34(2)(s), Code of 1971, could be determined when appropriate.

Section 85.34(3), Code of 1971, concerns permanent total disability, which is the permanent total disability referred to in section 85.34(2)(s). The Iowa Supreme Court has consistently held that for injuries outside of the specific schedules the determination is industrial disability — reduction of earning capacity, and not mere functional disability. *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 10 N.W.2d 569 (1943). It appears, then that an injury to two hands caused by the same accident was entitled to be evaluated industrially under the old law. Pursuant to section 85.34(2)(u), Code of 1971, such an industrial disability would also be proportionately diminished if it was less than a total disability. The claimant would be entitled to have the disability to his hands determined industrially under sections 85.34(2)(s), 85.34(2)(u) and 85.34(3) had not the Code of Iowa, in respect to those sections, been amended in recent years.

During the 1973 session the Sixty-Fifth General Assembly amended Iowa Code section 85.34(3) to delete the words "for a period of time not to exceed five hundred weeks" from the end of unnumbered paragraph one of the section. By this action a permanent total disability is to be compensated weekly during the period of the employee's disability. This amendment created the situation where an employee who had lost, for example, both hands or a hand and a foot in a single incident would be compensated during the period of his disability with no five hundred week limitation. The Sixty-Fifth General Assembly addressed this situation and proceeded to amend Iowa Code section 85.34(2)(s) to read:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such, however, if said employee is permanently and totally disabled he may be entitled to benefits under subsection three (3) of this section.

Under Iowa Code section 85.34(2)(s) as it now stands, the loss of both hands or a hand and a foot caused by the same injury is no longer compensated as if it were a permanent total disability unless it is, in fact, such. If an injury to both hands is anything less than a permanent total disability, under Iowa Code section 85.34(2)(s) the disability is compensated as a scheduled disability using the five hundred week schedule.

An injury to both arms caused by the same incident, as is the case here, does not fall under the "other" category of permanent partial disability entitling the employee to a body as a whole disability pursuant to Iowa Code section 85.34(2)(u). Such an injury falls explicitly within Iowa Code section 85.34(2)(s). If the injury proves to be anything less than a permanent total disability, under Iowa Code section 85.34(2)(s) the injury is compensated on a five hundred week schedule. The record indicates that claimant's injury to her arms, caused by the single incident in this case, is a scheduled disability under Iowa Code section 85.34(2)(s). Thus, claimant's injury should not be evaluated from an industrial disability standpoint, but rather from a functional impairment standpoint only.

The difference between section 85.34(2)(s) and the preceeding subsections is that it is necessary to convert the functional impairment ratings of the listed appendages or organs into bodily impairment ratings and then combine them in a manner such as provided in the combined values table of the AMA Guides to Evaluation of Physical Impairment to obtain the combined effect upon the physical impairment to the body as a whole.

ISSUE NO. 2

Rule 500—4.28, IAC requires an appellant to submit a brief and exceptions on appeal which shall include: "an argument corresponding to the separately stated issues and contentions of appellant with respect to the issues presented and reasons therefore, with specific reference to the page or pages of the transcript which are material to the issues on appeal."

Claimant questions whether or not the 4 percent finding of functional disability is compatible with the uncontroverted medical evidence. However, this issue is not addressed in the argument and no reference is made in the brief to portions of the transcript which would overcome or rebut the finding of the deputy.

As appellant concedes the medical evidence is uncontroverted then she apparently agrees with the functional impairment rating of Dr. Arnis B. Grundberg in claimant's exhibit 6 which states: "...I do no think that she has more than 3% permanent physical impairment in the right and the left upper extremities."

Findings of Fact

1. Claimant received an injury resulting in disability on June 1, 1979 arising out of and in the course of her employment.

2. Claimant's injury affected and is limited to both upper extremities.

3. Claimant's condition was disabling from June 1 to September 9, 1979 for a period of fourteen point two hundred eighty-six (14.286) weeks for which benefits have been paid.

4. Claimant's condition was again disabling from January 10, 1980 to March 11, 1981 for a period of sixty-one (61) weeks for which benefits have been paid.

5. Claimant's weekly benefit rate is one hundred forty-eight and 50/100 dollars ($148.50).

6. Claimant sustained a permanent physical impairment of three percent (3%) of the right upper extremity.

7. Claimant sustained a permanent impairment of three percent (3%) of the left upper extremity.

8. The combined physical impairment of both upper extremities equals four percent (4%) of the body as a whole.

9. Claimant incurred transportation expenses for one hundred eighteen (118) miles.

Conclusions of Law

1. Claimant's injury is compensable under the provisions of section 85.34(2)(s), Code of Iowa, 1979.

2. Claimant's injury is compensable as a scheduled disability based upon physical impairment.

THEREFORE, it is ordered that defendants pay claimant twenty (20) weeks of permanent partial disability beginning March 12, 1981 at the rate of one hundred forty-eight and 50/100 dollars ($148.50) per week.

Accrued benefits are to be paid in a lump sum together with statutory interest.

Defendants are to reimburse claimant for incurred transportation expenses for one hundred eighteen (118) miles at the rate of eighteen cents per mile for travel incurred before July 1, 1979 and twenty cents per mile for travel thereafter.

Defendants are further ordered to pay the costs of the original proceeding and to file a final report within twenty (20) days from the date of payment of this award.

Costs of the appeal are taxed to claimant.

* * *

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

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court;
Remanded for finding extent of physical impairment.

Appealed to Supreme Court; Pending.

DONNIE SKOU,

Claimant,

vs.

SCHALLER CONSOLIDATED POPCORN COMPANY,

Employer,

and

AID INSURANCE SERVICES,

Insurance Carrier,
Defendants.

Appeal Decision

Statement of the Case

Claimant appeals from an arbitration decision wherein he was awarded healing period disability for eight days, five percent of the body as a whole permanent partial disability benefits and no section 85.27 benefits in addition to those already paid. The award was for an alleged injury on June 24, 1980 while in the employ of the defendant employer.

The record on appeal consists of the record of the arbitration proceeding which includes the transcript of the arbitration hearing with claimant's deposition; claimant's exhibit 1, 2 and 3; defendants' exhibits A, B, C, D, and E; and the deposition of Richard Jones, D.C. Claimant filed a brief

on appeal. Defendants filed a reply brief beyond the allowable time although there was an error as to the submission date in the letter setting the briefing schedule and therefore it will be considered.

Issues

Claimant's notice of appeal indicates appeal is being made from all findings of fact and conclusions of law in the arbitration decision. Industrial Commissioner Rule 500—4.28 requires the briefs and exceptions on appeal to include a statement of the issues on appeal. Claimant's brief recites the singular issue of "did the deputy err in concluding that the medical services performed by Dr. Jones were unauthorized."

Review of the Evidence

Claimant, at the time of the hearing, was a 20 year old single male with no dependents. (Tr., p. 5) He completed regular education through the ninth grade and obtained a General Equivalency Degree (G.E.D.). (Tr., p. 20) His lower back was allegedly injured when he was lifting 50 pound bags of popcorn from a conveyor belt onto pallets while in the employ of the defendant employer. (Tr., pp. 10-11) Claimant testified he felt a "popping, pulling type sensation" in the lower part of his back. (Tr., pp. 11-12) This injury occurred three days after being hired by the defendant employer. (Tr., p. 42)

At his break time, the claimant notified the defendant employer's receptionist of his injury and proceeded directly to the office of Richard Jones, D.C. (Tr., pp. 13-14) At this time, claimant received x-rays and chiropractic treatment from Dr. Jones. (Tr., p. 15) Later this same day, claimant telephoned the defendant employer's manager and said Dr. Jones advised him to lay off for approximately two weeks "to relax and let it come back into place again." (Tr., p. 15) Eight days later, claimant telephoned the manager to return to work, however, the manager did not recontact the claimant. (Tr., pp. 17, 37, 38) The claimant did not attempt another contact to regain employment. (Tr., p. 38)

Prior to his employment with the defendant, claimant had a history of unskilled labor following his early withdrawal from high school. Initially he was employed as an unskilled construction worker during a summer; next as a freight delivery agent for 6 to 8 months; followed by unspecified general labor for approximately 1 1/2 years; and finally he was an unskilled worker at a chicken breeding farm from October 1978 until his termination in May 1980, approximately one month before employment by the defendant. (Skou depo., pp. 4-8)

After his alleged injury, claimant worked odd jobs during the ensuing summer and became employed as a janitor for the local school district in November 1980 until termination in March 1981. (Tr., pp. 17-19, 46) He then became self-employed as a residential house painter and seems to be earning more money than he earned under the employ of the defendant. (Tr., pp. 6, 36) Claimant testified the work related incident has caused him to be unable to work an eight hour day as a painter without his back bothering him. (Tr., p. 27)

Dr. Jones wrote a memorandum to the defendant employer on July 8, 1980 attempting to causally connect the "tightness of the muscles and spasms" in claimant's lower back to lifting the 50 pound bags of popcorn. (Claimant's exhibit 2) Dr. Jones requested the employer to "send us the proper workmen's [sic] compensation papers." (Claimant's exhibit 2) Claimant received chiropractic treatment approximately two times a week for one year at a total billing cost of $2,347. (Jones depo. exhibit 1)

The insurance carrier sent a memorandum to the claimant on July 18, 1980 notifying him "as of this date, no further chiropractic treatments are authorized and AID Insurance will not be responsible. If you are still having trouble we will make a referral to a specialist." (Claimant's exhibit 3, see Tr., pp. 81-82 for admission of this exhibit) Claimant brought this notice to Dr. Jones. (Tr., p. 33) A similar notice was sent on August 25, 1980. (Claimant's exhibit 1, p. 2)

Dr. Jones and claimant jointly telephoned the insurance carrier on July 24, 1980 and August 27, 1980. (Tr., pp. 30-31; 53-56) On deposition, Dr. Jones testified he asked an adjuster for the name of a specialist "to make sure he (claimant) was going to see another doctor" and to discover reasons for discontinuance of chiropractic care. (Jones depo., p. 20) He testified he did not receive the name of a specialist for referral. (Jones depo., p. 14) Likewise, the claimant stated he did not receive a referral. (Tr., p. 31) There is no indication in the record that the claimant asked for a referral.

The claims superintendent of the insurance carrier testified at the hearing from business records which were formulated spontaneously with the telephone conversations with Dr. Jones and claimant. (Tr., pp. 51, 57) Regarding the July 24, 1980 phone call, the claims superintendent stated Dr. Jones said the claimant needed more chiropractic treatments before he could be released and that the claimant stated he had no prior back problems. (Tr., pp. 53-54) The carrier paid $171.00 for chiropractic treatment received from June 24, 1980 through July 22, 1980 because the carrier felt that the claimant may not have received the notice disallowing such treatments until July 22, 1980. (Tr., pp. 72-73) Dr. Jones' receptionist telephoned the carrier on August 26, 1980 requesting further payment, however, the receptionist was informed the treatment was no longer authorized. (Tr., pp. 54-55)

The insurance carrier's business records reflected, as testified by the claims superintendent, that Dr. Jones stated in his telephone call on August 27, 1980 that he thought the carrier was still paying for the claimant's treatments. (Tr., pp. 55-56) Dr. Jones once again stated the claimant needed additional treatment. (Tr., p. 56) The carrier's adjuster informed him that they would consider additional chiropractic authorization after the medical reports on the claimant were received. (Tr., pp. 54-55) However, Dr. Jones was informed that such treatment remained unauthorized. (Tr., p. 55) On deposition Dr. Jones acknowledged the treatments were not authorized, but stated he continued to treat the claimant at his request and that the claimant "would receive much relief just after each treatment." (Jones deposition, p. 15)

The carrier subsequently learned of a previous back injury sustained by the claimant while working for an earlier

employer and in an automobile accident. (Tr., pp. 77-78) C. M. Coe, M.D., had treated claimant for low back strain on three occasions — October 31, 1978, November 5, 1979 and May 31, 1980. (Defendants' exhibit A) The claim for benefits under the employer's policy was denied by the carrier on October 7, 1980 on the basis of a preexisting condition. (Claimant's exhibit 1)

The claims superintendent testified that company policy mandated referral of a claimant for alternative treatment when the claimant's condition does not seem to be improving. (Tr., p. 66) In response to claimant's attorney questioning as to why the carrier did not refer the claimant to a specialist when he called in conjunction with Dr. Jones, this witness stated "I told you we can't adjust our claims in front of a chiropractor. We need Donnie (claimant) to call us so we could talk to him and make an agreement. We were not asking Doctor Johns [sic] to make a referral. We wanted to do it on our own." (Tr., p. 70) Apparently the claimant never contacted the insurance carrier except through telephone calls initiated by Dr. Jones. (Tr., p. 65)

Dr. Jones' diagnosis was "acute strain sprain to the lumbosacral pelvic spine" and treatment consisted of "mechanical and manual spine manipulations." (Jones depo., p. 7) Dr. Jones testified he realized in September 1980 that the problem was not going to correct itself completely and estimated the claimant suffers from a 20 percent disability to the body as a whole. (Jones depo., p. 9)

David C. Naden, M.D., an orthopaedic specialist, examined the claimant on April 16, 1981 for the defense. He reported "[h]istory-wise he (claimant) denies any problems with his back with sneeze, cough or strain." (Defendants' exhibit E) Dr. Naden found x-rays of the lumbosacral spine revealed the claimant to have an "incomplete closure of the neural arch in the first sacral segment... some mild narrowing of the anterior aspect of L-1" and "a very minimal scoliosis with the apex to the left. (Defendants' exhibit E) He reached the diagnosis of "[f]acet syndrome of the lumbar vertebra" and found the claimant, at that time, to be "moderately incapacitated as far as heavy work is concerned." (Defendants' exhibit E)

Dr. Naden is of the opinion that the claimant sustained a five percent permanent partial disability rating to the body as a whole as a result of lifting the 50 pound bags of popcorn. (Defendants' exhibit E) He does not anticipate any further problems or deterioration and suggested the claimant could improve his status with proper rehabilitation and may obtain any type of desired employment. (Defendants' exhibit E)

Applicable Law

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of employment. Code of Iowa, section 85.3(1).

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 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).

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).

Section 85.27 of the Code of Iowa provides 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....
>
> * * *
>
> 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 * * * * *In an emergency, the employee may choose his care at the employer's expense,* provided the employer or his agent cannot be reached immediately. (Emphasis supplied.)

Analysis

The first bill that was sent to defendants by Dr. Jones was paid by them. This was the first notification to defendants that claimant was receiving treatment and by whom. At the time of such notification they not only paid the bill to date but exercised their right to choose the care to be rendered. Claimant did nothing to respond to defendants' offer of alternate care but rather with Dr. Jones as counsel chose to question their authority and right to select the care and treatment. Claimant chose to continue care with Dr. Jones with full knowledge that defendants had not authorized the care. He cannot now be heard to complain. If claimant was aggrieved by the selection, section 85.27 provides a procedure for alternative care.

Upon completion of its investigation the insurance carrier denied the claim for benefits under the employer's coverage. Claimant was notified of its denial upon receipt of the carrier's October 7, 1981 letter.

For determination of the extent of industrial disability and healing period, the deputy gave greater weight to Dr. Naden's opinion as opposed to Dr. Jones because of Dr. Naden's orthopaedic specialty and expertise. It is the deputy's opinion that the claimant's earning capacity has only been slightly affected in consideration of the claimant's young age and the minimal functional impairment as a result of the incident. In accordance with Dr. Naden's opinion, the deputy found the claimant has sustained a

disability for industrial purposes of five percent of the body as a whole.

Based upon review of the entire record and weighing the credible evidence, the deputy's proposed arbitration decision as exemplified herein is adopted as the final decision of this agency.

Findings of Fact

1. Claimant sustained a work-related injury to his lower back on June 24, 1980 when he lifted a 50 pound bag of popcorn from a conveyor belt onto a pallet.

2. Claimant, at the time of the hearing, was a 20 year old single male with no dependents who finished regular school through the ninth grade and obtained a G.E.D.

3. Claimant as a result of his injury sought emergency chiropractic treatment.

4. Defendants paid for the treatment at such time as they received notification that they were being rendered and by whom.

5. Claimant received notice from the employer's insurance carrier through memoranda dated July 18, 1980 and August 25, 1980 that further chiropractic treatments were unauthorized.

6. Claimant was informed through the above mentioned memoranda to contact the insurance carrier for referral to a specialist if he was still experiencing pain from his back injury.

7. Claimant and his chiropractic provider jointly telephoned the insurance carrier on July 24, 1980 and August 27, 1980.

8. Claimant did not show he personally requested a referral to a specialist from the defendants.

9. Claimant did not receive a referral to a specialist by the defendants through either above mentioned telephone contacts.

10. Claimant continued to receive chiropractic treatments after defendants notified him such care was unauthorized.

11. Claimant had three prior episodes of low back pain prior to his three days of employment with defendant employer the last of which was less than one month prior to the injury sub judice.

12. Claimant was unable to return to substantially similar employment from June 24 to July 2, 1980.

13. Claimant received minimal amount of permanent disability as a result of his injury.

Conclusions of Law

1. Claimant has a five percent industrial disability as a result of his injury.

2. Claimant has a healing period entitlement of eight days.

3. All authorized treatments for claimant's injury have been paid.

4. The carrier did not waive its statutory right under section 85.27 to select the treatment for the claimant's injury where the claimant received written notices advising the claimant to contact the carrier for referral to a specialist.

Order

THEREFORE, it is ordered:

Defendants shall pay the claimant healing period benefits for eight (8) days at the stipulated rate of ninety-four and 91/100 dollars ($94.91).

Defendants shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated rate of ninety-four and 91/100 dollars ($94.91).

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

Interest shall accrue pursuant to section 85.30, Code of Iowa.

Defendants shall file a final report upon payment of this award.

* * *

Signed and filed this 2nd day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ARTHUR LOUIS SMITH,

Claimant,

vs.

J. C. PENNEY,

Employer,

and

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant has appealed both from an order filed December 9, 1981 in which defendants' motion to dismiss was granted, and from the denial of his rehearing application. It was determined that claimant's review-reopening petition was filed more than three years after the date of the last payment of weekly benefits and, consequently, was time barred pursuant to Iowa Code section 85.26.

The record on appeal consists of the contents of the file as well as the appeal briefs of the parties.

The issue on appeal is whether the statutory limitations set forth in section 85.26 serve as a bar to claimant's claim.

Claimant suffered an injury which arose out of and in the course of his employment on October 16, 1972. A memorandum of agreement was filed on November 22, 1972 indicating that claimant was to receive temporary disability compensation at a weekly rate of sixty-eight dollars. Claimant was paid 14 1/7 weeks of compensation, receiving his last payment on February 20, 1973.

On November 18, 1981, claimant filed a review-reopening petition in which he specifically asserted that he is permanently and totally disabled and that defendants are estopped from raising the statute of limitations defense. Claimant indicated in his petition that he is entitled to compensation for Iowa Code section 85.27 expenses.

Since claimant sustained his injury in 1972, the workers' compensation statute in effect at the time is applicable to this proceeding.

Iowa Code section 86.34 (1971) provides:

> *Review of award or settlement.* Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon * * * *

Iowa Code section 85.27 (1971) provides in pertinent part:

> *Professional and hospital services — prosthetic devises.* The employer, with notice or 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 necesssary 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, nursing and hospital services and supplies, and no statutory period of limitation shall be applicable thereto.

Code section 86.34 was repealed in 1977 and its provisions with regard to statutory limits on review-reopenings are now reflected in Iowa Code section 85.26(2). Section 86.34 clearly stated, as does section 85.26(2), that a review may be made "at any time within three years from the date of the last payment of compensation." This three-year limitation requirement has been consistently and strictly construed as barring any review-reopening actions after the expiration of the three year period. Although some circumstances exist by which the statutory period under 85.26(1), which relates to arbitration proceedings may be extended past the two-year limitation period, no such exceptions apply to the three year statutory time limit for initiating review-reopening proceedings. *See, e.g., Polson v. Meredith Publishing Co.*, 32nd Biennial Report 41 (1976).

Section 86.34, however, pertains only to disability benefits and not to section 85.27 benefits. Although section 86.34 did not specifically provide that no limitation period applied to section 85.27 benefits, as does the present 85.26(2), section 86.34 was interpreted in conjunction with section 85.27, to mean that an employer retains an ongoing duty to provide medical care to an employee who sustained a job-related injury. Section 85.27 had, and has, no statute of limitation on medical care available to an injured claimant if that care is causally related to an on the job injury which was initially covered by the workers' compensation law. *See, Polson v. Meredith Publishing Co.*, 32nd Biennial Report 41 (1976). Therefore, claimant's review-reopening claims with regard to any disability benefits are time barred under section 86.34 and must be dismissed, but his claims for section 85.27 benefits are not barred by statutory time limitations and will be retained.

Claimant asserts that defendants are estopped from asserting the defense of statutory bar.

While it is possible for a claimant to plead estoppel in a workers' compensation case in order to overcome statutory time limitations, claimant has failed to allege sufficient facts essential to a claim of estoppel. The four essential elements of estoppel as set forth in *Paveglio v. Firestone Tire & Rubber Co.*, 167 N.W.2nd 636, 638 (Iowa 1969) are:

> False representation or concealment of material facts,
>
> Lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made,
>
> Intent of the party making the representation that the party to whom it is made shall rely thereon,
>
> Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice.

Claimant, who allegedly was unaware of the facts, asserts that defendants concealed from him, "the nature and extent of his injuries, the resulting functional and industrial disability to claimant, and, his right to worker's [sic] compensation." Claimant further contends that he relied upon defendants to "determine his disability and right to worker's [sic] compensation," and this reliance was intended by defendants. Purportedly, defendants' "agents and physicians represented to the claimant that he would be

eligible for compensation and §85.27 expenses all his life."

Claimant's allegation set forth in his pleading that the nature and extent of his injuries was concealed from him by defendants is not persuasive. It was claimant who actually sustained the injury. It was claimant who was examined by physicians. Only claimant was fully aware of his condition and any changes in it, and to contend otherwise is without merit. Claimant waited eight years to file his review-reopening petition; it would only seem natural that if his condition warranted further medical treatment and an increased rate of compensation, he would have sought such relief much earlier. Therefore, claimant has failed to allege sufficient facts to estop defendants from raising the statutory limitation bar.

Findings of Fact

1. A memorandum of agreement was filed on November 22, 1972.

2. Claimant received 14 1/7 weeks of temporary disability compensation.

3. Claimant received his last compensation payment on February 20, 1973.

4. Claimant filed a review-reopening petition on November 18, 1981.

5. Claimant seeks further section 85.27 benefits.

Conclusions of Law

1. Under Iowa Code section 86.34 (1971), claimant is time barred from filing a review-reopening petition, since he filed the petition more than three years after receiving his last payment of compensation.

2. There is no statute of limitation with regard to section 85.27 benefits to which claimant may be entitled.

THEREFORE, it is ordered:

That defendants' motion to dismiss claimant's review-reopening petition be granted with respect to disability benefits and be denied with regard to section 85.27 benefits.

* * *

Signed and filed this 19th day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ARTIE SMITH,

Claimant,

vs.

KEN KUTA CONSTRUCTION,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision on Application for Section 85.27 Benefits

Pursuant to Code 85.27 and Industrial Commissioner Rule 500—4.1(3), claimant, Artie E. Smith, filed an application for payment of a medical expense against his employer, Ken Kuta Construction, and the insurance carrier, Aid Insurance Services. At the time of the hearing on November 12, 1981, the pro se claimant was not present. Rather, Dr. Pandeya, whose bill is the subject of the dispute, appeared with his own counsel to defend his charges. Accordingly, the undersigned construed Dr. Pandeya's action and participation in the present proceeding as incorporating Code section 86.39 and Industrial Commissioner Rule 500—4.1(9).

The official agency filings indicate that defendants have paid claimant weekly benefits and certain medical expenses on account of the left hand injury he sustained in the course of and arising out of his employment on April 27, 1980.

The record consists of the testimony of N.K. Pandeya, D.O., of Marilyn Terrell and of Kathy Fliehler; doctor's exhibit 1, Dr. Pandeya's statement for services rendered with updated indication of payments made; defendants' exhibit 1, correspondence between defendant carrier and Dr. Pandeya or his counsel; defendants' exhibit 2, documentation of payments made by defendant carrier to Dr. Pandeya in this case; defendants' exhibit 3, correspondence between defendant carrier and the Iowa Foundation for Medical Care regarding peer review; defendants' exhibit 4, a May 15, 1981 letter from the chairman of the Committee on Peer Review to Dr. Pandeya advising Dr. Pandeya of defendant carrier's request for a review; defendants' exhibit 5, October 21, 1981 memorandum to Kathy Fliehler from Becky Hemann; defendants' exhibit 6, sheet of recommendations for services; and defendants' exhibit 7, June 29, 1981 opinion letter from Iowa Foundation for Medical Care. Objections to the admissibility of defendant's exhibits 8 and 9 were sustained.

Issues

N.K. Pandeya , D.O., claimant's treating physician for the work injury, charged $2125 for services performed. Defendants paid $850 of such amount based on a recommendation made by the Iowa Foundation of Medical Care and contend that the balance was excessive.

Recitation of the Evidence

N.K. Pandeya, D.O., testified that he completed 10 years of medical training in 1975, at which point he started his Des Moines practice in plastic and reconstructive surgery. He continually pursues updated training in his specialty. He

belongs to numerous medical organizations. He knew of three other doctors in the Des Moines area who specialize in plastic and reconstructive surgery. Dr. Pandeya indicated that he has discussed his fee schedule with only one of these individuals and that his fees are comparable.

Dr. Pandeya recalled that he first saw the claimant on April 24, 1980 in the emergency room at Mercy Hospital. After reviewing the claimant's chart, Dr. Pandeya examined claimant's hand and found a rugged laceration of the left index finger involving the blood vessels and nerve and of the left thumb including the nail and nailbed area. About an hour later he performed microsurgery on the injured member. He was assisted by Lee Abrahamson, D.O., who is a resident associate with Dr. Pandeya's office. The operation lasted an hour and a half. Thereafter, Dr. Pandeya saw the claimant in 4 office visits to remove the sutures, to check for infection and to prepare the claimant emotionally for a very slight handicap as a result of the injury. Dr. Pandeya indicated that upon completion of his treatment, claimant demonstrated satisfactory range of motion and full sensation. He had referred the claimant to Dr. Connair for physical therapy.

Dr. Pandeya testified that his fee of $2000 for the surgery included the claimant's routine follow-up visits and any reports that he dictated for the insurance carrier. He explained that the amount of the fee depends on the length of the surgery and the complexity of the procedure. Dr. Pandeya also charged $125 for the consultation before surgery. He testified that he was not aware if it was customary to include the consultation charge in the surgery fee. Dr. Pandeya explained that he had no knowledge of nor control over any charges made by Dr. Abrahamson or Dr. Connair.

Dr. Pandeya recalled being advised by defendant carrier that his bill was considered excessive and that he declined to reduce the total amount. He stated that when he received the $500 payment from the defendant carrier he referred the matter of collection of the remaining $1625 to his attorney. He repeatedly denied any recollection of being advised from any source (prior to preparation for this case) that this matter was being submitted to the Iowa Foundation for Medical Care (IFMC) for peer review. Dr. Pandeya likewise was unaware of the fact that the defendant carrier paid him the difference between the $500 and the IFMC recommendation. With regard to all such questioning, Dr. Pandeya suggested that such correspondence or documents were handled by office staff or his attorney.

Dr. Pandeya acknowledged the existence of the IFMC but conceded a lack of familiarity with the peer review procedure. He vaguely was aware of the existence of an appeal process from a district chairman's recommendation but did not believe that he had pursued such an avenue. Dr. Pandeya commented that it is his understanding that the peer review process is funded by insurance companies and therefore he does not wish to participate in the program. He appeared concerned over the fact that the IFMC has not disclosed the names of the reviewers in these cases (except in one instance when ordered to do so by an unidentified judicial tribunal).

Dr. Pandeya agreed that microsurgery was not limited to the plastic and reconstructive surgery fields, and that if a general practitioner or orthopedic surgeon had the additional necessary training in microsurgery, they might have been able to perform the surgery he utilized in claimant's case. He appeared to accept the idea of review of fees of plastic surgeons or those with similar training as plastic surgeons.

Marilyn Terrell, claims superintendent of defendant carrier's workers' compensation division, testified that upon receipt of Dr. Pandeya's bill (defendants' exhibit 1), defendant carrier wrote Dr. Pandeya indicating that his charges appeared excessive and asking him to reassess the amount (defendants' exhibit 1, page 1). Dr. Pandeya responded that he felt his bill was reasonable in light of the procedure that was done: "Micro re-anastomosis of a nerve itself usually runs around $1500 and considering the additional procedures of the unguinectomy, repair of nail bed and repair of germinal epithelium, all under magnifications, we do not feel our charge to be excessive." (Defendants' exhibit 1, page 2.)

Thereafter, defendant carrier paid $500 of Dr. Pandeya's bill (defendants' exhibit 2) and again contacted him about lowering his fee and referred to another case that had been submitted to the IFMC for peer review. (Defendants' exhibit 1, pages 3 through 5.) Ms. Terrell testified that the defendant carrier's next and following contact regarding the bill referral to IFMC was with Dr. Pandeya's attorney. (Defendants' exhibit 1, pages 6 and 7.)

Ms. Terrell testified that she had no record of specific charges being made for any reports from Dr. Pandeya in this matter. Apparently, most of the medical records were obtained through the hospital except for one report that was delayed and required contacting Dr. Pandeya's office directly. According to Ms. Terrell, such records were forwarded to the IFMC for use in the peer review. (Defendants' exhibit 3.) Ms. Terrell further testified that upon receipt of the IFMC June 29, 1981 opinion letter recommending that $850 was a reasonable fee (defendants' exhibit 7), defendant carrier paid an additional $350 of Dr. Pandeya's bill. (Defendants' exhibit 2.)

Kathy Fliehler, assistant director of operations for the IFMC, testified that in addition to monitoring the quality of medical services throughout the state, the IFMC also provides a program of peer review of the reasonableness of medical charges. Ms. Fliehler stressed there was no connection between the IFMC and the insurance industry. She explained that seed money came from a $10 membership fee and defendant carriers are charged $55 per peer review request to cover administrative costs. No charges are made to a doctor seeking such review insofar as membership is open to all the physicians of Iowa and 2000 of the Iowa physicians are members and participate voluntarily in the peer review program. She pointed out that the program usually pays for itself but if it runs into a deficit the medical society offers financial assistance.

Ms. Fliehler estimated that about 350 reviews are conducted yearly and noted that the 1974 to 1975 period was the all time peak for peer review requests. Thereafter, submissions leveled off until this last year during which time an increase had been noted. Ms. Fliehler explained that pertinent information is obtained from both sides of a

fee dispute and set to 3 or more reviewers chosen from a specialty and geographic listing. The actual selection of reviewers is made by Becky Hemann, an administrative staff member, who then submits the information received from both sides (with appropriate deletion of all names and information which would reveal the name of the doctor or institution) to peer reviewers. She explained that the recommendations received by the reviewers are transferred to a summary sheet which is then given to the district chairman. Any written material from the doctors is destroyed. Even the district chairman does not know who the reviewers are. If he needs clarification about the recommendations, he works with Ms. Hemann for further contact with the reviewers. Only Ms. Hemann has knowledge of who performed a particular review, and she does not document the matter. Anonymity of the doctor being reviewed and of the reviewers is preserved.

Ms. Fliehler testified that in the present matter the IFMC advised Dr. Pandeya of the information defendant carrier provided with their request for a review of his fee and asked him for a response or documentation in support of his assessment of charges. (Defendants' exhibit 4.) When Dr. Pandeya failed to respond after a reasonable period of time, the case was sent to a plastic surgeon, an orthopedic surgeon and a general practitioner for review. The plastic surgeon, who practices in a community of 47,000 and performs microneuro anastomosis, recommended $1500 as a reasonable allowance for services in this case. The orthopedic surgeon, who practices in a community of 110,000 and performs the same procedure, recommended $650. The general practitioner, who practices in a community of 200,000 plus, does not perform such procedure but recommended $400 based on consultations with physicians who do perform such operation. (Defendants' exhibits 5 & 6.) J.W. Olds, M.D., the district chairman, reviewed the recommendations and issued his opinion in a letter to defendant carrier dated June 29, 1981 (with indication that copy was sent to Dr. Pandeya):

> The Iowa Foundation for Medical Care was requested to peer review the case involving the below patient. This review involved a question on the customary or reasonable allowance for services described below. The Foundation has made every effort to insure this review was performed by physicians of a similar peer classification as was involved in the care. Questions on this review should be directed to the Foundation office.

The report of the review is as follows:

> *CASE IDENTIFICATION NUMBER:* 4-5575
>
> *PATIENT:* Artie Edward Smith
>
> *LEVEL OF REVIEW:* First Level — Appeal Available
>
> *PHYSICIAN:* Dr. N.K. Pandeya
>
> *CARRIER:* AID Insurance
>
> 4/24/80 / E.R. Consultation for surgery. Radical exploration of the wound left thumb. Radical exploration of the jagged incision PIP joint left index finger. Unguinectomy left thumb. Repair of nail bed left thumb utilizing 5-0 Vicryl sutures. Repair of germinal epithelium left thumb utilizing 5-0 Vicryl sutures. Isolation and identification of microneurovascular bundles, left index finger, radial aspect. Microneuro anastomosis utilizing 9-0 nylon sutures. Plastic closure of the area involved / $2125
>
> *QUESTION FOR REVIEW:* To determine the reasonable or customary allowance for the above described services.
>
> *FINDINGS AND RECOMMENDATIONS:* It is the opinion of the first level review that $850 is a reasonable allowance for the services described above.
>
> This recommendation is based on the opinions of general surgeons who have reviewed the appropriate customary profiles, itemized report of medical services, the operative report, pathology report and other pertinent information provided by the involved physician and insurer.
>
> Appeal of this case may be requested through written notice to the Foundation office within 30 days of the date of this report by either the involved physician or insurance company. However, considering the in-depth review given to each case during the first level consideration, such an appeal should be based on specific case information not previously considered or clarification of medical facts where possible misinterpretation may have occurred. (Defendants' exhibit 7.)

According to Ms. Fliehler, Dr. Pandeya did not exercise his right to appeal. In fact, he did not correspond with the IFMC at anytime during the review process. She explained that although the 30 day appeal time had expired, the committee virtually always allows an untimely appeal request. She explained that an appeal hearing provides an opportunity for the appellant to argue the case before the entire district review committee. Thereafter, the committee discusses the case and renders its opinion which can be appealed to the IFMC board of directors which meets every other month. Ms. Fliehler estimated that 10 percent of the cases are appealed to the second level of review and about 3 percent of the cases are also appealed to the last level of review.

Applicable Law

Code Section 85.27 provides in relevant 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....

* * *

Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for determination, and the commissioner may, in connection therewith, utilize the procedures provided in sections 86.38 and 86.39 and conduct such inquiry as he shall deem necessary. Any institution or person rendering treatment to any employee whose injury is compensable under this section agrees to be bound by such charges as allowed by the industrial commissioner and shall not recover in law or equity any amount in excess of that set by the commissioner.

Code section 86.39 states:

All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 85 and 87 shall be subject to the approval of the industrial commissioner, and no lien for such service shall be enforceable without the approval of the amount thereof by the industrial commissioner. For services rendered in the district court and appellate courts, the attorney's fee shall be subject to the approval of a judge of the district court.

(Code section 86.38 concerns examinations conducted at the industrial commissioner's direction and is not relevant to this case.

Code section 85.26 provides in relevant part: "No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his or her dependent or his or her legal representative if entitled to benefits."

Industrial Commissioner Rule 500—4.1 provides in relevant part:

Contested case proceedings before the industrial commissioner are:

* * *

4.1(3) Benefits under section 85.27.

* * *

4.1(9) Approval of fees under section 86.39.

Analysis

While it is true that Dr. Pandeya appeared at the present proceeding (not actually as a party because the statutory framework under which this agency operates does not provide for a treating physician to file an action to recover his claim but rather presents a vehicle for determination of what fees are reasonable) and explained that his charges were based on the time and complexity of treatment, such appearance and testimony alone do not outweigh the defendants' evidence from the peer review proceeding and recommendations.

The peer review procedure established by the IFMC provides credible evidence on what might constitute reasonable medical fees in a particular case. The opportunity for a party to present its argument and supporting information regarding the issue of reasonableness is preserved at all levels of the peer review proceeding. Had Dr. Pandeya participated in the IFMC action, the undersigned would have been better able to ascertain and assess his position. His suspicions about the organization appear grounded on mere speculation. The attempted attacks made by his attorney against the quality of review for the most part were not persuasive. Criticism pursuant to participation in the process would be useful, if justified.

In *Larson v. Reuben Lundberg, Inc., and Aid Insurance Services*, Decision on Application for Section 85.27 Benefits filed November 9, 1981, the undersigned adopted the IFMC recommendation but admonished that such action in that case should not be construed to mean that IFMC recommendations automatically and uncontrovertedly establish what this agency would determine to be a reasonable fee in every case. Indeed, in the *Larson* case the breakdown analysis of the charges, the referral of the case to more experts performing the procedure in question, the self-disqualification by the one medical expert who had no experience in the area and the district chairman's further itemized assessment of the charges made the final recommended fee acceptable. In the present case, the same degree of itemization is not present, the case was referred to only one plastic surgeon and to one other medical expert performing the procedure in question, the opinion of the general practitioner who had no expertise in the area was taken into consideration by the district chairman and the final recommended fee appears to be a mere average of the three recommendations. Accordingly, the IFMC recommendation in this case will be adjusted to exclude the recommendation of the general practitioner and to give some greater weight to the opinion of the plastic surgeon.

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant's treating physician charged two thousand one hundred twenty-five and 00/100 dollars ($2125.00) for services performed in the treatment of the work related injury. He based such fee on the time and complexity of the treatment.

Finding 2. Defendant carrier thought the fee was excessive and initially paid five hundred and 00/100 dollars ($500.00) of the total amount. Upon unsuccessful attempts to discuss a compromise figure with the doctor, defendant carrier submitted the fee dispute to the Iowa Foundation for Medical Care (IFMC) for peer review.

Finding 3. Recommendations of fifteen hundred and 00/100 dollars ($1500.00), four hundred and 00/100 dollars ($400.00) and six hundred fifty and 00/100 dollars ($650.00) were elicited from a plastic surgeon (population 47,000) performing such procedure as that done by claimant's doctor, from a general practitioner (population 200,000 plus) who does not perform such operation, and from an

orthopedic surgeon (population 110,000) who does perform such procedure, respectively. The district chairman of the peer review committee, in turn, wrote an opinion letter wherein he made a recommendation that eight hundred fifty and 00/100 dollars ($850.00) would be a reasonable allowance for services rendered.

Finding 4. No weight is given to the opinion of the general practitioner and greater weight is given to the recommendation of the plastic surgeon when reviewed with that of the orthopedic surgeon. Accordingly, the district chairman's opinion is discounted.

Finding 5. Claimant's treating physician at no time during the peer review process availed himself of opportunities to defend the amount of his fee.

Finding 6. Defendant carrier paid claimant's treating physician the difference between the five hundred and 00/100 ($500.00) and the IFMC recommendation.

Conclusion A. Pursuant to Code section 85.27, the amount of claimant's treating physician's bill that is over thirteen hundred and 00/100 dollars ($1300.00) is deemed excessive and will not be allowed.

Order

THEREFORE, it is ordered pursuant to Code section 85.27 that defendants pay an additional three hundred fifty and 00/100 dollars ($350.00) of Dr. Pandeya's fee in this proceeding.

Costs of the proceeding are taxed to defendants, exclusive of any expert witness for Dr. Pandeya insofar as he was not testifying as an expert on medical fees. See Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 24th day of November, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

ARTIE SMITH,

Claimant,

vs.

KEN KUTA CONSTRUCTION,

Employer,

and

AID INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

On November 21, 1981 the undersigned filed a decision in the above-entitled matter finding that Dr. Pandeya was entitled to $1300 for his services and that defendant carrier had paid the doctor $850. However, in the Order, on page 7, defendants were directed to pay only an additional $350. The amount is in error and should read "$450."

THEREFORE, it is ordered that the order of the November 21, 1981 decision be corrected to read four hundred fifty and 00/100 dollars ($450.00) rather than three hundred fifty and 00/100 dollars ($350.00) and that the decision otherwise remains unchanged.

* * *

Signed and filed this 1st day of December, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

LENORE SMITH,

Claimant,

vs.

CARNATION COMPANY,

Employer

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision on Section 85.27 Benefits

On October 23, 1981 claimant filed an application for order of alternate medical care. The matter came on for hearing before the undersigned at the offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on December 10, 1981. The record was considered fully submitted as of that date.

On December 21, 1977 defendants filed a first report of injury concerning a June 22, 1977 injury. On November 8, 1978 defendants filed a memorandum of agreement indicating that the weekly rate of compensation benefits was $147.20. At the time of the hearing, defendants filed an updated first report indicating that they were still in the process of paying 250 weeks of permanent partial disability awarded in the Appeal Decision filed July 23, 1981.

The record consists of the testimony of the claimant and of Donna Drees, M.D.; claimant's exhibit 2, an August 18, 1981 letter from defense counsel to claimant's counsel; claimant's exhibit 3, a November 24, 1981 letter from

claimant's counsel to defense counsel; claimant's exhibit 4, a November 10, 1981 letter from defendant insurance carrier to claimant's counsel regarding cut off of authorization of Dr. Drees' care, with attached correspondence regarding rejected pharmacy bill prescribed by Dr. Drees; defendants' exhibit A, records from the Mayo Clinic regarding claimant's April 1980 orthopedic consultation; defendants' exhibit B, duplicate of claimant's exhibit 2; defendants' exhibit C, September 15, 1981 letter from defense counsel to claimant's counsel; defendants' exhibit D, duplicate of claimant's exhibit 3; defendants' exhibit E, an updated final report; defendants' exhibit F, a December 9, 1981 letter from Peter Wirtz, M.D., to defendant insurance carrier; defendants' exhibit G, claimant's original notice and petition signed by claimant's counsel and dated June 9, 1981. Defendants filed a hearing brief and argument.

Issue

What medical care for the claimant is proper under Code section 85.27, unnumbered paragraph 4?

Recitation of the Evidence

On August 18, 1981, defense counsel advised claimant's counsel that defendants were authorizing the care of Orthopaedists Limited and that any treatment rendered by any physicians not associated with such office from that day forward would not be honored. (Claimant's exhibit 2; defendants' exhibit B.) Citing such official tender of medical care, defendant insurance carrier denied reimbursement of a pharmacy bill prescribed for the claimant by Donna Drees, M.D., after August 18, 1981. (Claimant's exhibit 4.)

In a letter dated November 24, 1981, claimant's counsel explained to defense counsel that claimant objected to the tendered care because Dr. Drees had managed claimant's case for four years without objection by defendants, because Peter D. Wirtz, M.D., of Orthopaedists Limited and who had examined the claimant for defendants in the past, was not familiar with the Northwest Hospital Pain Clinic utilized by Dr. Drees, because the pain clinic facility was superior to the services of Thomas Bower, L.P.T., the therapist associated with Dr. Wirtz' office, because a valuable doctor-patient relationship existed between the claimant and Dr. Drees which totally was lacking with regard to Dr. Wirtz. (Claimant's exhibit 3; defendants' exhibit F.) At some earlier point, claimant's counsel had suggested to defense counsel that the claimant be placed under Dr. Blessman's care. Dr. Blessman is Dr. Drees' partner and director of the Northwest Hospital Pain Clinic. Defendants rejected such compromise. (Defendants' exhibit C.)

Peter D. Wirtz, M.D., assessed the situation in a letter dated December 9, 1981 and addressed to defendant insurance carrier:

> In review of correspondence in my examination of this patient, I see that this patient has been managed at the Northwest Hospital Pain Clinic. This clinic is similar to the clinics in Omaha and Rock Island, Iowa [sic] areas. These clinics utilize the similar management of chronic pain problems. These management problems center around physical therapy and psychological management of chronic pain. These services are well ingrained in our orthopaedic practice in Des Moines.
>
> The physical therapy facilities at Northwest Hospital may offer the use of neuroprobe which would be the only difference between those facilities and the facilities of Thomas Bower, L.P.T. at 3716 Ingersoll.
>
> I have not seen the recommendation by the Pain Clinic Therapist for the use of the neuroprobe and this patient's care. The facilities with Mr. Bower are of equal quality to those that are in the rest of the community.
>
> The patient's confidence in her private physician or the clinic is understandable. It has been my recollection that the Pain Clinics have been an organized effort to evaluate chronic pain problems on an objective basis. The patient's confidence in such a clinic is necessary but there should not be any dependency on the clinic for chronic management of these problems. (Defendants' exhibit F.)

Dr. Drees, board certified in family practice, testified that the claimant has been one of her patients since October of 1976 and that she had been treating the claimant with respect to the work injury since June of 1977. Thereupon, Dr. Drees reiterated her major involvement in the management of claimant's case which has been documented in previous decisions in this matter. She noted that Mayo Clinic evaluated the claimant and recommended physical therapy, exercises and supportive care. (See defendants' exhibit A [part of the record in the prior proceeding.]) Dr. Drees indicated she would administer such suggested care as well as an orthopedic surgeon and estimated she has treated 3 to 4 back cases every week over the past 16 years.

Dr. Drees noted that claimant improves with therapy but is in a regressive state right now because no regimen can be established. She last saw the claimant in October of 1981. She acknowledged that there had been no routine physical therapy program for the claimant before that visit but explained that claimant was on a p.r.n. basis. She commented that claimant presently was not receiving any physical therapy because of the withdrawal of authorization. Dr. Drees further clarified that prior to claimant's mother's recent death, claimant did not feel free to embark on an intensive program of therapy that would require her to be away from her terminally ill mother, who lived next door, for any length of time. She now strongly recommended that claimant pursue not only physical therapy per se but the inpatient program at the Northwest Hospital Pain Clinic. According to Dr. Drees, such facility encompasses every modality of physical therapy. Dr. Drees conceded that any doctor may make referrals to such facility but doubted whether Dr. Wirtz would do so.

Dr. Drees testified that a good doctor-patient relationship is important in every case and particularly in the present matter. She commented on the insight a doctor obtains from management of a case and how that aids in further overseeing the course of treatment and directly affects the outcome. She felt dependency in a doctor-patient relation-

ship existed where the doctor was being manipulated by the patient. She emphasized that claimant was not such a patient.

Claimant testified that she has complete confidence and trust in Dr. Drees and similarly has faith in the physical therapy program at Northwest. Claimant testified that she received physical therapy at Northwest Hospital on a fairly continuous basis from May 17, 1981, the last date shown on her recent original notice and petition (defendants' exhibit G), through mid August of 1981. Apparently, in accordance with their August 18, 1981 letter, defendants paid claimant's Northwest Hospital physical therapy bills up to that date but have refused to do so since unless Orthopaedists Limited recommends such care. Claimant testified that she has not gone to Dr. Wirtz since his care was tendered, nor has she met the other doctors or physical therapists connected with Orthopaedists Limited. Claimant stated she did not feel comfortable with Dr. Wirtz because of his cold impersonal mannerisms.

Applicable Law

Code section 85.27, unnumbered paragraph 4, states:

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

Analysis

Defendants argue that claimant has made no improvement in the time Dr. Drees has been managing the case and therefore they want a specialist (Orthopaedist Limited) to take control of the course of treatment. They rely on their right to choose the medical care pursuant to Code section 85.27 but, in the alternative, state that such statute allows the Industrial Commissioner to order alternate care — other than Dr. Wirtz or Dr. Blessman, the compromise offered by the claimant.

Claimant contends that defendants have demonstrated no reasonable basis for their withdrawal of authorization after all this time. Claimant reiterates the reasons set forth in the November 24, 1981 letter (claimant's exhibit 3; defendants' exhibit D) for resisting the defendants' action. Claimant notes that the Industrial Commissioner urged her to consider the services of a qualified pain clinic. (See Appeal Decision filed July 23, 1981, page 8.) Finally, she maintains that Code section 85.27 empowers the Industrial Commissioner to order either Dr. Drees' or Dr. Wirtz' care in this matter.

It is a well known principle of workers' compensation law that the Act is to be construed in the light most favorable to the claimant. Code section 85.27, unnumbered paragraph 4, clearly states that the employer has the right to choose the care but qualifies that tendered care must be offered promptly, must be reasonable and must not entail undue inconvenience to the employee. Such statute contemplates that there may be times the employee will be dissatisfied with the care and accordingly sets forth a procedure whereby such disputes may be resolved.

It is apparent to the undersigned that it is the defendants in this case who are dissatisfied with the care that they authorized originally. (The parties did not dispute that the care was authorized. Whether this was a direct authorization or implied by conduct was not developed in the present proceeding but would not affect the outcome of this decision in either event.) Their manipulation of the statute by withdrawing such authorization, thereby forcing the claimant to become the dissatisfied party and setting into action the specified procedure and concomitantly delaying claimant's care, is totally unjustified in the present case. Had claimant been forum shopping at defendants' expense (which is the thrust of the case law set forth in defendants' brief and argument), their efforts at making a formal tender of care would have been reasonable and approved. However, the claimant herein has cooperated with the authorized managing physician (Dr. Drees) from the beginning of the case. Through Dr. Drees, claimant has seen numerous specialists and attempted various treatment programs. Defendants have not established that Dr. Drees' further managment of the case pursuant to the Mayo Clinic recommendation is not still reasonably suited to treatment of the injury as it was when they originally authorized it. Indeed, in view of the recommendation of the Industrial Commissioner regarding pain center treatment, claimant's ability at this time to pursue such care and Dr. Drees' obvious ability to work with the claimant in completing such a program, the defendants' insistance that claimant change treating physicians and be allowed to enroll in the Northwest Hospital Pain Clinic only if such program is recommended by Orthopaedists Limited is unreasonable.

Findings of Fact and Conclusions of Law

WHEREFORE, for all reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Defendants authorized the care of Dr. Donna Drees subsequent to the June 22, 1977 work injury.

Finding 2. Dr. Drees' care and management of claimant's case has been and continues to be reasonably suited to treatment of the injury.

Finding 3. As of August 18, 1981, defendants advised claimant that only the services of Orthopaedists Limited

would be authorized in the future. The basis for such action is defendants' desire to have a specialist manage the case because claimant's condition seemingly has not significantly improved. Claimant has been dissatisfied with Dr. Peter Wirtz of Orthopaedists Limited, who has examined her for defendant insurance carrier in the past.

Finding 4. Claimant has confidence in Dr. Drees and has cooperated with her medical management of the case. Due to a change in family circumstances, claimant is now able to pursue pain clinic treatment suggested by the Industrial Commissioner. Dr. Drees is familiar with the Northwest Hospital Pain Clinic and recommends that claimant pursue such treatment.

Conclusion A. Pursuant to the spirit of Code section 85.27, claimant is entitled to continued treatment by Dr. Drees.

Order

THEREFORE, it is ordered that defendants continue to reimburse claimant for treatment by Dr. Drees.

Costs of the proceeding are taxed to the defendants.

. . .

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

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

LENORE SMITH,

Claimant,

vs.

CARNATION COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed and claimant cross-appealed from a proposed review-reopening decision filed July 31, 1980 wherein claimant was awarded compensation for permanent partial industrial disability, healing period benefits through December 5, 1978, plus related medical expense.

On October 31, 1978, Deputy Industrial Commissioner Helmut Mueller filed an arbitration decision wherein the claimant was found entitled to a running award until the terms of Iowa Code section 85.34(1) were met. On November 8, 1978 defendants filed a memorandum of agreement indicating that the weekly rate for compensation benefits was $147.20. The arbitration decision of October 31, 1978 ordered the defendants "to file a Form 5 within twenty (20) days when the terms and conditions of this case become final." No final report was filed. Claimant commenced the present action on February 16, 1979. In a post hearing brief filed August 17, 1979 defendants state that they have paid the claimant healing period benefits from the date of the injury through December 5, 1978, and as of December 6, 1978 were paying permanent partial disability benefits based upon eight percent disability to the body as a whole.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant and Donna Drees, M.D.; claimant's exhibit 1; defendants' exhibit A, the deposition of Peter Wirtz, M.D.; defendants' exhibit B, the deposition of Donna Drees, M.D.; defendants' exhibits C, D and E; Wirtz deposition exhibit 1; claimant's answers to interrogatories 1, 3, 5 and 7 from the prior proceeding; the April 22, 1980 report of the Mayo Clinic; the trial briefs of claimant and defendants; and the appeal brief of the claimant.

The issue on appeal by both parties is the nature and extent of claimant's industrial disability.

Claimant, age 39 at time of hearing, is divorced with two dependants. Claimant testified at hearing that she has a high school education and has also completed business college courses. She has a lengthy employment history which includes general office and secretarial work, personnel management, operation of a small business, and employment counseling.

The record indicates that claimant sustained a muscle strain in her low back as the result of an auto accident in April 1971. She was found by the deputy's decision of October 31, 1978 to have fully recovered from that injury and that this prior injury played no part in the injury of June 22, 1977.

The arbitration decision filed October 31, 1978 discusses the incident of June 22, 1977:

> Claimant... began her duties as a display worker for the defendant employer in January 1979. Her duties required extensive auto travel encompassing a territory from Des Moines north to the Minnesota state border containing some 120 supermarkets and requiring her to be away from her residence overnight and on a regular basis. On June 22, 1977, while in the Dahl's supermarket in West Des Moines, and being in a squatting position, the claimant was pulling on a 20 pound bag of pet food arranging shelf space in accordance with her duties. While doing so, she felt "something" pull in her lower lumbar area. Claimant has not been gainfully employed since that date.

Claimant testified at hearing on July 31, 1980 that she has continued to suffer from almost constant lower back pain, headaches, and numbness in the right lower extremity. Claimant further testified that her back pain makes it difficult

to sit, stand, or lie for even a small period of time making house work impossible. Claimant has not sought employment since June 22, 1977 and testified that she refused an employment offer with another company citing her pain as the reason.

In her deposition of July 13, 1979, Donna Drees, M.D., testified that her last examination of the claimant took place on July 9, 1979. Dr. Drees testified that the July 9 examination yielded the following results:

> I've got five degrees of flexion, zero degree extension, five degrees of lateral flexation. Her straight leg raising is positive on the right at thirty degrees, positive on the left at forty-five degrees and that she has two plus reflexes, both knees and ankles. [Drees deposition, page 17.]

Dr. Drees made the following assessment of the claimant's condition for claimant's counsel:

> Q. Doctor, based upon all of your examinations and discussions with Lenore Smith, and so forth, do you have a diagnosis of her condition today?
>
> A. I believe that we have to call her chronic myofascial strain of the lumbar area.
>
> Q. Based upon reasonable medical certainty, do you have an opinion as to how long that condition is likely to persist?
>
> A. Having viewed the progress of events the last two years, I am not optimistic that there will be a cessation of the condition without some spectacular intervention or some spectacular event. [Hearing transcript, page 38.]

Dr. Drees prescribed physical therapy at Northwest Hospital immediately upon consultation after the June 22, 1977 incident. Claimant has continued the therapy but testified that the treatment fails to bring satisfactory relief from the pain. In addition to the physical therapy, claimant was also prescribed varying combinations of Nembutal, Percodan, Butazolidin Alka, Tylenol with Codeine, Robaxin and Valium. In assessing these attempts to limit claimant's discomfort, Dr. Drees testified in her deposition, "we have seen nothing but progressive, slow deterioration and I don't see any indication or anything that would forecast any optimism." [Drees deposition, page 21.]

Claimant's future course of treatment was discussed by defendants' counsel and Dr. Drees:

> Q. As far as viable alternatives to Lenore Smith's problem then, as I see it in my own mind, there are three. She can either live with it, learn to live with it on her own, go to a pain center and probably have some help to learn to live with it or the surgery. Is that about what we are boiled down to at this point?
>
> A. Yes, that's what I believe. I would say were she to go to a pain center and get relief, that would be fine. Were she to go to a pain center and find no significant relief, I don't think anybody would want to take surgery on her without an intensified physical therapy program to try to maximize the amount of mobility that you could get postoperatively.
>
> I mean, there is no question that she has lost ground, you know, in terms of her activity and her mobility and it's unfair to expect surgery to make her, you know, a mobile, functional sort of person with the slash of the blades so to speak.
>
> I think that before anybody undertook surgery that they would also want to, you know, go with an intense physical therapy program.
>
> Now, you say, "Why don't we do that right now?" Because nobody is actually planning to do surgery and she hasn't got that much improvement with therapy and getting her to the hospital and getting the therapy and getting her back home becomes such a big, horrendous ordeal that she loses the benefit.
>
> Q. Are you saying that if we decide to send her to a pain center, we should send her there first before we do surgery?
>
> A. Yes.
>
> Q. And in the absence of one of those two alternatives your opinion is that you do not anticipate further improvement in her condition?
>
> A. No, I don't see any. [Drees deposition, pages 22-23.]

Finally, the ability of the claimant to engage in gainful employment was discussed between the claimant's counsel and Dr. Drees.

> Q. Based upon your examinations of Lenore Smith and the taking of her medical history itself, do you feel that she is capable of returning to a job such as the one she had with Carnation?
>
> A. Absolutely not.
>
> Q. Do you feel that she is capable of returning to a job which would require any sitting or standing for longer than thirty minutes at a time?
>
> A. Not at this point in time. [Hearing transcript,page 39.]

Upon cross-examination by defendants' counsel, however, Dr. Drees qualified the above answer to be contingent on the absence of new therapy or surgical procedures.

Dr. Drees testified in her deposition that because of the lack of improvement from therapy at Northwest Hospital, she referred claimant to Jerome Bashara, M.D., a Des Moines area orthopedic surgeon. In his report of June 4, 1979, Dr. Bashara writes:

> The above patient was seen in follow-up on May 24, 1979, at which time she was continuing to have low

back pain with radiation down the right lower extremity. In reviewing her history, since this injury occurred two years ago, she has had a 30 lb. weight gain and has had progressive difficulties with ambulation, a limp and a marked amount of back stiffness. Sitting in a chair is her primary difficulty. It produces increasing pain down the right lower extremity and some numbness of the right leg from the knee down.

On physical examination, she has a marked amount of spasm of the paravertebral muscles. There is tenderness throughout the lumbar spine posteriorly. Her motion is as follows: Flexion of 20 degrees, extension of 0 degrees, right lateral bending 10 degrees and left lateral bending 10 degrees. A neurological examination of the lower extremities is normal. Her knee jerks are equal at 2+ and ankle jerks are 2+ bilaterally. [Claimant's exhibit 1.]

Dr. Drees also recommended that claimant seek a possible alternative treatment at the Mayo Clinic or at the University Hospitals in Iowa City. After considerable negotiations over reimbursement for expenses and the types of testing that were to be performed, claimant consented to a consultation at the Mayo Clinic. The April 22, 1980 report of Richard Stauffer, M.D., of the Mayo Clinic yields conclusions in contrast to those of Drs. Drees and Bashara. Dr. Stauffer writes:

On physical examination she is a moderately obese, middle-aged woman who tends to walk with an exaggerated type limp on the right leg. She moves very slowly and cautiously. She can bend forward only a very few degrees because of back pain. Side bending likewise is limited by pain but there is no paravertebral muscle spasm present. Hyperextension is very painful. She tends to hyperreact to even very gentle pressure or palpation over her buttock. Straight leg raising to either side at 90 degrees causes only back pain. Popliteal stretch test is negative. There is no obvious evidence of motor weakness in either lower extremity. Reflexes are somewhat hypoactive but knee jerks and ankle jerks are symmetric.

X-rays of the lumbar spine show some moderate narrowing of the lumbosacral disc space with no evidence of translational instability on flexion-extension. The lumbosacral facet joints are narrowed and somewhat subluxed bilaterally. Cervical spine films show only very mild degenerative changs [sic] at C5-6 level. Pain drawing shows no excessive magnification of her symptomatology. However, the MMPI is definitely abnormal with a "conversion V" and elevation of the hysteria and hypochondriasis parameters to the 75th percentile.

I doubt that the patient has any true radicular features to her symptomatology. Her pain sounds as though it is due to segmental instability caused by degenerative disease in the lumbosacral level. I think there is a good deal of functional magnification of her symptomatology with chronic pain behavior. Also compensation consideration may play an important role here. She seems to be quite angry at her employer because of difficulties she has had in the past. [Mayo report, pages -5.]

Dr. Stauffer continues:

Appreciate neuro review. He does not feel there is any evidence of radiculopathy here. He feels that her problem is "clearly functional." Dr. Maruta of the Psychiatric Department feels the patient has marked chronic pain behavior and agrees that functional elements are very important. It is my feeling that Ms. Smith does suffer from degenerative disease of the lower back, that she may well have aggravated the pre-existing degenerative disease in the injury she describes at work, and that emotional factors are important in magnifying her degree of actual disability. I would estimate she suffers 15 percent permanent partial physical impairment of the spine because of the degenerative disease of the lumbar spine. This translates to about 7 percent permanent partial physical impairment of the individual as a whole. I feel that all we have to offer in the way of treatment is that she continue the isometric exercise and physical therapy at home per the instructions she has received. She needs to lose 20 pounds. I certainly would not consider any surgical treatment in the way of fusion here. [Mayo report, page 6.]

Peter Wirtz, M.D., a Des Moines orthopedic surgeon, testified by deposition that he examined the claimant on December 6, 1978 at the request of defendant-carrier. Dr. Wirtz reports the findings of his examination:

...she walks with a limp and a tilt to the left side. When she is standing, her legs are of equal length. She has tenderness to pressure in the lower lumbar area, on either side of the spinal canal. Her flexion is only 10 degrees while standing.

Straight leg raising, in the sitting position is to 85 degrees on the left and 75 degrees on the right. She has pain in the lower lumbar area, with straight leg raising, as well as in the supine position, at about 45 degrees bilaterally. The pain increases in the lower back with flexion of the pelvis. The knee jerks are 2/1 and the ankle jerks are 1/1. There is no specific weakness of the extensors of the toes. There is no sensory deficit notes. [Wirtz deposition exhibit 1.]

Dr. Wirtz testified that claimant's loss of forward flexion was 80 degrees, which, using standardized American Medical Association guidelines for disability, translates to 8 percent disability of the body as a whole. Claimant's counsel challenged the AMA rating used by Dr. Wirtz for its supposed consideration of only functional flexion to the exclusion of pain resulting from such flexation. Dr. Wirtz acknowledged that the AMA guide does not strictly consider pain, the actual results do reflect pain insofar as

the patient's perception of real flexation. Dr. Wirtz explains, "when patients bend forward and they stop at whatever motions they are, they usually do that because of pain, and I don't increase that, the pain." [Wirtz deposition, page 15.]

Defendants' counsel queried as to varying restrictions of motion when claimant was tested in different positions by Dr. Wirtz. Dr. Wirtz testified:

> A. The patient on the neurological examination was normal, but she has restriction of motion of her back as far as flexing forward or varying positions of the back when we examined the straight leg raising.
>
> When a patient has a disc problem which would cause a neurological involvement, the restriction of motion of the back, whether they are standing, sitting or laying down, is the same in all the examinations. Hers varied from position to position.
>
> Then without any neurological would indicate to me that she did not have specific nerve root involvement as the cause of the back pain. [Wirtz deposition, page 8.]

Defendants' counsel continued the inquiry.

> Q. Doctor, the fact that you mentioned that in the different positions some of these motion or flexion tests the results are different, could you again explain to me what the significance is of that finding?
>
> A. Well, if the motions are different in different positions, to me it's not an objective finding that there is such a problem as a disc disease or infection. In other words, the varying restriction is voluntary in nature. [Wirtz deposition, page 10.]

Defendant's counsel also asked for qualifications of the term "voluntary."

> Q. Okay. You have previously mentioned that and stated that part of Lenore's restriction of movement is voluntary.
>
> What do you mean by "voluntary"?
>
> A. That means that she just restricts you from moving her in different positions when you examine her. Whether it's due to pain or whether she just doesn't want you to examine that, I can't really tell you.
>
> Q. Okay.
>
> Now, again, is there any way for you to measure whether she is experiencing pain?
>
> A. Just by what she tells me.
>
> Q. Again, when you say "voluntary," do you mean merely that there is no physical obstruction to the motion?
>
> A. If it was truly voluntary, there would be no physical obstruction to the motion. [Wirtz deposition, page 22.]

While Dr. Wirtz testified that he did not recall claimant describing her work with defendant-employer, claimant's counsel posed a characterization of claimant's former duties by means of a hypothetical question. As to whether claimant would still be capable of performing such tasks, Dr. Wirtz entered into the following dialogue with claimant's counsel.

> A. Well, her symptoms may be aggravated, but I feel that she probably would be able to handle that kind of work.
>
> Q. But by saying her symptoms would be aggravated you mean her pain would be increased?
>
> A. Yes, she would definitely have some pain, but I don't feel it would be severe enough to stop her from doing that kind of work.
>
> Q. How much pain do you feel she is experiencing?
>
> A. Well, I think that she does have pain, I agree. And the amount I really can't grade, but if she did do that kind of work with some of those restrictions that we spoke of, I think she would be able to handle that kind of work. [Wirtz deposition, pages 28-29.]

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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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 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, supra*. This department is charged with the statutory duty of determining a claimant's industrial disability. In an attempt to further clarify this issue, we quote from *Olson, supra*, at page 1021:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered [citing *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 deputy's decision filed July 31, 1980 found claimant to have sustained an injury resulting in 50 percent industrial disability. Claimant's appeal asserts that the findings of Dr. Drees justifies an award of permanent total industrial disability. Defendants, on the other hand, contend that the findings of Drs. Wirtz and Stauffer dictate a complete denial of compensation benefits.

All of the medical evidence in the record points out that the claimant has suffered an injury and that her present disability is more serious than her moderate functional impairment might indicate. While this disability may make it impossible to return to her former employment, her disability as a result of the injury has not been convincingly proven to be so serious as to preclude any form of gainful employment in the future. The medical evidence suggests that the claimant needs assistance in adapting to her pain and possibly accepting a slower employment pace.

Claimant testified at hearing that she has not attempted employment since her injury of June 22, 1977. Claimant's impressive and extensive work history points out that there is a large variety of job tasks in which she is not only qualified, but experienced, and which would be far better to suit the physical restrictions caused by her disability. Claimant has not demonstrated that she is unable to perform work which is more sedentary in nature.

As noted above, any determination of industrial disability must not only take into account functional impairment, but also background of the individual. While both parties did an admirable job of making their case, the record points out that the deputy's determinations of credibility were well founded.

Finally, neither party contested the deputy's conclusions as to healing period benefits or the related medical expense. Having an adequate basis in the record, and having not been placed in issue on appeal, the deputy's conclusions are therefore considered to be proper.

Claimant should seriously and conscientiously consider the service of a qualified pain clinic as the experience of the agency has shown that many who are in similar circumstances as claimant who truly wish to improve their lot by learning to live with their condition have found considerable help by cooperative effort in such endeavor.

Findings of Fact

1. That claimant was an employee of defendant-employer on June 22, 1977. [Defendants' answer to petition.]

2. That claimant has a preexisting degenerative disc disease.

3. That claimant sustained an injury on June 22, 1977 while performing duties in accordance with her employment with defendant-employer. [Defendants' answer to petition.]

4. That claimant, at the time of the hearing, suffers from a chronic myofacial strain of the lumbar area. [Hearing transcript, page 38; Drees deposition, page 15.]

5. That claimant has a disability resulting from her injury which restricts her ability to engage in gainful employment. [Wirtz deposition, pages 28-29.]

6. That claimant has sufficient educational and employment background to allow her to engage in acts of gainful employment within the restrictions placed upon her by her disability. [Answer to interrogatory 5, Wirtz deposition, pages 28-29.]

7. That the weekly rate of compensation benefits is $147.20. [Memorandum of agreement filed November 8, 1978.]

8. That claimant has been paid healing period benefits from June 22, 1977 to December 5, 1978, and permanent partial disability payments from December 6, 1978 based upon 8 percent disability to the body as a whole. [Defendants' brief of August 17, 1979.]

Conclusions of Law

That claimant suffered an injury which arose out of and in the course of her employment.

That the injury contributed to the cause of claimant's industrial disability.

That as the result of the injury of June 22, 1977, claimant sustained a fifty percent permanent partial industrial disability to the body as a whole.

WHEREFORE, it is found:

That in accordance with the above analysis, is is hereby found that as a result of the June 22, 1977 injury in the nature of aggravation of a preexisting condition, claimant is entitled to 250 weeks of permanent partial disability benefits. It is further found that claimant is entitled to healing period benefits from the date of injury to December 5, 1978.

That the twenty-eight and 50/100 dollar ($28.50) medical expense for Dr. Drees' services in February of 1979 was for treatment that was reasonable and necessary as contemplated by Code section 85.27.

That the proposed review-reopening decision filed July 31, 1980 is adopted as the final decision of this agency.

THEREFORE, it is ordered:

That the defendants pay the claimant two hundred fifty (250) weeks of permanent partial disability at the rate of one hundred forty-seven and 20/100 dollars ($147.20) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of December 6, 1978.

That defendants are ordered to pay the claimant healing period benefits from the date of injury through December 5, 1978 at the rate of one hundred forty-seven and 20/100 dollars ($147.20) per week.

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

That credit is to be given to defendants for the amount of compensation previously paid by them for this injury.

That defendants are further ordered to pay unto the claimant the following medical expense; Dr. Donna Drees, $28.50.

That costs of the proceedings are taxed to the defendants. See Industrial Commissioner Rule 500—4.33.

That interest shall run in accordance with Code section 85.30.

That a final report shall be filed by defendants when this award is paid.

. . .

Signed and filed this 23 day of July, 1981.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

MARVIN SMITH,

Claimant,

vs.

IOWA FARMERS UNION,

Employer,

and

FARMERS ELEVATOR MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Statement of the Case

Claimant appeals from a proposed arbitration decision filed October 4, 1977 wherein death and burial benefits were denied to the claimant as surviving spouse of Mary Lou Smith.

The above captioned matter comes back for final agency determination on appeal after dismissal of claimant's petition for judicial review. A considerable amount of time has been expended reconstructing the file of this matter after being misplaced while before the district court. The parties have agreed that the record on appeal should be considered complete and the case fully submitted for appeal. The record on appeal includes the transcript of the hearing which contains the testimony of claimant and Arthur T. Thompson; claimant's exhibit 1, a report of John T. Bakody; claimant's exhibit 2, medical records of John Rawland, M.D.; claimant's exhibit 3, Mercy Hospital records; the depositions of Dr. Bakody, Lowell Edmund Gose, Elsie Pugh, Margaret Louise Rawland, and Dale Miller, Ph.D.; Bakody deposition exhibit 1, Miller deposition exhibits 1 and 2; the constitution and by-laws of The Farmers' Educational and Co-Operative Union of America; the reports of Robert Kreamer, D.O.; the 1975 policy statement of the National Farmers Union; all pleadings and documents filed as indicated in the proposed records submitted by the parties; and the appeal briefs of all parties.

Issue

The issue on appeal is whether the death of claimant's decedent was caused by an injury which arose out of and in the course of her employment.

Review of the Evidence

Claimant's decedent, Mary Lou Smith, suffered a cerebral hemorrhage or "stroke" on November 21, 1975. She died on December 1, 1975 after failing to regain consciousness.

Claimant testified at hearing that the decedent began working for defendant employer on a part-time basis in 1964. Decedant began working full time in 1973 and became defendant employer's office manager in 1975.

Claimant described the decedent as being extremely good natured and animated but at the same time extremely intense. (Tr., p. 36) Decedent was not only actively concerned in the affairs of the defendant Iowa Farmers Union, but with legislation concerning agriculture, ecology, and energy generally. Decedent was an active stockholder in Iowa Power and Light Company and was active in the Democratic Party. Decedent also participated in an assertiveness training course at Drake University. Finally, decedent was actively involved with a variety of organizations identified as The International League For Peace and Freedom, Another Mother For Peace, The League of Women Voters, and the National Organization For Women. Claimant testified that decedent often entertained and socialized with individuals in the forementioned organizations in addition to participating in the regular activities of those groups. (Tr., p. 44)

Claimant testified that in September of 1975, the decedent planned and organized an annual state convention for defendant employer. (Tr., p. 33) Decedent's duties involved the making of reservations, the securing of speakers, and all other arrangements in relation to the convention.

Claimant's decedent later attended a land use seminar at Drake University on November 21, 1975. Apparently, the Iowa Farmers Union was a participant in that seminar sponsored by Drake University. However, decedent did undertake the responsibility of transporting individuals to and from the airport for defendant employer including Tony DeChant, president of the National Farmers Union.

Claimant testified that the decedent complained a great deal of headaches the two to three months before her stroke. (Tr., p. 46) Claimant stated that she awoke about two nights each week and would take pain medication to go back to sleep. (Tr., p. 47) Claimant indicated that he expressed concern to decedent that she appeared to be more tired than she ever had previously. (Tr., p. 47) Claimant said that in the fall of 1975 he would often arrive home to find decedent resting on a couch; something he felt was out of character for her. (Tr., p. 48) Claimant denied that decedent had a history of high blood pressure. (Tr., p. 58)

As to the period just before decedent's stroke, claimant testified that decedent entertained about 25 persons at a meeting of the Women's International League For Peace and Freedom in her home on November 19, 1975. Claimant

indicated that the meeting broke up about 11:30 or midnight. Claimant indicated that decedent then worked her regular full day before attending a meeting of the National Organization For Women until 10:30. (Tr., pp. 62-63) Claimant further testified that the next morning, November 21, 1975, decedent arose earlier than usual. Claimant indicated that she was usually animated and excited about meeting Tony DeChant, president of the National Farmers Union. (Tr., p. 49)

Elsie Pugh, bookkeeper for defendant employer, testified by way of deposition that the decedent was given the freedom to perform her employment in any way she saw fit. (Pugh depo., p. 18)

Ms. Pugh indicated that the defendant employer paid her regular salary while she attended the assertiveness training course at Drake, but her tuition was not paid and attendance had no other relationship to her employment. (Pugh depo., pp. 23-24)

Ms. Pugh stated that she knew decedent to smoke heavily, and entertain frequently; often into late hours. (Pugh depo., p. 55)

Ms. Pugh testified that she attempted to convince decedent not to attend the land use seminar at Drake University on November 21, 1975. Although decedent had not worked overtime during the period prior to the seminar, Ms. Pugh felt that she appeared too tired to attend the seminar. However, the decedent insisted upon continuing. (Pugh depo., pp. 56-57) Ms. Pugh stated that claimant wanted to attend the seminar and that defendant employer did not require her attendance. (Pugh depo., p. 40)

Finally, Ms. Pugh testified that on November 20, 1975, the decedent was "quite excited" and that her face appeared flush. (Pugh depo., p. 46)

Margaret Louise Rawland was an employee of defendant employer and also worked with the decedent. Her husband, John Gardner Rawland, M.D., was decedent's family doctor. Ms. Rawland indicated that decedent was anxious to meet Tony DeChant during the seminar to discuss her future in the Iowa Farmers Union. (Rawland depo., p. 74)

Lowell Edmund Gose testified by way of deposition that he was president of the Iowa Farmers Union. Mr. Gose testified that decedent came and went at her convenience and performed her duties as she saw fit. (Gose depo., p. 3) Mr. Gose indicated that decedent smoked a great deal and drank excessive amounts of coffee. (Gose depo., p. 7) Mr. Gose also indicated that he approved of decedent's activities surrounding the land use seminar on November 21, 1975. He stated, however, that decedent's actions were purely voluntary. (Gose depo., pp. 9, 19)

Dr. Dale Miller, Professor of Religion at Drake University, was present at the land use seminar on November 21, 1975. He testified by way of deposition that he was speaking with the decedent when she suffered her stroke. Professor Miller testified that he had not met the decedent prior and that she appeared pleasant and animated before being stricken. (Miller depo., pp. 13-14) Professor Miller also indicated that they were discussing politics at the time claimant suffered her stroke. (Miller depo., p. 13) Finally, Professor Miller pointed out that the decedent was merely a spectator at the seminar and in no way participated on behalf of defendant employer.

John T. Bakody, M.D., first saw decedent in the emergency room at Mercy Hospital on November 21, 1975. Dr. Bakody testified by way of deposition that decedent died on December 1, 1975 as the result of a cerebellar hemorrhage on November 21, 1975. (Bakody depo., p. 5) Decedent never regained consciousness. Bakody deposition exhibit 1 is the office records of Dr. John Rawland. These records reveal recordings of elevated blood pressure on March 20, 1972, October 30, 1972 and June 26, 1973. Dr. Bakody indicated that this history of elevated blood pressure suggested the condition of arterial hypertension. (Bakody depo., p. 8)

As to the cause of claimant's stroke, Dr. Bakody was supplied with a lengthy hypothetical question which included decedent's recent job and non-job activities. (Bakody depo., pp. 8-15) Based upon this hypothetical question, Dr. Bakody testified:

> A. It is my opinion that there is a causal connection between the events related in the hypothetical question and this patient's death.
>
> Q. Now, doctor, specifically is it your opinion that the events in connection with the September convention in 1975 played a part in the final illness of Mary Lou Smith?
>
> * * *
>
> A. I would not wish to answer this particular item specifically, but I would certainly as a reason for my opinion point out that it is my understanding that this lady did in fact have arterial hypertension and that she did in fact die of a cerebral hemorrhage associated with arterial hypertension and the assumption that I make or the conclusion which I am reaching is based on the fact as I understand the events and accepting them in the hypothetical question, that this lady was in fact under a considerable amount of mental and emotional stress immediately prior to the time of her cerebral hemorrhage, and that such emotional stress and physical stress can adversely affect blood pressure, that is to say, elevate the blood pressure and further elevation of the arterial blood pressure in an individual who has arterial hypertension can certainly bring about or precipitate a cerebral hemorrhage. (Bakody depo., pp. 16-17)

Later on direct-examination, Dr. Bakody was asked:

> Q. Yes. Doctor, would you tell us whether or not the fact that she had evidence of arterial hypertension in earlier years would make it easier or more difficult for stress and strain in her employment to precipate the conditions that led to her death?
>
> A. Well, the answer to this would be that it would be more likely that cerebral hemorrhage occurs in an individual who has arterial hypertension.
>
> Is that being responsive?

Q. Yes. Doctor, would you tell us whether or not in your opinion there is significance to the fact that for about six months before her death Mary Lou Smith complained of headaches at night and would get up and take aspirin, but would not have headaches during the daytime, so far as we know.

A. Yes, I do think it is significant and probably means that there were changes going on in the blood vessels of the brain during the period of time, this six-month period that you have indicated when she was having nocturnal headaches. (Bakody depo., pp. 17-18)

Later on cross-examination, Dr. Bakody was asked again about causation.

Q. Could this have occurred, doctor, in the absence of those stressful situations?

A. I'm not saying it could not, no, sir. (Bakody depo., p. 28)

This response was met by another inquiry on redirect-examination.

Q. But, doctor, would it be your opinion that it would be more likely that it occurred because of these stressful situations that I have presented to you?

A. I would not want to generalize on this. I was given specific information in a hypothetical question. I know this woman, what she had, what she died from and then I am trying to give a reasonable opinion as to what the relationships are and this is what I have tried to do.

Certainly we see people with arterial hypertension who might have a cerebral hemorrhage without having gone through the identical stressful situation she did, but I was speaking to the events that were presented to me.

Robert Kreamer, D.O., Professor of Cardiology at the College of Osteopathic Medicine and Surgery, examined decedent's prior medical history, Mercy Hospital records, and defendants' autopsy report. In his report of October 12, 1976, Dr. Kreamer writes in part:

> It is my opinion that there exists a slight discrepance into the exact activity of Mrs. Smith immediately prior to her collapse. The history as recorded on the chart is that "the patient's husband gives a history that the patient was lecturing at Drake University. Subsequent to finishing her presentation she felt faint, laid down, and developed respiratory difficulty and was unconscious."
>
> The letter from Dale Miller states "she was sitting on a bench on the third floor of the Olmstead Center. I was standing close to her. We were visiting about the relationships between the Farmers Union position and Democratic Party position over the years....
>
> . . .
>
> The letter from Mr. Grose [sic] states, "As far as we know, she did not have a part on the program and was not involved in its preparation other than to drive Tony to Drake University."
>
> I think it is quite important that we establish exactly whether she had stress immediately prior to her collapse. It is well known that people's blood pressure goes up during periods of emotional stress and this might have precipitated a fatal accident. If however, her activities were of a nature that could be called ordinary, I would assume that there was no "precipitating" event and that the course of hypertension had claimed its victim.

Applicable Law

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 21, 1975 which arose out of and in the course of her 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 employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Iowa Code section 85.3(1).

The injury must both arise out of and be in the course of the employment. *Crowe v. DeSoto Consol. Sch. Dist.*, 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also *Sister Mary Benedict v. St. Mary's Corp.*, 255 Iowa 847, 124 N.W.2d 548 (1963) and *Hansen v. State of Iowa*, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. *Crowe v. DeSoto Consol. Sch. Dist., supra.*

The words "in the course of" refer to the time and place and circumstances of the injury. *McClure v. Union et al. Counties*, 188 N.W.2d 283 (Iowa 1971); *Crowe v. DeSoto Consol. Sch. Dist., supra.*

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." *Cedar Rapids Comm. Sch. Dist. v. Cady*, 278 N.W.2d 298 (Iowa 1979), *McClure v. Union et al. Counties, supra, Musselman v. Central Tel. Co., supra.*

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 exertions which, superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in compensable injury.

If there is some personal causal contribution in the form of a previously weakened or diseased heart, the employment contribution must take the form of an exertion greater than that of nonemployment life.

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. *Sondag v. Ferris Hardware*, 220 N.W.2d 903 (Iowa 1974).

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. *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 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.

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. *Burt v. John Deere Waterloo Tractor Works*, 247 Iowa 691, 73 N.W.2d 732 (1965). "The opinion of experts need not be couched in definite, positive or unequivocal language." *Sondag v. Ferris Hardware, supra.* However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra*, page 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, 133 N.W.2d 867 (1964). See also *Musselman v. Central Telephone Co., supra.*

Analysis

On appeal, there is no real dispute that claimant's decedent was stricken while in the course of her employment. The fact that decedent wasn't required to attend the land use seminar on November 21, 1975 does not mitigate the benefit that defendant employer received by her activities on that day. Defendant employer was itself an interested participant in the seminar. Speaking at the seminar was Tony DeChant, the president of the National Farmers Union of which defendant employer was an affiliate. The decedent had even picked up Mr. DeChant at the airport on the day of her stroke. In sum, her activities on November 21, 1975 had the full approval of defendant employer.

However, the question whether decedent's stroke arose out of her employment is a more difficult question. As *Sondag, supra,* points out, claimant must establish that some employment incident or activity was the proximate cause of decedent's stroke.

Where a preexisting circulatory condition exists, *Sondag, supra,* recognizes two theories for establishing causation with the employment. The first theory, where the job requires continual heavy exertion, is of no benefit after applying the facts before us. The second theory requires *"an* instance of unusually strenuous employment exertion imposed upon a preexisting diseased condition...." *Sondag, supra* at 905. (Emphasis added.)

At hearing, claimant's testimony included repeated denials that the decedent had high blood pressure or any other condition other than occasional headaches. Lay testimony contained in the record establishes that in the months prior to her stroke, claimant's hectic pace was as much a product of her personal social schedule as of her employment. Moreover, decedent's most strenuous or stressful activity the day of her stroke was driving Mr. DeChant from the airport. In the moments before she was stricken, decedent was discussing politics as a spectator at a land use seminar. These activities were ordinary in the course of decedent's social and professional life.

It is for the finder of fact to weigh the medical evidence. It is for medical experts to opine what events caused decedent's stroke. While an employment injury need not be the sole cause of one's disability, *Sondag, supra,* (which claimant urges application of upon appeal) requires an unusual employment exertion to precipitate the disabling stroke.

The application of *Sondag, supra,* to the facts before us requires caution, however. In that case, claimant suffered a heart attack and continues in heavy exertion immediately afterward. The court in *Sondag, supra,* places great emphasis upon the continued heavy physical labor after claimant suffered his heart attack. In the facts before us, decedent suffered a stroke and immediately lost consciousness until her death. There was no stressful incident immediately prior to her being stricken let alone any heavy physical exertion. Moreover, cerebellar hemorrhage or stroke may have an etiology far different and more complex than a heart attack.

Dr. Bakody, a neurosurgeon, opined that decedent's stroke could have been the result of her overall activities just prior to the event or that the stroke could have occurred in the absence of any stressful situation. Such testimony does not meet claimant's burden of proof.

Considerable effort has been expended in arguing the weight that Dr. Bakody's conclusions merit. Much of Dr. Bakody's opinion of causation depend upon the lengthy factual situation set forth in hypothetical form. Extensive review of the entire record indicates that this hypothetical question was accurate, objective, and contains no facts not in the record. Nor at any point does Dr. Bakody understand the decedent to be a speaker in the seminar on November 21, 1975 or otherwise appear to confuse personal with employment activities. Nonetheless, Dr. Bakody is unable to state that there was any event related to decedent's employment which caused or precipitated her stroke.

The report of Dr. Kreamer, a professor of cardiology, is also helpful in pointing out the complexity of causation in this matter. While he was not supplied the lenghty hypothetical that Dr. Bakody was, Dr. Kreamer bases his opinions upon the medical records and eyewitness reports. Dr. Kreamer clearly indicates that if decedent's activities were no more stressful than her ordinarily hectic routine, there would be no precipitating event and that preexisting hypertension would have caused the stroke. The opinions of Drs. Bakody and Kreamer are then substantially in agreement.

In his decision of October 4, 1977, the deputy concludes that the stresses of November 21, 1975 were not even as great as would be present in her normal daily activity. Review of the record on appeal fails to establish that any event, employment related or otherwise caused the stroke which ultimately led to the untimely death of the decedent, Mary Lou Smith.

Findings of Fact

1. That claimant's decedent was defendant employer's office manager in 1975.

2. That decedent actively participated in a variety of social and political organizations.

3. That decedent often entertained professionally and socially.

4. That decedent smoked cigarettes regularly at the time of her stroke.

5. That decedent experienced headaches regularly thoughout a six month period prior to her stroke.

6. That decedent was a voluntary spectator at a land use seminar held at Drake University on November 21, 1975.

7. That decedent drove the president of the National Farmers Union to the seminar on November 21, 1975.

8. That decedent suffered a cerebral hemorrhage on November 21, 1975 while discussing politics with Professor Miller.

9. That decedent had a preexisting condition of arterial hypertension.

10. That there existed no single event, employment related or otherwise, that precipitated decedent's stroke.

Conclusions of Law

That claimant has failed in his burden of proof that decedent's stroke was caused or precipitated by her employment.

That claimant has failed in his burden of proof that decedent's death arose out of her employment.

That claimant is not entitled to compensation benefits pursuant to Iowa Code sections 85.28 and 85.31.

WHEREFORE, it is found that the findings of fact and conclusions of law in the deputy's proposed decision filed October 4, 1977 are proper.

THEREFORE, it is ordered that relief sought in claimant's application for arbitration is denied.

Costs of these proceedings are taxed to the claimant.

* * *

Signed and filed this 29th day of June, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

WAYNE SOLOMON,

Claimant,

vs.

RUAN TRANSPORT COMPANY,

Employer,

and

CARRIERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Decision for Partial Commutation

This is a proceeding for partial commutation brought by Wayne W. Solomon against Ruan Transport Co., employer, and Carriers Insurance Company, insurance carrier. On August 27, 1981 a review-reopening was filed in which claimant was awarded a permanent partial disability of 30 percent and defendants were instructed to pay unto claimant 150 weeks of permanent partial disability benefits at a rate of $244 per week with payments commencing as of February 25, 1981. On December 23, 1981 this action was heard by the undersigned and the case was considered fully submitted upon receipt of the transcript on January 7, 1982.

The record consists of the testimony of claimant; claimant's exhibits 1 through 4; and a form 2 filed by defendants on December 31, 1981.

Issue

The only issue presented by the parties is whether or not claimant should have a partial commutation.

Facts Presented

Claimant testified that he moved from Mason City to Council Bluffs in September of 1981 and now wants all of his benefits except for 1 week commuted.

Claimant worked for defendant employer as a transport driver and although he has not been able to return to work for defendant employer he has not been terminated. Claimant's family moved to Council Bluffs because his wife's employer, Northwestern Bell Telephone, transferred claimant's wife to the Omaha office. Claimant is renting one-half of a duplex in Council Bluffs.

Claimant's daughter is in her freshman year at Creighton University and claimant estimates his out-of-pocket expenses for her run $5,000 a year. Claimant revealed that he has already borrowed $2,700 from a relative so that he could pay some of his daughter's expenses.

Claimant also wants to buy a 22 to 24 acre piece of real estate with a house located thereon. Claimant made an offer to buy which was accepted but was unable to come up with the downpayment. Five acres of the real estate is suitable for raising crops. The rest of the real estate claimant wants to use for raising feeder cattle. Claimant stated that he would be given some calves from his brother-in-law to start the operation. Claimant indicated the five acres of crop ground would be rented out. Claimant stated:

Q. You want to operate a feeder operation?

A. Yes. I think with the income from it — we could make

a good income. You don't have to put out that much money.

Q. Do you think you'll be able to operate this ten acres in a feeding operation given the physical limitation which you have experienced?

A. Well, there's really no problem in feeding the cattle, and I could do that.

Q. You think you can handle the work given your physical limitations.

A. Yes.

* * *

Q. Do you know what the downpayment is that's required on this property?

A. Roughly fifteen thousand.

Q. If you got enough money for the partial commutation, you could theoretically put more money down; is that right?

A. Yes.

* * *

Q. Have you figured out what the mortgage payments would be if you put the amount down which they have requested and then you make mortgage payments over a twenty or twenty-five year period? Have you figured out what the monthly payments would be on that?

A. Roughly about six fifty, maybe a little more.

Q. Can you make payments on a monthly basis of six hundred fifty dollars on your wife's salary if you have no separate income?

A. Yes.

Claimant disclosed he has not checked into what his return would be if he invested money he would receive rather than buy the acreage. Claimant stated he does not have any savings and opined that his wife might have $2,000 in savings.

On cross-examination, claimant stated:

Q. Aside from going out to the Ruan terminal at Omaha once or twice, have you made any effort to gain employment of any kind.

A. No, I haven't. Actually, I don't know of anybody that would hire me coming down to it.

Claimant indicated his father had a farm until he was 11 or 12 years old. Claimant revealed that he did not know what cattle were selling for or what it cost to get feeder cattle ready for market. Claimant indicated he knew that feeder operations were not making any money. Claimant also revealed that his wife's salary is approximately $15,000 a year. Claimant's rent presently is $300 per month which is approximately one-half of his family's monthly budget. Taxes on the property claimant intends to purchase would run over $65 per month. Claimant, at the same time, opined that it would only cost them a little bit more than what it costs them presently to live if he bought this acreage.

Applicable Law

Code section 85.45 contains the following:

> Future payments of compensation may be commuted to a present worth lump sum payment of the following conditions:
>
> 1. When the period during which compensation is payable can be definitely determined.
>
> 2. When it shall be shown to the satisfaction of the industrial commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefor.

The supreme court in *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments are compared to a lump sum payment will entail undue expense, etc., on the employer. In *Diamond* the court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *Id.* at 929, 129 N.W.2d at ____. A reasonableness test was applied by the court in *Diamond* to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Analysis

The greater weight of evidence indicates that it would be in claimant's best interest to have a partial commutation so that he can pay some of his debts for his daughter's education. The evidence reveals that claimant should have $5,000 of his future benefits commuted at this time for that purpose.

Claimant has, however, failed to show that it would be in his best interest to have benefits commuted so that he can buy the real estate mentioned. While the undersigned should not be an unyielding conservator of claimant's property and disregard claimant's desires and reasonable plans just because success in the future is not assured, the undersigned cannot find it in claimant's best interest to approve a commutation if claimant's plans are doomed to failure.

It is clear that claimant has not been able to save money from the 44 weeks of permanent partial disability previously paid to him. Claimant has had to use those payments for paying everyday living expenses. Thus, it would not appear that claimant and his wife can live at their present status if his weekly benefits were terminated. It is also evident that if claimant should purchase the real estate in question their housing expenses will more than double from the $300 for rent presently to the payment of over $700 per month for monthly mortgage payments and taxes. In other words, claimant's family would have $976 less income per month and over $400 in additional expenses.

It is also clear that claimant does not know the expenses which are inherent in the feeder cattle business. Rather than showing that claimant can make money in such a business, by claimant's own comments it would appear that such a venture would not be profitable at this time. It is interesting to note that claimant does not even know how much income the 5 acres of rented ground produces in a year.

As indicated in the previous decision, claimant's desire to return to his former position is unrealistic. In that claimant has failed to attempt to secure other employment, the reduction in his benefits will greatly reduce claimant's ability to even pay his present expenses, let alone those involved with the ownership of realty. Without other income, claimant will be unable to meet his expenses if he would purchase this property.

Claimant's attorney also tried to show that it would be in claimant's best interest to have a commutation of all but one week of his benefits even if claimant did not buy this real estate. Claimant's attorney, through the use of leading questions, tried to show that it would be in claimant's best interest to invest his future benefits rather than to have them paid out weekly. Claimant's answers, on the other hand, show that claimant does not really know what to do with his money if it is commuted. Although the undersigned realizes that money can be invested at a greater rate of return than the discount taken as a result of a commutation, claimant does not have any plans for investment and demonstrated lack of knowledge regarding saving money and investments. In that claimant has no other income other than his wife's salary, it would appear to be in his best interest to deny any commutation other than for his daughter's education.

Findings of Fact and Conclusion of Law

WHEREFORE based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On August 27, 1981 claimant was awarded one hundred fifty (150) weeks of permanent partial disability benefits at a rate of two hundred forty-four and 00/100 dollars ($244.00) per week with payments commencing as of February 25, 1981.

Finding 2. As of the date of hearing, claimant had been paid forty-four (44) weeks of permanent partial disability benefits.

Finding 3. Claimant's daughter is going to school at Creighton University.

Finding 4. As a result of his daughter's education, claimant will have five thousand and 00/100 dollars ($5,000.00) in out-of-pocket expenses.

Finding 5. Claimant wants to buy a twenty (20) to twenty-four (24) acre piece of real estate with a house.

Finding 6. Claimant presently rents a house duplex for three hundred and 00/100 ($300.00) a month.

Finding 7. Claimant has not been able to save any of the permanent partial disability benefits previously paid to him.

Finding 8. The permanent partial disability benefits which have been paid to claimant have been used for present living expenses.

Finding 9. If claimant should purchase the real estate in question he would be paying over seven hundred and 00/100 dollars ($700.00) a month in payments and taxes.

Finding 10. If claimant should have his benefits commuted he will have nine hundred seventy-six and 00/100 dollars ($976.00) less income per month.

Finding 11. Claimant is not aware of the expenses inherent in a cattle feeding operation.

Finding 12. Claimant has no knowledge regarding investments.

Finding 13. Claimant does not know how to invest his money if his benefits were commuted.

Finding 14. Other than buying the mentioned real estate, claimant has no plan for investing money that may be commuted.

Conclusion A. It would be in the claimant's best interest to commute funds for his daughter's education.

Conclusion B. It would be against claimant's best interest to commute an amount for the down payment on real estate or for investment.

Order

THEREFORE, defendants are to pay unto claimant a partial commutation in the following manner:

	Weeks	Factor
remaining (Assuming defendants have continued to pay claimant)	101	96.3168
new remainder	78	75.1789
weeks commuted	23	21.1379

In other words, defendants are to pay unto claimant a commutation of twenty-three (23) weeks for a total value of five thousand one hundred fifty-seven and 64/100 dollars ($5,157.64). Defendants are to continue to pay claimant for an additional seventy-eight (78) weeks when claimant's weekly benefits will cease.

Defendants are to pay the costs of this action.

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

* * *

Signed and filed this 27th day of January, 1982.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

DORRETT SONDAG, Executor of Estate of LEO SONDAG, and DORRETT SONDAG,

Claimant,

vs.

FERRIS HARDWARE,

Employer,

and

GRAIN DEALERS MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from a proposed decision on section 85.31 [sic] benefits in which it was determined that decedent's "later medical care was caused by the original injury" and that the expenses relating to this care were reasonable and necessary.

The record on appeal consists of the testimony of claimant; the deposition of Dr. Donald Soll (October 6, 1972); and claimant's exhibits 1 through 10, number 1 being the August 10, 1979 deposition of Dr. Donald Soll; and the appeal briefs of both parties.

The issue on appeal is whether certain medical expenses incurred by decedent after 1971 and prior to his death should be paid pursuant to section 85.27, Code of Iowa.

Decedent, Leo Sondag, was working for defendant employer on August 20, 1971, when he suffered an injury which arose out of and in the course of his employment. On the date of the injury, decedent began having chest pains but continued to work for approximately one hour. The diagnosis upon hospitalization was myocardial infarction.

In earlier litigation of this same case, the Iowa Supreme Court recognized that "damage caused by continued exertions required by the employment after the onset of a heart attack is compensable." *Sondag v. Ferris Hardware*, 220 N.W.2d 903 906 (Iowa 1974).

Upon remand by the court, this agency determined that decedent's continued job-related exertions materially aggravated his preexisting coronary deficiency and that compensation benefits could be recovered. Claimant was found to be permanently and totally industrially disabled.

Defendants appealed this agency's decision to the district court, which affirmed the commissioner's decision. The district court discussed the testimony of Dr. Bannitt and referred to the Iowa Supreme Court's reference in *Sondag* to Dr. Bannitt's statement that "[t]he continuance of his work would be in my opinion an aggravation of this in such a fashion that it would very probably worsen the amount of damage." The district court concluded that substantial support existed for the commissioner's determination that the aggravation occasioned full industrial disability. No appeal of this decision was made to the Iowa Supreme Court.

Claimant in the present case, decedent's widow, testified that after the 1971 heart attack decedent's health deteriorated, at first gradually and then steadily. According to claimant, decedent was completely disabled subsequent to his heart attack in 1971.

Dr. Donald Soll's testimony corroborates claimant's testimony. In his 1979 deposition, Dr. Soll testified that after decedent's heart attack in 1971, decedent's health gradually "went down hill" and that engaged, if at all, in only minimal physical activities. (Soll deposition, page 4.) Dr. Soll also stated that medication was prescribed for decedent continuously after the 1971 heart attack. (Soll deposition, pages 4-5.) Decedent's health eventually declined to the point where installation of a pacemaker was necessary. Numerous problems developed with respect to the pacemaker which necessitated additional medical attention. (Soll deposition, pages 6-9.)

According to Dr. Soll, virtually all of decedent's medical expenses incurred after 1971 were related to his heart. (Soll deposition, page 9.) Dr. Soll testified that the 1971 heart attack was "the thing that set him off going down hill." (Soll deposition, page 12.)

Section 85.27, Code of Iowa, provides for the payment of medical expenses incurred as a result of injury. The Code, at the time the injury occurred, provided:

> The employer, with notice or 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, nursing and hospital services and supplies, and no statutory period of limitation shall be applicable thereto.

Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for

determination, and the commissioner may, in connection therewith, utilize the procedures provided in sections 86.38 and 86.39.

The aggregate medical expenses exceed $7,500. Therefore, a finding of whether these expenses are reasonable and necessary is crucial.

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).

Defendants appear to argue that the evidence presented in this case merely relates claimant's current claim to the noncompensable incident, i.e., the heart attack, rather than to the compensable injury, i.e., the continued exertion by decedent which aggravated his heart attack. Defendants, however, have offered no evidence to rebut that submitted by claimant which relates decedent's later disability and consequent medical expenses to the compensable injury suffered by decedent in 1971.

Furthermore, the district court recognized that "the amount of disability occasioned by the compensable aggravation, in distinction to the claimant's pre-existing condition, cannot precisely be determined." The court concluded that the agency's finding that the aggravation occasioned full industrial disability was supported both by the record and by established tort law. Causal connection between decedent's heart injury and his job, therefore has been previously established and cannot be re-litigated.

Both decedent's widow and Dr. Soll testified with regard to decedent's general decline in health after the 1971 heart attack and his complete disability. Virtually all of decedent's health problems and medical expenses prior to his death in 1977 relate back to his 1971 heart attack and the aggravation to the heart injury by continued exertion. It is impossible to separate the heart attack itself from the damage done to the heart from the aggravating exertion. As a result, defendants' contention that no causation exists, is without merit. Claimant has sustained her burden of proof with regard to the causal relationship between her late husband's disability which required further medical attention and his 1971 heart injury.

Defendant's contentions that the deputy's proposed decision filed September 25, 1981 violates Iowa constitutional and statutory provisions as well as agency rules and is in excess of the agency's statutory authority, likewise, are without merit. The determination of whether decedent's injury arose out of and in the course of employment had been made in previous litigation of this same case and cannot be redetermined. *Sondag v. Ferris Hardware, supra.* Claimant was only required to prove that decedent's disability for which she was seeking additional compensation was proximately caused by his 1971 heart injury. This claimant did.

Findings of Fact

1. Decedent, Leo Sondag, was employed by defendant employer on August 20, 1971, when he sustained an injury arising out of and in the course of his employment when he continued to work after the onset of a heart attack.

2. As a result of decedent's 1971 heart injury, he was found to be permanently and totally disabled.

3. Decedent continued to suffer heart problems prior to his death on August 21, 1977. The cause of death was myocardial infarction and severe chest pain.

4. The unrebutted medical evidence indicates that the final heart attack was causally related to the 1971 heart injury.

5. The parties stipulated that the medical bills and services are fair and reasonable. They include:

Cardiac Thoracic and Peripheral Vascular Surgery, P.C.	$1,980.00
St. Joseph Hospital (May 1977)	6,618.55
Cardiac Center of Creighton University	873.50
Crawford County Memorial Hospital	1,349.70
Denison Medical Clinic, P.C.	445.50
Missouri Retired Persons Pharmacy Inc.	19.30
Johnson Drug, Inc.	129.05
Walters Pharmacy Inc.	4.05

Additionally, claimant claims 14 trips to Omaha for 2,240 miles at $.18 (the rate then in effect) for a total of $403.20.

Conclusions of Law

1. That decedent's disability for which claimant seeks compensation was proximately caused by the 1971 heart injury.

2. The expenses incurred by decedent for treatment of his disability were both necessary and reasonable, allowing claimant to be reimbursed for those amounts in excess of $7,500.

THEREFORE, it is ordered that defendants pay unto claimant the following medical expenses:

Cardiac Thoracic and Peripheral Vascular Surgery, P.C.	$1,980.00
St. Joseph Hospital (May 1977)	6,618.55
Cardiac Center of Creighton University	873.50
Crawford County Memorial Hospital	1,349.70
Denison Medical Clinic, P.C.	445.50
Missouri Retired Persons Pharmacy Inc.	19.30
Johnson Drug, Inc.	129.05
Walters Pharmacy Inc.	4.05
Mileage — 14 trips to Omaha for 2,240 miles at $.18 (the rate then in effect)	403.20

Interest shall accrue pursuant to section 85.30, Code of Iowa.

A final report shall be filed upon payment of this award. Costs of the proceeding are taxed against defendants.

* * *

Signed and filed this 13th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

ROBERT STANEK,

Claimant,

vs.

IOWA PUBLIC SERVICE COMPANY,

Employer,
Self-Insured,
Defendant.

Appeal Decision

Claimant appeals from a proposed review-reopening decision filed August 27, 1981 wherein claimant was denied additional compensation benefits for failure to establish disability.

The record on appeal consits of the transcript of the hearing which contains the testimony of claimant and Tom Grunig; claimant's exhibits 1 through 3; defendant's exhibits A through C; an April 24, 1981 report of Ronald K. Miller, M.D.; and the briefs of the parties on appeal.

Claimant, a mechanic, sustained an injury arising out of and in the course of his employment on August 31, 1978 when he felt back pain in the lower back while lifting a wrench. The parties herein subsequently entered into a memorandum of agreement. On June 17, 1980, claimant filed a petition in review-reopening seeking additional benefits alleging an aggravation of the original injury. In a decision filed November 25, 1980, claimant was denied compensation benefits for failure to establish the existence of permanent disability. On December 11, 1980, claimant petitioned for a rehearing purporting the existence of new evidence. In an order filed December 30, 1980, the hearing deputy overruled claimant's rehearing application finding that the evidence sought to be admitted, a December 10, 1980 report of Horst G. Blume, M.D., addressed the findings of a clinical examination which took place after the date of the hearing. Claimant filed no appeals and the decision of November 25, 1980 became final. On January 29, 1981, claimant brought a second petition in review-reopening again alleging aggravation of the August 31, 1978 injury. Defendant filed a motion for dismissal asserting that the petition of January 29, 1981 failed to allege a change in claimant's condition since the prior hearing. In an order filed February 27, 1981 defendant's motion was overruled and claimant was given the opportunity to present new evidence. In the proposed decision filed August 27, 1981, the deputy found that claimant's reliance upon the December 10, 1980 report of Dr. Blume was insufficient to prove permanent disability.

Claimant's brief of November 30, 1981 now purports three issues on appeal. Simply stated, the issue is whether the claimant has met his burden in proving additional disability since the last hearing.

The facts, briefly, are as follows:

Claimant, as noted before, injured his lower back on August 31, 1978. The following day, claimant was sent to defendant's company physician, Rex Morgan. M.D., who started claimant on a program of physical therapy. Dr. Morgan referred claimant to John J. Dougherty, M.D., who diagnosed a lower back strain. Dr. Dougherty noted that claimant had injured his back two years prior when he fell some fifteen to twenty feet onto the side of a truck. Neither Dr. Morgan nor Dr. Dougherty indicated that claimant was permanently disabled.

Claimant returned to work on November 1, 1978 at a parts job which he still holds. His wages were not reduced.

On December 20, 1978, claimant went on his own to consult Mark A. Kruse, D.C. Dr. Kruse treated claimant with physical manipulation and assessed permanent impairment at 20 percent of the body as a whole. Claimant was also seen by Alan Pecaek, M.D., and Vernon Tieszen, D.C., in early 1980. Apparently, neither made an assessment of disability.

On August 22, 1980 claimant was seen by Dr. Blume, a neurosurgeon. Dr. Blume treated claimant through the hearing date. In a report dated December 10, 1980 Dr. Blume stated: "After seeing the patient again and re-examining him on December 5, 1980, I came to the conclusion that the patient's physical disability is 5% and the industrial disability is 15%."

Claimant was seen by Ronald K. Miller, M.D., on April 1, 1981. In his report of April 24, 1981 Dr. Miller stated:

> This gentleman was examined on 4-1-81 and past medical records were reviewed. On examining this gentleman we certainly did not find any significant neuro-vascular or neurological impairment and based on our physical findings certainly could not find any significant permanent disability. This gentleman radiographically, on AP, lateral and oblique films, does have some early cervical spondylosis at C4-5 and 5-6 and on the lumbar spine shows miminal degenerative changes noted throughout the lumbar spine. These appear to be quite minimal.
>
> This gentleman, in our opinion, probably has no significant permanent impairment and I do not typically rate industrial disability since I think this is a legal interpretation rather than a medical interpretation.

Claimant has remained under the care of Dr. Blume since the prior hearing. Claimant states that since the last hearing his condition has gotten worse and bothers him more after working. Claimant testified at hearing that his pain is always present and that he only gets relief when lying down.

Claimant revealed that he is working in the parts department at this time and is required to lift up to 50 or 60 pounds but is able to get help lifting the heavier items.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 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).

In a review-reopening proceeding, the claimant has the burden of showing a change in condition (or a condition which, although existing at the time of a previous award or settlement, was unknown and could not have been discovered by the exercise of reasonable diligence at such prior time) and that such change in condition resulted proximately from the original accident. *Henderson v. Iles*, 250 Iowa 787, 96 N.W.2d 321, 324 (1959), *modified* by *Gosek v. Garmer and Stiles Co.*, 158 N.W.2d 731 (Iowa 1968).

Claimant's brief repeatedly asserts that his condition has deteriorated since his previous hearing. However, the medical evidence offered by claimant does not bare this out.

The report of Dr. Kruse is dated September 23, 1980 and thus predates the previous hearing of October 2, 1980. The report of Dr. Kruse therefore does not present any change in claimant's condition after October 2, 1980.

The report of Dr. Blume dated December 10, 1980 simply opines that claimant has a five percent permanent impairment as a body as a whole. Nowhere does the report state that claimant's condition has deteriorated or that this is a revised rating.

Claimant contends that it is obvious his condition has deteriorated in that the report of Dr. Blume was not available until December 10, 1980. While Dr. Blume's short statement of December 10, 1980 states that the last examination for purposes of the report was made on December 5, 1980, the letter does not specify that claimant's disability has changed or was undeterminable before then. Nor does this critical exhibit even causally relate claimant's disability to the injury of August 31, 1978. Moreover, omitting to obtain medical evidence does not establish that it was unavailable at time of hearing.

The report of Dr. Miller does nothing to contribute to claimant's assertions. Again, vagueness as to any disability rating or causation between the injury and the resulting disability gives no basis upon which to make a finding of permanent industrial disability.

While the preparation of this case by both parties was less than exhaustive, claimant's evidence fails to preponderate. See *McDowell v. Town of Clarksville*, 241 N.W.2d 904 (Iowa 1976).

Merely establishing that the claimant was injured does not meet the claimant's burden of proof that he is entitled to increased benefits in an action for review-reopening.

Findings of Fact

1. That claimant sustained an injury arising out of and in the course of his employment on August 31, 1978.

2. That on October 2, 1980, claimant had a hearing resulting in a decision which found claimant had failed to prove any permanent disability.

3. That claimant's physical condition has not changed since the date of his previous hearing. (Claimant's exhibit 2, Miller report of April 24, 1981.)

WHEREFORE, it is found that claimant has failed in his burden of proof that he has sustained permanent parital disability.

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

Costs of this proceeding are taxed to claimant.

* * *

Signed and filed this 18th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

IETA L. STUFFLEBEAM,

Claimant,

vs.

HUDSON TRUCKING, INC. d/b/a LITTLE AUDREY'S TRANSPORTATION CO.,

Employer,

and

CARRIER'S INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Commutation Decision

This matter came on for hearing at the Juvenile Court Facility in Cedar Rapids, Iowa on October 7, 1981 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 May 6, 1981. A Memorandum of Agreement was filed on June 22, 1981 along with a final report showing that claimant had been paid 50 3/7 weeks of healing period at the rate of $205.23. The record consists of the testimony of the claimant and claimant's exhibits 1 through 8 inclusive. The issue for

resolution is whether the commutation sought by claimant should be granted.

Findings of Fact

1. Claimant was employed by defendant-employer on May 3, 1980 when she sustained an injury arising out of and in the course of her employment.

2. As a result of the injury, claimant received 50 3/7 weeks of healing period compensation and claimant asserts that her total entitlement of 60 weeks of permanent partial disability compensation is supported by the finding by the treating physician that claimant has sustained a 15 percent permanent partial impairment to each leg. This equates to a 12 percent loss to the body as a whole (see AMA guides).

3. Claimant plans to use any proceedings from a full commutation to pay certain bills which approximate $8,000 in addition to assisting in the maintenance of the family's standard of living. Claimant was a truck driver before her injury and will probably never return to this work and it appears that her husband, who also was a truck driver, quit his job because he wished to be home to help claimant. He has had to accept a lower paying position which also required the purchase of certain tools. Both claimant and her husband need glasses and one child needs to have a hearing loss corrected by medical treatment.

4. There was no evidence to indicate whether claimant would need further medical care. It is also apparent that claimant's family income of nearly $1,600 a month includes claimant's compensation (which amounts to roughly $820 a month). The family's expenses are about $1,300 a month and debts approximately $8,000. It does not appear that claimant would be able to make ends meet without the continuance of weekly compensation. After claimant's entitlement to weekly compensation ceases, it is unknown how claimant would make ends meet. Even if a commutation were granted, claimant would apparently be unable to meet monthly family expenses. The finding, therefore, must be that it would not be in claimant's best interest to grant a commutation.

Conclusions of Law

1. This agency has jurisdiction of the subject matter and parties hereto. Sections 85.3 and 85.20, Code of Iowa.

2. Section 85.45, Code of Iowa, governs the granting of commutations. This section states that either the best interest of claimant *or* the hardship upon the employer shall be the criterion considered. The case of *Diamond v. Parson's Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964) contains the applicable interpretation of the commutation statute. It stated that the statute required the consideration of the best interest of the claimant. It is granted that claimant would perhaps be better off if the commutation were granted because certain debts would be excused. This however is outweighed by the undersigned's concern for the family if a commutation is granted. The finding having already been made that it would not be in claimant's best interest to grant said commutation, claimant's application therefore must be and is denied.

IT IS THEREFORE ORDERED that claimant's application for commutation be denied.

Costs of this action are taxed against defendants.

* * *

Signed and filed this 9th day of November, 1981.

JOSEPH M. BAUER
Deputy Industrial Commissioner

No Appeal.

CHERYLL SWALWELL,

Claimant,

vs.

WILLIAM KNUDSON AND SON, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed a proposed arbitration decision in which it was determined that there was a causal relationship between Everett Swalwell's death and his employment with defendant employer.

The record on appeal consists of the testimony of the claimant, Marvin Hiddleson, Ken Chenoweth, Howard Hansen, Harvey Gust, Mark Keese and William Bellmer; claimant's exhibits 1 through 7; defendants' exhibit A; depositions of Michael J. Taylor, M.D., and Donald D. Brown, M.D.; and appeal briefs of both parties.

The issue on appeal as stated by defendants is "whether claimant sustained his [sic] burden of proof by a preponderance of the evidence that a causal relationship exists between the death of Everett Swalwell on April 10, 1979 and his employment by William Knudson & Son, Inc."

On the date of his death Everett Swalwell, age forty-six, was employed in a supervisory capacity by defendant employer, a position he had held since 1975. Prior to 1975, decedent owned his own construction business and after this partnership dissolved he worked as a carpenter for two years.

At the time of his death, decedent was supervising the nearly completed construction of a Seifert's store in Fort Dodge. Decedent's duties as a supervisor were described by Howard Hansen, the now retired general superintendent for

defendant employer as follows: "[H]e was responsible for the job. The idea was to make a profit for the company he worked for, keep the customers happy and was responsible for the men producing and safety." (Transcript, page 55.) According to Hansen, decedent was a conscientious supervisor and was loyal to the company, characteristics of decedent which were identified by other witnesses. (Transcript, page 76.) Claimant testified that decedent was nearly obsessed with doing a good job for his employer and that his allegiance was "extremely strong." (Transcript, pages 28-29.) According to claimant, decedent was competitive and a perfectionist. (Transcript, page 15.)

Ken Chenoweth, a carpenter with defendant employer, stated that decedent was both easy and difficult to work for, depending on whether the job was progressing satisfactorily or not. Chenoweth stated that if a job was not going well, decedent was "kind of nervous to hurry up and get it done" and would push to get the job completed. (Transcript, page 37.)

Harvey Gust, vice-president with defendant employer, testified that project completion dates for Seifert's built by defendant employer were mutually agreed upon in a meeting among himself, decedent and a Seifert's representative. (Transcript, page 86.) Mr. Gust stated that if Seifert's suggested an acceptable date of completion, defendant employer would accept that date and strive to complete construction on schedule. (Transcript, page 71.)

The testimony of several witnesses indicates that the scheduled completion date for the grand opening of the Fort Dodge Seifert's was just before Easter in 1979. (Transcript, pages 39, 72.) It was claimant's impression, based upon conversations with her husband, that Seifert's grand opening was to be the week of April 10th (shortly before Easter), and that decedent was "very concerned that things were not going to be completed when he wanted them done." (Transcript, page 19.)

According to Ken Chenoweth's testimony, decedent was in a hurry to complete construction and continued working after everyone else had stopped on the night before his death. (Transcript, page 39.) Decedent was supposed to meet Chenoweth, Mark Keese and Bill Bellmer after work and then go with them to dinner later that night. Decedent did meet them at the bar, but Chenoweth later saw decedent talk to Bill Bellmer, Seifert's property manager, for approximately twenty minutes. After this conversation decedent left the lounge and did not go out to dinner with the rest.

Chenoweth testified that that same night Bellmer told him that decedent would not do another job for him since decedent was allegedly not doing the job the way Bellmer wanted it done. (Transcript, pages 52-53.) Mr. Bellmer recalled having a conversation with decedent that night about the quality of construction, but was unable to remember specifics of the conversation.

On April 4, 1979, the Wednesday morning preceding his death, Everett Swalwell experienced a fainting spell while in the bathroom of his motel room. Mr. Bellmer testified that on the previous day he had expressed his concerns about the way the store was being constructed and about the way decedent was performing his job. The decision concerning quality of construction occurred throughout the day. (Transcript, pages 106-109.)

After fainting on April 4, 1979, decedent returned to work, but later sought treatment at Trinity Regional Hospital. The emergency room diagnosis was "syncope-unknown etilogy."

An examination of decedent was performed by Lon Matthews, D.O., on April 6, 1979. A history of six to eight weeks of "dull aching discomfort in the chest and left upper arm" was recorded by him. Dr. Matthews' diagnosis was "chest pain and syncope of unknown etiology. Suspect may have a vagal response." Decedent was referred by Dr. Matthews to Northwest Hospital for pulmonary function, EKG, and treadmill tests. (Claimant's exhibit 6.)

Thomas M. Brown, Jr., M.D., reported his findings as follows: "Exercise stress test is negative for ischemic EKG changes. There is very good exercise tolerance."

Decedent was found on the job site at the beginning of the work day by fellow employees on April 10, 1979.

The findings of the autopsy were, in part, as follows (claimant's exhibit 5):

I. ACUTE CORONARY ARTERY INSUFFICIENCY
   A. Marked generalized coronary atherosclerosis
   B. Mild, patchy myocardial fibrosis.

II. CONGESTION AND EDEMA, LUNGS

III. CONGESTION, LIVER AND SPLEEN

FINAL SUMMARY: In the opinion of the undersigned pathologist, Everett Swalwell died from a fatal arrhythmia secondary to acute coronary artery insufficiency. The lack of an acute coronary thrombosis at autopsy does not exclude a cardiac death, as approximately two-thirds of sudden cardiac death cases will have only coronary atherosclerosis without acute thrombosis at autopsy.

John C. Garfield, Ph.D. stated in a report dated June 6, 1980 that "[g]iven the presence of heart disease, there is strong evidence that emotional stress can precipitate fatal arrhythmias." According to Dr. Garfield, decedent's "job related stress served as a 'trigger' or precipitating factor in the arrhythmia which was the immediate cause of death."

Thomas M. Brown, Jr., M.D., the physician who conducted decedent's stress test, also was of the opinion that decedent was "under a high degree of job related stress in the period immediately prior to his death" and that the stress was a contributory factor to this death.

Paul From, M.D., in a report dated August 18, 1980, concluded that decedent's job related stress aggravated decedent's preexisting heart disease, and that a direct causal connection existed between the death of Everett Swalwell and his job.

Donald D. Brown, M.D., a cardiologist, based upon the record, concluded that decedent was not placed under any unusual stress and that decedent's job had nothing to do with his death. It was also Dr. Brown's opinion that a "given stress at a given point of time may or may not have anything to do with a fatal ventricular arrhythmia."

Michael J. Taylor, M.D., a psychiatrist, stated that he found no evidence of stress in the record and concluded that no causal relationship existed between decedent's employment and his death. Although Dr. Taylor concluded that decedent was not under stress, on cross-examination he agreed that based upon the description of decedent's job, it could have caused stress. (Transcript, page 22.)

In discussing decedent's fainting episode one week prior to his death, Dr. Taylor stated that if the episode had occurred on the job site it "would make the contention that his death was somehow related to job stress remotely plausible rather than preposterous." (Transcript, page 25.) Dr. Taylor then went on to state, following a hypothetical concerning decedent's knowledge of Mr. Bellmer's comments to Mr. Chenoweth, that based upon the hypothetical's facts, it is "remotely" possible that decedent's heart failure was related to his job.

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 insufficient, 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 (Iowa 1974).

Causal relationship is in the realm of expert testimony and is a question "with respect to which only a medical expert can express an intelligent opinion." *Bradshaw v. Iowa Methodist Hospital,* 251 Iowa 375, 101 N.W.2d 167 (1960). 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. *Bodish v. Fischer, supra.* Further, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. *Sondag v. Ferris Hardware, supra.* at 907.

In Iowa, a claimant with a preexisting heart condition may recover under at least two concepts of causation: (1) work ordinarily requiring heavy exertions which, "superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in a compensable injury;" (2) "compensation is allowed when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a pre-existing disease condition" resulting in a heart injury. *Sondag v. Ferris Hardware, supra.*

Based upon the information they received, Dr. From and Dr. Thomas Brown concluded that decedent was under stress to complete the construction of the store, and that his death was causally related to the job induced stress. Although Drs. From and Thomas Brown rendered their opinions on causal relationship before the hearing was held, and as a result, did not have the entire record at their disposal, the record supports their conclusion that decedent was under stress which stemmed from job pressures.

The general concensus was that the store was scheduled to open prior to Easter in 1979. Decedent's death occurred during the week before Easter, at a time the store was nearly completed. The record amply demonstrates that decedent was an extremely conscientious and loyal worker who was almost obsessed with doing a good job. Decedent indicated to his wife that he was concerned about meeting the pre-Easter deadline. Decedent's fellow employee testified that decedent was so concerned about completing construction on schedule that he stayed after quitting time the night before his death to do some further work.

When these facts are considered in addition to the fact that William Bellmer had been displeased with the way in which the construction was progressing, the record substantially supports claimant's contention that her husband was feeling pressured. William Bellmer testified that he discussed the quality of construction with decedent both the night before his death and the day before decedent's fainting spell in his motel room. As a result, decedent had not only the completion deadline to contend with, but also the dissatisfaction of a Seifert's representative with the quality of the job that was being done.

Decedent was described by both defendants' and claimant's physicians as a type A personality. Such a person is considered highly competitive, driven to success, impatient, restless and hyperalert. A type A personality also tends to establish deadlines which are then rigidly adhered to.

Although the general conclusion was that decedent was a type A personality, defendants' have a different opinion as to the cause of his death than claimant's experts. Neither Dr. Taylor nor Dr. Donald Brown found decedent to be under job related stress. They attributed his death to factors other than stress. However, the record supports the contention that decedent did experience a great deal of stress which arose from his job.

The record demonstrates that decedent was under an unusual amount of stress with respect to the completion of construction and the dissatisfaction of William Bellmer regarding the quality of construction. This stress, imposed upon decedent's preexisting heart condition, resulted in a heart injury.

Claimant introduced the opinion of John C. Garfield, Ph.D., as further evidence of compensability. Dr. Garfield's opinion with regard to the phychological connection between stress and heart disease was enlightening. However, although Dr. Garfield is highly qualified to diagnose and treat certain problems of the mind, his expertise does not necessarily extend to clinical pathology in the case of death. Although the opinion of Dr. Garfield has been considered, the opinions of Drs. From and Thomas Brown are given more weight.

Findings of Fact

1. The decedent, Everett Swalwell, age 46, died on April 10, 1979.

2. The decedent has a type A personality.

3. The decedent suffered a syncopal episode on April 4, 1979.

4. The subsequent physical examination indicated good exercise tolerance.

5. The decedent was found to have been suffering from marked generalized coronary atherosclerosis.

6. The decedent was under considerable pressure to complete the construction of the Seifert's store.

7. The Seifert's representative was dissatisfied with the quality of construction and communicated this dissatisfaction to decedent.

8. The claimant remarried on February 14, 1981.

Conclusions of Law

1. Claimant has sustained her burden of proof by a preponderance of the evidence that a causal relationship exists between the death of Everett Swalwell on April 10, 1979 and his employment.

THEREFORE, it is ordered that the defendants pay weekly compensation in the sum of two hundred sixty-four and 23/100 dollars ($264.23) from the date of death until the provisions of section 85.31, Code of Iowa, are met.

Interest on the foregoing shall be contemplated in accordance with section 85.30, Code of Iowa, and accrued benefits are payable in a lump sum.

Defendants are further ordered to pay the sum of one thousand dollars ($1,000) to the Second Injury Fund in accordance with the provisions of section 85.65, Code of Iowa.

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

* * *

Signed and filed this 8th day of January, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District;
Remanded for Settlement.

ROSEMARY PATRICIA THOME,

Claimant,

vs.

GIBSON ENTERPRISES, INC.,

Employer,

and

MILWAUKEE 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 review-reopening decision.

The record on appeal was stipulated by the parties and contained a narrative stipulation and attached reports.

The result reached by the hearing deputy is changed by this final agency decision. The findings of fact and conclusions of law are those of the undersigned deputy industrial commissioner. The issues are stated in defendants' brief:

> 1. Did the Deputy Commissioner err in assuming that Claimant's hand had been immobilized prior to her surgery despite the fact there is no firm evidence of this in the record, and in fact contrary evidence exists?
>
> 2. Did the Deputy Commissioner err in failing to grant the Employer and Insurance Carrier their Application of Hearing to present evidence that there was no substantial immobilization of Claimant's wrist prior to her surgery?
>
> 3. Did the Deputy Commission [sic] err in finding that a possibility the work incident could have resulted in the claimed injury was sufficient in this case, in that Claimant was not afflicted with such condition prior to the accident, despite the fact that Claimant was afflicted with arthritic problems in her hands both prior to and subsequent to the accident, which her doctor indicated could be a cause of her trigger fingers?

The stipulation of facts reads as follows:

> 1. That claimant was injured on the 3rd day of November, 1977 in the course of her employment with Gibson Enterprises, Inc. She received compensation payments from November 3, 1977 to March 7, 1978.
>
> 2. That claimant was released by Dr. Smith to return to work, on March 7, 1978. Dr. Smith later reversed this decision and referred her to Dr. Delbridge, an orthopedic specialist, for problems with her right hand and fingers. Dr. Smith stated he was unable to say if this was a job related problem.
>
> 3. Claimant consulted Dr. Delbridge on April 7, 1978. Dr. Delbridge found that she could not close the long finger of her right hand because of the tight tendon sheath. He stated that this problem could be related to her accident of November 3, 1977, because any time an extremity is immobilized or carried in a dependent position, the tendency for this type of thing to occur is enhanced. Dr. Delbridge felt that the injury was related to the work injury. Dr. Delbridge operated on the hand, released the tendon sheath and subsequently she regained almost full motion. He released her to return to work on May 31, 1978.
>
> 4. Dr. James E. Crouse, also an orthopedic specialist, has reviewed written information submitted to him. This doctor states that the tenosynovitis which claimant developed and which required the surgery could possibly have resulted from the injury to the wrist and the subsequent cast immobilization, but states that this is only a possibility and that he does not think it a

probability that it was the likely cause of the finger program. Dr. Crouse has never examined claimant.

5. Issue: Was the tenosynovitis, or trigger finger, surgery and resulting recovery period to May 31, 1978, work related, justifying payment of workmen's compensation for that period plus payment of those reasonable medical bills?

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 claimant has the burden of proving by a preponderance of the evidence that the injury of November 3, 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).

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

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

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 (1963). 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.

Expert testimony of a possible causal relationship coupled with other testimony that claimant was not afflicted with any such condition prior to the injury is sufficient to support an award. See *McClenahan v. Des Moines Transit Co.*, 257 Iowa 293, 300, 132, N.W.2d 471 (1965); *Bodish v. Fischer*, 257 Iowa 516, 133 N.W.2d 867 (1965); *Chenowith v. Flynn*, 251 Iowa 11, 17, 99 N.W.2d 310, 314 (1959); *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 383, 101 N.W.2d 167, 171; and *Rose v. John Deere*, 247 Iowa 900, 910, 76 N.W.2d 756, 761 (1956).

Here one sees that the physician's opinion states only a possible causal link between the injury and the tenosynovitis. The reports amplify that analaysis beyond what is stated in the narrative stipulation. With that fact and a lack of evidence that claimant did not have such a condition prior to the injury, one must conclude as a matter of law that claimant's case fails.

Findings of Fact

1. Claimant was injured at work on November 3, 1977 when some lumber fell on her; the nature of her injury was an acute lumbosacral strain and a sprained right hand. (Report, Janssen, January 11, 1978)

2. Claimant was at first treated by Joel D. Janssen, D.C. (Reports dated January 11, 1978 and February 21, 1978)

3. Eugene Smith, M.D., treated claimant for a dupuytren's contraction of the right hand and referred the claimant to an orthopedic surgeon. (Report, April 3, 1979)

4. Claimant was treated by James E. Crouse, M.D., an orthopedic surgeon for tenosynovitis. (Report, April 7, 1978)

5. The expert opinion of Dr. Crouse established that there was a possible causal relationship between the injury and the tenosynovitis. (Reports, April 24, 1978 and March 12, 1980)

6. There is no evidence of record that claimant had not had any such condition prior to the injury.

Conclusions of Law

There is insufficient evidence upon which to base an award that claimant's disability from work and medical and hospital bills were caused by the compensation injury.

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

Costs of this action are accessed against defendants.

Defendants are ordered to file a final report of payments.

* * *

Signed and filed at Des Moines, Iowa this 28th day of July, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

ELMER E. THOMPSON,

Claimant,

vs.

MASON CITY COMMUNITY SCHOOL DISTRICT,

Employer,

and

IOWA NATIONAL MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Elmer E. Thompson, the claimant, against his employer, Mason City Community School District, and the insurance carrier, Iowa National Mutual Insurance, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on September 18, 1978. This matter came on for hearing before the undersigned at the Cerro Gordo County Courthouse in Mason City, Iowa on May 20, 1981. The record will be considered fully submitted as of that date since defendants decided against taking post-hearing depositions of Jane Miiler-Hair and Todd F. Hines, M.D. and so notified the undersigned on June 18, 1981.

On October 9, 1978 defendants filed a first report of injury concerning the September 18, 1978 injury. On April 18, 1979 defendants filed a memorandum of agreement indicating that the weekly rate for compensation benefits was $136.42. At the time of the hearing, the defendants indicated that they had paid the claimant 96 3/7 weeks of healing period benefits through July 25, 1980 and were completing payment of 50 weeks of permanent partial disability benefits based on 10 percent disability to the body as a whole.

The record consists of the testimony of the claimant and of the claimant's wife, the testimony of defense witnesses, Westley Fiala and Rufus Ginder; claimant's exhibit 1, Park Clinic notes for pre-accident period (May 12, 1973 to May 19, 1977); claimant's exhibit 2, North Iowa Medical Center records for September 20, 1978 (Brinkman) hospital admission; claimant's exhibit 3, North Iowa Medical Center records, September 20, 1978 (Janda) consultation; claimant's exhibit 4, radiographic report dated September 19, 1978 (Wilmarth); claimant's exhibit 5, North Iowa Medical Center records, October 2, 1978 (Brinkman) summary of hospitalization; claimant's exhibit 6, North Iowa Medical Center records, October 9, 1978 (Janda) discharge summary for hospitalization of September 20, 1978; claimant's exhibit 7, North Iowa Medical Center records, October 16, 1978 (Janda) history and physical; claimant's exhibit 8, North Iowa Medical Center records, October 17, 1978 (Hayreh) report of consultation; claimant's exhibit 9, radiographic reports dated October 19, 1978, October 20, 1978, and October 25, 1978: claimant's exhibit 10, North Iowa Medical Center records, (Janda) discharge summary for hospitalization of October 16, 1978; claimant's exhibit 11, Dr. Janda's patient progress notes from October 12, 1978 to March 6, 1979; claimant's exhibit 12, patient progress notes for December 19, 1978 (Brinkman), March 30, 1979, April 16, 1979 and May 18, 1979 (Janda); claimant's exhibit 13, North Iowa Medical Center radiographic report dated December 19, 1978; claimant's exhibit 14, St. Joseph Mercy Hospital records history and physical (Janda) dictated March 30, 1979; claimant's exhibit 15, St. Joseph Mercy Hospital records history and physical (Janda) dictated March 31, 1979; claimant's exhibit 16, Dr. Janda's report dated March 27, 1979; claimant's exhibit 17, St. Joseph Mercy Hospital records history and physical (Chanco) dictated April 18, 1979 with flow velocity and impedence examination; claimant's exhibit 18, Dr. Janda's report dated April 24, 1979; claimant's exhibit 19, Dr. Henderson's report (Mayo Clinic) dated August 23, 1979; claimant's exhibit 20, Dr. Janda's report dated August 20, 1979; claimant' exhibit 21, Dr. Janda's report dated October 18, 1979 with attached patient progress notes for October 12, 1979; claimant's exhibit 22, Dr. Wolbrink's report of July 18, 1980 with patient progress notes for March 5, 1980 to June 16, 1980; claimant's exhibit 23, Dr. Walker's report of July 28, 1980; claimant's exhibit 24, unreimbursed medical expenses; claimant's exhibit 25, two report expenses; claimant's exhibit 26, Dr. Wolbrink's report of September 8, 1980 with patient progress notes; defendant's exhibit A. Mercy Hospital Medical Occupational Evaluation Center report dated March 24, 1980; defendants' exhibit B, vocational evaluation report of Jane Miiler-Hair dated May 12, 1981; defendants' exhibit C, A.M.A. Guides page 103; and defendants' exhibit D, statement of claimant dated October 24, 1978. Defendants' objections to claimant's exhibit 23 were overruled at the time of the hearing. Defendants' objections to claimant's exhibits 24 and 25 are overruled for reasons set forth below.

Issues

The issues to be determined are whether there is a causal relationship between the alleged injury and the disability and whether claimant is entitled to benefits for additional healing period and permanent partial disability.

Recitation of the Evidence

On September 18, 1978 while stooping in the process of picking up a 40 to 80 pound box in the course of his employment duties, claimant experienced back and leg pain. Claimant testified that he was unable to stand up and instead reclined in a sitting position resting on his elbow. Claimant estimated that he had moved about 150 boxes earlier that day. Claimant denied any previous back injury although he did recall that his back was stiff and sore for awhile in 1976 when a tree fell on him causing injury to his left arm. (Claimant's exhibit 1.) He sustained a leg injury and suffered from hepatitis while in the service. He broke his little finger many years ago. Claimant also successfully recovered from carcinoma of the bladder in 1966 and of the colon in 1973. (Claimant's exhibit 1.)

With respect to the injury in issue, claimant stayed home from work the day after the injury and went to see J. H. Brinkman, M.D. in the afternoon. Claimant was hospitalized the next day and Wayne E. Janda, M.D. was called in for consultation. (Claimant's exhibits 2 & 3.) Examination at that time revealed:

> EXAMINATION: Lumbar spine, in stance there may be a slight list to the right. He has tenderness in the lower lumbar region over L-5 spinous process and to the left and the sacroiliac and posterior iliac crest region. There is equivocal tenderness left buttock. Lumbar flexion 25 degrees, extension 0 degrees, lateral flexion 10 degrees bilaterally and lateral rotation 10 degrees bilaterally, all with mild to moderate pain. Ankle and knee deep tendon reflexes physiologic and equal. Motor strength lower extremities, there may be slight weakness in the dorsiflexors of the left foot and toes.
>
> Straight leg raising, 60/30 degrees with pain on the left.
>
> X-rays of the lumbosacral spine show degenerative changes with no evidence of spondylolysis or lithesis. (Claimant's exhibit 3.

While hospitalized, claimant was treated with bedrest, medications, physical therapy and pelvic traction. He was fitted with a corset. He was discharged on October 2, 1978 with crutches and prescriptions of parafon forte and tylenol. (Claimant's exhibit 6.) Final diagnosis was acute back strain and exogenous obesity according to Dr. Brinkman. Claimant's exhibit 5.) According to Dr. Janda there was also suspected degenerative lumbar disc with right sciatica and osteoarthritis of the lumbar spine. (Claimant's exhibit 6; in claimant's exhibit 16, Dr. Janda states his impression at the time included left, not right, sciatica. Parenthetically, it should be noted that this is but one of many minor inconsistencies, too numerous to itemize, that appear throughout the record.)

Claimant was hospitalized again on October 16, 1978 with complaints of low back and left leg pain with numbness and lightness in his left calf muscles. He gained no relief from the medications given to him upon his first hospital discharge. Examination of the back at that time revealed:

> Has diffuse tenderness in the perivertebral erector spini muscles and over the insertion sites at the sacroiliac joint and in both sciatic notches. Lumbar flexion 45degrees [sic]; extension 0 degrees, lateral extension 10 degrees, and lateral rotation 15 degrees, all with pain. Ankle and knee deep tendon reflexes physiologic and equal. There is mild to moderate weakness of the left calf muscles including plantar flexion of the foot and dorsal flexion of the foot and toes. There is numbness to touch posterior calf, left leg, down to the ankle. Transverse and gait are guarded. He has a forward list to the right. (Claimant's exhibit 7.)

S. Hayreh, M.D., was called in for neurological consultation. The history he received from the claimant included intermittent episodes of back pain since the knee incident and which had been relieved previously with bedrest and analgesics. He was aware of claimant's 1978 injury and course of treatment. Dr. Hayreh noted that claimant's complaints included numbness in the left leg, weakness in both legs, back pain, neck pain with radiation into the left arm. Neurological examination revealed:

> Normal mental status and speech. Cranial nerves were all intact. Neck movements were free and supple. There was slight pulling sensation on flexion of the neck. Examination of the upper extremities showed normal motor, sensory and cerebellar functions with deep tendon reflexes +2/+2 all over. Hoffman bilaterally negative. On examination of the lower extremities there was no abnormal posturing nor abnormal wasting of the muscles. It was difficult to check the strength of various groups of muscles because of associated pain with all the muscle activities in both lower extremities. There seemed to be some functional overlay with a give-away type of weakness in all groups of muscles. Deep tendon reflexes showed KJ +2/+2, AJ +1/+1, plantar response bilaterally flexor. He had a sensory loss in both lower extremities which was much more marked in the left below the umbilicus with no definite nerve root distribution. He also had some dulling of pinprick over the right buttock. Straight leg raising sign was positive at 60 degrees bilaterally. The Patrick's sign was positive on the left side. He has percussion tenderness of the spine at L-3,4 and the sacrum all over. Some questionable tenderness in the mid-dorsal region.

He concluded:

> Considering the above history and examination and in reviewing the x-ray of 9/19/78 which showed some moderate hypertrophic arthritis the spinous processes were intact. The disc spaces were maintained. The sacroiliac joint showed only minimal arthritis, indicative of moderate degenerative arthritis. I think that Mr. Thompson has musculoskeletal low back pain primarily secondary to degenerative disease in the lumbosacral spine with possible some radiculopathy. But, clinically, there is no clear evidence of one or two particular roots being affected. There seemed to be some functional overlay and maybe some compensation neurosis associated with it.
>
> I will recommend treating him with further bedrest and analgesics and gradually increasing his activity. In addition, Elavil 50-75 mgs. h.s. may be of some help with some encouragement. I would do a bone scan on him considering the history of malignancies in the past. If the above fails to relieve his symptoms, I may consider doing a myelogram. (Claimant's exhibit 8.)

A bone scan was performed on October 19, 1978. It revealed an increased uptake in the left proximal tibia and mild diffuse uptake in the lumbar spine consistent with arthritis. X-ray of the left tibia was performed on October 20, 1978. No

bone or joint abnormality was noted. An October 25, 1978 x-ray of the left ankle revealed only mild soft tissue swelling. (Claimant's exhibits 9 & 10.) Phlebitis was considered as a cause of claimant's left calf and ankle complaints and accordingly claimant was treated with TED hose and rest. The left ankle swelling was treated as a sprain and an ACE wrap was applied.

Claimant's second hospitalization included pelvic traction, bedrest, medications and physiotherapy. Upon discharge on October 30, 1978 claimant's "straight leg raising tests were 45/45 degrees with some pain on the left". He was instructed to avoid bending, stooping, lifting and sitting. (Claimant's exhibit 10.) Claimant pursued physical therapy treatments off and on under the care of Dr. Janda. In December of 1978 claimant was put on a transcutaneous electrical nerve stimulator which seemingly proved more successful than other treatment to date. (Claimant's exhibits 11-13.) In March of 1979 x-rays of the claimant's lumbar spine, pelvis and hips were taken:

> ...Examination of the lumbar spine reveals slight narrowing of the lumbosacral disc space. The pedicles and spinous processes are intact. The disc spaces are adequately maintained. There is slight lipping seen from the L-4 and 5. There are some mild degenerative changes of the lumbar spine. Film of the pelvis with laterals of both hips failed to reveal significant bone abnormality. (Claimant's exhibit 16.)

In a letter dated March 27, 1979 Dr. Janda summarized his observations and opinion to date:

> In reviewing Mr. Thompson's clinical course, it is my impression that he has stabilized. His main impairment is in terms of symptoms of pain and stiffness. Motivation has been a problem in helping the patient assume a more independent and functional capacity. I have been unable to detect any significant neurologic impairment. The recent x-rays and blood tests of March, 1979 probably rule out a systemic illness or recurrence of cancer. In my opinion this patient suffers from psychogenic rheumatism. Perhaps a psychiatric evaluation would be helpful in returning this patient to function and work. (Claimant's exhibit 16.)

However, shortly thereafter claimant was hospitalized again for increased pain, swelling and tenderness in the left leg. Examination of the extremities revealed:

> Left leg is very edematous and is more so than the right leg. Edema extends from the foot all the way up to the groin area. Some pitting edema evident around the ankles. There are some varicosities evident around the ankle bilaterally, the left side being more affected than the right. These varicosities aremostly [sic] in the medial aspect but are also lateral and on the dorsum of the foot approximately to the middle of the foot. They have a very nodular feeling and appearance but were no [sic] indurated. The varicosities extended medially, slightly above the medial malleolus. Did not not [sic] any varicosities of the calves or thighs. had [sic] bilateral calf tenderness. No tenderness in the thigh. He was very tender on the medial ankles below the malleolus. Homan's sign was positive on the left and questionable positive on the right. There is no dark discoloration of the lower extremities or any open lesions or ulcers noted. No pallor, cyanosis, or dependant rubor were evident. The left calf measured 1-2 cm. larger in diameter than the right calf at the midcalf level approximately 15 cm. below the tibial tuberosity. Dorsal pedis pulses were 4+ and equal bilaterally. Posterior tibial pulses were not palpable bilaterally. I can not adequately detect popliteal pulses. Did not have any aparen [sic] arterial insufficiency. LEft [sic] leg was quite edemat [sic] and was very boogy all the way up to the groin area. Cranial nerves intact. Good sensation in the trunk and extremities. Gait was very guarded as previously noted. DTRs were only a trace but were equal bilaterally. Had positive straigth [sic] leg raising tenderness bilaterally approximately 90-95 degrees even with the leg flexed. Seemed to be worse on the left side. No Babinski. (Claimant's exhibit 15.)

Dr. Janda's diagnosis was "[r]ecurrent thrombophlebitis left leg, degenerative lumbar disc and chronic and recurrent with sciatica and back strain syndrome both related to industrial injury in September of 1978". (Claimant's exhibit 14.) Dr. Janda considered the thrombophlebitis of the left leg to be a complication of the September 1978 work injury. (Claimant's exhibit 18 and 21.) He referred the claimant to A. G. Chanco, M.D. for treatment of the thrombophlebitis. Dr. Chanco updated his examination findings and described claimant's course of treatment while hospitalized:

> Impedance plethysmography shows abnormally slow venous flow in the left leg compared to the right. Doppler examination of the right leg shows that all of the major deep veins are patent and responsive to Valsalva and augmentation maneuvers. Doppler examination of the left leg shows markedly diminished augmentation through the superficial femoral vein. Both greater saphenous veins are patent.
>
> Impression: Abnormal non-invasive venous study with probable deep vein thrombosis in the left superficial femoral vein.
>
> . . .
>
> Patient was put on bed rest with the legs elevated above the level of the heart. Hot warm compresses were applied to the left leg to alleviate discomfort. These compresses were used continuously. Patient was started on Heparin on 3-30-79. Heparin was started at 1,000 units every hour. Heparin was later elevated to 1,200 units per hour. Patient was continued on Heparin and was getting good anticoagulant response. He was symptomatically improving and his leg was less tender and the edema swelling of the leg was diminishing gradually. 7 days after admission patient was up walking with the use of thigh high Ted

hose. 8 days after admission patient was started on Coumadin 30 mg. daily. On 4-11 patient was ambulating well and pain in leg was less as well as the swelling. Patient was discharged on 4-11 and will be followed in the office as an outpatient. He will continue use of Ted stockings and will be seen in the office. (Claimant's exhibit 17.)

Claimant continued to see Dr. Chanco until his release from care on August 31, 1979. However claimant remained unable to return to work because of the back condition. (Claimant's exhibit 21.)

In a letter dated August 23, 1979 Edward D. Henderson, M.D., of the Mayo Clinic reports that he saw the claimant in orthopedic consultation on August 2, 1979. His examination of the claimant indicated no restriction of lumbar spine motion, normal hip and knee motion, negative SLR, normal reflexes and muscle strength in the lower extremities, no evidence of muscle spasm, no tenderness and normal x-rays. He concluded that claimant had not completely recovered from a sprain of the lumbar spine. He anticipated recovery and return to work. (Claimant's exhibit 19.)

A. J. Wolbrink, M.D., of the Park Clinic in Mason City first saw the claimant on March 5, 1980 as the request of G. H. West, M.D., another doctor from the internal medicine division of the same clinic. (Dr. Brinkman's name is also listed in that division.) He and Dr. West apparently have continued to treat the claimant to date.

In letters dated July 18, 1980 and September 8, 1980 Dr. Wolbrink indicates that claimant's maximum recuperation occurred in September of 1980. He opined that claimant had a 15 percent functional impairment to the body as a whole as a result of the September 1978 work injury. He thought claimant's previous bout of thrombophlebitis was not related to the work injury; however, he did opine that claimant's pre-existing osteoporosis was aggravated by inactivity since the work injury. He did not think claimant would be able to do the work claimant was performing when injured because of back pain which limits claimant's ability to lift, bend, stoop and stand for extensive periods. (Claimant's exhibits 22 and 26.)

Claimant was evaluated at the Medical Occupational Evaluation Center of Mercy Hospital in the spring of 1981. William Boulden, M.D. reported his examination findings and impression:

> Physical examination revealed the patient to have forward flexion of only 45 degrees. Right lateral bending of 10 degrees, left lateral bending of 10 degrees, extension of 15 degrees. He had no sciatica anotshininus. He had diffused lumbar sacral tenderness throughout the lumbar spine area. There was no specific motor point tenderness as noted. Negative straight leg raising bilaterally, negative laseques test, negative cross leg leseques [sic] test; deep tendon reflexes are equal and symmetrical. There is no motor loss in the lower extremities. No sensory loss in the lower extremities. Lumbar spine film shows no degenerative joint disease without L5-S1 narrowing.
>
> Impression: I feel that this patient has had a chronic lumbo sacral strain with early lumbo sacral junction narrowing consistent with early degenerative disc disease. Patient subsequently has not responded to any type of therapy modalities or medical management in the past and I feel that the patient is quite capable or [sic] returning to his previous occupation. I feel that the patients [sic] main problem is one of regaining mobility in his lumbar spine from the strain and that wearing a back brace is not improving this problem at all. I do not feel that the patient would benefit from any type of physical therapy at this point in time because of the length of the problem going on and his age and lack of motivation. It is my feeling that the patient has at the present time a 10 percent permanent/partial disability of the lumbar spine based on american [sic] guidelines from Americal [sic] Medical Association guidelines for disability evaluation based on loss of motion. In reference to the blood clot on the left leg, I feel that there is no direct relation between the lumbar strain and the blood clot in the left lower leg. Therefore, in conclusion, I feel that the patient has a chronic myofacial irritation, lumbo sacral in nature, with restriction of motion of lumbar spine with no neurologic component with permanent/partial disability of 10 percent of the lumbar spine.

Thomas Bower, LPT, also examined the claimant and made certain recommendations:

> Physical examination shows range of motion forward flexion to 45 degrees, extension to 15 degrees. Rotation is full in both directions and lateral flexion 10 degrees bilaterally. All the above motions in resistance are painful and show the same amount of range of motion. Straight leg raises in a standing position; the patient is able to forward flex as previously mentioned, to 45 degrees with some pain into his calf on the left side. In a sitting position, the patient is able to perform straight leg raises to 95 degrees bilaterally with some pain in both hips and calfs. In the lying position the patient is able to perform straight leg raises to 90 degrees bilaterally without any significant radicular pain. In regards to muscle tightness, the hamstrings show no tightness, his flexors no tightness. The Quads and lumbar extensors show no significant tightness in a long sitting position, however, the limited range of motion would be primarily limited to the lumbar extensor. Reflexes of the lower extremities are normal and equal on both sides. Patient complains of no numbness and does complain of very slight parasthesia in the left foot and leg. Muscle strength shows the quads to be 4+/4+, hamstrings 4+/4-, hip flexors 4+/4+, hip extensors 4+/4+, dorsa flexors 4+/4-, extensor hallicus 4/4, plantar flexors 4+/4+. The patient is able to perform heel-toe walking without significant difficulty. In repetitive activities, the patient is able to perform ten repetitions of both squatting and stooping with some discomfort, however, is able to perform the entire maneuver. The

patients [sic] general posture is upright and shows no significant deviation or list to either side. General area of complaint of pain is over the left and right paraspinus [sic] muscles, more significantly over the L5-S1 junction. Leg length measures 93 centimeters bilaterally. Patient states as far as vocation, that he only has an 8th grade education, and that he has only been trained for the more heavier types of labor.

The range of motions that were taken for a disability rating, which show that there is a 45 degree limitation of forward flexion, there is a 15 degree limitation of extension, a 10 degree to both sides for lateral flexion. This would combine to be a total disability as set up by the AMA guidelines for motion measurements of 10 percent impairment of the body as a whole.

Recommendations: I feel that this patient is utilizing the high frequency to his utmost and perhaps a low frequency TENS unit would be more applicable in this case, due to the fact that studies recently show that low frequency will tend to get the remaining component of pain. The projected disability rating of 10 percent of the body as a whole, I feel could be improved upon due to the fact that the patient is very tight, and perhaps throught [sic] an extensive exercise program, more devoted to loosening of the lumbar extensors, would increase his present mobility. I would also strongly suggest discontinuation of the back brace, due to the fact that this is more of a crutch, and as a result would tend to limit motion of lumbar extensors.

Alfredo Socarras, M.D., performed a neurological examination:

Neurological Examination: Patient was alert, well oriented and cooperative. His speech was normal. Cranial nerves were intact. Fundoscopic examination was negative. He refused to walk on his toes, but he was able to walk on his heels without difficulty. His gait was normal. The Romberg test was negative. His blood pressure was 160/100. Muscle strength was normal except that he gave way when the muscles of the left lower extremities were tested. This is a functional type of weakness. Deep tendon reflexes were active and equal. There was no pathological reflex. His coordination was normal. Superficial sensation as well as proprioception were intact.

In summary, the neurological examination failed to reveal any objective deficit. X-ray of the lumbar spine show mild degenerative changes. It is my opinion that this patient's symptoms are most likely on a psychophysiological basis. I recommend an electromyogram of the left lower extremity and a paraspinal muscles as a screening test and a psychiatric evaluation.

Todd Hines, PhD., performed a psychological evaluation:

Neurotic patterns of personality structure appear to be a definite factor in the present status of this patient. He demonstrates rather pronounced somatic conversion and it is very likely that much of his symptom presentation is either psychogenic in nature or representative of emotional exacerbation of physiological anomoly. While this situation may not be direct malingering, above and beyond intrapsychic conflict there exists a set of expectations which he holds for himself that create motivational problems and negative self-awareness; Mr. Thompson has a "can't do" orientation and a self image of weakness and inability which cause him to be easily frustrated and discouraged and to literally refuse to try to complete tasks which he might otherwise be able to accomplish. He requires almost constant support and positive reinforcement, and seems capable of responding well if such support is available. However, it is not likely that positive reinforcement alone could overcome the strong tendencies toward neurotic utilization of physical symptoms precipitated by hysterical personality patterns. He presently derives considerable secondary gain from physical illness and appears to have even increased his net monetary income through symptom presentation.

Although Mr. Thompson functions well within the normal range of intelligence with no remarkable variability in performance, he does not appear to be a good rehabilitation training candidate because of motivation and self image issues. He presents essentially no motivation to work and demonstrates career interest in little other than outdoor recreation. Job satisfaction indicators are limited to the existence of a regular routine and being able to direct his own activity; it is likely that self-employment in some form would be the best vocational option. The interest which he has expressed behaviorally in law enforcement activities could well be an acting out of passive — aggressive, hysterical responses which, if encouraged on a more extensive basis, could serve to stimulate hysterical patterns including somatic conversion. A return to his former employment appears to be eliminated as an option because of his lack of motivation precipitated by a belief that he cannot do the work. Should Mr. Thompson be required to return to his former job, it is highly likely that his present symptoms will intensify and that he may be again injured in some manner. It is probable that the neurotic patterns existent at this time are chronic and pre-date the accident; the observable behaviors which restrict performance are most likely a combination of conscious and unconscious processes which interact in complex fashion to produce chronic pain and diminished motivation.

Mr. Thompson is not a good candidate for psychological intervention. He has, in many ways, more to gain than to lose by maintaining present symptom patterns. He rather enjoys his present life style and, except for the pain itself, has little motivation to

change. Moreover, he has little insight and would probably be very defensive and, perhaps, uncooperative in relation to psychological treatment. Medical care needs to be exercised with regard to prescription medication because of the possibility of chemical dependency or habituation. (Defendants' exhibit A.)

The social and vocational evaluation of the claimant generally revealed that claimant portrayed himself as one who had little deire to return to work or to pursue further studies. It was pointed out that he seemingly was better off financially than before the injury. His wife was working and he was receiving both workers' compensation and Social Security disability. Only Bill Parsons, who evaluated the claimant for biofeedback possibilities, thought the claimant would like to return to work — contingent upon his back condition improving. (Defendants' exhibit A.)

The concensus of the evaluators was that claimant could return to work immediately. It was noted that defendant-employer might take the claimant back if claimant received a medical release for certain lifting and custodial cleaning tasks. Again a comment was made that claimant had not appeared confident nor motivated to return to strictly physical work. (Defendants' exhibit A.) Jane Miiller-Hair, vocational counselor for the Center, recommended that the claimant pursue a GED program to enhance his vocational future and self-image. She also noted that the claimant did not seem motivated to pursue additional formal educational plans. Contingent upon medical approval and claimant's desires, Ms. Miiller-Hair thought the claimant could attempt the following: 1) Dairy Queen franchise, given adequate investment capital; 2) automobile self-service gas station manager ($900.00 — $1,000.00 net per month), if the employer was understanding of claimant's medical limitations; 3) motor vehicle dispatcher $5.00 — $7.90 per hour in 1978); 4)— parts salesman ($6.10 per hour in 1978 plus commissions), a position that would allow a mixture of standing and sitting; 5) meat grader ($12,266.00), which would require 3 years of experience regardless of a high school diploma; 6) grain processor ($11,000.00 plus benefits); 7) traffic clerk ($8.11 per hour); and 8) protective signal operator ($4.00 — $5.50 per hour). (Defendants' exhibit B.)

Claimant was independently evaluated by John R. Walker, M.D., F.A.C.S., in July of 1980. After extensive review of claimant's medical history (as received from the claimant and from review of the varied medical reports), Dr. Walker reported his examination findings and rendered his opinion of the case:

> Today on examination I note that he is very well-developed, well-nourished, powerfully muscled male who gets up and down off the examining table and moves very poorly. He walks in a shuffling manner and seems to be still in the entire lumbar and dorsal spine. The patient is tender over the posterior spines of L-1, L-2, L-3, L-4 and the sacrum. He is also tender in the paraspinal musculature bilaterally in these areas. Basically, he is wearing four TENS patches, which I have not removed. In forward flexion at about 35 degrees, all the musculature in the paraspinal region became taut and tense. With further flexion, they practically become spastic. Straight-leg-raising test is positive at 10 degrees bilaterally. He is tender in both sacroiliac joints and over the sacrum itself. Forward flexion is markedly restricted and he comes within only thirteen inches of touching his fingers to his toes. This is a belabored and difficult task for him and he has pain in flexing and pain in arighting himself to the erect posture. Leg lengths are equal. The Lasegue sign appears to be positive on the left, although the back pain seems to be so severe that it is really difficult to evaluate. Reflexes are as follows: Knee jerks 2+/2+; the Achilles 1+/1+ and the plantar reflexes are 1-/1-. When the patient is supine, the right leg becomes white and the left leg is more mottled, bluish-purple but seems to be more of a normal color. He has 1/2 inch atrophy of the right leg and he has 1/2 inch atrophy of the left thigh measured three inches above the patella. This patient definitely has some circulatory problems. On the left I get good bounding dorsalis pedis pulse. I do feel a posterior, tibial pulse on the left side. On the right lower extremity I am unable to really feel the posterior tibial or the dorsalis pedis pulse on the right side. There is pitting edema bilaterally, over both pre-tibial areas, slightly worse on the left. Babinski sign is negative and he appears to have no neurological deficit, that I can elicit today.
>
> On examination I note a well-healed scar about 1 to 2 mm. in depth, measuring 2 inches by 1.5 inches, in width. This is the result of his war injury.
>
> We have taken AP & lateral, right, left, oblique views and spot views of the lumbar spine and we note; a moderate narrowing 5th lumbar disc with low grade osteoarthritic spurring. There is a questionable failure of fusion of the neural arch of S-1 in the midline. AP & lateral views of the dorsal spine are not particularly remarkable, but again show some small amount of osteoarthritic spurring.
>
> OPINION: There is no question in my mind that this patient is totally disabled at this time and is unable to do much of anything as far as work is concerned. His back problem is certainly directly due to his injury at work in 1978 and consists, actually at this point, of strain and sprain from L-1 down through the sacrum. A second problem that this man appears to have had from the very first, is a circulatory problem, namely a so called blood clot or a thrombosis of the veins of the left lower extremity.
>
> At this point, it appears that he has the problem bilaterally. I tend to agree with Dr. Janda, that the vascular problem, particularly on the left leg is related directly to his workmen's compensation injury, but I feel that at this time he also has a similar problem involving the right lower extremity. Whether or not this is directly related to the injury, I cannot be sure.
>
> At this point, I would state that this man, for practical purposes is unemployable and that he has a perma-

nent, partial disability of 75% of the body as a whole. As far as treatment is concerned, I do not believe that anything but rest and supportive care is going to help him. His present regime appears to be adequate at this time. (Claimant's exhibit 23.)

Claimant is 57 years old and has an eighth grade education. He took a course in welding. He served overseas in the army infantry and in the military police from 1943 to 1946. His previous employment history includes farming, furniture sales, lubricant sales, carpentry, construction work, welding and cement work. He went to work for defendant-employer in 1969 because the work was easier, the pay was better and the location was nearer his home. Initially he was a janitor and then became part of the ground crew. He earned $809.00 per month. He has worked as a traffic director during the school's football and basketball seasons.

Claimant testified that he did receive a return to work release from either Dr. Janda or Dr. Wolbrink and that both those doctors and the experts at the Mayo Clinic advised him to avoid lifting over 10 pounds. Claimant reported that after his extensive evaluation in Des Moines in March of 1980, he contacted defendant-employer in the fall of 1980 to see if they had any work he was qualified to do. According to the claimant, he was advised that they would not take him back. Claimant has not attempted to find employment elsewhere. Although he testified that he would be willing to consider other employment or rehabilitation if offered, he indicated that no such offers have been made nor has he himself pursued such avenues. With regard to recommendations made by Ms. Miiller-Hair, claimant testified that he would have difficulty being a parts salesman because of the standing and that he had no experience in grading meat or grain. Claimant testified that although he is receiving income from a number of sources (Social Security, IPERS, and army pension, workers' compensation, and Banker's Life), he could earn more money working. With regard to improving his education, claimant responded that no one from the school had contacted him.

Westly Fiala, defendant-employer's supervisor of buildings and grounds since June 1, 1979, testified that claimant contacted him in August of 1980 and presented him with Dr. Walker's report and showed him the TENS unit. Fiala related that he has never received a medical release for the claimant from any of claimant's doctors. Fiala was not aware of the extensive evaluation conducted in Des Moines nor of the evaluation center's recommendations. Fiala noted that the defendant-employer did not have any part-time work that did not entail lifting more than 10 pounds.

Claimant's present complaints include back, hip and leg pain. He cannot do much sitting or standing. Claimant testified that walking alleviates his condition — he walks a couple miles a day. He thinks his pain has remained about the same since the date of injury. He still notes some leg swelling, even in the right extremity if he rides too long. He cannot be flat on his back and has difficulty sleeping because of muscle spasms at night. Claimant no longer mows the lawn, shovels snow or vacuums. Claimant likewise quit fishing, bowling and dancing since the injury. He currently is taking calcium pills and Motrin. He continues to wear a back support and uses the TENS unit. He continues to see Dr. Wolbrink every three months.

Claimant's wife of 30 years, verified his complaints. She noted that they have done some traveling both by plane and by car since his work injury but emphasized that such travel was uncomfortable for the claimant because of his condition.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 18, 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).

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. *McSpadden V. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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).

Section 85.34(1), Code of Iowa, 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 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.

Industrial Commissioner's Rule 500—8.3 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 comes first.

Analysis

The weight of the medical record supports finding that claimant sustained an acute lumbar strain as a result of the September 18, 1978 injury which in turn caused the episode of the thrombophlebitis in 1979 and aggravated the preexist-

ing osteoporosis. Dr. Janda, who was claimant's treating physician in 1979, causally related the thrombophlebitis in the lower left extremity to claimant's work injury and referred the claimant to Dr. Chanco. The thrombophlebitis was resolved as of August 31, 1979 and, according to Dr. Janda, was not responsible for claimant not working. Whether claimant's bilateral thromobophlebitic condition is causally related to the work injury is not established. Dr. Walker thinks the continued problems on the left are so related. The evaluation center doctors and claimant's treating physician since March of 1980, Dr. Wolbrink, do not find a connection between the injury and thrombophlebitic condition. Claimant has not established his burden on such matter. However, as in August of 1979, it is clear that claimant's back condition is the major source of pain. and limitation. Claimant's functional impairment has been rated at 10 percent, 15 percent, and 75 percent — the latter, being that of Dr. Walker, presumably took the thrombophlebitic condition into account. Although there is no evidence of neurological involvement, claimant's complaints are believed. The majority of the doctors that have treated or examined him seemingly agree that the claimant has need of the TENS unit, if not the back brace. Claimant likewise must avoid or limit lifting, bending, stooping and prolonged sitting or standing. However, while the undersigned accepts claimant's belief he has pain and limitations, she questions his testimony that he would return to work if it were offered or would accept rehabilitation or even other medical treatment including surgery. He has self-limited his activities to those he cares about doing (watching television, visiting his grandchildren who live nearby, perhaps making toy boxes for them as alluded to in Dr. Wolbrink's report [claimant's exhibits 22 and 26] and going on occasional trips with his wife) and has made absolutely no attempt to pursue a GED program or rehabilitation. When lighter work possibilities were suggested he presented excuses based either on what he thought he could not do physically or on what he did not know from experience. (Again, the possibility of what he could learn did not, to this observer, appear to interest the claimant. Ironically, woodworking was not assessed by the vocational rehabilitation experts.) Claimant's only attempt at returning to work was to approach defendant-employer with Dr. Walker's report in hand and a display of the TENS unit. Had claimant's motivation been better than that displayed by the whole of his testimony at the hearing (and corroborated by review of the medical and vocational reports), a much higher industrial disability might have been awarded. Had he attempted some avenue of employment and failed because of his physical problem, a greater award might have been justified. The record only contains Dr. Walker's relegation of the claimant to the stockpile of the unemployable and claimant's protestations over what he cannot do rather than meaningful inquiries into what he can do.

With regard to the issue of healing period, claimant maintains that he should have been paid such benefits through September 18, 1980 in accordance with Dr. Wolbrink's indication that such injuries usually reach maximum recovery in two years. Yet, between the time Dr. Wolbrink anticipated such a recuperation date in his July 18, 1980 report, his clinical notes (and the letter reports themselves) reveal no true medical improvements. Defendants paid the claimant healing period benefits through July 25, 1980 (inclusive of the 30 day *Auxuer* period according to claimant's brief). Termination of healing period at such time was appropriate in light of both the medical reports of the evaluation center, which indicated claimant had reached maximum recovery as of the time of the evaluation and Dr. Walker's determination in late July of 1980 that claimant would not improve further.

Findings of Fact and Conclusions of Law

For all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant sustained an acute lumbar strain as a result of a lifting incident at work on September 18, 1978.

Finding 2. The weight of the medical evidence indicated that while claimant's 1979 episode of thrombophlebitis in the lower left extremity, which was resolved in August of 1979, was caused by the work injury, the alleged present bilateral thrombophlebitic condition is not so causally connected.

Conclusion A. Claimant has failed to establish that a causal connection exists between the work injury and his alleged thrombophlebitic condition.

Finding 3. Claimant's back condition is the major source of his pain and limitation.

Finding 4. The medical experts seemingly agree that claimant should continue to use the TENS unit (there is disagreement over the use of a back brace) and should avoid or limit lifting, bending, stooping and prolonged sitting or standing. His impairment was rated at both ten (10%) percent and fifteen (15%) percent of the body as a whole. (Dr. Walker's rating of seventy five [75%] percent was deemed to be excessive and took into consideration the thrombophlebitic complaints.)

Finding 5. The claimant is fifty-seven (57) years old, has an eighth grade education, and an employment history including farming, sales, and construction work. He was a member of the general maintenance crew for defendant-employer.

Finding 6. Claimant cannot return to the same or similar work he was engaged in on the date of injury. However, a vocational expert report indicates that he would be able to pursue a number of other employment possibilities.

Finding 7. Claimant's motivation to return to work or to seek further education or retraining was extremely poor.

Conclusion B. As a result of the September 18, 1978 injury claimant sustained thirty (30%) percent industrial disability.

Finding 8. Claimant has not returned to work and cannot return to the same or similar work in which he was engaged on the date of injury.

Finding 9. The weight of the medical evidence indicates that claimant reached maximum improvement at the time the defendants terminated such benefits.

Conclusion C. Claimant's healing period ended as of July 25, 1980, the date defendants terminated such benefits and began paying permanent partial disability. No further healing period benefits will be awarded.

Finding 10. Two medical expenses shown on claimant's exhibit 24 were for treatment that was necessary in the care of claimant's condition.

Conclusion D. Defendants shall reimburse the claimant for the expenses shown on claimant's exhibit 24 pursuant to Code section 85.27.

Order

THEREFORE, it is ordered that the defendants pay the claimant one hundred fifty (150) weeks of permanent partial disability at the rate of one hundred thirty-six and 42/100 dollars ($136.42) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of July 26, 1980.

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

Credit is to be given to defendants for the amount of permanent partial disability compensation previously paid by them for this injury.

Defendants are further ordered to pay unto the claimant the following medical expense:

North Iowa Medical Center	$ 120.35

Costs of the proceeding (including a total of sixty-four and 00/100 dollars [$64.00] for two medical reports as shown on claimant's exhibit 25) are taxed to the defendants. See Industrial Commissioner's Rule 500—4.33.

Interest shall be filed by the defendants when this award is paid.

* * *

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

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

ROY L. THRASHER,

Claimant,

vs.

J. P. CULLEN & SONS CONSTRUCTION,

Employer,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Insurance Carrier,
Defendants.

Declaratory Ruling

Claimant asked for a declaratory ruling as follows:

1. Claimant herein, Roy Thrasher, was the plaintiff in a civil case in the Wapello County, Iowa, District Court, No. CL 710-1077, in respect to the case entitled *Roy Thrasher, Plaintiff, v. Donald Gerken and Geo. A. Hormel & Company, a Delaware corporation, Defendants.*

2. As part of the above litigation the deposition of Bruce L. Sprague, M.D. was taken February 8, 1980, in Iowa City, Iowa. A copy of the deposition is attached hereto as Exhibit A. A copy of the pre-trial stipulation is attached hereto as Exhibit B.

3. Dr. Bruce Sprague was the treating physician of Roy Thrasher claimant herein, in respect to the injuries for which Roy Thrasher seeks workman's [sic] compensation benefits herein.

4. Present at the deposition of Dr. Bruce L. Sprague was Attorney Mark J. Wiedenfeld of Grefe & Sidney, which firm represents the employer (Cullen) and the employer's insurance carrier in this workman's [sic] compensation case. Direct examination was conducted by the claimant's attorney, Dennis W. Emanuel, and Mark J. Wiedenfeld participated in the cross-examination of Dr. Bruce Sprague. The claimant tends to offer into evidence, at the hearing before the Deputy Iowa Industrial Commissioner, the deposition of Dr. Bruce L. Sprague, copy of which is attached hereto as Exhibit A.

5. The claimant is informed and believes that the respondent in the above-entitled workman's [sic] compensation intends to contest the admissability of the deposition of Dr. Bruce L. Sprague.

6. Section 86.18(2) of the 1981 Iowa Code permits the introduction of Dr. Bruce L. Sprague's deposition into evidence at the workman's [sic] compensation hearing before the Deputy Iowa Industrial Commissioner.

7. Additionally, the deposition of Dr. Bruce L. Sprague qualifies as an admissible submission of the treating doctor's report pursuant to Ch. 17A and the Iowa Administrative Code [500—4.18(85, 86, 17A)].

Section 86.18(2) provides that the "deposition of any witness may be taken and used as evidence in any pending

proceeding or appeal within the agency." It is obvious from the resistance to the application for declaratory ruling that the defendants herein were not parties to the taking of the subject deposition (even though defendants' attorneys did represent one of the parties). Clearly the deposition cannot be entered into evidence as the equivalent of testimony because defendants had no chance to cross-examine and are not in any way collaterally estopped.

However, under rule 500—4.18, I.A.C., the deposition may be entered as evidence of direct testimony of the doctor. The purpose of the rule is to reduce the expenses of litigation and the question and answer format is not a departure from the described "narrative" report. Of course, the deposition must satisfy the requirements of rule 4.18.

IT IS THEREFORE RULED that the deposition of a doctor taken in a civil case to which the workmen's compensation defendants were not parties may be offered into evidence as satisfying the requirement of a narrative report under industrial commissioner's rule 500—4.18, I.A.C. so long as the other requirements of that rule are met.

* * *

Signed and filed at Des Moines, Iowa this 10th day of February, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

HARRY TINDELL,

Claimant,

vs.

JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration and for section 85.27 benefits brought by Harry Tindell against John Deere Dubuque Works of Deere and Company, self-insured employer, for benefits as a result of an injury on March 6, 1980. On May 21, 1981 this case was heard by the undersigned. This case was considered fully submitted on June 9, 1981.

* * *

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, healing period and permanent partial disability benefits he is entitled to.

Facts

Claimant testified that he was injured while working for defendant on March 6, 1980. Claimant stated he was working on core knock out and was trying to loosen a part on a conveyor belt by pulling it towards him when he felt something like a burning, tearing pain in the left side of his lower back. Claimant indicated he had never felt anything like that before. Claimant told the general foreman about the injury and then reported to the dispensary where he was seen by a Dr. Morrison. Claimant revealed that Dr. Morrison gave him some medication and placed claimant on light duty of no lifting over 25 pounds and no bending. Claimant stated that upon returning to work he was placed shoveling sand with a scoop shovel. Claimant indicated that the following day he was put on picking up parts which weighed up to 50 pounds. Claimant stated that the doctor kept placing him on light duty.

Claimant testified he was laid off on June 12, 1980 because he was on light duty and opined that if he had not been on light duty they would have kept him working for a while because of his seniority. Claimant stated that in October of 1980 he requested the doctor to take him off of light duty work and without an examination was taken off of light duty.

Claimant testified he started working for defendant again on April 6, 1981 at defendant's Moline, Illinois plant. Claimant indicated he worked in the foundry in Moline and was transported there by bus. Claimant revealed he only worked for 2 weeks at that position because the work and ride on the bus were hard on his back. Claimant stated the long ride caused his leg to go numb.

Claimant disclosed he has passed a course at a technical school to become a machinist. Claimant also intends to take a course for diesel mechanics.

Claimant indicated that besides seeing other doctors for defendant, he also on his own saw Dr. Peasecki who placed him on a 20 pound weight restriction.

Claimant states he presently has pain in his lower back and leg when he walks long distances and his leg goes numb. Claimant also indicated that while sitting he now favors his left side and sits at an angle and also has problems sleeping.

Claimant revealed that in August of 1980 he enrolled in a karate course at Dr. Morrison's suggestion. Claimant indicated that the karate course helps loosen him up. Claimant indicated he had to quit the course when his benefits ran out. Claimant disclosed he holds a blue belt in karate.

On cross-examination, claimant revealed that he medically could have returned to work in October of 1980 but could not because of general lay off. Claimant indicated he started working for defendant in Moline on April 6, 1981 but only worked 2 weeks when he went to his foreman and resigned. Claimant disclosed that in Moline he worked as a chipper and grinder. Claimant stated:

Q. Now, did you tell Mr. Strupp at East Moline at any time while you were working those 2 weeks that you were in pain or hurting?

A. I just told him when I told him I wanted to quit — no, not until I wanted to quit.

Q. You told him — you come in and told him you wanted to quit?

A. Yeah, that I wanted to try and get a job here in town so I didn't have to have that ride.

Q. You did quit?

A. Yes.

Q. Then you came back the next day and wanted to have the job back?

A. Yeah. I called to see if I could have the job back.

On redirect, claimant testified that when Dr. Morrison returned him to work he was not given an examination or asked any questions.

Robert Strupp testified that he was claimant's supervisor when claimant worked in the Silvis, Illinois plant (also known as the Moline plant). Mr. Strupp stated:

Q. Now, in addition to the good job he was doing, did you observe him with any limitation of motion?

A. (Negative nod)

Q. Or bending activity?

A. No, I didn't.

Q. Did he ever say anything to you while he was there in your employment about having pain in any part of his body or problem?

A. No, sir.

Q. Did you ever learn of that problem?

A. No, I had no idea.

. . .

Q. Now, it was testified here today that he resigned to you?

A. Yes, he did.

Q. Can you tell us that discussion, what he said?

A. Harry came to me and said he was going to quit. The reasons he was going to quit was because he had another job lined up here in Dubuque and he didn't want to travel 90 some odd miles back and forth every day.

Q. Was there any other discussion that he gave you on the reason for quitting?

A. None whatsoever.

Q. Now, did he then later call you or contact you in some way about getting his job back?

A. Yes, he did.

Q. How was that contact made?

A. That was made over the telephone to me personally.

Q. At work or at home?

A. I believe it was at home.

Q. What did he say?

A. He basically — paraphrase of what he said, he said he regretted the fact that he quit and he had to have a job, and whatever it was here in Dubuque it didn't pay enough for him, and he had to have his job back.

In a report dated July 10, 1980 James R. Stull, M.D. stated:

The patient gives a history of injuring his back while pulling heavy castings while employed at John Deere Tractor Works in Dubuque, Iowa. This happened in March, 1980. He states that the pain became progressively worse throughout the shift. Finally after 3 or 4 hours he asked for and was granted permission to see the company doctor. The physician placed him on light duty for a couple of days. The pain did not improve and remained status quo since March of this year.

He describes this pain as burning type located in the left quadratus lumborum area with associated radicular pain down the posterior aspect of the thigh and numbness in the anterior portion. The radicular pain occurs after heavy lifting or repeated lifting. The numbness occurs with sitting. He reports that all symptoms become worse when he "works". Mr. Tindell states that he has had no prior back trouble... Examination revealed... lumbar curve is flattened with hypertonicity noted in the paraspinal muscles. A slight scoliosis was also noted. ROM of the lumbar spine was limited to the following: anterior flexion 53 degrees, extension 20 degrees, right lateral flexion 32 degrees, left lateral flexion 15 degrees, rotation faced left 20 degrees, rotation faced right 15 degrees. Heel & toe walking is done adequately.

Occupational therapy reports that findings on a sensory examination were inconsistent and varied from one time to the next on repeated testing. The right leg measured 1/2 inch shorter than the left. Muscle power & reflexes are equal bilaterally. Motion of the hip was painful in external rotation past 5 degrees. Patient ambulates with a limp which he attributes to back pain. ROM and muscle power of the right lower extremity are within normal limits. X-ray of the left hip was interpreted as showing the possible existance [sic] of stress fractures and otherwise was negative for any other associated pathology.

We feel that Mr. Tindell has a lumbosacral pain and that there is no clinical or x-ray evidence of herniated nucleus pulposus. This lumbosacral strain should improve with completed bed rest for 14 days and conservative therapy. Subsequent studies of the left hip

conducted elsewhere rule out any hip pathology. We feel that the prognosis is good for this individual with conservative management; however, the current socioeconomic influences may have an influence on his rate of improvement and the time required to return him to gainful employment.

In a report dated March 30, 1981 Dr. Stull stated:

This patient was first seen in our low back clinic a number of months ago and was suspected of having a strain/sprain of the lumbar spine and some hip pathology which was later ruled out.

He has been following a conservative course of treatment and has lost weight. He has taken up karate and is currently in good physical condition.

All range of motion measurements of his low back and hips fall within normal range. He has currently lost some of his excess body weight. He complains of occasional back discomfort but this is relieved by stretching exercises.

Judging by his normal pain-free range of motion, his good physical condition at this time, and his activity level at present (green belt in Karate) he should have no significant problems physically returning to his vocational activities as long as he practices good body mechanics.

Claimant's exhibit #6 contains a statement by Robert B. Merrick, M.D. in which he states:

LUMBOSACRAL SPINE: Vertebral bodies and disc spaces are normally maintained. There is no evidence for fracture or dislocation. There is some straightening of the normal lordotic curve which may be associated with muscle spasm. There is no evidence for spondylolysis or spondylolisthesis. The sacroiliac joints are normal.

CONCLUSION: Slight straightening of the normal lordotic curve which may be associated with muscle spasm. The lumbosacral spine is otherwise normal.

The same exhibit contains a document which states:

March 24, 1980 AP, lateral and oblique views of the lower thoracic and lumbo-sacral portions of the spine show no evidence of old or recent bone, joint or disk abnormality other than to show some loss of the normal thoraco-lumbar and lumbar lordotic curvatures suggesting possible muscle spasm. The underlying bones joints and disks are intact as are the sacroiliac joints.

Impression: Minimal loss of normal lumbar curvature suggesting possible mild muscle spasm without underlying bone, joint or disk abnormality.

In his report of February 5, 1981 Anthony J. Piasecki, M.D. stated:

I have seen the above noted man on two occasions only, these being March 24, 1980, and January 20, 1981.

On March 24, 1980, he was seen in my office with a history of having hurt his back some two months prior to that time while lifting heavy parts at work. He stated he continued working, doing light duty, and then about two weeks prior to being seen by me he was again lifting, and because of increase in pain in his back, he came in to see me for an examination. He stated the pain at that time was in his low back, and at times did go into his left buttock and thigh. His symptoms were worse with lifting and bending.

Examination at that time revealed a rather robust heavyset 23-year old male who got on and off the examining table without any difficulty. He was able to walk on his toes and heels quite well. Tendon reflexes in the lower extremities were normal. Straight leg raising was 75 degrees bilaterally. He was able to flex his back to bring his fingertips to the level of the middle third of his tibia. He stated that normally he could bend much further than that but hadn't touched his toes for quite awhile, as he put on excess weight. His other back motions were of relatively normal range. He did have some discomfort on the extremes of motion.

X-rays of his lumbosacral spine showed no particular bony abnormality. There was some mild flattening of the usual lumbosacral curve.

DIAGNOSIS: Myofascial strain of back.

It was recommened to him that he return to light duty and to restrict his lifting to no more than 30 pounds, do back exercises, and apply heat to his back as necessary. He was advised to return if he had any problems.

The next time I saw him was January 20, 1981, at which time he came in because he wished further examination regarding his back. He told me he had been treated by the plant physician and had been on light work, but was laid off work in June of 1980, because light work was not available for him. He also stated that during the past summer he had a bone scan at Xavier Hospital, and also the company sent him to Waukon for an examination and an evaluation by a Doctor Stull.

He stated he still had pain in his back, particularly if he sat for very long or walked for prolonged periods of time or rode in his car for very long. He described the discomfort he had while riding in a car as more stiffness rather than pain, and this stiffness usually would disappear with activity. He stated his pain in his back was sometimes like that of a toothache occurring if he did something wrong, such as lifting or sitting down too fast. He stated his symptoms seemed to be helped with exercises. The weather had no effect on his symp-

toms nor did the time of day affect his symptoms. He also stated that he had been taking karate since August of 1980, and the stretching and exercises appeared to help his back. He had no difficulty with micturition or defacation [sic].

He further stated he felt that at this point he might be able to do his normal job but would have some pain. During the course of his normal job, he states he would have to lift 25 to 60 pounds, and at times would have to shovel sand.

Examination on January 20, 1981, revealed a heavy-set 23-year old man. His height was 71 inches, and weight was 232 pounds. Straight leg raising was 75 degrees bilaterally. Tendon reflexes, muscle power, and skin sensation were normal in the lower extremities. He was able to flex his back to bring his fingertips to the middle third of his tibia. Other back motions were very slightly restricted. He did have some mild tenderness on deep pressure in the paralumbar muscles, both left and right low on the back. He was able to walk on his toes and heels without any difficulty.

It was my feeling that he probably had some residual findings due to his back strain.

We did obtain the results of his x-rays of his pelvis and left hip he had taken at Xavier Hospital on the 11th of July 1980. These did reveal a very small area of sclerosis on the superior aspect of his left femoral neck which was not felt to be of any great significance. A bone scan was done at about that time and it did reveal normal uptake in the skeleton except for a small area in the lateral left orbital rim.

IMPRESSION: I feel that this man has some residual symptoms referable to his back strain, and associated with this he is overweight.

I feel that the greater part of his disability is due to his discomfort, and any impairment of his function or his back that he has at this time would be 10% or less.

In his report dated May 6, 1981 Dr. Piasecki stated:

> The following is the medical report you requested on the above noted man with his signed permission.
>
> I did see Mr. Tindell in my office May 1, 1981. He states he did return to work on April 6, 1981 and worked approximately two weeks, then had to stop because of discomfort in his back and in the left leg. He states that his main pains are in his left low back with extension into the left leg and buttock but not going below the knee. His symptoms seem worse with heavy lifting, bending and moving quickly, riding in a car or walking long distances. He states that occasionally his left leg will fall asleep from the knee to the thigh and this occurs if he walks a long distance or if he rides in a car. This numb feeling will last for about 20 minutes. He has had no difficulty with micturition or defecation. He states he sleeps fairly well. He describes his pain "its like a toothache there all the time". Some days his symptoms are usually worse on arising inthe [sic] morning and sometimes appear worse towards the end of the day if he works hard.
>
> Examination reveals he stands 72 1/4 inches high and weights 229 pounds. Straight leg raising on the left was 60 degrees and then on the right was 75 degrees. His tendon reflexes, muscle power and skin sensation appeared normal in both lower extremities. He was able to flex his back to bring the fingertips to the proximal third of his tibia. Lateral flexion to the right produces some discomfort in his left low back. Rotation and lateral flexion of the back, however, are of a normal range. His old x-rays of March 24, 1981 were reviewed and they showed no particular abnormality apart from a minimal loss of the lumbar curve suggestive of muscle spasm.
>
> It is my impression that this man still has some residual symptoms of myofascial strain of his low back and at this time I would feel that he should be able to continue with light work with lifting restricted to 25 pounds. I also think that he should continue on with an exercise program, the use of heat and should try to gradually increase his activity as tolerated.

Applicable Law

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on March 6, 1980 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 March 6, 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). 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.*

Analysis

The undersigned observed claimant's demeanor and noted the inconsistencies between his testimony and that of Robert Strupp and has determined that claimant has been less than candid while testifying.

Even though claimant has been less than candid, he has met his burden in proving he received an injury arising out of and in the course of his employment with defendant on March 6, 1980. Although there appears to be a few inconsistencies, the notes of defendant's medical department appear to support claimant's contention. Furthermore, the

doctors' reports also support a finding that claimant injured his back.

Claimant has, however, failed to prove he has any permanent disability as a result of his injury. The March 30, 1981 report of Dr. Stull, which indicates that claimant is in good physical shape, appears to be supported by the testimony of Robert Strupp, who disclosed claimant worked without any indication of physical difficulty. Furthermore, the undersigned finds it significant that claimant quit his employment with defendant for another job rather than because of his medical problems. It is noted that the reports of Dr. Piasecki would indicate that physical activity reduced claimant's pain while work increased his pain. Considering the record as a whole, such statement appears inconsistent.

The cases of *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) do not apply to this case because claimant voluntarily quit his job. It is apparent that defendant had made attempts to provide work for claimant but claimant did not like the work provided. Obviously, because the undersigned finds that claimant received no permanent disability, the issues raised in his brief will not be discussed.

There is ample evidence presented that claimant was placed on light duty. However, claimant has not met his burden in proving he was laid off because of his restriction to light duty. Although defendant did not present any evidence directly refuting claimant's testimony that he was laid off because of his restrictions, the fact that there was a general layoff combined with claimant's lack of candor would indicate that claimant was not laid off as a result of his injury.

Findings of Fact and Conclusions of Law

WHEREFORE, based on the evidence presented and the principles of law stated, the following findings of fact and conclusions of law are made:

Finding 1. On March 6, 1980 claimant injured his back while working for defendant.

Conclusion A. Claimant received an injury arising out of and in the course of his employment.

Finding 2. Claimant was less than candid at the time of the hearing.

Finding 3. Dr. Stull found claimant to have no permanent impairment and in good physical condition.

Finding 4. When claimant worked for defendant in Illinois he did not exhibit any physical problems.

Finding 5. Claimant voluntarily quit his job with defendant for other employment.

Finding 6. When claimant quit his job he did not make any indication he quit because of medical problems.

Conclusion B. Claimant has not received any permanent disability as a result of his injury.

Finding 7. Claimant was placed on restrictions.

Finding 8. Claimant was laid off because of a general layoff.

Finding 9. Claimant was not laid off because of his injury.

Finding 10. Claimant did not miss any work because of his injury.

Conclusion C. Claimant has failed to prove he is entitled to any temporary total disability benefits.

THEREFORE, claimant is to take no weekly benefits as a result of this action.

Claimant is to be reimbursed for any medical benefits that he has incurred which are causally connected to his injury.

Defendant is to pay the costs of this action.

* * *

Signed and filed this 24th day of July, 1981.

DAVID E. LINQUIST
Deputy Industrial Commissioner

No Appeal.

RANDALL TODD,

Claimant,

vs.

LUNDA CONSTRUCTION COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed May 21, 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.

The result of this final agency decision will be the same as the review-reopening decision, but the findings of fact and conclusions of law are those of the undersigned deputy industrial commissioner.

Defendants state the issue as "whether or not the deputy commissioner's ruling is supported by the evidence." (Defendants brief.) Put another way, the issues are those of whether the injury is causally related to any permanent disability and, if so, the extent of that disability.

Claimant is a young man of a rather itinerant nature. While working for the employer on April 23, 1979, he strained his

back. The employer filed a memorandum of agreement, admitting the injury. He returned to work on July 13, 1979 and was layed off. After drawing some unemployment compensation, he went to work for another construction company and apparently sustained an injury in the fall of 1979 while working for that company.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 23, 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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *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).

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 charted 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, 375, 112 N.W.2d 299 (1961), the court quotes with approval from C.J.S.:

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

Expert evidence indicating a possibility coupled with other testimony nonexpert in nature (here there is claimant's testimony) that claimant was not afflicted with a low back condition prior to the injury is sufficient proof upon which to base an award. *McClenahan v. Des Moines Transit Co.*, 257 Iowa 293, 300, 132, N.W.2d 471 (1965). This proposition is supported in *Bodish v. Fischer*, 257 Iowa 516, 133 N.W.2d 867 (1965), *Chenowith v. Flynn*, 251 Iowa 11, 17, 99 N.W.2d 310, 314 (1959), *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 383 101 N.W.2d 167, 171, Rose v. John Deere, 247 Iowa 900, 910, 76 N.W.2d 756, 761 (1956).

One can understand defendants' position. There is much evidence in their favor in the record. But one must also look at the evidence in claimant's favor. John R. Huey, M.D., deposition (p. 8, l. 23, p. 17, ll. 17-19) and the penult paragraph of his January 29, 1980 report all gives rise to the possibility of a causal connection between the injury and the permanent impairment.

Findings of Fact

1. Claimant had a temporary muscle pull in his back in 1973 but recovered. (Tr., 8)

2. Claimant hurt his back at work for the employer on April 23, 1979. (Tr., 12, see also memorandum of agreement in industrial commissioner's file filed August 3, 1979 for an April 23, 1979 injury: "popped hip out of joint")

3. The work injury caused a permanent impairment to claimant's back. (Huey depo., 8, 17, 19; Huey letter dated 1-29-80)

4. Claimant is a traveling musician. (Tr., 5)

5. Claimant was born July 10, 1955. (First report)

6. Claimant had worked as a manager for a franchise restaurant. (Tr., 6)

7. Claimant worked as a laborer for Lunda Construction Company. (Tr., 6)

8. Claimant finished the 11th grade and then completed the G.E.D.

Conclusions of Law

Claimant sustained an injury arising out of and in the course of his employment on April 23, 1979 when he strained his back while working for the employer.

The injury caused permanent impairment to claimant's low back.

The injury caused claimant to sustain an industrial disability of five percent (5%).

The correct rate of weekly compensation is two hundred eight and 34/100 dollars ($208.34).

* * *

Signed and filed at Des Moines, Iowa this 27th day of July, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

DALLAS TUCKER,

Claimant,

vs.

HOWARD P. FOLEY CO.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,

TRAVELERS INSURANCE COMPANY,

Cross-Petitioner,

vs.

NEW HAMPSHIRE INSURANCE CO.,

Defendant to
Cross-Petition.

Appeal Decision

By Order of the Industrial Commissioner filed September 18, 1981, 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. The case was considered as submitted for decision on November 3, 1981. The Travelers Insurance Company appeals an adverse ruling on a special appearance.

The record on appeal consists of the filings in the Industrial Commissioner's Office which pertain to this case.

The result of this appeal decision will be the same as that reached by the hearing deputy.

The Travelers Insurance Company (hereinafter Travelers) carried the workers' compensation insurance on the Howard P. Foley Company as of June 19, 1979. On that date, claimant was injured and as a result was paid workers' compensation benefits by Travelers. On January 5, 1981, Travelers filed a cross-petition against the New Hampshire Insurance Group (hereinafter New Hampshire). Travelers claimed that New Hampshire, which carried the workers' compensation insurance for the employer as of January 5, 1979, "should be held liable in whole or in substantial part for any disability or medical payments here before made or to be made in the future to Mr. Tucker on account of the above described complaints."

(There was no petition filed by claimant in this action. Indeed, there still is no petition on file by claimant, although certain pleadings in the Industrial Commissioner's file indicate the parties' belief that such a petition is on file. However, even if such a petition had been filed by claimant, it would not affect the issue in the case.)

The workers' compensation law does not provide for actions in indemnity or contribution, which, as the deputy who ruled on the special appearance remarked, belong in a proper court. Further, the code provides that no claim or proceedings for benefits shall be maintained by anyone other than the injured employee, his/her dependent or his/her legal representative. Section 85.26, Code.

Findings of Fact

The Travelers Insurance Company and the employer filed a cross-petition on January 5, 1981, claiming that the Travelers had made payments under the workers' compensation law as a result of an injury of June 19, 1979 and that part of said payments were incurred as a result of an injury of January 5, 1979 at which time the New Hampshire Insurance Group had coverage, the cross-petition asking for relief as to the payments already made and for those which may be ordered in the future.

Since there was no hearing on the merits and no stipulation filed, no findings of fact as to any injury or disability can be made.

Conclusion of Law

Where the Travelers Insurance Company paid workers' compensation benefits unto claimant as a result of an injury of June 19, 1979, the industrial commissioner has no power to adjudicate the claim by Travelers that the New Hampshire Insurance Group should be held liable in whole or in substantial part for any disability or medical payments therefore made by Travelers or to be made in the future on account of the injury of June 19, 1979 and the prior injury of January 5, 1979.

WHEREFORE, the special appearance filed by the New Hampshire Insurance Group is sustained.

Costs of this action are charged against the Travelers Insurance Company.

* * *

Signed and filed at Des Moines, Iowa this 10th day of December, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

LLOYD VAN LAAR,

Claimant,

vs.

SNAP-ON TOOLS CORPORATION,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

Arbitration Decision

Introduction

This is a proceeding in arbitration brought by Lloyd Van Laar, claimant, against Snap-On Tools Corporation, employer, and Insurance Company of North America, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of his employment on July 5, 1979. It came on for hearing on October 20, 1981 at the Buena Vista County Courthouse in Storm Lake, Iowa. It was considered fully submitted on December 11, 1981 with the filing of the deposition of Richard P. Bose, M.D.

The industrial commissioner's file shows a first report of injury received on September 20, 1979.

At the time of hearing the parties stipulated to a rate of $163.51 based on claimant's status as married with six exemptions.

The record in this matter consists of the testimony of claimant, Clara Van Laar, Zeno Reising and Tom Larson; claimant's exhibit A, a letter from R. P. Bose, M.D., dated December 31, 1979 with a pulmonary function study; claimant's exhibit B, a letter from Dr. Bose dated January 11, 1980 with attached laboratory data; claimant's exhibit C, a letter from Dr. Bose dated July 2, 1980; claimant's exhibit D, a letter from G. H. West, M.D., dated January 14, 1981; claimant's exhibit E, a letter from Dr. Bose dated October 2, 1981; claimant's exhibit F, a medical bill from Dr. Bose; defendants' exhibit 1, a request for leave of absence; defendants' exhibit 2, medical reports and data from Stephen K. Zorn, M.D.; defendants' exhibit 3, records from defendant employer; defendants' exhibit 4, a diagram of the paint booth; the deposition of Dr. Zorn; and the deposition of Dr. Bose. Both parties have submitted briefs.

Issues

The issues to be determined herein are whether or not claimant received an injury which arose out of and in the course of his employment; whether or not there is a causal connection between the alleged injury and claimant's disability; and whether or not claimant is entitled to temporary total or healing period benefits.

Statement of the Case

Forty-two year old married claimant, father of four, testified to service in the air force followed by work in greenhouses and flower shops, bridge construction a factory making fishing rods and as a barber. Although he was exposed to insecticides, chemicals for drying flowers and powders and sprays in some of these employments, he denied chest or lung problems or shortness of breath. He said that he lived on an acreage and has a small garden on which no chemicals are used.

He acknowledged that he had been a smoker until December 1963 when he stopped smoking following a challenge from his spouse and that he had pneumonia in 1972.

Claimant stated he began work for defendant employer in January 1978 as a spot welder. He said that he had no problems with his lungs; however, there was smoke from burning oil in the area and no exhaust hoods were used. In October 1978 claimant bid out of spot welding and into a job as a material handler which entailed getting materials for welders and involved occasional operation of a forklift. Again he denied lung problems or shortness of breath.

Claimant recalled that in April or May 1979 he was asked by the foreman to help out in the paint department. This work required him to bring parts to a spray booth to be painted and remove the parts after painting. Smaller parts were placed on racks and then put into ovens after painting. The painting was done using compressed air. Claimant denied being told that he should not be in the booth as the painter was spraying and stated that he did go in to hang and remove parts as the painter painted. Claimant said that some paint came out of the booth and got on the floor, that he sometimes got paint on himself, that he got mist on his glasses and that his clothes felt sticky. He also noted the hairs in his nose sticking together. He claimed that the painter wore a mask most of the time, but he himself was not given a mask and did not wear one. He was unsure whether or not he had talked with the painter about his mask, but he had not asked for a mask for himself. Claimant claimed that about three weeks after working this position, he noticed a sore throat which got worse as the week went on and improved over the weekends. He asserted he experienced a loss of stamina and strength, wheezing and an inability to get air. Claimant testified that he was taken out of the paint one or two weeks before his condition got bad.

He remembered feeling bad over the Fourth of July. His work after the holiday was to take boxes off the line and stack them on cardboard. He recollected the events of the day as follows: He was unable to keep up with the job. He became lightheaded. He went down splitting his hand open in the process. He stayed on his knees awhile. Later he saw the nurse and the next day he went to Dr. Bose. Claimant was granted a leave of absence.

Claimant alleged that for the remainder of 1979 he had trouble breathing when he tried to do something, but that he gradually got a bit better. At Christmastime he remained unable to work. In early 1980 he was hospitalized with a prostate problem. He said it was not until March 1980 that he felt able to return to work. He claimed no breathing trouble since that time.

In February 1980 claimant was terminated by defendant employer, an action which he found surprising but explainable on the grounds that he was able to return to work as far as his prostate problem was concerned. Claimant testified to remaining off work until March 1981 when he returned to barbering. Claimant acknowledged the receipt of $90 per week in benefits. It was his understanding that in order to receive that amount, he had to pay $72 per month. These benefits were received until February 26, 1980.

Clara Van Laar, claimant's spouse of twenty years, testified to feeling tackiness on claimant's clothes which she attributed to the paint mist. She had also observed a mist on claimant's glasses. She recalled that in June 1979 he began complaining of a sore throat and acting as though he had a bad chest cold. She heard him wheeze. In addition to the sore throat, she said that claimant complained of the paint smell and of stickiness in his nose. Van Laar claimed the condition worsened and was worse in the fall. At Christmastime claimant's energy remained low. It was not until the spring of 1980 that she recognized improvement.

Zeno Reising, general supervisor of the second shift since 1965 who had worked at painting, testified to knowing claimant, and he described the paint booth and explained his drawing of the area. The booth, which was sixteen feet long and nine feet high and about five deep, is open on the front edge except for a two foot drop. The end walls have three by seven foot doors. The back wall is covered with filters. Exhaust fans operate on the back and above to facilitate a complete exchange of air every two and one-half seconds. The witness said that with proper spraying feedback would occur for only five or six inches. Reising claimed that the painter should not have been painting when parts were being carried in. He said that parts being removed could still bleed paint.

Tom Larson, personnel manager for defendant employer since August 1974, testified that his duties include overseeing the payment of disability benefits. In claimant's case those benefits were paid at a rate of $90 per week commenced on July 12, 1979. He testified that claimant was given a leave of absence until October 5, 1979. That leave was later extended to February 26, 1980. He said that the $72 was paid on major medical, life insurance and dependency.

Defendants supplied a copy of the union contract and a letter of explanation regarding procedure for the group health plan and pension for employees on lay-off or total disability.

Records from defendant employer showed claimant was seen in the medical department on February 16, 1978 with complaints of a sore throat, headaches and weakness which he believed to be the flu. About eleven months later, on January 17, 1979 he complained of lightheadedness. The entry for July 5, 1979 reads as follows: "C/O chest feeling tight, hard to breathe, lightheaded & weak. Gets this way a couple times a year. Allergy related?" Employer's records further show that claimant was granted a leave of absence from July 5, 1979.

Richard P. Bose, M.D., signed the request for leave of absence giving "pneumonia, bronchial asthma" as a reason for granting the leave.

Dr. Bose, a family practitioner, testified that he has treated claimant since 1970. He saw claimant on July 6, 1979 at which time claimant reported developing cold symptoms, trouble breathing, progressive weakness and an episode of faintness for which he had been taking antibiotics. At the time of this visit claimant stated that he had been out of the fumes for the past week. Nothing in particular was found on physical examination and claimant was placed on Breathine. Dr. Bose thought perhaps claimant had a respiratory infection with edema in the bronchial tubes.

On July 16, 1979 claimant again asserted breathing difficulties, particularly with exertion and especially at night. The doctor was unaware as to whether or not claimant was in paint fumes. Theolair was substituted for Breatherine.

On August 27, 1979 claimant's complaints persisted. He also alleged pain in the left rib cage. His blood pressure was borderline. His lungs were clear to auscultation and percussion. Alupent, an inhaler, was tried. The doctor said that had claimant's complaints been attributable to either spasm in the bronchial tubes or infection causing swelling, the bronchodilators would have given him relief.

When claimant was seen on September 21, 1979 he complained of pain in his chest with exertion and a feeling of an inability to get oxygen. He told the doctor that he was becoming depressed. Claimant's blood pressure was elevated. His lung sounds were clear. Pulmonary function studies were undertaken which were enterpreted by the doctor as "pretty much within normal range." The doctor proposed that as claimant was getting adequate volumes of air, his difficulty would have to be attributed to claimant's inability to get oxygen from the blood.

A probable return to work was set for October 22, 1979. However, on that date claimant was still lightheaded with activity and had some aching in his left chest. His symptoms on November 26, 1979 were dyspnea with exertion and a pounding head.

The doctor acknowledged that at no time did claimant demonstrate any objective pulmonary difficulties other than by subjective complaints. He stated that breathing paint fumes or mist would not result in abnormal lung sounds which could be heard with a stethoscope. Dr. Bose denied knowledge of any previous respiratory problems. As to causal connection between claimant's exposure to fumes and his symptoms, the doctor wrote to claimant's attorney in a letter dated October 2, 1981: "It is my opinion that the symptoms that Mr. Van Laar exhibited could possibly have been caused by his exposure to paint fumes in the summer of 1979." Dr. Bose did not believe claimant's symptoms were permanent and thought him capable of returning to work on February 8, 1980.

Steven Zorn, M.D., board certified internist whose predominant practice is in pulmonary disease, saw claimant on referral from the insurance carrier on October 24, 1979 with complaints of shortness of breath. Claimant gave a history of exposure to paint fumes after which he developed a sore throat and shortness of breath. The doctor took a history and physical, did an EKG and performed a screening spirometry. As preliminary testing showed a possibility of moderate or severe decrease in expiratory flow rates, claimant was scheduled for complete pulmonary function studies which the doctor said would reflect the oxygenation transport across the membrane to the lung, how well air can be expired and the volume of air taken into the lungs and a

cardiopulmonary exercise test. Testing revealed the carbon monoxide diffusion capacity was supra normal indicating normal transport of oxygen. The cardiovascular pulmonary treadmill exercise study was stopped when claimant's blood pressure reached 170/100. Dr. Zorn wrote that claimant's exercise tolerance was not due to a limitation of cardiac or respiratory systems. Blood gases were done which showed a partial pressure of oxygen in the blood at the lower limit of normal. While he said it is hard to tell, the doctor thought the lower rating might be ascribed to claimant's smoking. Although the doctor did not know what testing would have shown at the time of exposure, he found no permanent disability at the time of his testing. Dr. Zorn was asked, "And isn't it a fact that you have a history of exposure to paint fumes or to paint mists and sprays that conditions like this would develop?" The doctor responded, "Not always. I think its very individualized." He acknowledged however, that paint fumes can irritate the respiratory tract.

G. H. West, M.D., reviewed claimant's medical records in response to a request by claimant's counsel and also showed them to a Dr. Shetty and a Dr. Cooley. Dr. West wrote: "I think we are all in agreement that at the time this consultation was made, it is difficult to draw any definitive conclusions concerning the possible relationship between the patient's symptoms and any possible toxic exposure because of the prolonged time lapse between the exposure and the examination."

And further, "I am afraid our evaluation is somewhat inconclusive and perhaps not very helpful because of the prolonged time interval between the exposure and the testing, the inadequate testing, and the difficulty in our being able to review the poorly reproduced record."

Findings of Fact

WHEREFORE, IT IS FOUND:

That claimant is forty-two years old.

That claimant is married and entitled to six exemptions.

That claimant has work experience in greenhouses, flower shops, bridge construction, factory work and barbering.

That claimant was a smoker until 1963.

That in April or May of 1979 claimant commenced work in the paint department where he hung and removed parts to be spray painted.

That claimant did not wear a mask in the paint area.

That claimant developed symptoms after three weeks in the paint area.

That claimant was out of the paint area for a week or two.

That on July 5, 1980 claimant complained of lightheadedness, weakness, tightness in his chest, and difficulty breathing.

That claimant was placed on a leave of absence, giving as a reason pneumonia, bronchial asthma, and received some weekly disability benefits.

That claimant was terminated by defendant employer.

That claimant returned to barbering in March of 1981.

That claimant's spouse observed that claimant had tackiness on his clothes and mist on his glasses.

That claimant's spouse verified her husband's complaints regarding his condition.

That defendant employer's supervisor discussed the painting procedure in the paint booth and said that a complete exchange of air took place every two and a half seconds and that feed back would occur for only five or six inches with proper spraying.

That Dr. Bose, claimant's family physician, treated him with bronchodilators.

That pulmonary functions studies in September of 1979 were "pretty much normal".

That Dr. Bose was of the opinion that claimant's symptoms "could possibly have been caused by his exposure to paint fumes in the summer of 1979".

That Dr. Bose found claimant's symptoms not to be permanent in nature.

That Dr. Bose found claimant capable of returning to work on February 8, 1980.

That Dr. Zorn, an internist specializing in pulmonary problems, performed a number of tests and was unable to find any permanent disability.

That Dr. West's evaluation of claimant's medical records was inconclusive.

Applicable Law and Conclusions of Law

In order to receive compensation for an injury, an employee must establish that the injury arose out of and in the course of his employment. Both conditions must exist. *Crowe v. DeSoto Consolidated School Dist.*, 246 Iowa 402, 450, 68 N.W.2d 63, (1955).

In the course of relates to time, place and circumstance 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 duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *McClure v. Union County*, 188 N.W.2d 283, 287 (Iowa 1971).

Iowa Code section 85.61(1) provides: "The words 'personal injury arising out of and in the course of 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. . .

In addition to establishing that his injury occurred in the course of his employment that claimant must also establish the injury arose out of his employment. An injury "arises out of" the employment when a causal connection between the conditions under which the work is performed and the resulting injury followed as a natural incident of the work. *Musselman v. Central Telephone Co.*, 261 Iowa 352, 154 N.W.2d 128 (1967).

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.2d 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

deference is ordinarily given opinion involving medical expertise. *Merchants v. SMB Stage Lines*, 172 N.W.2d 804 (Iowa 1969). Expert medical evidence must be considered with all other evidence introduced bearing on causal connection. *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 76 N.W.2d 756 (1956).

The briefs of the parties indicate their recognition of the fact that if claimant is to prevail in this matter, he must rely on the testimony of Dr. Bose that claimant's symptoms "could possibly have been caused by his exposure to paint fumes in the summer of 1979" coupled with lay testimony. The opinion of the Iowa Supreme Court in Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956) at 910, ____, states that "medical testimony it is possible a given injury caused a subsequent disability is insufficient, standing alone, to establish a causal relationship." The court went on to cite with approval *Schroder v. Western Union Telegraph Co.*, 129 S.W.2d 917, 922 (Mo. App.):

> The medical testimony to the effect that such a blow to the claimant's head... could be the precipitating cause... of his condition coupled with the circumstances shown in evidence that the claimant was not afflicted with any such condition prior to the time he met with the accident... constitute a sufficient basis to warrant the reasonable inference drawn by the commissioner that claimant's present condition... resulted from the accident...

See also *Nicks v. Davenport Produce Co.*, 254 Iowa 130, 115 N.W.2d 812 (1962); *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375, 101 N.W.2d 167 (1960); *Chenoworth v. Flynn*, 251 Iowa 11, 99 N.W.2d 310 (1959).

A caution was added in *Giere v. Aase Haugen Homes, Inc.*, 259 Iowa 1065, 146 N.W.2d 911 (1966) at 1072-73, ____, that while expert testimony coupled with nonexpert is sufficient to sustain an award, it does not compel one as "[i]t is for the fact finder to determine the ultimate probative value of all the evidence." The opinion then cited with approval 2 Larsons' Workmen's Compensation Law section 80.32 as follows:

> The distinction between probability and possibility should not follow too slavishly the witnesses' choice of words, as sometimes happens in respect to medical testimony. A doctor's use of such words as "might," "could," "likely," "possible" and "may have," coupled with other creditable evidence of a nonmedical character, such as a sequence of symptoms or events corroborating the opinion, is sufficient to sustain an award.

As claimant points out, the testimony was presented as to the absence of pulmonary problems prior to 1979. However, defendant correctly observes claimant had pneumonia in 1972. Claimant apparently told the medical department on July 5, 1979 that the symptoms he had on that date occur "a couple of times a year." Defendant also noted that claimant was out of the pain area for sometime before his collapse on July 5.

Dr. Bose, a family practitioner, treated claimant and provided him with testimony relating to causation. The doctor's deposition indicates that he did not know on July 16, 1979 whether claimant was being exposed to paint fumes. Objective testing ordered by the doctor failed to substantiate pulmonary difficulties. Dr. Zorn, an internist specializing in pulmonary medicine, found a portion of one test to be at the lower limit of normal, but it was normal. Dr. West was unable to reach a conclusion.

THEREFORE, it is concluded that claimant has failed to prove by a preponderance of the evidence an injury arising out of and in the course of his employment.

Order

WHEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That defendants pay costs of the proceeding pursuant to Industrial Commissioner Rule 500—4.33.

* * *

Signed and filed this 14th day of January, 1982.

JUDITH ANN HIGGS
Deputy Industrial Commissioner

No Appeal.

BETTY VAN WEELDEN,

Claimant,

vs.

VAN WEELDEN CONSTRUCTION,

Employer,

and

TRANSAMERICA INSURANCE GROUP,

Insurance Carrier,
Defendants.

Commutation Decision

This is a proceeding in commutation brought by the claimant, Betty Van Weelden, against Van Weelden Construction Company, her deceased husband's employer, and Transamerica Insurance Group, the insurance carrier, to recover commuted benefits under the Iowa Workers' Compensation Act by virtue of a fatal industrial accident which occurred on October 30, 1980. This matter was heard in Des Moines, Iowa, on November 12, 1981, and considered fully submitted at the conclusion of the hearing.

Based upon this deputy's notes, this record consists of the testimony of the claimant, Harry Ver Meer, Dirk Van Zante and Mike Theobald; claimant's exhibits A through F; and defendants' exhibit 1, together with claimant's deposition and her answers to interrogatories.

The single issue in this matter is whether or not claimant is entitled to benefits as contemplated by Section 85.45, Code of Iowa, as being in her best interest.

There is sufficient credible evidence contained in this deputy's notes to support the following statement of facts:

Claimant, age 53, widow, is now the chief executive officer of the defendant employer having a total of seven full building trade employees. Claimant produced her personal and corporate financial statements, which, together were supportive witnesses, clearly demonstrate claimant's financial posture as having a net worth in excess of $800,000. Claimant's ability to manage her personal and corporate duties are of the highest order.

Claimant seeks the entire balance of her weekly entitlement to discharge a $60,000 corporate debt and to invest the balance in municipal bonds.

In a recent similar case, *Finn v. Gee Grading*, #603299, filed November 5, 1980, the Iowa Industrial Commissioner said in support of an award, in part, as follows:

> The supreme court in *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In *Diamond* the court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *Id.*, at 929, 129 N.W.2d at ____. A reasonableness test was applied by the court in *Diamond* to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Professor Arthur Larson's philosophy on granting commutation is much more restrictive than that of the Iowa Supreme Court in 1964. He warns that:

> In some jurisdictions the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings... The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will be best served by a lump-sum award. The beginning point of the justifiability of the lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice. *Larson, Treatise on the Law of Workmen's Compensation*, §82.70.

Professor Larson indicated that experience has shown that a claimant is often under pressure to seek a lump-sum payment, and once the payment is received it is soon dissipated.

Additionally, Iowa's first industrial commissioner, in the first *Biennial Report of the Workmen's Compensation Service* (1916) at page 12, pointed out that, although in exceptional cases commutation promotes personal welfare, weekly payments should be regarded as a general rule better adapted to the real needs of compensation service since large lump sums are often unwisely used by beneficiaries.

> Despite the rational reasoning in support of the more restrictive views on commuation of compensation benefits, the *Diamond* guidelines still prevail in Iowa. Relying on *Diamond* and claimant's substantial monetary resources, excluding weekly compensation benefits, this commissioner would be hard-pressed to conclude that a lump-sum payment would not be in the best interest of claimant, notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.
>
> Although workers' compensation benefits differ from the benefits claimant is receiving from Social Security they are philosophically for the same purpose, i.e., periodic payments to partially replace lost earnings. In this economic era few would not jump at the chance to have future earnings paid to them in advance so they could invest them in a lump-sum and live off the earned income. The difference in the workers' compensation law is that it provides a vehicle, commutation, for doing just that.
>
> That a sum invested at today's prevailing interest rates would yield considerably more than the claimant is now receiving in workers' compensation benefits (even after taxes) is elementary.
>
> It is archaic that the discount rate for commutations is still at five percent. Nevertheless, it is the law, and, as this agency is a creature of statute, it must be guided by the statute and decisions of the supreme court which interpret the statutes and define the authority of the agency.
>
> Lump-sum awards in this and most other cases gives workers' compensation the appearance of damages in a tort action. Workers' compensation was implemented to replace tort damage cases. Until action is taken either by the courts or legislature this agency is duty bound to follow the current authority. As previously

mentioned, it would be incredible for this agency to say that a commutation which would produce considerably more money than the claimant is currently receiving would not be in his best interests.

THEREFORE, IT IS ORDERED:

That in light of the foregoing rationale, it is found that claimant's application for full commutation of the remaining balance of her entitlement under Iowa Workers' Compensation Act should be and hereby is granted, based upon claimant's stipulated weekly rate of three hundred twenty-seven and 54/100 dollars ($327.54).

That the commuted benefits can be definitely determined by the use of the table in I.A.C. Rule 500—6.3(3).

That it is found that the commutation is in claimant's best interest.

That claimant's entitlement is to be computed as of the date of her formal application.

Costs as contemplated by Iowa Industrial Commissioner Rule 500—4.33 are charged to the defendants.

* * *

Signed and filed this 24th day of February, 1982.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal.

MARILYNN VOLLMECKE,

Claimant,

vs.

IOWA DEPARTMENT OF SOCIAL SERVICES,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed May 21, 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 appeal decision has been delayed some three months by claimant's failure to return the transcript to this office. Defendants appeal from an adverse review-reopening decision wherein claimant was given a so-called running award of temporary benefits.

On appeal the record consists of the transcript; the deposition of Robert C. Larimer, M.D.; claimant's exhibits 1-4, inclusive; defendants' exhibits 1-3, inclusive; joint exhibit 1; and defendants' post-hearing exibit 1.

The result of this final agency decision will be a very slight modification of the hearing deputy's proposed agency decision in that the payment of the bill from the Mayo Clinic will not be allowed.

On December 7, 1977, claimant slipped and fell on the floor while at work. The slip and fall aggravated a preexisting phlebitis and caused problems in her neck and back. Her problems with a sore back and phlebitis go back to 1970. Defendants paid compensation to claimant until December 12, 1979.

Claimant has been seen and treated by several doctors, among them James E. Powell, M.D., a general practitioner, Robert C. Larimer, M.D., a qualified internist, and John L. Juergens, M.D., of the Mayo Clinic, an internist. The opinions of these doctors vary, Doctors Powell and Larimer agreeing that claimant's thrombophlebitis problem was aggravated by the injury and continues to disable her, while Dr. Juergens' examination did not reveal even a positive diagnosis of thrombophlebitis, let alone assigning a causal relationship between the injury and the disability.

The issues are stated in defendants' brief: "Whether claimant's current disability is causally related to her work injury of December 1977. Whether the claimant's medical bills are related to claimant's work injury of December 1977."

Claimant has the burden of proof. Matters of causal relationship are essentially within the realm of expert testimony. *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 101 N.W.2d 167 (1960).

An analysis of the evidence will show that Dr. Powell and Dr. Larimer connect the injury and the ensuing disability. As stated above, Dr. Juergens' report does not make such a connection. The opinions of the former two physicians are accepted because they are both treating doctors and, of course, Dr. Larimer is himself an internist.

The bill for the drugs (claimant's exhibit 1), was objected to at the time of the hearing as follows: "I have no objection to the exhibits, provided it can be shown that there's a connection between these drug prescriptions and Mrs. Vollmecke's original accident of December 7, 1977, and not any subsequent hospitalization for problems with her chest or her right arm." (Tr. 27-28.) That objection is not specific enough in that it is conditional and equivocal.

The Medical Associates, P.C., bill was objected to at the hearing as follows:

> Your Honor, the State would object to the exhibits in here which might refer to the right arm for the reason that Mrs. Vollmecke has never claimed as of this date that her injury, nor has she alleged in a petition that her injury of December 7, 1977, caused her to have any difficulties with her right arm or her lung. Without raising that issue, we believe these exhibits are irrelevant and immaterial to the issues presented here today. (Tr. 28-29.)

The objection goes to materiality; in that respect, claimant's petition mentions, inter alia, "entire body," which includes

the arm. For that reason, the objection will not be allowed.

With respect to the bill of the Floyd Valley Hospital (claimant's exhibit 3), defendants stated at the time of the hearing that they had no objection to it being received in evidence, so it is too late to raise the issue of admissibility now.

Finally with respect to the charges by the Mayo Clinic, the only reference to that bill is claimant's testimony (Tr. 35) that it was "somewhere between $520 and $535." Such testimony is insufficient to justify ordering the payment of the bill.

Findings of Fact

1. As of July 7, 1980, claimant was unable to work but still improving. (Joint exhibit 1, Powell report of July 7, 1980; Larimer depo. 16)

2. Claimant's recuperation will take a long time. (Joint exhibit 1, Larimer report 12-7-79)

3. Claimant's difficulties stem from her work-connected fall of December 7, 1977. (Larimer depo. 30; Joint exhibit 1, Powell report of July 7, 1980)

4. Claimant has phlebitis with veno-occlusive disease, a generalized disease which was aggravated in her fall of December 7, 1977. (Larimer depo. 8, 30; Joint exhibit 1, Powell report of July 7, 1980)

5. Claimant had an episode of thrombophlebitis in 1970 and had continuing difficulties with that condition. (Joint exhibit 1, Frederick J. Lohr, M.D., report of January 13, 1977, and Larimer report of June 26, 1978)

6. Claimant's thrombophlebitis affects her lower left leg and right arm. (Joint exhibit 1, Powell report of May 14, 1980)

7. In addition to the difficulty with phlebitis, claimant also hurt her back in the December 7, 1977 injury. (Joint exhibit 1, Lohr report of July 14, 1978)

8. Defendants did not object to the introduction of claimant's exhibit 3. (Tr. 26)

Conclusions of Law

On December 17, 1977, claimant sustained an injury which arose out of and in the course of her employment.

Defendants filed a memorandum of agreement for this injury.

Defendants paid weekly compensation benefits to December 12, 1979.

Claimant continues to be temporarily disabled because of her work injury.

Defendants' objection to the introduction of claimant's exhibit 1 was not specific.

Defendants' objection to the introduction of claimant's exhibit 2 was overruled because the exhibit was material.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for temporary total disability at the rate of one hundred thirty-two and 66/100 dollars ($132.66) per week beginning December 12, 1979 to be paid during the period of claimant's disability, accrued payments to be made in a lump sum together with statutory interest payable until three (3) months prior to the date of this decision and recommencing as of the date below.

Defendants are further ordered to pay the following bills:

Drugs	$ 147.87
Medical Associates, P.C.	164.00
Floyd Valley Hospital	77.00

Defendants are also ordered to pay mileage expenses.

Costs of this action are taxed against defendants.

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

* * *

Signed and filed at Des Moines, Iowa this 30th day of October, 1981.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

SARAH K. VOWELL,

Claimant,

vs.

DAVENPORT TRUCK PLAZA,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed November 16, 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.

On appeal the record consists of the transcript of the testimony of the hearing of May 27, 1981; claimant's exhibits 1-8, inclusive; and defendants' exhibits A, B, C, and D; also a part of the record is a packet of papers marked "evidence JMB 5-27-81."

The result reached by the undersigned deputy industrial commissioner will be the same as that reached by the hearing deputy; however, the result is reached for reasons addi-

tional to those stated by the hearing deputy.

After working for a number of years at Bendix Aviation, claimant secured a second full-time job with the defendant-employer beginning March 1980. The employee claims that while at work on July 10, 1980, she fell down some stairs and seriously hurt her back. Basically, defendants claim that the employee was not in the course of her employment when this incident occurred. The issues raised by defendants' brief will be discussed separately.

I.

Defendants' exhibit D was refused admission into evidence by the hearing deputy. His decision will be modified somewhat in that that exhibit will be admitted. The exhibit, which relates to some of claimant's conduct and the reason for her leaving her employment at the Davenport Truck Plaza, was objected to by claimant as self-serving. Defendants claim the only reason for its admission into evidence is that it shows the reason claimant left the employment was *not* the injury. The documents are self-serving; however, they will have probative values and will be admitted for the limited purpose mentioned by defendants.

II.

The main issue of the case concerns whether or not claimant was in the course of her employment at the time of her injury. Claimant's son Allen also worked at the Truck Plaza. Claimant and Allen Vowell both testified that there was some questions about the sufficiency of his paycheck; they further testified that claimant's supervisor, Doug Neece, stated that claimant should inquire about the check at the office of one Bill Hartsock. Neece further told claimant she could accompany Allen and show him the correct office. Neece did not recall giving such permission.

At any rate, claimant and son Allen went to the office of Bill Hartsock, who was busy. As they left the area, claimant fell down some steps and hurt her back. There is no doubt that this incident occurred during claimant's working hours. "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, 172 (Iowa 1968). Although the hearing deputy did not make a flat statement or a finding that Neece told claimant to show Allen to the office, the deputy did say that the greater weight of evidence indicated such was the case. One would agree that the clear recollection of claimant and her son is of greater weight than that of Mr. Neece, who simply did not remember. Thus, with no real conflicting evidence, there is no reason to disbelieve claimant.

The question, then, is whether claimant sustained an injury which arose out of and in the course of her employment. Claimant has the burden of proof. *Lindahl v. Boggs*, 236 Iowa 296, 18 N.W.2d 607 (1945); *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934). Claimant's actions just do not seem unreasonable. Had Mr. Neece suggested claimant abandon her employment for some clearly private motive, claimant might not have remained in the course of her employment. However, such was not the case. It is hardly unusual for one employee to show another employee about the premises, and the fact that the two employees are related would not make any difference. Claimant carries the burden.

III.

With respect to claimant's testimony estimating weights lifted by other persons at Bendix Aviation, defendants argue that claimant could not testify with any accuracy. Admittedly, the weight itself of the evidence is not great; however, the claimant's testimony as to her general knowledge of people's work at Bendix is admissible.

IV.

On another point of evidence, defendants object to claimant's testimony that, if she lost her present position at Bendix Aviation, she would be hard put to transfer to as light a job as she presently does. Again, claimant's general knowledge of the situation at Bendix is admissible. Not a great deal of weight is attached to the evidence of what would happen is she lost her present job.

V.

Defendants object that the medical and allied bills should not be paid because there was insufficient evidence that they were necessitated by the treatment. (The parties agreed that the bills were fair and reasonable.) Claimant indeed was derelict either in not ironing out the problems with the defendants prior to the hearing or in failing to obtain greater support. However, an examination of the record clearly shows that most of the bills were for treatment related to the compensable injury. One bill for a cystoscopy does not appear to be compensable.

VI.

Another perhaps more important issue is the one of industrial disability. Claimant appears to be a bright woman, a high school graduate with good potential. Her injury, however is severe. According to an examining physician, Leo J. Miltner, M.D., a qualified orthopedic surgeon, claimant's impairment was only 10% of the spine. On the other hand, the treating doctor, Richard T. Beaty, D.O., a qualified osteopathic doctor, assigned a rating of 25% permanent partial impairment. (It must be conceded that the hearing deputy stated the only estimate of permanent partial impairment was that of Dr. Miltner, when the record clearly was to the contrary. But, making that concession highlights the fact that the arbitration decision was only the proposed agency decision. The final agency decision may or may not adopt the proposed decision. In this case, only the result is adopted. See §17A.15.)

A rating of 25% permanent partial impairment is serious. This would appear to be a case of back surgery gone wrong, as claimant had to be readmitted to the hospital after surgery for radiating pain. Since claimant's disability is in her back, the measure is the loss of earning capacity, which includes

considerations of age, education and ability to work and earn money. *Martin v. Skelly Oil*, 252 Iowa 128, 106 N.W.2d 95 (1960); *Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961). Considering the functional impairment along with the other elements of industrial disability, claimant has a fairly restricted future and a 40% permanent partial disability to the body as a whole is not extravagant.

VII.

Finally, defendants object to what they feel is the injection of the hearing deputy's personal opinions, empathy or private knowledge into his interpretation of the record. The hearing deputy is known to have a bad back. His familiarity with the TENS UNIT (Tr. 29) on the one hand could be prejudicial, or, on the other, could increase his expertise. His remark, or finding, that claimant operated "on sheer will power in order to do even routine duties" does not necessarily stem from the deputy's opinion of his own bad back. Also, when defendants state that "other evidence [exists] which would require a far lower rating of industrial disability," (Brief, 8) they, too should not overlook the treating doctor's estimate of functional impairment.

Findings of Fact

1. Claimant was age 42 at the time of the hearing. Claimant is a high school graduate. (Tr. 8-9)

2. Claimant has worked regularly at Bendix Aviation since 1973; her occupation is not physically demanding. (Tr. 10)

3. On July 10, 1980, claimant was also employed full time as a cashier at the employer's place of business. (Tr. 13)

4. Claimant's son Allen was employed at employer-defendants' place of business as a dish washer. (Tr. 19)

5. Claimant's supervisor at the time of injury was Doug Neece. (Tr. 19, tr. 87)

6. On the injury date, at Doug Neece's suggestion, claimant went with her son to Bill Hartsock's office in the upstairs portion of claimant's premises to check the accuracy of the amount of Allen's paycheck. (Tr. 19) Upon completing that errand, as she was returning to the cash register, she fell down some steps. (Tr. 20-21)

7. As a result of the fall at work, claimant sustained a herniated nucleus pulposis at L4-5. (Beaty report 12-18-80; Lank report 9-22-80)

8. Claimant had disc surgery, a partial hemilaminectomy, L4, L5 on the left, on August 14, 1980. (Beaty operative report 8-14-80)

9. The fall at work and subsequent surgery resulted in permanent partial impairment to the body as a whole of 25%. (Beaty report 12-18-80)

Neither side disputed the length of the healing period and the weekly rate found by the hearing deputy to be $98.93 per week, so that rate will be applied in this case.

Conclusions of Law

On July 10, 1980, claimant sustained an injury which arose out of and in the course of her employment.

Said injury resulted in a permanent partial disability to the body as a whole for industrial purposes of forty percent (40%).

Defendants' exhibit D is hereby admitted as a part of the record.

The medical and allied bills, listed below, resulted from necessary treatment of the work injury.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of twenty-three and four sevenths (23 4/7) weeks for healing period at the rate of ninety-eight and 93/100 dollars ($98.93) per week and further to pay weekly compensation benefits unto claimant at the same rate for a period of two hundred (200) weeks for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay the following medical and allied expenses:

Orthopedic Surgery Associates	$ 90.00
Russell A. Lyons, D.O.	335.00
Campbell Clinic	978.00
Surgical Associates	80.00
Richard T. Beaty, D.O.	1,843.00
Davenport Osteopathic Hospital 7/15	85.75
Davenport Osteopathic Hospital 7/15 — 8/23	10,039.65
Davenport Osteopathic Hospital 10/80	1,065.35
Davenport Osteopathic Hospital 2/15/81 — 3/2/81	4,428.80
Regara Corp (TENS UNIT)	595.00
Ambulance	120.00
Schweinberger Surgical Supply	46.12
Drugs, walker, brace	484.40

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

Costs are taxed against defendants.

* * *

Signed and filed at Des Moines, Iowa this 11th day of February, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

MATT VRBAN,

Claimant,

vs.

CITY OF DALLAS,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a proposed review-reopening decision filed October 21, 1981 wherein claimant was denied further compensation benefits.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Joseph H. Dickerson, Ph.D., Robert C. Pack, Ruth K. Shilling, William J. Dixson, Thomas Franklin Borrall, Vivian Scott, Walter Henning, Pennie Nelson, Delbert Austin Hayes and Joseph D. French; claimant's exhibits 1 through 7; defendants' exhibits A through E and G through M; the depositions of Paul From, M.D., Delbert Austin Hayes, Joseph L. Dickerson, Ph.D., Michael Taylor, M.D., and the claimant; and the briefs of all parties on appeal.

Claimant's brief on appeal fails to posit any issues on appeal. Claimant's notice of appeal and defendants' appeal brief indicate an issue as to whether or not claimant has met his burden of proof that his alleged permanent disabilities are causally related to any employment related injury.

Claimant, 59 years old and single at the time of hearing, has a tenth grade education. He lived on his parents' farm much of his life and has a sporatic history of manual labor jobs. Claimant spent a year in the United States Army Air Corps. Claimant was later employed by the Veterans Administration in Knoxville, Iowa where on June 30, 1955 he sustained a severe electrical shock in the course of his employment. As a result of this injury, claimant sustained permanent disability. Claimant was awarded a non-service connected pension from the Veterans Administration until 1975 at which time claimant began his employment with defendant employer. (Transcript, pages 16-18.)

Claimant was hired by the defendant employer on a temporary basis by virtue of a money grant from the Central Iowa Regional Association of Local Governments (CIRALG). The purpose of the grant was to train eligible participants to gain skills which could lead to full-time employment of such participants in the future. (Defendants' exhibit H; Hayes deposition, page 8.) Claimant was hired as a maintenance worker and "police department." (Transcript, page 21.) He was the sole member of each unit.

Claimant alleges that he sustained an employment injury on December 13, 1977, the same day he informed defendant employer that he wanted medical attention. Claimant testified that this alleged injury occurred during attempt to remove a broken drive chain from a city owned road maintainer. (Transcript, pages 28-30.)

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 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).

Claimant's credibility is placed in doubt by several factors. The treatment records of Collins Memorial Hospital, in Knoxville, Iowa, where defendant employer took claimant for treatment, indicate that claimant related a history of an injury two months earlier in October of 1977. The December 13, 1977 report of John E. Griffin, M.D., claimant's original treating physician, states in part:

> This 55-year old white male is employed by the city of Melcher and he states that he bumped his left elbow rather hard accidently while using a city maintainer vehicle two months previously. Since that time, he has experienced tenderness and pain on the lateral aspect of the elbow which is aggravated by motion. The day of admission, he developed, slowly over several hours duration, numbness of the left forearm with inability to use the muscles of the wrist and hand. He denies complete loss of function but describes a weakness and numbness which begins at the mid aspect to the left forearm and extends to involve the remainder of the arm and the entire hand. (Claimant's exhibit 2.)

Testimony of city officials indicates the road maintainer claimant referred to was broken and repaired in October rather than in December of 1977. Defendants further produced a work order from Gibbs-Cook Equipment Company dated October 29, 1977 which covered repair costs for the maintainer. (Defendants' exhibit E.)

This work order, together with medical records and testimony at hearing, establishes that if an injury in fact occurred it would have been in October 1977. Claimant's testimony and medical evidence indicate, however, that claimant was working without restriction until December 13, 1977. (Claimant's exhibit 2.) Such a lapse of time from the injury to the onset of symptomatology creates some doubt as to whether claimant's alleged disabilities were caused by an injury arising out of and in the course of his employment.

The November 1, 1978 report of Peter D. Wirtz, M.D., states that claimant suffers no permanent functional impairment. (Claimant's exhibit 2.) Moreover, the reports of Drs. Griffin and Wirtz, J. R. Scheibe, M.D., A. L. McCormick, D.O., A. P. Neptune, M.D., and William J. Stewart, M.D., all fail to disclose the etiology of claimant's complaints.

Claimant's counsel asserts that claimant suffers a permanent impairment due to a conversion reaction caused by

the injury of December 13, 1977. Claimant himself has consistently denied, however, that his alleged disability is due to such a psychogenic reaction to an injury.

Dr. Joseph Dickerson, chief psychologist at the Veterans Administration Hospital in Des Moines, testified in deposition that he examimed claimant on January 20, 1978 and March 20, 1978. Dr. Dickerson testified that during the examination of January 20, 1978, claimant gave a history of having been injured "several months" before. (Dickerson deposition, page 7.) As to the results of psychological testing of claimant, Dr. Dickerson testified:

> Well, according to the profile of the test, the MMPI showed the highest peak of hypochondria at 90 T-score. That would be very very high. It would be in the top 1 percent or less of the general population on that scale. This showns an over-emphasized reaction of physical symptoms and physical problems. (Dickerson deposition, page 10.)

Dr. Dickerson, however, was unable to state positively whether claimant's psychological problems were triggered or aggravated by an industrial injury. Dr. Dickerson testified: "I would say that it is possible that a trauma may trigger it or could have triggered this. It might also happen under other circumstances which we do not know." (Dickerson deposition, page 18.)

Dr. Dickerson's testimony also indicated that if claimant's symptomatology did not arise for two months after the injury, claimant's behavior would be inconsistent with a conversion reaction caused by an injury.

> Q. When did you — what are you assuming with respect to the onset of the symptoms or when they came?
>
> A. I am assuming they came with the injury or shortly afterwards.
>
> Q. And how long in the usual case would you expect a conversion reaction?
>
> A. Usually immediately.
>
> Q. That is assuming that the reaction is related to the trauma; correct?
>
> A. Yes.
> (Dickerson deposition, page 27.)

Paul From, M.D., a specialist in internal medicine, examined claimant on December 31, 1978. Dr. From testified that he took claimant's history, reviewed the medical records of the Collins Memorial and Veterans Administration Hospitals, and performed a neurological examination. (From deposition, pages 9, 21.) Dr. From testified that claimant gave a history of having been struck by lightning in 1967.

Dr. From opined that claimant had no permanent functional impairment as a result of an industrial injury. Dr. From, did however, feel that claimant was disabled as the result of personality problems. (From deposition, page 9.) Dr. From testified as to the impact of claimant's psychological problems:

> ...He tended, from the psychological standpoint, I thought, to martyr his symptoms. That is, he explained to me many times how disabled he was and could not do anything. But yet, if he had his way this would not be the case. He would certainly be back to work, but it was just impossible for him to do anything.
>
> * * *
>
> He had some abnormalities in pain distribution and in stright leg raising studies, which were somewhat bazaar in the relationship to the alleged areas of injury and symptomatology; so much so that I wondered if some of these were voluntarily induced rather than what I was objectively finding in a complaint basis, somebody that would let you just examine them. I thought maybe some of the findings were voluntarily being put on, especially muscle weakness and in limitations of motion that I was finding. Other than for those findings, the remainder of the examination really was not significant. He had evidence of previous hernia repair surgery. He had evidence of some bronchitis or a lung disorder of a mild degree. But those were all the objective findings I could elicit. (From deposition, pages 7-8.)

Dr. From went on to define what was meant by the term "conversion reaction":

> A conversion reaction is a very common type of reaction one sees in medicine. It is based upon psychological problems. That is, one has a conflict of some type within one's body or psychic makeup and rather than being able to bring that problem out, it is converted into a somatic problem which could take the form of nearly anything. For example, it could be any one of the cranial nerves involved with an inability to function or function in a bazaar manner, with paralysis or weakness of any part of the body, with unusual sensations, with inabilities to function in some way. When that conversion takes place, then that symptomatology becomes a prominent symptom and the original conflict then is no longer bothering that individual.

Dr. From concluded that while the industrial injury which claimant alleges may have caused some type of reaction, claimant's disabilities are due to his preexisting psychological makeup. (From deposition, pages 13-14.)

Michael Taylor, M.D., a psychiatrist, examined claimant on September 25, 1980. Based upon a lengthy history and the results of psychological testing by Dr. Dickerson, Dr. Taylor opined that claimant's complaints were exaggerated in relation to his symptoms. (Taylor deposition, pages 19-20.) While Dr. Taylor diagnosed claimant to be suffering from a conversion reaction, he did not feel that such a reaction was caused by an injury occurring on December 13, 1977. (Taylor deposition, pages 17, 20.) Dr. Taylor further testified that a conversion reaction would be totally inconsistent with the circumstances surrounding the alleged injury. Dr. Taylor testifies:

The records from Collins Memorial Hospital and from the VA Hospital both quote Mr. Vrban as saying the injury occurred two months prior to December of 1977.

So, first of all, the delayed onset — the alleged injury occurred in October of 1977. His symptoms don't start until December of 1977 — and then, secondly, again, by far and away the most predominant cause of conversion reactions is underlying psychological stress, rather than a physical injury such as this.

But the primary factor is the delay.

Q. Well, you have already testified that you read the deposition of Dr. Dickerson; and in there he alludes to the possibility of a minor conversion reaction in October of 1977 which builds into a major problem in December of 1977.

I would ask you, what would your views be on that proposition?

A. That's inconsistent with everything I have read about conversion reaction.

The onset of conversion reactions is usually sudden, and to say that he had a mini-conversion reaction in October which then blossomed into a full conversion reaction in December has been inconsistent with everything I have read about conversion reactions.
(Taylor deposition, pages 17-18.)

As to whether claimant's psychological problems affects his ability to work, Dr. Taylor opined that claimant was capable of performing any employment for which he is educationally suited. (Taylor deposition, pages 18-19.)

The medical evidence contained in the record clearly establishes that claimant has preexisting psychological problems. Claimant's own denial of such a problem plus the medical and lay testimony in the record create serious question as to whether such a preexisting condition was aggravated or even made symptomatic by an industrial injury.

Further doubt is created by factual disputes over other possible causes for claimant's conversion reaction.

Defendants' exhibits J, K, L and M indicate that funds for claimant's position with defendant employer were to be discontinued. Testimony of Delbert Hayes and Pennie Nelson, Mayor and City Clerk respectively for defendant employer, indicates that claimant was aware of his impending termination in December of 1977.

Dr. Taylor felt that claimant's conversion reaction was due to stress unrelated to any trauma. (Taylor deposition, page 16.) Dr. Dickerson opined that claimant's conversion reaction could have been triggered by the loss of a job in which he took great pride. (Dickerson deposition, page 30.)

The record on appeal reveals that claimant may best be described as a colorful individual who lives in his own self-exaggerated world. In his proposed decision filed October 28, 1981, the deputy states:

In this decision we are dealing with a 59 year old male who may best be described as the town "character." The judgement of claimant's peers as to his reliability is significant. The City of Dallas never issued the claimant's police badge (Transcript, page 99, line 20). Claimant, who described himself as the "Chief of Police" in Melcher, Iowa, was unable to secure a renewal of a gun permit (Transcript, page 75, line 3 and page 195, line 20).

In passing, it should be noted that the claimant has never been reimbursed by the city counsel of the defendant employer for the expense incurred by the claimant of his purchase of a police radio (Transcript, page 79, line 1 and page 194, line 25).

Claimant would have the undersigned believe that he was offered the position of police chief by the authorities at Kellogg. Walter Henning, Maylor [sic] of Kellogg, denies making such an offer of employment (Transcript, page 123, line 2).

The record clearly indicates that claimant has psychological problems but truly believes that he is functionally disabled as the result of an injury on December 13, 1977. The record further indicates that claimant is a proud individual who enjoys work and now evokes sympathy from his peers because of his disability. Nonetheless, the fact that claimant may obtain sympathy does not establish that claimant has suffered a permanent industrial disability.

The testimony and reports of Dr. Taylor establish that claimant's psychological problems preexist claimant's alleged injury and that these psychological problems were not initiated or significantly aggravated by any industrial injury. The medical evidence and lay testimony in this case is filled with inconsistencies requiring extensive comparison of lay testimony, exhibits and medical testimony. Upon review, the opinions of Dr. Taylor are afforded the greater weight, given his qualifications, his access to medical records and the fact that his opinions are based upon a history corresponding more closely to the record.

Taking all the credible evidence from the record on appeal into account, it is concluded that claimant has failed to meet his burden of proof that the disabilities which he alleges arose out of an injury of December 13, 1977.

Findings of Fact

1. That claimant sustained a permanent disability while an employee of the federal government in 1955 for which he received a non-service disability pension until he began employment for the city of Dallas, Iowa in 1975. (Transcript, page 18.)

2. That claimant was hired as a part-time law enforcement officer by virtue of a CIRALG grant. (Defendants' exhibit G.)

3. That in December of 1977 claimant was aware that his employment was to be terminated because of discontinuation of that CIRALG grant. (Defendants' exhibits J, K, L and M; transcript, page 194.)

4. That claimant has a history of psychological abnormality predating December of 1977. (From deposition, page 14; Taylor deposition, page 16.)

5. That claimant sustained a nondisabling incident in October of 1977. (Defendants' exhibits C and D.)

6. That claimant's preexisting psychological abnormalities were not triggered or aggravated by an incident occurring in October or December of 1977.

Conclusions of Law

That claimant has sustained a permanent disability which predates and is unrelated to the alleged injury in this matter.

That claimant has failed to sustain his burden of proof by a preponderance of the evidence that any condition he has is as a result of an injury arising out of and in the course of his employment.

WHEREFORE, the finding of the deputy in a proposed decision filed October 21, 1981 are proper.

THEREFORE, it is ordered:

That claimant take nothing further as a result of these proceedings.

That pursuant to Industrial Commissioner Rule 500—4.33, costs of these proceedings are taxed to the claimant.

* * *

Signed and filed this 9th day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

VIRGINIA WAGNER,

Claimant,

vs.

DES MOINES AMERICANA HEALTHCARE CORP.,

Employer,

and

CONTINENTAL INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants have appealed from an order filed by the deputy on September 10, 1981, which overruled defendants' motion to set aside default and motion to dismiss.

The record on appeal consists of all pleadings, motions, orders and filings in this matter, including the appeal briefs of the parties.

The issue on appeal as stated by defendants in their appeal brief is whether "the failure of the claimant to serve a named party [is] a denial of that party's constitutional right to notice and hearing."

On July 1, 1981 claimant filed an original notice and petition with this agency. An affidavit of mailing and return receipts indicate that copies of the petition were mailed to H. A. Stoebe, registered agent for Quality Health Care Center and Francis Phillips, the insurance administrator for Americana Health Care Corporation. Mr. Stoebe's copy was delivered on July 10, 1981 and Mr. Phillips copy arrived on July 20, 1981.

Defendants failed to file an appearance within the twenty day period provided for in Industrial Commissioner Rule 500—4.9. Thereafter, on August 14, 1981 claimant mailed a copy of the application for default to Mr. Phillips. An order for default was entered on September 10, 1981 at which time defendants still had not filed an appearance.

On November 9, 1981 defendants filed a motion to set aside default and a motion to dismiss, alleging that the petition "was not forwarded to the defendant insurance carrier through inadvertence, mistake, and excusable neglect" until after the default order was entered, and in addition that the statute of limitations with respect to claimant's claim had run. Claimant's resistance to defendants' motions was filed on November 17, 1981. On November 25, 1981 an order was filed which overruled defendants' motion. It is from this order which defendants have appealed.

Iowa Code section 87.10 provides:

> *Other policy requirements.* Every policy issued by an insurance corporation, association, or organization to insure the payment of compensation shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and 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.

The Iowa Supreme Court in *Kratz v. Holland Inn*, 186 Iowa 963, 969, 173 N.W. 292 (1919) recognized that the obligation assumed by the insurer as provided in the statute which was in effect in 1919, a section essentially identical to the present section 87.10, is to "indemnify the employer against the liability which the Compensation Act imposes upon him in favor of employees injured in his service. . . ." That provision recognizing the insurer's liability has a binding effect upon the insurer of every liability established against the employer in favor of the employee. *Id.* at 971.

Under the Workers' Compensation statutes, "the liability of the insurance carrier to the injured employee depends only upon the liability of the employer to the employee, regardless of any question that may arise between the employer and the insurer." *Bates v. Nelson*, 240 Iowa 926,

933, 38 N.W.2d 631 (1949). Misunderstandings between the insurance carrier and employer cannot affect the rights of the employee for whose protection the workers' compensation laws were enacted. *Id.* at 932.

Defendants cite *Henschel v. Hawkeye-Security Ins. Co.*, 178 N.W.2d 409 (Iowa 1970) as support for their argument that due process requires that a named defendant be notified when a workers' compensation action has been commenced. Defendants note that the requirements contained in section 87.10 render workers' compensation policy provisions "radically different" than other insurance policies and recognize that this provision is intended to protect the employee.

What defendants fail to discuss, however, is that most insurance agreements are not intended to directly benefit third parties. Normally, an insurance agreement is a contractual arrangement between the insurer and the party to be benefitted, the insured, which specifically provides for notice of a claim against the insured. In these cases, the insured knows who to contact in the event such notice is required. The party bringing suit against the insured is not required to notify the insurer.

Similarily, in workers' compensation cases the insured possesses the necessary information as to notification of its insurer, information the employee is not necessarily aware of. *See In re Disinterment of Tow*, 243 Iowa 695, 699, 53 N.W.2d 283 (1952). The employee is not a party to the insurance agreement between the carrier and the employer. In the majority of cases, the insured will notify the insurer but in the event such notification is withheld, the employee is still protected under the provisions of section 87.10.

Defendants additionally contend that failure to notify the carrier of a pending action is a violation of the Industrial Commissioner's Rules and the Iowa Administrative Code.

Although section 17A.12 speaks in terms of notice to "parties," the workers' compensation law clearly contemplates that notice of a claim need only be given to the employer who in turn will generally notify the insurer. Iowa Code Section 87.10.

Imposing a requirement of notice to the insurer on a claimant would be detrimental to claimants who may not possess any information regarding their employer's compensation carrier.

There is no doubt that in an ordinary insurance case in which a contract exists between the insured and the insurer, the carrier may deny coverage if notice was not properly given by the insured; however, claims arising under Iowa's workers' compensation statute in which no notice was given to the insurer have a different outcome due to the theory of employee protection underlying these compensation laws. Even though disputes between the employer and carrier may be the subject of litigation between the insurer and employer, these differences do not affect the employee's rights. *See Bates v. Nelson*, 240 Iowa at 932.

Although defendants' constitutional due process argument is well presented, the fact remains that defendant insurer's contention arises from a notice dispute between themselves and the employer. Section 87.10 clearly provides for this type of situation with protection of the employee in mind. Therefore the order overruling defendants' motion to set aside the default judgment and motion to dismiss was proper.

Findings of Fact

1. Claimant mailed copies of the petition to H. A. Stoebe, registered agent for Quality Health Care Center and Francis Phillips, the insurance administrator for Americana Health Care Corporation.

2. Defendant insurer made no showing of mistake, inadvertance, surprise, excusable neglect or unavoidable casualty which would allow the default judgment to be set aside.

Conclusions of Law

1. Claimant is not required to notify defendant insurer of the workers' compensation claim he filed against defendant employer.

THEREFORE, it is ordered:

That the order filed November 25, 1981 overruling defendants' motion to set aside default and motion to dismiss be affirmed.

* * *

Signed and filed this 26th day of February, 1982.

ROBERT C. LANDESS
Deputy Industrial Commissioner

No Appeal.

ETHEL L. WALLER,

Claimant,

vs.

CHAMBERLAIN MANUFACTURING,

Employer,
Defendant.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Ethel L. Waller, the claimant, against her employer, Chamberlain Manufacturing, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury she sustained on November 7, 1977. This matter came on for hearing before the undersigned at the Wapello County Courthouse in Ottumwa, Iowa, on September 24, 1981. The record was considered fully submitted on that date.

On November 21, 1977 defendant filed a first report of injury concerning the November 7, 1977 injury and a memorandum of agreement indicating that the weekly rate for compensation benefits was $122.33. On May 10, 1978 defend-

ant filed a form 5 indicating that 10 3/7 weeks of temporary total disability benefits had been paid pursuant to the memorandum of agreement. At the time of the hearing, the parties agreed that claimant had received temporary total disability benefits through June 29, 1979.

The record consists of the testimony of the claimant; the testimony of Paul Halferty; joint exhibit 1, varied medical reports; and claimant's exhibit 2, a GATB individual aptitude profile. Defendant objected to the testimony of Paul Halferty because his name had not been included on a witness list as specified in the pre-hearing order. Claimant's counsel acknowledged that he missed such requirement. However, the parties agreed that claimant's counsel did state, at the time of the pre-hearing conference, that he would be calling an expert to testify on behalf of the claimant. In light of such minimal notice, defendant's objection was overruled and claimant's counsel was admonished to heed the specifics of the pre-hearing order in the future. Defendant's other objections to Halferty's testimony and claimant's exhibit 2 were noted as going to the weight of such evidence, not to the admissibility.

Issues

The issues to be determined include whether there is a causal relationship between the alleged injury and the disability, and the nature and extent of such disability.

Recitation of the Evidence

Claimant testified that on November 7, 1977 as she was reaching overhead to take a stack of packaged glass from the rack where it was stored down to a cart in the course of her employment duties as a set up person, some of the packaged glass fell over, pinning her left arm and shoulder against the still-rack. (On cross-examination, claimant testified that it was her upper [distal] arm and under [proximal] arm that were pinched.) She recalled being trapped in that position for about 10 minutes.

Claimant was treated initially by the company doctor, a Dr. Crane of Albia, two or three times within the first three week period. Claimant testified that her upper left extremity was black and blue from the shoulder to the hand for 1 1/2 months. She noticed constant pain from the shoulder to the fingers and a loss of grip strength.

When Dr. Crane released the claimant to return to work he advised her to go to Donald D. Berg, M.D., if she had further difficulty. Claimant related that she attempted to work for about three weeks. She wore an elastic bandage on the upper left extremity between the shoulder and lower forearm. Another employee assisted her in performing some of the work she regularly completed by herself prior to the injury. Claimant testified that she experienced extreme pain in the upper left extremity and so advised her foreman, who referred her to the company nurse who, in turn, made an appointment for her to see Dr. Berg.

In a letter dated April 18, 1978 (joint exhibit 1, page 14) Dr. Berg reports that he first examined the claimant on December 19, 1977 at which time claimant had "noted evidence of lateral epicondylitis which was apparently refractory treatment with antiinflammatory [sic] medication." He injected claimant's lateral upper condyle with Cortisone and placed it in a Fromison splint. He advised the claimant to remain off work for a few days. When Dr. Berg saw the claimant on March 10, 1978 she "continued to have lateral epicondylitis, left elbow with less intensity" and "bicepital [sic] tendonitis, left shoulder." He advised the claimant to use ice packs and avoid lifting at work for 3 weeks.

Claimant testified that the ice packs made the pain worse but lessened the swelling in her upper left extremity. Claimant recalled that when she showed Dr. Berg's restriction to defendant employer's plant manager, he advised her there was no light duty work for which she would qualify and told her to go home.

When claimant returned to Dr. Berg on March 31, 1978, he injected the tendonitis insertion site of the deltoid muscle in the humerous with Xylocaine and Cortisone and advised her not to return to work until her arm was better. (Joint exhibit 1, page 14.) Dr. Berg next saw the claimant on April 18, 1978 at which time he noted that she was:

> ...still having tenderness in the deltoid muscle, left shoulder, and has some limitation of abduction abduction going to 90 degrees. Flexion and extension are normal and rotation is normal. She is tender at the insertion site of the deltoid muscle and in the muscle itself. There is also slight tenderness in the lateral epicondyle. There is also some forearm tenderness.
>
> I feel the basis of her problem is inflammatory conditionwith [sic] tendonitis and inflammation of ligamentous insertions in left shoulder area and left forearm. Her general prognosis is good. Presently I feel that she would have a 5 percent disability of the left arm secondary to her pain. However, in the future I suspect this will resolve and she will have no disability.
>
> I recommend at the present time that she take Naprosyn, 250 mg. 2 b.i.d. and Norgesic, 1 q.i.d. Apply ice packs to her shoulder and to return to work as of May 1, 1978. (Joint exhibit 1, pages 14 through 15.)

Claimant testified that she has remained under a doctor's care to date and has made no effort to return to work with defendant employer.

When Dr. Berg saw the claimant on June 27, 1978 he again injected the tendonitis insertion site of the deltoid muscle of the humerous with Cortisone. He last saw the claimant on July 17, 1978, at which time claimant continued to demonstrate bursitis and tendonitis left deltoid, and Dr. Berg advised the claimant that he had no further treatment to offer her and referred her to University of Iowa Hospitals and Clinics in Iowa City. He noted that claimant had improved medially but did not think that surgery was indicated. (Joint exhibit 1, page 16.)

In clinical notes from the University of Iowa Department of Orthopaedic Surgery for September 25, 1978 Dr. Lehmann states in part:

> She localizes pain to the lateral aspect of the upper arm near the deltoid insertion and trapezius. She notes that on lifting her arm in ABduction [sic] and flexion

this exacerbates the pain. She also complains of numb like feeling over the dorsum of the ulnar 2 fingers on the left hand. She feels that her hand has become weaker. These symptoms bother her enough now that she has difficulty dressing.

Physical examination — shows a full passive range of motion of the shoulder, elbow and wrist. On active ABduction [sic] and flexion she can only get to 90-100° before she has pain. She is markedly tender over the triceps and distal portion of the deltoid. She is less tender over the biceps and brachialis. She has a full range of motion of the elbow, but on pronation, supination with pressure over the radial head, she has some tenderness. She has a negative Tunnel at the elbow. Neurological examination shows somewhat decreased sensation to fine touch to the dorsum of the ulnar 2 fingers. She has a negative Froman's test, although her interosseus is less strong on her right hand. She has no obvious muscle atrophy.

X-rays taken today show no abnormalities.

We feel that Mrs. Waller's primary problem is secondary to her trauma 10 months and there is probably some scarring in the muscle groups of the upper arm. We feel that anti-inflammatory such as Naprosyn 250 mgm BID may be of benefit, but that primarily she needs an exercise program. She was sent to Physical Therapy for active and passive exercise instruction for the shoulder and elbow and the importance of these were stressed. When she returns to clinic in 3 weeks if she is having persistent pain, consideration to T & S [sic] should be given. She has had ultrasound, in the past, with minimal benefit. (Joint exhibit 1, page 12.)

Three weeks later claimant reported increased strength but also augmented pain in the upper left extremity, especially upon lifting objects in abduction with shoulder extension. She noted a persistent soreness in the lateral aspect of the arm. The numbness over the dorsal aspect of the ulnar two fingers of the left hand had subsided. Examination revealed:

> Physical examination — shows normal range of motion of the shoulder with an increase in pain on extension and ABduction [sic] of the shoulder against resistance. She has local tenderness over the mid-lateral arm in the area of the deltoid. She also has some tenderness anteriorly along the biceps and some tenderness over the articulation of the radius and capitellum with pronation and supination. There is full range of motion at the elbow without production of pain. Her grip strength is symmetrical, bilaterally, and muscle strength in the upper arms appear to be within normal limits and bilaterally symmetrical. There is no evidence of erythema or swelling of the shoulder area or the left upper arm. The patient has normal sensation of both arms and hands.... (Joint exhibit 1, page 11.)

Claimant was sent to physical therapy for evaluation with transcutaneous nerve stimulation. After a few weeks using the TNS unit, claimant noted marked improvement of her symptoms, an increase of range of motion (both when exercising while wearing the unit and when not wearing it) and additional strength in the shoulder and arm. Examination on that date indicated that claimant still had tenderness upon abduction and extension of the shoulder against resistance, improved range of motion, slightly decreased grip strength and normal, symmetrical muscle strength in the upper extremities. (Join exhibit 1, page 11.)

In clinical notes for March 13, 1979 Dr. Lehmann reports in part:

> She has been treated with multiple Cortisone injections, TNS unit, anti-inflammatory medications, but has failed to have relief. She continues to have the pain as before. TNS did localize the pain to a spot in the distal portion of the deltoid for a short period of time, but now the pain is more diffused as before. She occasionally, has pain and numbness in the medium nerve distribution of the left hand and also complains of swelling in the left hand and arm.
>
> Examination reveals slightly obese white female. Examination of the left upper extremtiy [sic] reveals tenderness in the distal portion of the deltoid. There is nothing specifically localized. There is some tenderness over the area of the lasteral [sic] epicondyle of the humerous. Range of motion of the left elbow and shoulder within normal limits. Neurologic examination reveals slightly decreased pin prick sensation in the left thumb and index finger. Motor strength is decreased in the left upper extremity, questionably because of pain. Reflexes are 2+ on the left hand and right.
>
> X-rays examination of the left upper extremity reveals no evidence of fracture myositis ossificans, infection or calcifications in bursa.
>
> IMPRESSION — left upper extremity pain questionable etiology.
>
> PLAN — patient is being referred to Dr. Flatt's clinic for his impression regarding this patient's problem. She will return to this clinic subsequent to his evaluation. (Joint exhibit 1, page 13 [No reports from Dr. Flatt nor further reports from the University of Iowa Department of Orthopaedic Surgery are in evidence.])

William H. Robb, M.D., examined the claimant on July 17, 1979 apparently at the request of the defendant. The medical history he received from the claimant essentially was consistent with the rest of the record. (Joint exhibit 1, pages 2 and 3.) Thereafter he relates his examination findings and conclusions:

> On my examination of 7/17/79, the patient continually reiterates the pain in her left upper arm. She emphasizes this and never describes any significant impairment of function unless questioned and then at that point states that "Oh yes, she might have a little loss of grip." She drops things. She states that she is not able to return to work because of pain in the left

arm. She has used the TNS stimulator with some benefit, and that is really all that has provided relief.

On examination of this patient, she shows no restriction of range of motion of the shoulder, elbow, wrist or hand of the left arm as compared to the right. There is no muscle atrophy present in the upper arm or forearm as measurements are 12" left and 12" right in the upper arm, 10" right, 9½" left forearm, and this could be attributed to decreased use of the left upper extremity and usually there is a discrepancy due to the right handedness.

On palpation the only tenderness that I illicit [sic], and it is hypersensitive, is slight pressure over the mid upper arm area of the deltoid insertion. This pertains also to the triceps posteriorly as well as the biceps anteriorly. This tenderness is diffuse and not markedly localized. Palpation of the lateral epicondyle of the left elbow did not illicit [sic] any significant pain, nor did the extensor musculature of the forearm.

A neurological examination concerning reflexes was normal for upper extremities. I did not detect any significant differential of grip between the right and left arm on examination. I did not detect any sensory deficit in the hand, nor was there any weakness of the intrinsic muscles of the hand.

X-ray examination of the left upper arm did not show any periosteal reaction secondary to trauma nor any abnormality of the bone.

Diagnosis: Contusion muscles left upper arm without neurological deficit at this time.

Recommendations: This patient has very few objective findings to substantiate the pain of which she complains which is much greater than the objective deficit.

It is my opinion that she sustained a contusion of the muscles of the left upper extremity, namely the upper arm, which was attended by scar tissue formation and which muscles, with activation, are going to be moderately uncomfortable. The degree of pain she illicits [sic] is out of proportion to the objective findings.

Since she states she absolutely cannot return to her previous occupation, it is my opinion that she should have an evaluation perhaps by a pain center and psychological counseling and perhaps even a psychometric evaluation.

In conclusion, the treatment provided this patient has been excellent. I have nothing to add to it. I think the complaints are very disproportionate to the objective findings and psychometric evaluation could be valuable. (Joint exhibit 1, pages 3 and 4.)

In a follow-up letter dated October 10, 1979 and addressed to defendant's counsel, Dr. Robb clarifies that he did not find any permanent functional impairment in the left arm attributable to the work injury. He noted that such conclusion did not mean that the claimant would not have symptoms upon using such extremity. (Joint exhibit 1, page 1.)

Paul D. Poncy, D.O., saw the claimant on November 16, 1979 apparently at the request of the State of Iowa Disability Determination Services. After reciting claimant's medical history in a fashion essentially consistent with the record (there was some minor date discrepancy) and noting that claimant was still using the TNS unit intermittently, complained of poor ability to lift or to grip and had constant throbbing pain and occasional swelling in the arm that prevented her from doing much of her household activity, Dr. Poncy reported his examination findings and conclusions:

On evaluation of the left and right shoulders, left shoulder flexion was 0 to 172% with extention [sic] on 0 to 46 degrees. This patient was able to abduct the left shoulder 0 to 110 degrees and abduct 0 to 67 degrees. In comparison to the right shoulder she was able to flex the right shoulder 0 to 220 degrees, extend 0 to 85 degrees, abduct 0 to 180 degrees, and abduct 0 to 104 degrees. On further neurological evaluation of the left and right upper extremities, on evaluation of dull and pin pricks sensations this patient had an equal response bilaterally to both dull and pin prick sensations. Evaluation of the pulses, the radial pulse, the subclavian and bracheal pulse were found to be bilaterally equal and intact. The biceps brachialis reflex in the left was 2/2 and in the right 1/2. On the measurement of muscle size, the right forearm measured 10 inches and the left forearm 9½ inches, the right bicep measured 13 inches and the left bicep measured 12 inches. The patient was very able to both pronate and suppenate [sic] both arms although there was noted reduction in the left on flexion and extention [sic]. The measurement in flexion and extention [sic] of the elbow joint reveals a minimal degree difference although on passive range of motion there was a noted reduction in both flexion and extention [sic] on the left side. I was unable to secure a device to measure grip strength although on bilateral testing I would certainly represent the grip strength of the left 75% of that which is on the right side.

Mrs. Waller then went out to St. Joseph Mercy Hospital for an x-ray of the left shoulder and this was a negative left shoulder. There was no evidence of any fracture, dislocation, or other boney pathology.

. . . It is my impression she has a diagnosis at the time of a neuritis of the left arm. On ranges of motion in the left and right shoulder on comparison she did have approximately a 60% reduction in range of motion in the left shoulder versus range of motion of the right shoulder. I am under the impression that she would have more noted atrophy of the musculature of the upper extremities although this was not the case when they were measured. There is a certain degree of atrophy in comparison to the muscles on the right side but I feel this to be of minimal significance. Evaluation of sensory and reflex findings were essentially within normal limits and bilaterally equal and responsive. The circulatory system in both arms from the subclavian,

brachial, and radial arteries were essentially normal with the pulses being always full and bounding. There is no question this woman does have a decreased range of motion in the left shoulder, although on the end points of motion such as flexion and extention [sic] of the shoulder she did not appear to be in any considerable degree of pain. I am essentially unable to determine what degree of pain this woman is undergoing. With the degree of atrophy present in the left arm as comparison to the right arm I do feel that she is certainly doing some work to keep this muscle in a certain state of conditioning. I am thinking it might be interesting to see what Iowa City and Dr. Berg would have to say on the myofascial and neurological implications of this injury. It might be very helpful as well to have a nerve conduction velosity [sic] study to see what extent a neuropathy may or may not be present. (Joint exhibit 1, pages 8 and 9. [There is no additional evaluation or testing conducted by any other doctor in evidence.])

In a letter dated April 24, 1981 and addressed to defendant's counsel, Dr. Poncy stated that he saw the claimant again on March 30, 1981 and her condition had not significantly changed. He repeats his "diagnosis of neuritis of the left arm, probably of the brachial plexes and a reduction in range of motion involving the left shoulder" and comments on the need for a nerve conduction velocity study. He then states:

> In reviewing your letter of December 3, 1979, there is some question whether the 60% reduction in the range of motion of the left shoulder is a result of nerve conduction loss to the muscle, either with a nerve perse [sic] or at the neural musculature junction. As an approximation of the disability to the whole body, of a 60% range of motion of the left shoulder would probably equivocate out to approximately 2 to 4%. (Joint exhibit 1, pages 5 and 6.)

Claimant disagreed with references in the medical reports to any doctor being able to move her arm without her experiencing noticeable pain. She did not think her left arm was smaller than the right. Claimant disputed that the exercise program (Iowa City) increased her range of motion or that the TNS unit was of assistance. She later testified that medication and the TNS unit did allow her to do more activity but emphasized that they only relieved the pain temporarily. She acknowledged that she could do more lifting (up to about 5 pounds) when wearing the TNS unit but disagreed that she could wear it for 8 hours because she suffers from terrific headaches when she wears it too long. Claimant was adamant about not needing a psychological examination, as suggested by Dr. Robb.

Claimant, whose age was not established by her own testimony in the record (the medical records suggest that she is presently about 40 years of age), has a tenth grade education and employment history including waitressing, egg separating, being a Stanley home dealer and manager, and corn separating. Claimant explained that all of these jobs required the use of both hands. Waitressing and home servicing required lifting and carrying considerable weights. The separator positions entailed ambidexterity. Claimant indicated she had no difficulty doing such jobs and encountered no physical problems with her upper extremities. Claimant began working for defendant employer in July of 1975. Her first assignment was in the preparation of door latches and hinges. Claimant described such job as entailing both minute work such as putting and holding the pin and spring together while inserting them into the latch, and larger work, such as punching out the hinge portion of the door frame. Such work required the use of both hands and general agility. Claimant reported that she usually completed 10 doors above the hourly quota of 15. However, claimant testified that she was paid by the hour. Claimant bid on a glass glazer position which also involved working on both small and large items with both hands. She had no difficulty meeting the glazer quota. Claimant's last position was that of set up person which entailed supplying materials to the rest of the plant. Claimant testified that she used both hands doing such work and was required to lift up to 75 pounds.

Claimant testified that she had no difficulty using her upper left extremity before the date of injury. Her present complaints include constant pain from the shoulder to the fingers with numbness of the fingers and loss of grip strength. She attempts no lifting with the left hand because of the loss of grip. She testified that she is unable to do many of her household chores such as moving furniture, hanging out clothes or serving small items. She can wash dishes but uses the left hand only as a rest for the plate rather than holding onto the plate with the left hand. She has more difficulty changing beds. She does the wash but can handle only one item at a time with her right hand. She drives. She does most of her family's grocery shopping but either the grocery clerk or her husband carries the purchases. She has difficulty dressing. She does no exercising except occasional dancing.

Claimant did not think she could return to latch assembly, glass glazing or corn sorting. Within the last six months, claimant has applied at Job Service of Iowa both in Ottumwa and Oskaloosa without success. According to the claimant, she was advised that employers in the Ottumwa area were not hiring and, when she indicated that she left her last job because of a left arm injury, she was told she would not be hired. Recently, claimant contacted rehabilitation services in Ottumwa.

Paul Halferty, the vocational rehabilitation expert with whom claimant interviewed on two occasions, testified that he has been working for the State of Iowa in such capacity since August of 1970. Halferty testified that he was contacted by claimant's attorney on the fourth of the month of the hearing to arrange an interview with the claimant. Halferty did interview the claimant that same day for one hour. He questioned claimant about her past history and present limitations. He apparently reviewed some of claimant's medical records. At the second meeting he asked claimant to hold on to a gripping device first with one hand, then with the other. He noted that claimant could maintain the grip longer with her right hand and that her left arm turned red

five seconds after she began squeezing the test object. He administered no other tests of any kind. Halferty did ask the claimant to take a Job Service examination which he typically uses in his assessment of an individual's capabilities (claimant's exhibit 2). Based on claimant's finger and manual dexterity test results, Halferty did not think she could be employed as a typist. He opined that the claimant could not install door latches or glaze glass at a competitive rate.

Halferty admitted that the Ottumwa area was not one of the better places in Iowa to be looking for work. Accordingly, while he thought claimant could be employable in the areas of telephone answering, simple filing and very light industrial work, he did not anticipate she would have much of a chance of securing such work.

Halferty agreed that the claimant needs the equivalent of a high school degree for employment outside of factory work. He noted that she had the ability to get a GED within two years. He acknowledged that claimant's scores were quite above average in clerical work and that she likely could be trained easily. He noted that evaluating a person's motivation was an intangible and basically gave any benefit of the doubt to the claimant. He verified that he has not yet had an opportunity to observe the claimant's efforts at looking for work.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 7, 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).

Preponderance of the evidence means the greater weight of evidence, the evidence of superior influence or efficacy. *Bauer v. Reavell*, 260 N.W. 39, 219 Iowa 1212 (1935). A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. *Burt v. John Deere Waterloo Tractor Works, supra.*

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., supra.* 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, supra.* 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.*

Expert testimony stating that a present condition might be causally connected to claimant's injury arising out of and in the course of employment, in addition to non-expert testimony tending to show causation, may be sufficient to sustain an award but does not compel an award. *Anderson v. Oscar Mayer & Co.*, 217 N.W.2d 531, 536 (Iowa 1974).

Code section 85.34(2)(m) and (u) states:

> (m) The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks.
>
> (u) In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole.

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).

Code section 85.33 states: "The employer shall pay to the employee for injury producing temporary disability and beginning upon the 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."

Analysis

At the outset of the hearing, claimant's counsel stated that it was claimant's position that she was still temporarily totally disabled and that matters of industrial disability would be explored only in the alternative. Claimant has failed to establish by a preponderance of the evidence that she is incapable of returning to gainful employment or that she has suffered a loss of earning capacity as a result of the November 7, 1977 work injury.

As of April of 1978 Dr. Berg expected the inflammatory condition in the left shoulder and forearm to resolve itself. After reporting in September of 1978 that claimant probably sustained some scarring in the muscle groups of the upper arm, Dr. Lehmann concluded in March of 1979 that claimant's pain was of unknown etiology and referred her to Dr. Flatt for further evaluation. Claimant apparently did not pursue such follow-up examination. Dr. Robb likewise opined that scar tissue formation resulted from the contusion of the muscles of the upper extremity. He specified that claimant had no functional impairment as a result of the work injury and emphasized that her subjective complaints, which far outdistanced the objective findings, might benefit from examination at a pain center, psychological counseling or a psychometric evaluation. Claimant obviously was hostile to such recommendation and did not pursue such treatment. Dr. Poncy was willing to give the claimant a 2 to 4 percent "disability" rating to the body as a whole based on 60 percent loss of motion of the left shoulder; however, he

had some question about the cause of such loss of motion and recommended that nerve conduction velocity studies be conducted. Once again, claimant seemingly ignored further diagnostic evaluation. Even Dr. Poncy comments that he is unable to determine claimant's degree of pain. Review of his report suggests that he allowed the claimant to demonstrate, unassisted, her range of motion whereas the other doctors manipulated the arm and found no significant loss of motion and little indication of pain by the claimant during such testing. Indeed, Dr. Poncy noted that the claimant did not appear to be in any considerable degree of pain at the end points of motion. Claimant's disagreement with certain aspects of the medical record was deemed not credible in light of the general consistency found in the medical reports. Hence, claimant has failed to establish that her present complaints of pain are causally related to the work injury or that she has suffered any permanent impairment as a result of such incident.

Even if claimant had established a connection between the work injury and the alleged disabling condition on which she bases her complaints, she did not prove that she is incapable of return to any form of gainful employment. The only restriction claimant received from any of the doctors was that on lifting from Dr. Berg in 1978. Claimant's litany of difficulties concerning the use of her left arm is dubious in light of clinical findings. However, even accepting such complaints as true would not assist claimant's case. She is right handed and has no loss of use of the upper right extremity. Halferty testified that there are some jobs for which claimant would be qualified even if she was unsuccessful in obtaining them. It should be noted that the fact that a community's employment situation is bleak and otherwise affects the claimant's chance of securing employment does not obviate the finding that claimant is capable of performing such work and, concomitantly, is not entitled to continuation of temporary total disability benefits. While it is true that defendant did not provide work for claimant in 1978 when she was given the lifting restriction and might explain why claimant has not applied to return to work with defendant, the undersigned is very skeptical that the claimant really wants to return to work. Claimant testified that she applied at Job Service of Iowa six months ago, which is almost 3½ years after the injury and a month or two after her petition for review-reopening was filed. Claimant apparently did not contact any employers directly. Furthermore, she noticeably did not seek vocational rehabilitation until a day after the September 3, 1981 pre-hearing conference whereby the hearing was scheduled for later the same month. Indeed, this relatively young claimant did not even attempt to obtain a GED or otherwise further her education and skills during the past 3½ years.

Nor would claimant be entitled to a determination of industrial disability. The weight of the medical evidence would not support finding that claimant had a permanent impairment. Pain that is not substantiated by clinical findings is not a substitute for impairment. *Compare Franklin W. Goodwin, Jr. v. Hicklin G.M. Power* (August 7, 1981 Appeal Decision). Furthermore, whether the resultant injury was limited to claimant's left upper extremity or extended into the body as a whole was not as well defined or described as a trier of fact might wish. References to both areas were used in describing the radiation of pain. The determination of actual impairment necessarily is interwoven with identification of the extent of the resultant injury and hence for reasons discussed above, a finding as to whether claimant sustained a scheduled injury or an injury to the body as a whole, entitling her to a determination of industrial disability, could not be made on the present record. Likewise, the claimant is not entitled to a determination of disability based on the fact that defendant employer did not have work she could perform when she approached them with her limitation on lifting, because the present record does not clearly establish that she sustained an injury to the body as a whole as required by the April 17, 1980 order filed in *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980). Parenthetically, it is noted that in *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980), the Iowa Supreme Court stated that a defendant employer's refusal to give any sort of work to a claimant after the claimant suffers a work injury or a claimant's inability to find other suitable work after making bona fide efforts to find suitable work *may* justify an award of disability. In the opinion of the undersigned, claimant's extreme lack of motivation or initiative in this case, her lack of interest in securing other diagnostic study and her refusal to consider pain center or psychological evaluation would not justify an award of disability under the *McSpadden-Blacksmith* rationale.

Findings of Fact and Conclusions of Law

WHEREFORE, for the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant was injured at work on November 7, 1977 when some packaged glass slipped from a stack and pinned claimant's upper left extremity against a stillrack. Claimant has complained of constant pain from the shoulder area to the fingers and of loss of grip strength since that time.

Finding 2. The weight of medical evidence indicates that claimant's lasting complaints are of unknown etiology. Further diagnostic testing including but not limited to nerve conduction velocity tests and psychological evaluation were recommended by claimant's physicians but were not pursued by the claimant. Clinical findings failed to substantiate claimant's subjective complaints.

Conclusion A. Claimant has failed to sustain her burden of proving that the present disability on which she bases her claim was causally connected to the work injury.

Finding 3. Claimant received temporary total disability benefits through June 29, 1979 except for a few weeks when she attempted to work in late 1977 and early 1978. Claimant has not returned to work to date.

Finding 4. When claimant was given a temporary lifting restriction in early 1978, defendant employer advised her that they had no suitable work for her. She has not reapplied for work with defendant employer since that time.

Finding 5. Claimant has not made timely bona fide efforts to find employment elsewhere or to seek vocational rehabilitation.

Finding 6. Claimant is capable of performing some gainful employment.

Finding 7. The medical evidence suggests claimant does not have any permanent impairment. The status of the medical evidence prevents a determination regarding the extent (scheduled member or body as a whole) of the resultant injury.

Conclusion B. If claimant had established a causal connection between the work injury and her present disability, she would not be entitled to additional temporary total disability benefits because she is capable of return to some form of gainful employment. Claimant is not entitled to an assessment of loss of earning capacity because she has not established an injury to the body as a whole or a permanent impairment. Claimant is not entitled to a disability determination under the *Blacksmith-McSpadden* rationale because she has not established an injury to the body as a whole and moreover because she has not contacted defendant about returning to work since she was first advised in March of 1978 they had no light work available and put on weekly compensation through June 1979 and because she has made no bona fide effort to find suitable work elsewhere.

Order

WHEREFORE, it is ordered that the claimant's application for additional benefits be denied.

Costs of the proceeding are taxed to the defendant. See Industrial Commissioner Rule 500—4.33.

An updated final report should be filed by defendant.

* * *

Signed and filed this 22nd day of October, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

JERRY WALTON,

Claimant,

vs.

B & H TANK CORPORATION,

Employer,

and

DODSON INSURANCE GROUP,

Insurance Carrier,
Defendants.

Review-Reopening Decision

This is a proceeding in review-reopening brought by Jerry Walton, the claimant, against his employer, B & H Tank Corporation and the insurance carrier, Dodson Insurance Group to recover additional benefits under the Iowa Worker's Compensation Act on account of an injury he sustained on November 20, 1979. This matter came on for hearing before the undersigned at the Linn County Juvenile Court Facility in Cedar Rapids, Iowa on August 4, 1981. The record was considered fully submitted on the same date.

On November 27, 1979 defendants filed a First Report of Injury concerning the November 20, 1979 injury. On December 12, 1979 defendants filed a Memorandum of Agreement indicating that one week and five days (11-21-79 to 12-2-79) of temporary total disability, minus the three day waiting period, had been paid pursuant to the Memorandum of Agreement.

The record consists of the testimony of claimant and of the claimant's witness, Darrell Potton; the testimony of defense witness, Carl Polland; the testimony of claimant's rebuttal witness, David Mundt; claimant's exhibit 1, claimant's affidavit concerning medical mileage expenses; claimant's exhibit 2, claimant's counsel's affidavit concerning costs; claimant's exhibit 3, claimant's affidavit concerning medical expenses; claimant's exhibit 4, packet of varied medical reports; defendants' exhibit A, a return to work release signed by Paul E. Orcutt, M.D.; defendants' exhibit B, claimant's hospital records for November 20, 1979 through November 21, 1979 (duplicates of claimant's exhibit 4, pp. 8, 7, and 6 respectively); defendants' exhibit C, Surgeon's Final Report and Bill (duplicate of claimant's exhibit 4, p. 11); defendants' exhibit D, Surgeon's Report (duplicate of claimant's exhibit 4, p. 10); defendants' exhibit E, January 15, 1981 letter report from James R. LaMorgese, M.D. (duplicate of claimant's exhibit 4, p. 14); defendants' exhibit F, January 29, 1980 letter report from Dr. Orcutt (duplicate of claimant's exhibit 4, p. 1); defendants' exhibit G, February 9, 1981 letter report from John R. Huey, M.D. (duplicate of claimant's exhibit 4, p. 18); and defendants' exhibit H, July 27, 1981 letter report from Dr. LaMorgese (duplicate of claimant's exhibit 4, p. 20). Claimant's objections to defendants' exhibit H and defendants' objections to claimant's exhibit 2 and 4 were overruled at the time of the hearing. Defendants' objections to claimant's exhibits 1 and 3 were likewise overruled except as to the issue of causal connection. For reasons set forth below the remaining objections to claimant's exhibits 1 and 3 are hereby overruled.

Issues

The issues to be determined include whether there is a causal relationship between the alleged injury and the disability, and if so, the nature and extent of the disability.

Recitation of the Evidence

On November 20, 1979 while welding on a testing tank in the course of his employment with defendant-employer, claimant received an electrical shock that threw him 10 to 15 feet backwards. He landed on his back.

Claimant was hospitalized a little over 24 hours for observation by Paul E. Orcutt, M.D., the company doctor. Claimant's complaints included nausea, chest tightness, shortness of breath and bilateral hand tingling. X-rays taken at that time yielded no clinically significant findings. Examination revealed some tenderness in the neck and trapezius muscles but otherwise, essentially normal findings. Dr. Orcutt's impression was electrical shock. Dr. Orcutt recommended that claimant soak in hot water and take Tylenol #3 as needed. (Claimant's exhibit 4, pp. 3, 5-8.)

Dr. Orcutt next saw the claimant in an office visit on November 24, 1979 at which point claimant's main complaint was that of neck pain radiating into the head causing headaches. Dr. Orcutt switched the claimant from Tylenol #3 to Fiornal and recommended home cervical traction. (Claimant's exhibit 4, p. 3.) When Dr. Orcutt saw the claimant on December 1, 1979, claimant's condition had improved markedly from use of the traction. Dr. Orcutt released him to return to work on December 3, 1979 but advised continued use of the traction. He last saw the claimant on December 10, 1979 at which time claimant reported experiencing an onset of severe pain in the occipital area while dancing the previous Saturday night. His headache was not relieved by use of the cervical collar and Fiorinal. Dr. Orcutt prescribed a dozen Percodan to be taken as necessary for pain and warned the claimant against working while taking the medication. (Claimant's exhibit 4, p. 4.) Dr. Orcutt did not anticipate that claimant would suffer any permanent impairment as a result of the November 20, 1979 shock. (Claimant's exhibit 4, p. 1.) He thought claimant was capable of returning to the work he was doing on the date of injury. (Claimant's exhibit 4, p. 11.)

Claimant testified that after he returned to work on December 3, 1979, he was bothered by the pounding sounds and reported this to Dr. Orcutt. He explained that nodding his head to drop the welding mask on his helmet would irritate his headaches. He continued to suffer from headaches and thought he missed a few days of work because of such problem. However, up to the time of the general layoff in June 1980, he did work regular hours and carried out his work assignments.

Claimant next sought treatment for his neck pain and headaches from John R. Huey, M.D. Examination on December 18, 1980 revealed that claimant was tender throughout the cervical and upper dorsal spine. Claimant's reflexes were physiological and he demonstrated no atrophy or muscle weakness. X-ray of the cervical spine revealed well preserved disc spaces, prominent C-7 tranverse processes without definite cervical rib and no evidence of fracture. Dr. Huey thought claimant had suffered a cervical strain and recommended a Philadelphia collar, phonophoresis therapy and isometric exercises. Since claimant was still complaining of severe neck pain on January 1, 1981, Dr. Huey referred the claimant to James R. LaMorgese, M.D., a neurosurgeon. (Claimant's exhibit 4, pp. 16-18.)

Dr. LaMorgese saw the claimant on January 15, 1981. He received a history of the injury and course of treatment essentially consistent with the record as a whole. Neurologic exam was essentially normal and no focal findings were noted. Dr. LaMorgese's impression was that claimant had suffered a chronic cervical strain resulting in muscle contraction headaches. He prescribed Bellergal Space tablets and Midrin. In an office visit on February 5, 1981, claimant reported that the medication had helped but had not entirely relieved the headaches. (Claimant's exhibit 4, pp. 14-15, 19-20.)

Dr. LaMorgese opined:

> I feel the patient may well have a permanent neck pain and headache problem from his injuries. I would not anticipate a great deal of improvement in the coming months to year. I feel the patient has a permanent partial disability of 3 to 5%. (Claimant's exhibit 4, p. 20.)

He acknowledged:

> It is difficult for me to substantiate how much pain Mr. Walton has since the complaint of pain is subjective. I can state that Mr. Walton's neurologic exam is normal. There are no focal neurologic deficits and I feel that Mr. Walton's injury is restricted to the paraspinal muscles and ligaments in the neck. (Claimant's exhibit 4, p. 21.)

Claimant is 29 years old, received a formal education through the eighth grade and obtained a G.E.D. while serving in the Army. Claimant's employment history includes wrecker driving from 1977 to 1978 at $2.90 per hour, welding for one year at $6.25 per hour and self-employment painting houses. Claimant began working for defendant-employer in 1979 for $3.90 per hour. He testified that he worked on all sizes of fuel tanks manufactured by defendant-employer. According to the Form 2A, at the time of the injury claimant was earning $185.90 per week.

Claimant testified that after he was laid off work with defendant-employer he looked all over the Cedar Rapids area for employment without success. He agreed that the difficulty finding a job stemmed from the fact that employers were not hiring. He received unemployment compensation up until the time he went to work driving a small van and delivering light freight all over Iowa. Claimant was still so employed at the time of the hearing but indicated that two months ago he began training for tractor-trailer cross-country driving. When he completes this training and takes the required physical exam, he will be a full time relief driver. Claimant estimated that he presently earns an average of $65.00 to $70.00 per week. (Discrepancies between his testimony at the time his deposition was taken and testimony given at the time of the hearing with regard to his present occupation are explained by the fact that claimant checked on relevant dates and figures in the interim.) Claimant expressed concern that he might have difficulty fulfilling his duties as a relief driver because he has severe headaches,

that often cause him to feel nauseated, once or twice a week. He is unable to drive with such headaches and the medication he takes for such pain makes him drowsy. (See also claimant's exhibit 4, p. 21.) Although the claimant has considered going into body and fender work because of his mechanical ability and would have pursued a job offer in such area at the time he was making his general search for employment after the layoff, he has not sought out such job possibilities recently because he is trying to succeed at his present work.

Claimant has been in good health with the exception of work-related back, foot and hernia injuries. He also had some past difficulty with his eyes and recently suffered a heart attack. He is under only diet and exercise restrictions with regard to the latter condition. With regard to the injury and disability in issue, claimant's complaints include neck stiffness and headaches. He is no longer under active doctor's care for these problems but does take medication as needed and uses the home traction. He acknowledged that both Dr. Huey and Dr. LaMorgese had recommended exercise programs but noted that neither indicated how long he should pursue such program. Accordingly, claimant did the exercises only as long as they were helpful.

Claimant's witness, Darrell Potton, testified that he has known the claimant for 10 years and presently is the truck driver from whom claimant is learning the tractor-trailer trade. He corroborated claimant's testimony with regard to the frequency and severity of headaches and noted the claimant has not always been able to assist in loading or unloading the trucks. Potton estimated that he earns $600.00 per month on an average.

Defense witness Carl Polland, defendant-employer's manager, testified that claimant never reported feeling ill after his return to work on December 3, 1979 despite numerous safety meetings in which employees are advised to report not only injuries but also illnesses. He considered claimant to be a reliable, adequate worker but apparently not among the most qualified insofar as five welders have been called back out of 23 (including the claimant) that had been laid off.

Claimant's rebuttal witness, David Mundt, defendant-employer's foreman and Polland's son-in-law, testified that he occasionally noticed claimant was not working up to par after claimant's December 3, 1979 return to work and would ask the claimant what was wrong. According to Mundt, the claimant told him about the headaches, and he always advised the claimant to report the matter to Polland or to see a doctor. Mundt verified that the welders who were recalled all had more seniority than that of the claimant.

Applicable Law

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 20, 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. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). *Olson v. Goodyear Service Stores*, 255 Iowa 1112, 125 N.W.2d 251 (1963). *Barton v. Nevada Poultry*, 253 Iowa 285, 110 N.W.2d 660 (1961).

In *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.

Section 85.34(1), Code of Iowa, 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 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.

Industrial Commissioner's Rule 500—8.3 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 comes first.

Analysis

Claimant had no neck pain nor headaches prior to the November 20, 1979 incident. None of the medical experts appear to dispute that claimant's complaints were related to

the work injury. While Dr. Orcutt was claimant's treating physician at the onset and anticipated no permanent impairment, it can not be overlooked that he last saw the claimant on December 10, 1979, less than a month after the episode. Yet, claimant continued to suffer from neck stiffness and headaches and a year later sought additional treatment from Dr. Huey, who expressed no opinion regarding the nature and extent of claimant's disability. However, Dr. LaMorgese, the neurosurgeon to whom Dr. Huey referred the claimant, did conclude that claimant had a 3 to 5 percent disability (presumably impairment to the body as a whole). Dr. LaMorgese's opinion is given greater weight because of the continuance of claimant's complaints and because of Dr. LaMorgese's greater expertise.

While it is true that claimant did return to work at the same earnings, and was laid off and could not find other work due to general economic conditions causing a freeze on hiring in the Cedar Rapids area and not for reasons related to the injury, such factors do not obviate a conclusion that claimant has sustained some loss of earning capacity under the *Olson, supra,* analysis. Claimant's subjective complaints are believed. Claimant's testimony that he performed his duties with noticeable difficulty upon his December 3, 1979 return to work is corroborated by Mundt's testimony. Likewise, claimant's difficulty performing his present job was corroborated by Potton. Despite the discomfort, claimant appears willing at this point to continue training for the tractor-trailer driving. His motivation is good. His age is in his favor for finding or retraining for suitable employment if in fact the present work becomes unbearable. Finally, it is noted that the medical evidence indicates that the medication prescribed for claimant's headaches should not be used in conjunction with operating dangerous equipment. This appears to be the only present limitation or caution from a medical standpoint. Considering all the industrial factors as a whole, it is determined that claimant has sustained 10 percent industrial disability as a result of the November 20, 1979 work injury.

With regard to the matter of healing period, claimant testified that he missed a few days of work after his December 3, 1979 return due to headaches. Claimant is not entitled to additional healing period for such flareups of pain insofar as the record viewed as a whole suggests that his condition neither substantially improved nor worsened after December 3, 1979. Claimant's return to work and the point at which he reached maximum medical recuperation were one and the same.

With regard to the medical expenses shown on claimant's exhibits 1 and 3, it is clear from review of the record as a whole that such expenses were for care (or mileage incurred in obtaining such care) that was necessary in treating claimant's condition.

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned makes the following findings of fact and conclusions of law:

Finding 1. Claimant has suffered from continued neck stiffness and headaches since receiving a shock (which threw him 10 to 15 feet) from welding on a test tank in the course of his employment duties on November 20, 1979.

Finding 2. The medical record indicates that claimant's present complaints are related to the work injury.

Conclusion A. Claimant has sustained his burden of proving that the disability on which he bases his claim is causally connected to the work injury.

Finding 3. Claimant's chronic cervical strain with resulting muscle contraction headaches has been rated from a medical standpoint at three (3%) to five (5%) percent permanent partial disability.

Finding 4. Claimant returned to the same employment in which he had been injured nine days after the incident and until a general layoff occurred. Claimant experienced periodic severe headaches during that period of time.

Finding 5. Claimant presently is training to become a cross-country tractor-trailer driver. He continues to experience severe headaches once or twice a week which prevent him from driving or loading and unloading the trailer.

Finding 6. The medication prescribed for claimant's headaches should not be used in conjunction with operating dangerous equipment. Claimant is under no other limitations or restrictions with respect to his work-related disability.

Finding 7. Claimant is 29 years old, received a G.E.D. and has an employment history including wrecker driving, welding and painting houses.

Finding 8. Claimant's motivation appears good.

Conclusion B. Claimant has sustained ten (10%) percent industrial disability as a result of the November 20, 1979 injury.

Finding 9. Claimant returned to work on December 3, 1979 and thereafter missed a few work days because of severe headaches.

Finding 10. Claimant's condition did not improve or worsen after his return to work.

Conclusion C. Claimant's healing period ended when he returned to work on December 3, 1979; claimant is not entitled to additional days of healing period for any work days missed for headaches after December 3, 1979.

Finding 11. Offered medical expenses and related mileage costs were for medical care that was reasonable and necessary in the treatment of claimant's work injury.

Conclusion D. Claimant is entitled to reimbursement of the offered medical expenses and related mileage costs in accordance with Code section 85.27.

Order

THEREFORE it is ordered that the defendants pay the claimant fifty (50) weeks of permanent partial disability at

the rate of one hundred twenty-two and 33/100 dollars ($122.33) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of December 3, 1979.

Defendants are ordered to pay the claimant healing period benefits from the date of injury to December 3, 1979 at the rate of one hundred twenty-two and 33/100 dollars ($122.33) 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.

Defendants are further ordered to pay unto the claimant the following medical expenses:

James R. LaMorgese, M.D.	$ 65.00
Mercy Hospital	124.10
Orthopaedic Surgeons, P.C.	92.00
Mileage post 7-1-79 10 x $.18	1.80
Mileage post 7-1-80 196 x $.20	39.20
Mileage post 7-1-81 14 x $.22	3.08

Costs of the proceeding are taxed to the defendants. See Industrial Commissioner's Rule 500—4.33. (Regarding claimant's exhibit 2, the bill of costs, claimant is entitled to reimbursement for two [2] of the doctors' or practitioners' reports and for the certified service fee. Claimant is not entitled to reimbursement for his own deposition.)

Interest shall run in accordance with Code section 85.30

A final report shall be filed by the defendants when this award is paid.

* * *

Signed and filed this 25th day of August, 1981.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

DONALD WEBB, JR.,

Claimant,

vs.

LOVEJOY CONSTRUCTION COMPANY,

Employer,

and

BITUMINOUS INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded healing period and permanent partial industrial disability benefits as the result of an injury received arising out of and in the course of employment on August 18, 1977.

The record on appeal consists of the transcript of the review-reopening proceeding together with claimant's exhibits 1 through 18 and defendants' exhibit A; depositions of Sinesio Misol, M.D., Jerome G. Bashara, M.D., with deposition exhibits 1 through 4, and Linda Riley; as well as the pleadings, official filings, and appeal briefs of both parties.

At the time of the hearing, claimant was 34 years old. He is married with no children. Claimant has a ninth grade education (Transcript, page 20) and has been a union carpenter for ten years. (Transcript, page 22.)

Claimant was working on a construction job in West Des Moines on August 18, 1977 nailing boards in a sky light, when the ladder on which he was standing collapsed. Claimant fell, first striking a scaffold, and then the concrete floor approximately 20 feet below. (Transcript, page 21.) He received emergency care at Iowa Methodist Medical Center where an x-ray of his skull and cervical spine were negative for fractures. (Exhibit 13.) Tylenol 3 x 20 was prescribed.

Claimant was released from Iowa Methodist that same day and instructed to stay off work for two weeks. He then attempted to return to work, but quit after two days complaining of back pain.

Claimant was seen by James E. Mansour, M.D., on August 31, 1977 (Exhibit 1) and apparently at a later date (Exhibit 2) and after a week of physiotherapy was finally referred to Jerome G. Bashara, M.D. (Exhibit 3.)

Dr. Bashara first saw claimant on November 11, 1977. (Exhibit 6 and Bashara deposition, page 6.) At that time, Dr. Bashara found an irritation of claimant's sciatic nerve on the right side. (Bashara deposition, page 10.) Dr. Bashara felt that the nerve irritation was caused by a protruding lumbar disc in the L-4, L-5 region. (Bashara deposition, page 12.) A back brace was prescribed and claimant was instructed to avoid heavy lifting and twisting activities.

Claimant was seen by Dr. Bashara again on December 21, 1977, (Bashara deposition, page 13) and February 1, 1978, (Bashara deposition, page 14). Because of lack of improvement, claimant was hospitalized by Dr. Bashara at Iowa Methodist Medical Center from February 12, to February 24, 1978. (Exhibit 14.) Claimant received traction and physical therapy. Dr. Bashara saw claimant again on April 7, 1978, (Bashara deposition, page 16) and May 19, 1978. (Bashara deposition, page 16.) Dr. Bashara felt that straight leg tests indicated a possible ruptured lumbar disc. Dr. Bashara recommended that claimant undergo a myelogram in order to confirm the presence of a ruptured disc which might require surgical intervention. Claimant refused to submit either to a myelogram or surgery. (Bashara deposition, page 17.) Dr. Bashara examined claimant again on June 30, 1978, (Bashara deposition, page 17), August 11, 1978, (Bashara deposition, page 18), October 11, 1978, (Bashara deposition, page 19), and April 10, 1979, (Bashara deposition, page 19). Because Dr. Bashara felt that claimant's condition was not improving, claimant began daily therapy as an outpa-

tient at Northwest Community Hospital on April 11, 1979. (Exhibit 15.) Dr. Bashara noted gradual improvement in claimant's condition with examinations of May 2, 1979, (Bashara deposition, page 20), May 23, 1979, (Bashara deposition, page 21), and July 25, 1979, (Bashara deposition, page 22).

With an examination on September 28, 1979, Dr. Bashara determined that the sciatic nerve irritation had been resolved, but that claimant continued to have difficulty with his lower back. (Bashara deposition, page 23.) Claimant was again examined on January 4, 1980, and continued to complain of back pain. (Bashara deposition, page 23.) Dr. Bashara then recommended weight loss to reduce pelvic pressure and an exercise program to strengthen the lower back muscles. Claimant admittedly failed to follow these recommendations. (Transcript, page 44.)

Dr. Bashara noted that claimant continued to have complaints of headaches and blurred vision as of April 11, 1980. (Bashara deposition, page 5.) Claimant was referred to Meredith Saunders, M.D., for an eye examination. Claimant was found to have a definite farsightedness unrelated to the injury of August 18, 1977. (Bashara deposition exhibit 4.)

As of the examination on April 11, 1980, the range of motion in claimant's back was limited to 25 percent of normal. Straight leg testing was found positive at 40 degrees bilaterally, leading Dr. Bashara to again conclude claimant had a sciatic nerve irritation, possibly the result of a disc herniation.

Dr. Bashara conceded that the only evidence of disc herniation was found in bending and motion tests he conducted which called for "subjective" response by the claimant. Claimant continued to refuse a myelogram. X-ray and neurological testing failed to reveal abnormality. (Transcript, pages 51-52.) Claimant also failed to report to Dr. Bashara that he had a family history of degenerative disc disease. (Transcript, page 34; Bashara deposition, page 47.)

After his examination of the claimant on September 28, 1979, Dr. Bashara concluded in his progress notes: "I am giving him a 10% permanent partial physical impairment based on his low back which is a severe musculoligamentous injury with the possibility of a disc syndrome, unsubstantiated by either a myelogram or EMG." (Exhibit 11.)

Dr. Bashara apparently felt that x-rays of the claimant taken at Iowa Methodist Medical Center also revealed a compression fracture of the lumbosacral spine. As of his examination of the claimant on April 11, 1980, it is difficult to determine what impact, if any, Dr. Bashara considered this compression fracture had on claimant's functional impairment.

After an examination on April 23, 1980, Dr. Bashara had new x-rays taken of claimant's lumbar and thoracic spine. Dr. Bashara testified that these x-rays revealed another mild compression fracture of the 12th thoracic vertebra. (Bashara deposition, page 25.) Dr. Bashara opined that this fracture, as well as the fracture previously known, were caused by the injury of August 18, 1977. (Bashara deposition, page 26.) Both fractures were considered healed at the time the x-rays were taken. Dr. Bashara stated that the second fracture was not found until April 24, 1980, because previous x-rays were of the lower spine and out of the area that a fracture at the 12th vertebra could have been seen. (Bashara deposition, page 27.)

Given the two healed compression fractures and the unsubstantiated disc injury, Dr. Bashara found claimant's functional disability to be 15 percent of the body as a whole, (Bashara deposition, page 28), with 10 percent attributable to the two fractures, and 5 percent functional impairment attributable to the unsubstantiated disc herniation. (Bashara deposition, page 32.)

Sinesio Misol, M.D., examined claimant on August 22, 1978. Dr. Misol testified that upon testing, claimant's spinal flexation was found to be 50 percent of the normal range of mobility. Dr. Misol indicated that an assessment of claimant's back flexation had to be qualified:

> I wrote in here it is impossible, and I quote, to tell if this limitation is functional or not, unquote.
>
> Q. Why is that, Doctor?
>
> A. What I mean is that if someone would ask me to bend my spine I can go ahead and do the best that I can or I can stop at the 50 percent if I want to. If they ask me, "Why do you stop there?" I can say, "I cannot go any further," or I can say, "It hurts me at that point." It is impossible to tell, at least with the patient awake, how much of the mobility is voluntarily restricted or not. (Misol deposition, page 7.)

Dr. Misol also conducted a straight-leg raising test to determine the possibilities of a herniated disc. Dr. Misol testified:

> A. The straight leg raising test, which consists of lifting the legs up to see if there is any irritation of the nerves coming from the spine to the legs. I wrote, "Straight leg raising tests with the patient laying down became positive on both legs at sixty degrees." Normal would be ninety or more.
>
> Q. With this test is it possible to tell whether it is a functional limitation or not?
>
> A. Not really. I found that he had normal reflexes in the knees and the ankles and this is more objective. It is very hard to fake the presence or absence of a reflex. He did not have any impairment to light touch or pin prick and these are both subjective. But when it is normal, it means the patient is really trying to cooperate because if they feel everything, it usually means they do. I did not find any evidence of muscle weakness or atrophy. Weakness can be faked, but atrophy cannot. If a calf is smaller then it is smaller. His were not. (Misol deposition, page 8.)

Dr. Misol testified that x-rays were taken of claimant for the August 22, 1978 examination. The x-rays covered claimant's spinal area from the 12th thoracic vertebra to the tail bone. (Misol deposition, page 9.) As to what these x-rays indicated, Dr. Misol testified:

A. I took, as I said, the films front and back side view and also forty-five oblique views and I wrote, quote, Fail to reveal the presence of any acute injury fracture this location, narrowing of spaces, or severe degenerate changes, unquote. So this is what I saw. At that time I did not see any of the above.

Q. You did not find any evidence of a compression fracture?

A. No, not that I recall or that I wrote in here.

Q. Okay. You have looked at your x-rays since then?

A. Yes.

Q. Do you find any evidence of a compression fracture now?

A. I don't think so. At least if there is one, I do not see it. (Misol deposition, page 9.)

On the basis of his examination of the claimant, Dr. Misol concluded that the back pain complained of was not symptomatic to the results of a compression fracture. (Misol deposition, page 13.) Nor did Dr. Misol believe that claimant suffered from a ruptured disc. (Misol deposition, page 11.) Rather, Dr. Misol diagnosed claimant to be suffering from a "strain of the musculature, post contusion, of the back." (Exhibit 4.) Claimant's functional impairment was rated at "10% of the use of the normal back." (Exhibit 4.)

As of the August 22, 1978 examination, Dr. Misol concurred with Dr. Bashara's conservative treatment of claimant. (Misol deposition, page 24.) Dr. Misol did express concern over claimant's weight and his failure to participate in an exercise program. (Misol deposition, page 14.) Dr. Misol felt that claimant's weight exacerbated difficulties in weak back muscles. (Exhibit 4.)

Although Dr. Misol felt that he could not fix a date as to when claimant's condition had stabilized (Misol deposition, page 14), his report of August 22, 1978 recommended that claimant return to work. (Exhibit 4.)

As noted above, Dr. Monsour examined claimant on August 31, 1977. His report of September 16, 1977 makes the diagnosis of ankylosing spondylitis. (Exhibit 1.) G. H. Holmes, M.D., in his February 13, 1978 report to Dr. Bashara, diagnosed claimant's condition upon examination as rheumatoid spondylitis. (Exhibit 14.) According to Dr. Bashara's testimony, rheumatoid spondylitis and ankylosing spondylitis are identical conditions. (Bashara deposition, page 57.)

Timothy J. Murphy, M.D., specializing in psychophysiological medicine, examined claimant on September 4, 1978. An MMPI test was administered and was interpreted to be above normal in the hypochondriasis and hysteria scales. There were no indications of other psychological or psychiatric disease. (Exhibit 5.)

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 18, 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 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."

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).

There is a common misconception that a finding of impairment to the body as a whole found by a medical evaluator equates to industrial disability. Such is not the case as impairment and disability are not identical terms. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to l oss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that an industrial disability is proportionally related to a degree of impairment of bodily function.

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. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of 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, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation — five percent; work experience — thirty percent, etc. Neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

In his decision, the deputy found that claimant's healing period ended on September 28, 1979, the date on which Dr. Bashara determined that the sciatic nerve irritation had been resolved. (Bashara deposition, page 23.) Defendants assert that healing period should terminate as of February 12, 1979, the date defendant employer offered light duty employment to claimant.

Iowa Code section 85.34(1), provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Claimant was merely offered employment on February 12, 1979. Claimant would have to actually have started the new employment in order to satisfy the requirements of Iowa Code section 85.34(1). Because the testimony of Dr. Bashara indicated that claimant's condition showed improvement as the result of therapy in 1979, Dr. Bashara's determination of claimant's maximum recuperation on September 28, 1979 is adopted. As a result, claimant's healing period ended on September 28, 1979.

While the medical evidence in the record does not firmly establish the presence of compression fractures, a ruptured disc, or strained musculature, the record does establish that claimant has suffered an industrial disability which has hampered his ability to be gainfully employed. While the medical evidence illustrates that claimant is at least 10 percent functionally impaired, it does not establish to what extent this functional impairment has effected his ability to work.

Claimant was a construction worker at the time of his injury. While his functional disability may make it impossible to return to the same type of employment activities as before his injury, this does not make claimant unemployable. Claimant's inability to find gainful employment, however, is more the result of claimant's attitude than the result of an industrial disability.

Claimant testified at hearing that because of back pain he is no longer able to engage in sport or help around the house as he once was. Yet, he admits to patronizing a local pool hall up to two and a half hours a day, four days a week. (Transcript, pages 25-26.)

Nor does claimant's testimony indicate that he has made efforts to find any employment since his injury. The hearing transcript is filled with claimant's statements such as "It [back] hurt and I just wasn't in the mood for working." (Transcript, page 37.)

Claimant testified that prior to the August 18, 1977 injury, his union had always located him construction jobs around the Des Moines area. The record fails to indicate any effort by the claimant in locating new employment through his union since. Claimant made no other efforts on his own to find work until he was referred by his attorney to the local Job Service of Iowa and CETA representatives in February of 1980. (Riley deposition, page 4; Exhibit A.)

Claimant was referred to Linda Riley of CETA in February of 1980 by Gretchen Berg, Job Service of Iowa manager in Creston. Ms. Riley found claimant eligible to participate in CETA vocational education and on-the-job training programs. Claimant was also found to score "quite high" on mental dexterity tests administered by Job Service. (Riley deposition, page 5.) Claimant was requested to take "VALPAR" test by Job Service and CETA. Ms. Riley described a VALPAR test as a tool for determining a client's physical capabilities for the purpose of job placement. Claimant declined to take the test on the advice of his attorney. (Riley deposition, page 8.) Ms. Riley testified that she referred claimant to potential employers, but that claimant did not report following up on such references. (Riley deposition, page 10.) As to claimant's attitude, Ms. Riley testified:

> A. The first time I talked to Don, he seemed to feel that he would not be able to find employment in the area. He related to me his limitations from his doctor with his physical abilities, and he didn't really seem to want to do too much about finding a job until after his case had been settled. (Riley deposition, page 6.)

Ms. Riley continued:

> A. The first meeting with Mr. Webb I tended to feel that if it wasn't a carpenter job, he really wasn't very interested in seeking and locating work, that his love is carpentry. He likes it, he's good at it. He related, I think, that he may not be able to do it again, but he really wasn't interested in anything we had to offer at the time. (Riley deposition, pages 9-10.)

Marion Jacobs, a vocational consultant, interviewed the claimant in order to determine his employability. Claimant stated that defendant employer had offered him a job driving a truck. Claimant refused the offer contrary to the advice of his attorney. (Exhibit A.)

Ms. Jacobs consulted defendant employer about the possibility of claimant's returning to work. Defendant employer stated that he had offered claimant other employment sometime around February of 1979. Job tasks, according to defendant employer, included running errands and light custodial work. Defendant employer stated that claimant at first accepted the job offer, but later declined. Ms. Jacobs wrote, "There was no indication that Mr. Webb expected or wanted to return to his former job." (Exhibit A.)

Claimant's brief on appeal assesses considerable weight to Ms. Riley's conclusion that the "depressed" economic conditions prevalent in the Creston area has greatly reduced claimant's ability to find employment. Why consideration was restricted to the Creston area when claimant's prior employment was primarily in the Des Moines area is unclear. Claimant contends that in periods of economic decline, employers are more inclined to offer what few jobs do exist to a physically fit individual rather than to one who suffers a functional disability.

As noted above, the amount of functional disability suffered, age, education, past job experience all serve to determine potential for future earning capacity. If one has a serious disability, their earning capacity is much lower in relation to the work force as a whole. If one has a poor education, their earning potential is also lower than the mainstream. But if the local economic situation is temporarily depressed, the earning capacity of the entire work force is decreased. The earning capacity of an industrially disabled worker because of an economic down turn has then been decreased regardless of the fact that he has been injured. It stands to reason, therefore, that a claimant should not be entitled to additional compensation benefits because the employment opportunities are temporarily restricted for one reason or another.

Claimant also contends that his earning capacity has been decreased because of prior felony convictions. Claimant asserts that potential employers are less likely to offer employment to ex-felons than they are to individuals with no criminal record.

The effect of claimant's felon status upon his past employment does not sustain his contention. Claimant testified that his felon status did not affect employability in the past because employers did not inquire as to his record nor did claimant volunteer such information. (Transcript, page 32.)

Raymond Blubaugh was the foreman for defendant employer at the construction site where claimant was injured. Mr. Blubaugh testified that as foreman, he was in charge of the hiring of workers for that construction job. Mr. Blubaugh testified that as foreman for defendant employer, he regularly hired parolees and in fact knew claimant was an ex-felon at the time he hired claimant. (Transcript, pages 67, 70.) Mr. Blubaugh stated that some construction contractors in the area "specialize" in hiring parolees and alcoholics. (Transcript, page 69.) Finally, Mr. Blubaugh acknowledged that potential employers are no longer permitted to inquire as to felon status; such questioning is now regarded as a discriminatory hiring practice. (Transcript, page 70.)

Claimant's appeal brief states that the testimony of Ms. Riley in her deposition illustrates the difficulty claimant would encounter as an ex-felon seeking employment. When asked as to the impact a felon status might have upon earning capacity, Ms. Riley answered: "I don't know. It could or it couldn't. Speaking from past experience, I have two, three ex-felons that have been placed and their employer is happy with them. It could just depend on who he talks to and who may know him more than I do." (Riley deposition, page 15.)

Given the above, there is little basis for concluding that claimant's status as an ex-felon will now impede his ability to find gainful employment.

Marion Jacobs is a vocational consultant specializing in the rehabilitation and employment placement of industrially disabled persons. Ms. Jacobs holds a M.S. degree and honors from the Department of Counseling and Personnel Services, Rehabilitation at Drake University. She authored a treatise entitled "Workers' Compensation Law As It Relates to Rehabilitation Efforts." Additionally, Ms. Jacobs has extensive professional experience in the field of rehabilitation and placement of disabled workers. (Exhibit A.)

Ms. Jacobs, in preparing a report on the employment future of claimant, interviewed claimant and his wife at their home in Creston. Ms. Jacobs questioned claimant about his background, his daily activities, past work history, the circumstances surrounding his injury on August 18, 1978, his state of mind, his efforts at finding employment, and claimant's employment expectations.

Ms. Jacobs also reviewed the medical reports of Drs. Masour, Bashara, Misol and Murphy. She talked to claimant as to what he thought his condition and limitations were.

Ms. Jacobs then consulted fourteen different resources in the Creston area to determine the potential for claimant finding employment. Ms. Jacobs consulted the Creston Chamber of Commerce; Job Service of Iowa; the Vocational Rehabilitation Branch of Southwestern Community College; CETA; the Iowa Merit Employment Commission; Babson Brothers, Inc.; A. V. Boyd Construction Co.; Van Mark Industries; Wellman Dynamics, Inc.; and defendant employer. (Exhibit A.)

As a result of these consultations, Ms. Jacobs stated in her report:

> In my opinion, employment through CETA's O.J.T. or the Vocational Rehabilitation program at Southwestern Community College are viable employment considerations for Mr. Donald Webb in today's work world. Both programs appear to be realistic alternatives for Mr. Webb.
>
> Mr. Webb qualified for both of these programs and either one should provide satisfactory/satisfying employment suitable to his abilities and disabilities.
>
> In addition, there are additional job possibilities for Mr. Webb in the Creston area, if he actively pursues them. (Exhibit A.)

Despite claimant's eligibility for CETA funded on-the-job training and education programs, and despite the favorable employment outlook resulting from participation in these

programs, claimant has declined enrollment in any program

Ms. Jacobs concludes that given claimant's age, education, work experience, vocational resources and opportunities available, functional ability to engage in employment for which he is fitted or can be successfully trained, and current earning capacity, claimant is 25 percent "vocationally disabled."

While it is the statutory duty of this agency to determine the degree of industrial disability based upon all of the credible evidence contained in the record, the assessments of vocational rehabilitation experts are valuable tools in the agency's ultimate determination of industrial disability. Given the qualifications of Ms. Jacobs and the extensive research which she conducted in this matter, her assessment of claimant's employability is significant.

Findings of Fact

1. That claimant was 34 years old with a ninth grade education at time of hearing. (Transcript, page 20.)

2. That claimant is married and has no children. (Transcript, page 20.)

3. That claimant suffered an admitted industrial injury on August 18, 1977. (Stipulated.)

4. That claimant attained maximum recuperation on September 28, 1979. (Bashara deposition, page 23.)

5. That claimant, as a result of the injury of August 18, 1977, has a functional impairment of 15 percent of the body as a whole. (Bashara deposition, page 28.)

6. That claimant has not been cooperative in the exercise and weight reduction programs prescribed for him. (Transcript, page 44.)

7. That claimant has not made good faith efforts to find gainful employment. (Riley deposition, page 4; Exhibit A; Transcript, pages 37-40.)

8. That claimant was offered and refused light duty employment by defendant employer. (Exhibit A.)

9. That claimant's inability to find gainful employment is not affected by his status as an ex-felon. (Transcript, page 70.)

10. That claimant has not attempted to participate in any rehabilitation or training programs available to him. (Exhibit A.)

11. That defendants have paid claimant 140 and 4/7 weeks of compensation benefits at the agreed weekly rate of $232.51. (Stipulated.)

12. That claimant is not entitled to additional benefits because local economic conditions are less than optimal.

WHEREFORE, it is held:

That claimant is entitled to healing period benefits until September 28, 1979.

That as a result of the injury suffered August 18, 1977, claimant is twenty-five percent (25%) permanently partially industrially disabled.

THEREFORE, it is ordered:

That defendants pay the claimant a healing period from August 18, 1977 and ending September 28, 1979 at the weekly rate of entitlement of two hundred thirty-two and 51/100 dollars ($232.51) together with statutory interest from the date due. Credit is to be given to the defendants for those amounts previously paid.

That commencing September 29, 1979 defendants pay to claimant one hundred twenty-five (125) weeks of permanent partial disability compensation at the rate of two hundred twenty-eight dollars ($228) per week.

Costs are charged to the defendants and shall include the amount of one hundred fifty dollars ($150) for the costs of the testimony of Jerome Bashara, M.D., as contemplated by section 622.72, Code of Iowa.

Defendants are to pay to claimant thirty-nine dollars ($39) for reimbursement of drug expense reasonably incurred necessary to treat the injury.

Defendants are to file a final report within twenty (20) days from the date that the terms and conditions of this decision become final.

* * *

Signed and filed this 20th day of October, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.
Appealed to Supreme Court; Dismissed by Claimant.

TERRY WEBSTER,

Claimant,

vs.

JOHN DEERE COMPONENT WORKS,

Employer,
Self-Insured,
Defendant.

Arbitration Decision

This is a proceeding in arbitration brought by Terry Webster, the claimant, against his self-insured employer, John Deere Component Works, to recover benefits under the Iowa Worker's Compensation Act on account of injuries he sustained while working for defendant from March, 1977 to June, 1978 and from May, 1979 to December, 1979. This matter came on for hearing before the undersigned at the

Black Hawk County Courthouse in Waterloo, Iowa on January 26, 1982. The record was considered fully submitted on March 11, 1982.

Defendant filed a first report of injury regarding this claim on January 9, 1981.

The record consists of the testimony of the claimant and of the claimant's wife; the deposition testimony of Arnold E. Delbridge, M.D.; of Hester J. Hursh, M.D., and of William Taylor, M.D.; joint exhibit 1, first report of injury and employee's earnings record; joint exhibit 2, drawings of air hammer, chisel and grinder; joint exhibit 3, December 30, 1981 report from Dr. Delbridge; joint exhibit 4, defendant's medical records; joint exhibit 5, July 21, 1981 and October 16, 1981 letters from Albert R. Coates, M.D.; and joint exhibit 6, records from St. Luke's Methodist Hospital.

Claimant requested that the testimony of each claimant in the following companion cases (all brought against defendant herein) be considered as part of the present record: Gerald Brackin (No. 666018); La Verne Buehler (No. 677307); Frank Courbat (No. 675213); David Frye (No. 677308); and Clayton Kalishek (No. 675217). It should also be noted that the deposition of Dr. Taylor, which was offered in all of these cases, also was part of the record in seven previously heard and decided cases (Nos. 607927, 608028, 632028, 632029, 632030, 632031 and 632999). The parties also arranged for Dr. Hursh's general testimony in those prior cases to be included in the transcript of her deposition offered in the present proceedings. Accordingly, the undersigned has adopted, with some modifications, portions of the prior decisions which summarized such testimony.

Issues

The issues to be determined include whether claimant sustained an injury in the course of and arising out of his employment; whether there is a causal relationship between the alleged injury and the disability; and if so, the nature and extent of the disability; whether defendant received notice of the injury in accordance with Code section 85.23; and whether claimant's action is barred by Code section 85.26(1). Subsequent to the hearing, the parties stipulated that the applicable rates of weekly compensation are $222.60 (chipping and grinding) and $250.54 (pangborn operator). The parties have not submitted exact dates regarding the period of time claimant was off work as they indicated they would do at the close of the hearing.

Recitation of the Evidence

All of the claimants did chipping and grinding at some time during their employment with defendant. While their testimony did vary slightly regarding lengths and weights of tools and products and with respect to identification of the drawings in one of the joint exhibits, they did present a uniform description of the chipping and grinding process. Castings for cylinder blocks, transmission cases, clutch housings and engine blocks are formed by pouring hot iron into molds. After cooling, the mold units are removed from the casting which is then blown to remove as much core sand as possible. The lead or outside worker first chips off the excess iron (created during the molding process), gates (20 to 30 masses measuring 1 inch x 1/4 inch to 8 inches x 6 inches and 1/8 - 1/4 inch thick, formed where iron was poured into the casting mold), fins (formed where the mold was clamped together, between the cores and molten seam where the cores meet the green sand, and measuring approximately 1/2 inch at the base to 1/18th inch at the peak, 1/4 inch to 4 inches high and running the length of the seam) and clumps (1/4 to 1/2 inch thick). The claimants testified that the three pneumatic hammers used in their work were the Rotary, the Chicago and the Ingersoll. They estimated that the air hammers utilized 80 to 110 pounds of pressure and beat 100 strokes per minute. Most preferred the Rotary because it was smaller (14 to 15 inches long, 6 inches high and 10 to 15 pounds) and faster. The Chicago required more pressing on the chisel. All of the claimants were right-handed and accordingly each held the pneumatic hammer with the right hand and held the chisel, which fit into the end of the hammer, with the left hand. The chisel had to be held tightly lest it would fly out of the hammer during operation. There were 25 types of chisels ranging from 6 inches to 2 feet long and from a point to 2 inches wide. Claimants indicated that both hands would shake from the vibration of chipping. They explained that the harder one pressed against the iron to be chipped, the faster the chipping would be completed. This was important insofar as they were on incentive pay. Both the outside and inside worker would chip off the burnt in sand which was a difficult operation requiring use of one of the larger chisels and up to 15 to 20 minutes of chipping.

The claimants testified that grinding entailed use of a pneumatic grinder weighing 20 pounds and measuring 18 inches to 2 feet long. Each would hold the grinder in the right hand and the sleeve end with the left hand. A 6 to 9 inch stone weighing up to 15 pounds fit in the end of the grinder. They estimated the grinder vibrated at 75 r.p.m. They considered grinding easier than chipping, especially pencil grinding which employed a much smaller grinder and stone.

Terry Webster testified that he performed chipping and grinding for defendant from March 11, 1977 to June of 1978. He usually worked on the inside of transmission cases. Claimant preferred the lighter pneumatic hammers and performed at 145% quota. He estimated that three-fourths of every working hour was spent chipping, ten percent of the time he did grinding and the remainder was devoted to miscellaneous work activity such as hoisting.

Claimant recalled that his hands began to ache and his fingers locked and became numb right after he started chipping and grinding. He assumed the symptoms would go away with more time on the job. However, his elbow also began to bother him and gradually grew worse to the point where he reported the discomfort to defendant's medical department. While the elbow was his primary concern, claimant stated that he also mentioned the symptoms he experienced in his hands. Claimant acknowledged that he did experience pain in his upper right extremity when he helped his brother lift a 75-100 pound incubator. However, claimant explained that the pain was similar to the elbow discomfort he had been experiencing since he began chipping and grinding.

Claimant recalled that he was off work from June, 1978 to May, 1979 on account of the right elbow. His elbow and hands improved. When he returned to work in May of 1979, he was assigned to the beef line, hoisting already chipped parts for reblasting prior to painting. Then he was assigned to the pangborn unit hooking unchipped castings and running hoists. Claimant described such jobs as being more difficult than the beef line. He noted it was incentive work. Claimant related that the hand numbness and cramping returned. He developed sensitivity to the cold. His hands began to bother him so much over the Christmas vacation that he sought care from a Cedar Rapids doctor who recommended surgery. Claimant indicated that after the holidays he conferred with Dr. Hursh for instructions and she advised that he continue under the care of the other doctor. Claimant estimated that following surgery he was off work until early March of 1980.

Claimant testified that when he returned to work on the pangborn he again had difficulty with both hands and because of such problems went off work in June, July and August of 1980. Claimant reported that when he returned to work in September of 1980, he shoveled sand for a while and then bid to the Northeast site where he worked on an assembly line loading, masking and unloading tractor as part of the painting process. Since December of 1980 he has been painting.

Claimant's present complaints include his hands becoming numb when sitting or driving, aching and feeling cold. He has curtailed the amount of hunting and trapping he used to do. Claimant insisted he has never reported his hands turning white, explaining that he has not paid attention to their color. Upon cross-examination he agreed that in general, the hand complaints have been continuous from and related back to the first day he began chipping and grinding for defendant. However, claimant observed that he no longer experiences finger locking. He has no present complaints of elbow pain and notices only a little left wrist discomfort.

Julie Webster, claimant's wife, testified that she has known the claimant for seven to eight years. She verified claimant's complaints and commented that she has observed claimant's hand turn pale in 50° temperatures. Ms. Webster indicated that she is in the process of obtaining a dissolution of their marriage and that they have been separated since October of 1981.

Hester J. Hursh, M.D., occupational hand surgeon, who presently is employed by defendant as the Associate Medical Director at the Moline site and who in addition has a private practice, testified that since leaving training, her practice has been exclusively devoted to hand surgery.

Dr. Hursh reported that when she became interested in the complaints of the chippers and grinders, she took more detailed histories, did more extensive examinations, visited the work area, watched the employees, and worked with the safety department to design tools and develop a screening test. Eventually, she attended the Second International Symposium on Hand/Arm Vibration where she met a number of persons working in the field of vibratory injuries including Don Wasserman who was with the National Institute of Safety and Health (NIOSH) and William Taylor, M.D.

Dr. Hursh recalled that NIOSH came to the plant in 1978 to do a cross-sectional study which proceeded by taking persons not exposed to vibration and using them as controls. At the same time NIOSH was doing studies, Dr. Hursh was pursuing longitudinal studies where the same group of persons are studied over a period of time and their test results are compared with their prior test results, on an individual basis.

While in the course of her work, Dr. Hursh said she looked for an accurate and reproducible test for the measurement of blood flow to the hands as the test considered most reliable was an arteriogram, which is an invasive procedure and deemed by the doctor as inappropriate for the work situation. Finally, she came in contact with Dr. J. S. Yao, a professor of vascular surgery at Northwestern University, and visited his laboratory. His technicians did testing in the plant in July of 1979 and 1980.

She explained Dr. Yao's test, referred to as the Northwestern test, which she classified as objective in nature, as follows: The worker to be tested is taken at the beginning of the shift, placed in a controlled environment of sixty-eight degrees for about thirty minutes, and not permitted to smoke for a period of one hour before the test. A history is taken. Blood flow is measured in the arteries of both upper extremities, beginning with the brachial artery at the elbow. A Doppler ultra-sonic device is used. The blood pressure in each digit is measured separately. According to the doctor, comparison of the pressure in the arm with that in the finger would produce an assessment of the capability of profusion of the artery. She said there is a necessity for pressure in the arteries to increase from the proximal or closer to the center of the body to the distal or fingertip. In white finger cases, the pressure in the finger is lower. Dr. Hursh explained that normal finger pressure should exceed arm pressure by a factor of 1.3. Anything below 1.0 was abnormal and any average in between was borderline.

The temperature of each digit is then recorded by a telethermometer with resting temperatures affected by vascular problems in the hand and by the nerves as well as by blood flow. The temperature probes are left taped to the fingers which are immersed in an ice water bath of thirty-two degrees for twenty seconds. The hands are removed from the bath and temperature readings are taken every five minutes. At the end of twenty minutes, the doctor then talks with the worker about the symptoms experienced and reviews the testing results.

The doctor recalled she had first believed white finger was a unilateral problem and that whiteness was present only in the fingers of one hand. It was her experience that whiteness first developed in the fingers of the nondominat hand of the chippers as that was the hand which controlled the chisel. Usually the ring finger was the first digit to become sypto-matic. According to Dr. Hursh, the NIOSH engineering tests indicated that the vibration at the chisel was greater then that of the hammer. Several methods were tried to decrease the contact with the chisel. Retainers were used with some hammers, but production problems resulted. Dr. Hursh was under the impression that as the workers' symptoms increased, their productivity by their assessments decreased. The doctor was impressed by the fact that the workers with

the greatest symptoms were those with the highest rate of production. First men who attacked the majority of the problem areas on the production teams had shorter latent periods that those who did the finishing up. Sand was found to increase the duration of hammer use.

Dr. Hursh distinguished Raynaud's disease from Raynaud's phenomenon thusly:

> Reynaud's [sic] Disease is considered a primary illness, which is apparently hereditary or tends to follow families and occurs in the population without any external causative factor being identified.
>
> * * *
>
> Raynaud's Phenomenon can occur as an isolated experience associated with other diseases such as scleroderma or Buerger's disease. And it can also occur as a result of external injury. (Hursh deposition, page 103.)

The doctor said that injury could be intermittent or as the result of trauma such as a crushing injury.

The doctor did not argue with the causation effect between vibratory white finger and chipping and grinding.

As to the parts of the body which are damaged in vibratory white finger, the doctor testified:

> A. There is some disagreement or lack of knowledge among the experts, and I think that we are — I would say we are not all in total agreement. But we have come to the point where we think that there is injury to the arteries, which —
>
> Q. That's vascular?
>
> A. The vascular system. Which, by the way, develops collateral circulation to protect itself. And then we also think that maybe there is something occurring with the nervous system. It might — the nervous system problems might be a result of the collateral circulation problems. Or I shouldn't say "collateral"; just "the circulation problems".
>
> But the ultimate decision of what is underlying this problem is made by examining the injured part under a microscope. And the problem with that is that the part is only affected on and off, so we can't take it off and look at it under a microscope. Nobody has donated us any parts.
>
> * * *
>
> A. So we really have very little microscopic information about the injury. We are trying to use non-invasive tests to give us as much information as we can get.
>
> Q. All right. But it's generally considered right now that this is a problem with the vascular structure and the neurological structure, the nerves and the arteries?
>
> A. That's what is generally accepted. (Hursh deposition, pages 105-106.)

Although she had no evidence either to refute Dr. Taylor's opinion, she disagreed with his supposition of permanent neurological damage to persons with vibratory white finger. The doctor was asked in the following exchange to comment on a study by Lidstrom:

> Q. And in her paper, she refers to the fact that nerve function disorders exist in persons who have complained of numbness with or without Vibratory Whitefinger disorders. Do you know what she — do you understand that one? She is saying she's found some problems with nerve functions with people who have worked with vibrating tools who have complained about numbness and they may or may not have Vibratory Whitefinger disorders, the blanching and such things as that.
>
> A. That's right. Yes.
>
> Q. That they can have nerve damage without the symptomatic indications of blanching and things such as that.
>
> A. Well, I think what we are saying is they are having symptoms, but what we don't know anatomically is, is the nerve damaged or is the nerve having difficulty because it is having poor internal circulation. This is something that is a great possibility, but we have no way of getting the nerve out and looking at it under the microscope. We may be able to do some of these things with computers as they become more useful in looking internally without invasion of the body. (Hursh deposition, page 122.)

And further:

> Q. It says [Lidstrom's paper] this: "This involved determining the magnitude of the temporary threshold shift —" She used the initials, I used the words — "for vibration perception following exposure to vibration. It has been established that there is a difference to reaction to vibration exposure in the case of persons with clear symptoms of vibration injury, and this reaction change must therefore be interpreted as an objective sign of derangement of the nervous system."
>
> So what she is saying, if you have somebody with objective signs of vibration injury, that would be Vibratory Whitefinger, would it not? It wouldn't have to be, but —
>
> A. I think Taylor in his testimony stated that it would be more accurate to call it vibration syndrome. Then you are not — you are including more things than just the whiteness which occurs.
>
> Q. All right. But what my point is, what Doctor Lidstrom is saying is that if you have a person with clear symptoms of vibration injury, and then you exposes them to vibration, that their threshold — their perception of the vibration will be at a much lower level; they will notice it very, very quickly, more quickly than an average person?

A. No. (Hursh deposition, pages 123-124.)

* * *

A. Now, at this point we need to say that in Europe, symptoms are accepted as objective. And in the U.S. it's not accepted. This is subjective. You see, symptoms are what the patient tells you. Signs are what you see. That is accepted as objective. And we have a difficulty across the countries because of that. And I think that may have something to do with why we are not as advanced as they are in looking at the problem. (Hursh deposition, page 125.)

* * *

A. It's saying that there is a difference. Now, what you just read me does not say whether it's a quicker reaction or slower reaction. But there is a difference from normal, yes. It does say that.

Q. Yes. Would you want to guess whether it would be quicker reaction or —

A. Yes. From my understanding of these patients, they are feeling less — all of them are saying they are feeling less than what is being presented to them.

Q. Okay.

A. They are not saying they feel more. They are not saying that they are hypersensitive. They are complaining of not feeling quite as much as what is presented.

Q. All right. But she's indicating that whatever — that it's abnormal, it's different than the norm?

A. Right. (Hursh deposition, pages 125-126.)

* * *

Q. And that difference from the norm indicates that there is what she calls an objective sign of derangement of the nervous system. You don't necessarily agree with that?

A. No, I wouldn't say it is objective, but it is a sign that the nervous system needs to be followed, examined.

Q. But Doctor Lidstrom, who's also an M.D. and an engineer, considers it objective.

A. But I just explained that. She's in the European system.

Q. Oh.

A. Which U.S. physicians do not accept. And I might add that the European researchers are coming to more objective tests, and this is Doctor Pyykko in Finland. He and his group of several doctors are being very objective. And they will be accepted, I believe, over here. (Hursh deposition, pages 125-126.)

Dr. Hursh agreed that exposure to a cold environment would cause more physical discomfort and blanching than an ice bath. She also referred to a refractory period as a time in which an episode of white finger has occurred in the preceding hour and another could not be stimulated. Similar to the refractory period, according to the doctor, is the temporary threshold shift or point at which a person can recognize a stimulus. Another time frame is a latent period which is the time between the exposure to vibration and actual blanching. A short latent period could suggest that a patient is more susceptible to vibration.

Dr. Hursh presented a paper at the Third International Symposium on Hand/Arm Vibration in May of 1981 entitled *Vibration-Induced White Finger Reversible or Not?* discussing reversibility. (Hursh deposition, exhibit 1.) Her testing was based on forty-six patients who were either Stage II or III according to Dr. Taylor's assessments to be discussed below. After the initial staging, only the Northwestern tests were used. At the time of the second testing, seventy-eight percent of all the workers who had been removed from vibratory exposure at their jobs, showed "chemical and laboratory improvement" with fifty percent of the improvement occurring within the first two years away from vibration. More specifically, thirty-one patients had symptoms, based on their verbal complaints and comments, less frequent, less severe, shorter in duration, involving less fingers, and occurring more distally on the fingers. Eleven reported no change in symptoms and four complained of increased symptoms. Digital pressure tests improved in thirty-six, showed no change in five, and decreased in five. Temperature responses improved in nine, worsened in nine, and were unchanged in twenty-eight. The doctor noted that more than half of those studied were exposed to vibration outside their employment and also smoked a significant amount. The surgeon was asked:

> Based on all of your experience and your studies which you have previously testified to, and based upon your medical expertise and reasonable medical certainty, do you have any opinion as far as the prognosis of improvement or reversibility of a workman who is in Stage II, Stage I, or even Stage III of VWF, future improvement? (Hursh deposition, page 32.)

She responded:

> I believe that it's important to remove the patient from exposure to all vibration. That is not only at work, but in his social life. It would be better if he did not ride his motorcycle and did not run his chain-saw during the time that he is trying to recuperate. If he is removed from all vibration, as I have said, I believe that he will make a definite return to normal through gradually decreasing symptoms.
>
> I would like to say probably that the first symptom that will be decreasing is the frequency of episodes of whitefinger and the number of fingers involved. (Hursh deposition, page 33.)

Dr. Hursh said that the vascular system is the one which shows improvement because it has the ability to develop collateral circulation. While the nervous system cannot repair itself, if a blood vessel has been impaired in a nerve, then it too, would be repairable.

Dr. Hursh disagreed with Dr. Taylor in that she did feel people could improve to the point of no impairment. She felt that the testing done indicated the worker's status was not conclusive. The doctor agreed that her testing was limited and that more time was needed to draw conclusions.

She stated that her testimony in regard to the claimants in these companion cases was based on "their entire history . . . in the Medical Department, which started out with history and physical exam; the typical hand examination, which involves checking circulation, tendons, motor function; the entire function of the upper extremities." (Hursh deposition, page 101.)

Dr. Hursh testified that of the thirteen claimants whose cases have been heard to date, all experienced a reduction of symptoms when they stopped chipping. As with the first group of seven, Dr. Hursh recommended that the six claimants in the present companion cases should not resume chipping and grinding. However, she noted that some of these individuals are so restricted because of additional physical problems, and not because of Raynaud's phenomenon.

With regard to the nature and extent of disability, Dr. Hursh opined that the odds of an individual with normal pressure and temperature testing becoming symptom free was nine to one. She estimated such recovery would take three years but conceded that each claimant's progress was unique. It was Dr. Hursh's opinion, based on fundamental physiology, that smoking contributed to the problem because nicotine decreases circulation in the fingers for one hour after each cigarette and lowers finger temperature by two degrees. Dr. Hursh verified that whether smoking and working with vibratory tools had an additive or synergistic effect on circulation was unkown.

Dr. Hursh found it impossible to measure any permanent impairment based on loss of motion, nerve pattern assessment or vascular impairment. Since she assessed claimant's conditions (except Mr. Buehler) as intermittent and not permanent, she found it otherwise impossible to apply the AMA Guides to these cases. Dr. Hursh did not equate the inability to return to work involving the use of vibrating tools with impairment. Dr. Hursh likewise did not consider the intermittent occurence of whiteness upon exposure to cold temperatures to be a significant impairment. She acknowledged that a number of chippers and grinders do not develope Raynaud's phenomenon.

During additional general cross-examination in these six cases by claimants' counsel, Dr. Hursh agreed that a number of medical articles indicated there was no diagnostic value in measuring pressure at rest. However, she disputed the argument that testing the systolic pressure during an extended period of cooling was a more accurate procedure. Parenthetically, the undersigned must comment that such extensive general cross-examining during these six cases, when the general direct and cross-examination in the earlier cases was included in the present record and when the direct examination in these cases was confined to the particular facts of each case, appears somewhat improper.

Dr. Hursh responded as follows to inquiries about carpal tunnel syndrome and tenosynovitis:

A. . . . It's a very common and also in part a normal occurrence for tendons to swell related to any activity. There may be a transient swelling, for instance, following strong gripping, such as opening a jar at home. Most people are not particularly aware of the sequela of this, because there is very mild swelling. But if many tendons are involved and if it persists, then all the symptoms that we experience, hear of, with this patient have to be taken into consideration.

Q. I'm not too familiar with the anatomy of the swelling. Are you saying that it can take place in carpal tunnel?

A. Yes.

Q. And that while that's taking place, there will be an impingement of the nerve?

A. That's right.

Q. But that that will go away when the swelling of the tendons goes away?

A. That's right.

Q. Is that what accounts for the intermittent tendency or can account for the intermittent tendency of that type of problem?

A. Yes, it can account for that.

Q. What is, if there is any, the prescribed treatment for tenosynovitis?

A. There are medications, anti-inflammatory medications, which are used. Sometimes rest is indicated. And sometimes rehabilitative exercises are indicated.

Q. Can it be controlled?

A. Yes. Usually. (Hursh deposition, pages 68-69.)

. . .

Q. Just a minute — if a particular job caused or aggravated the tenosynovitis or the carpal tunnel problem, how would you arrive at that decision as a medical doctor?

A. Usually by a detailed history.

Q. Clinical history?

A. Yes.

Q. If they were free of the symptoms before doing a particular job and did the job and went off the job and they developed the symptoms, and then went off and got better and then did a job again and it caused them more symptoms, what would that lead you to the conclusion of?

A. You not only have to have the man's work history, but you have to have his social history, too.

Q. But let's assume we have a man who says that based on his social history, his previous work history, his entire life style, that he had no problems with his hands or arms until he became a chipper and grinder, and then he developed problems with teno — how do you say that?

A. Tenosynovitis.

Q. Tenosynovitis, and carpal tunnel. And that he was taken off chipping and the symptoms subsided. And then he was put on another job where it took extensive gripping and the symptoms came back. What conclusion would that lead you to?

A. Provided you know all about his background, then you can say whether or not you think it's work-incurred, but you must know all the details. You cannot just take a portion of this. And one of the things that's occurred often at the Medical Department is that the worker will come and say, "I never had this before." But he may neglect to tell me that he was playing basketball every night or skiing or riding a motorcycle, or all kinds of other things that contributed to his problem.

Q. But that isn't what I have asked you. What I asked you is, let's assume you have an individual that we know his entire social background, his work history, and he has a carpal tunnel and tenosynovitis and it came following doing a particular job, according to his history. Let's assume that that's what's in the record. What conclusion would that lead you to?

You have had a rather long pause, Doctor.

A. Yeah. You're letting me assume that there is no other history?

Q. No other history.

A. You're saying the history is absolutely clean, in which case you're just led down to the fact that it's related to the work.

Q. All right.

A. But you must have these complete histories.
(Hursh deposition, pages 68-69.)

According to defendant's medical records, on November 22, 1977, claimant reported epicondylitis in his right elbow of six weeks duration. Dr. R. V. Corton noted that claimant "does chip and grind and a few days ago he wrenched his elbow when he turned it in a supinated position and felt a pull". (Joint exhibit 4, page 18.) Claimant received conservative treatment consisting of pain medication, moist packs, hot soaks and an arm band. In February of 1978, claimant suffered a recurrence of the epicondylitis on the right and noticed similar sensations in the left elbow the following month. After being temporarily restricted from chipping and grinding, his condition improved. Upon returning to such work for one and one-half weeks he experienced right elbow and right wrist pain. At that point claimant was treated with an injection of Carbocaine, Celestone and Depomedrol. A medical notation for May 23, 1978 states that claimant returned to chipping and grinding without difficulty until he injured both his elbow and back when carrying a chicken feeder. Claimant indicated he had been off work for two weeks and upon returning experienced more discomfort. Dr. Corton suggested claimant seek treatment from his own physician because the aggravation had not occurred at work. (In a letter dated June 5, 1978 and addressed to defendant's medical department, Jitendra D. Kothari, M.D., indicates he examined the claimant regarding a complaint of pain in the lateral aspect of the right elbow of six months duration. He recommended light duty and anti-inflammatory medication.)

Claimant's family physician, L. John Flage, M.D., referred him to James H. Dobyns, M.D., of the Mayo Clinic. In an October 26, 1978 letter addressed to Dr. Flage, Dr. Dobyns set forth the history he received from the claimant and his impression:

> This 30-year-old right-handed chipper for the John Deere Corporation is reviewed concerning persistent extensor origin syndrome discomfort which began as soon as he began his type of work about two years ago and has persisted in spite of the fact that he has been off the job for the past six months. (In fact, symptoms seem to have become aggravated the past few months and he has developed a constant aching pain for which he takes Tylenol). The job is an obviously stressful one with constant repetitive use of a vibrating tool. (Rest periods are unusual because pay is on an incentive basis). Most workers according to the patient, have some difficulty particularly at first and the types of problems are said to be locked fingers, painful wrists, with bumps at the carpal metacarpal junction (as he describes), painful forearms and painful elbows. Surveys have also been made with reference to the effect of vibrating tools on the circulation, (a known hazard). However, there are also may workers who seemingly have little trouble once the "breakin" period is over. Physical differences may account for this in part, but there are probably also technique differences which are factors. Neither patient nor I are aware of any knowledgable professional who can "sort out" the more aggravating techniques and suggest differing ones. At this point, it appears that this type of work is unsuitable for Mr. Webster and an alternate job should be sought. However, at this point, he is not even comfortable doing everyday activities. He has the classic findings of extensor origin syndrome with symptoms and findings currently related only to the lateral epicondyle, probably involving the origin of the extensor carpi radialis brevis primarily. (Joint exhibit 4, page 19.)

Dr. Dobyns recommended surgical release if a four to six month trial of conservative treatment failed. According to Dr. Corton's notes, claimant's surgical release by Dr. Dobyns

was scheduled for February 7, 1979 was cancelled because claimant's elbow was beginning to show some improvement. Dr. Dobyns preferred to continue a conservative approach. Dr. Flage specified that claimant should avoid chipping and grinding and jobs requiring pronation and supination (like turning a screw driver), complete over extension of the forearm and marked bending of the wrist. Apparently defendant had no suitable work for the claimant at that time. In a medical notation on March 27, 1979, Dr. Corton commented: "In reviewing his record, I see he had a tendinitis of the right elbow first in Nov. 77. We will have him permanently no chipping and grinding." (Joint exhibit 4, page 15.) As of April 26, 1979, claimant indicated he felt capable of doing almost anything but chipping and grinding. Dr. Corton removed all but the permanent restriction on chipping and grinding. In a slip dated April 26, 1979, Dr. Flage likewise indicated that claimant's restriction was with respect to chipping and grinding and specified the claimant had been under his care and unable to perform regular job duties from June 6, 1978 to April 30, 1979.

On January 2, 1980 Dr. Hursh made the following extensive medical notation:

> States he had been having gradually increasing problems with his hands and that he went to see Dr. Coates, Cedar Rapids, and was referred to Dr. Paul who did an EMG on both hands on 28 Dec.
>
> The patient reports that he was told by Dr. Paul that he would need surgery on his left hand immediately and probably also need surgery on his right hand. He states that he had been feeling that his fingers were swollen and achey around the joints. He states that he awakened 3-4 times each night with pain in both hands, particularly the left hand. The patient is right handed. He is presently operating a hoist, using the controls with his right hand and hooking parts from the apron with his left hand. He states that he wears cotton gloves while at work. He smokes about 1/2 pack cigarettes per day. He states that he has more symptoms when driving or reading a paper, more symptoms on awakening from sleep, and during cold exposure.
>
> He states that he has been given Darvocet for relief of symptoms. He states that he has an appointment to see Dr. Coates today.
>
> Patient states that he had normal hands until he worked as a chipper from March, 1977 to June, 1978. He was then off work for treatment of a right elbow tendinitis which involved an absence from work of 11 months. The patient states that he returned to work in May, 1979 running a hoist, his present job.
>
> The patient states that prior to employment here, he did construction work, but is una ble [sic] to give any instances of making persistent, strong grip in his work.
>
> On examination, the patient was seen to have normal sweating through out [sic] both hands. His range of motion is excellent. There is slight atrophy of the left thenar muscles. The patient is able to oppose both thumbs well. He has decreased soft touch sensation over the median serve distributions of both hands. It is my impression that the patient has a fairly severe left carpal tunnel syndrome and a mild right carpal tunnel syndrome. He has not been on any anti-inflammatory medication according to his history. He is to continue under the care of Dr. Coates. (Joint exhibit 4, pages 14-15.)

Records from St. Luke's Methodist Hospital in Cedar Rapids reveal that claimant was admitted from January 16, 1980 through January 18, 1980. An electroneuromyelogram yielded findings of moderate, severe carpal tunnel syndrome and incipient carpal tunnel syndrome on the right. In the history and physical, Albert R. Coates, M.D., commented: "He feels that most of his symptoms came from chipping at John Deere and Company and this may well be one of the rare employment aggravated carpal tunnels and making it a workmans' compensation type injury". (Joint exhibit 4, page 10.) Noting claimant's chronic lateral epicondylitis on the right and that it resulted in a lot of time off work, he questioned whether claimant was compensation oriented. Claimant underwent a flexor retinaculum release on the left on January 17, 1980. Dr. Coates released claimant to return to work on March 6, 1980.

According to defendant's medical records for April 3, 1980, claimant complained of stiffness and aching of both hands. He reported he had been working on the second shift using a hoist. Examination revealed "considerable flexor tendon swelling in irregularity with some crepitus in the region of the left thumb" and sluggish blood flow in the left ulnar artery. (Joint exhibit 4, page 13.) Dr. Hursh advised the claimant to see his family doctor for treatment of the chronic tenosynovitis and gave him a temporary twenty pound limit on repetitive lifting, gripping, pulling or pushing. In a medical notation for July 28, 1980, Dr. S. L. Casta reports that the claimant submitted a slip from Linn County Orthopedists, P.C., (Dr. Coates), which stated the claimant had degenerative arthritis in both hands and would be able to return to light duty work on July 28, 1980. According to a September 8, 1980 medical notation, claimant had been doing well without medication and felt able to return to his job of pangborn operator. The temporary restriction was removed. X-rays taken that day revealed no evidence of spur formation. (Dr. Coates had referred the claimant to Mayo Clinic because he had been unable to determine the exact etiology of the claimant's continued complaints. Claimant reported to Dr. Hursh that during his August 11, 1980 examination at the Mayo Clinic he had been advised that he had some small spurs suggestive of arthritis in both hands.)

Dr. Mursh testified that on January 18, 1982 claimant told her he had never observed blanching of his fingers but complained of his hands falling asleep at rest and when driving. He reported that his symptoms were relieved by moving his fingers. Dr. Hursh commented that numbness while driving is a common complaint and not necessarily related to vibratory syndrome. Dr. Hursh reported that claimant's temperature testing on January 18, 1982 was normal and that his pressures were normal on the right and borderline on the left. Although she testified on direct examination

that claimant did not suffer from vibratory syndrome, she acknowledged upon cross-examination that the left pressure findings were suggestive of vibratory syndrome.

Dr. Hursh further testified that based on the January 18, 1982 examination, it was her opinion that claimant did not have carpal tunnel syndrome and did not have any permanent impairment. (Dr. Coates earlier indicated: "At the last time I saw Mr. Webster, I feel that he carried a temporary impairment rating at that point of 5 percent of the dominant arm and 2 percent of the nondominant arm". [Joint exhibit 5, page 2.]) Dr. Hursh found it difficult to causally relate claimant's work of running a hoist with his complaints:

Q. Yeah. And he described his job of being required to grip the hooks hard and place them in castings for the pangborn.

A. I hear what you're saying, but I can't imagine that you have to grip the hooks hard.

Q. Well, you've got a moving hook and an object you're trying to get on them, right? And you have to hold the hook solid so you can get the object on them?

A. The hook has to be maneuvered into an opening on a casting. And it doesn't require a strong grip, such as maneuvering the air hammer.

Q. Do you know if that opening is always open?

A. Yeah, there is always some opening. They never — they never have to poke it with the hook.

Q. Okay. How many times have you seen that?

A. Oh, 50.

Q. For how long?

A. Probably ten minutes at a time.

Q. But if he were required, his job did require him to hold them tight, then would you accept that that would aggravate this condition of carpal tunnel?

A. It might. (Hursh deposition, pages 271-272.)

Dr. Hursh likewise testified that the work claimant performed for defendant may have aggravated his epicondylitis. She observed that any work including persistent gripping, regardless of a vibration factor, could aggravate chronic tenosynovitis. Although at the time of her deposition, Dr. Hursh could find no record of claimant being permanently restricted from chipping and grinding. She agreed that it would be advisable for him to avoid the use of vibratory tools.

Arnold E. Delbridge, M.D., arthopedic and hand surgeon, testified that he examined the claimants in these six and the prior seven vibratory syndrome cases at the request of claimant's counsel. He received a complete history from each claimant with respect to their exposure to vibratory tools. He estimated that the physical examination took twenty to twenty-five minutes in each case. Dr. Delbridge indicated that he performed sensation tests such as light touch, two point discrimination, and coin recognition upon the upper extremities to measure the impairment of the nervous system. He clarified that any two point discrimination under three millimeters was not considered in his impairment rating. Dr. Delbridge also performed the Phalen's sign which consists of acute flexion of the wrist to see if there is distribution of the median nerve to the thumb, index finger, middle finger and half of the ring finger. The test is positive if such fingers become numb. He designated such sign as the classic test for carpal tunnel syndrome. He likewise performed the Tinel's sign which consists of tapping over the median nerve. Dr. Delbridge examined the claimants' vascular systems by means of the Allen's test which entails elevation of the extremity above the head for a while followed by manual occlusion of the radial or ulnar artery as the hand is lowered. The test is positive if the hand slowly turns pink meaning that one of the arteries leading to the hand is very inadequate or occluded. Dr. Delbridge distinguished an occlusion from a clot, noting that the former referred to a hypertrophied wall of a vessel. He also tested the claimants for thoracic outlet syndrome which is caused when the area where the nerves and vessels exit from the thoracic cavity is constricted. Finally, Dr. Delbridge immersed claimant's hands into ice water (after no definite waiting period) for sixty seconds as a means of checking any neurogenic vasospasm by noting the speed of the returning circulation and the degree of blanching of the upper extremities.

Dr. Delbridge testified that it is generally recognized that there is a causal connection between the use of vibratory tools and Raynaud's phenomenon. Regarding the effect of such condition upon the body and its members, Dr. Delbridge and defense counsel had the following exchange:

Q. Okay. Let's talk about the individuals here. We are not talking about those uncommon cases you may have read about. These are the wrist and distal problems?

A. That's where the major problem is, yes.

Q. And there isn't any nerve damage — what do you call it when it's closer to the body?

A. Proximal.

Q. Proximal. There's no indication of proximal nerve damage or problems or that sort of thing?

A. No. There can be proximal symptoms, generally speaking; not proximal nerve damage.

Q. Now you have also described the VWF, vibration whitefinger, as being — don't let me put words in your mouth, but I understood you to imply it's principally vascular in nature?

A. It's both. The triggering response, of course, has to be mediated through the nerve system. And it's partly nerve, partly vascular. The two-point discrimination test is certainly a neurological test, whereas the vasospasm test like the cold water immersion is basically a vascular test. If the response in the vessels is mediated by the nerves, by the stimulation from here to the nerves that then in turn spasms the vessels.

Q. You have got to be able to feel the cold and you have got to be able to tell the vessel to do something, and that's neurological, but let's speak — is that right in a simple layman's way?

A. Yes. The nerve has to tell the vessel to go into spasm.

Q. Then let's speak of the vascular component of it. Can we talk about that? I mean will you know what I mean?

A. Yes. The vasospasm I'm assuming you mean.

Q. Now that again is confined, if I understand it, to the fingers or hands?

A. Well, the vascular situation, in order to turn a finger white you basically would need to shut down the blood supply of some arteries distal in the palm or proximal in the finger. But in addition, occasionally that's not the only thing that's susceptible. You can have vasospasm of the radial artery in the forearm, too.

Q. Okay. I see. Let me amend it and say then, depending on the individual involved, it could be up into the forearm?

A. Yes. I've never seen one proximal to the forearm. I wouldn't say they don't exist, but I've never seen one.

Q. Okay. Well, at least none of these six has vasospasm or vascular problems proximal to the forearm?

A. None of these do, no.

Q. And you were not talking about a situation like where you are talking about a thrombus or something that could move up into the lungs like thrombophlebitis or something like that, are we?

A. No. We are really talking about vasospasm mostly on the arterial side. In other words, the vessels going to the hand rather than the veins coming away. We are talking about the vessels with muscular walls that can respond to this stimuli. Veins really don't have muscular walls and they really can't respond to the stimuli.

Q. I see. Oh, I'm understanding you now. I see now. There isn't obviously any danger then of anything that you worry about with a blood clot moving into the heart or the lungs; that's not what we are concerned about here?

A. No. We are pretty safe from that standpoint, because supposing that an artery is occluded and maybe what's occluding it is a small clot, in order to get to the venous system and back to the lung like a pulmonary embolus, it would have to transverse the capillaries, which it can't do.

Q. I see.

A. It can't do that.

Q. In the fingers, you mean?

A. The only possible way is if there was a direct — in some people that have been shot or otherwise traumatized there can develop a direct channel between the artery and the vein. In those cases possibly, but in these cases there shouldn't be anything like that because a shunt of that magnitude we would probably have noticed.

Q. By "these cases," you are talking about the white-finger cases we've been discussing?

A. Yes. (Delbridge deposition, pages 82-85.)

Regarding the methodology of his impairment ratings, Dr. Delbridge explained that he computed the impairment of the digits on virtually all aspects of a claimant's history, examination and laboratory findings and then used the AMA Guides to obtain the appropriate impairment ratings for the hand, upper extremity and body as a whole. He commented that none of the claimants' had suffered any measureable loss of motion as a result of Raynaud's phenomenon. Dr. Delbridge acknowledged that, with the exception of Mr. Buehler, he maximized laboratory findings even though the AMA Guides suggest that evaluation of cardiovascular impairment be based on sound clinical judgement utilizing the history and examination but minimizing the laboratory aids. However, Dr. Delbridge's manner of assessing digital impairment was in accord with the following introductory remarks contained in the AMA Guides:

> Evaluation of permanent impairment is an appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficiency in one or more of the activities of daily living. These activities are self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized hand activities.

With respect to the various tests performed by Dr. Hursh and himself, Dr. Delbridge cautioned that the results of such procedures did not always correlate with arteriographic findings and symptomatology. In Dr. Delbridge's opinion, the "best test is probably the one that correlates more with the patient's symptoms or his history of severity that you can verify with the test." (Delbridge deposition, page 77.) He emphasized that his ratings were based on the present condition of each claimant. He had no opinion regarding whether the condition of any particular claimant would improve or worsen, but he generally was skeptical of the theory that vibratory syndrome is reversible.

Regarding carpal tunnel syndrome, Dr. Delbridge testified that such condition occurs when the compartment formed by the carpal ligament and bones around the distal palmer crease one and one-half inches into the palm tightens, thereby constricting the median nerve which passes under the ligament. He observed that symptoms may extend proximally from the wrist but not nerve damage. Dr. Delbridge assessed the causation of carpal tunnel syndrome:

A. ...Chipping and grinding seems to thicken the tissues in the hand, and many of these people complain that their hands lock up. And if you feel them,

they are doughy and they have a firm consistency not unlike swelling. And certainly this can have a bearing on the carpal tunnel, because as the palmar structures swell they decrease the size of the carpal tunnel. So carpal tunnel can be a result of exposure to vibratory tools.

Q. Can carpal tunnel happen without any causative effect?

A. Carpal tunnel can happen where we have no idea what the cause might be. It happens in quite a few people who aren't exposed to much of anything in terms of vibration.

Q. But are there things other than vibration that can cause carpal tunnel?

A. Yes. Repetitive flexing of the wrist seems to play a part. Also, anyone who has had a fractured wrist seems to be more prone. Diabetics are more prone; hypothyroidism people are more prone. There's a whole list of things that increases your chances of having carpal tunnel syndrome. (Delbridge deposition, page 24.)

He depicted the difference in symptomatology between carpal tunnel syndrome and vibratory syndrome:

A. Well, classic carpal tunnel syndrome has numbness in the three radial fingers, including the thumb, the index, the long and half of the ulnar fingers. There is no involvement of the small and half of the ring finger in carpal tunnel syndrome with classic distribution. The patient typically complains that he drops small objects, that he wakes up at night with pain, and that he gets rid of the pain by shaking his hand. And also he may describe pain, as mentioned, up into the forearm. And he also may complain that the pain occurs when he has his wrist bent for a time, such as in driving, or that he has trouble when he has to repeatedly pick things up and flex his wrist in the process. That's the typical story I get five days out of the week from carpal tunnel patients.

That differs a bit from the whitefinger syndrome in that the white-finger syndrome is almost always related to cold, where the carpal tunnel symptoms are generally not. Also, while some of the patients with vibration whitefinger syndrome complain of night pain, this is not unversal, but it's almost universal in a carpal tunnel to complain of pain at night and waking up with a numb hand. A lot of the vibration whitefingers do not do that, although some say they wake up. So there is some differences in the symptomatology of the two. (Delbridge deposition, pages 91-92.)

When Dr. Delbridge examined the claimant on December 8, 1981, he received a history from the claimant that was somewhat inconsistent and incomplete when viewed with the rest of the record. That is, he understood that claimant did chipping and grinding from March, 1977 to March, 1979, rather than to June, 1978, and the history did not reflect that claimant had been doing hoisting work from May, 1979 to December, 1979. Likewise, Dr. Delbridge noted that claimant both complained of blanching of all fingers upon exposure to cold and was uncertain of any improvement since quitting chipping and grinding. Upon examination, Dr. Delbridge found that the thoracic outlet syndrome test, Allen's test, Phalen's sign and Tinel's sign were negative and that claimant had reduced sensation to light touch and somewhat decreased sensation of pain. Two point discrimination was at three millimeters for the left index, long and ring fingers, at four millimeters for the right thumb and long and ring fingers, at five millimeters for the left small and right index fingers and at six millimeters for the left thumb and right small finger. Immersion of claimant's hands in ice water revealed blanching of both thumbs and the tips of the right index and ring fingers. Cappillary fill was prompt on both sides. X-rays of the hands and wrist were normal.

Dr. Delbridge opined that the claimant suffered from Raynaud's phenomenon that was attributable to the chipping and grinding claimant did for the defendant. He gave claimant a twelve percent impairment rating to each hand which converts to seven percent impairment to the body as a whole or a combined body as a whole impairment rating of fourteen percent. Dr. Delbridge indicated that such impairment ratings did not take into account claimant's epicondylitis, because claimant did not appear to have any present symptomatology as a result of such condition. It was his opinion that epicondylitis could be caused by use of vibratory tools. Likewise, Dr. Delbridge thought there was a causal relationship between claimant's work and the carpal tunnel syndrome. He indicated that because claimant's carpal tunnel syndrome was so improved, it was not a significant factor in the impairment ratings.

William Taylor, M.D., M.R.C.P., F.R.C.P., a retired professor of occupational medicine with a Ph.D. in chemistry who has been engaged in vibration research since 1967 and who was involved in survey work with NIOSH in the United States and in various research in other countries, testified regarding three international conferences dealing with vibration which had as an objective free interchange of research data and the discussion of reducing vibration and of setting safe vibration limits. The doctor acknowledged being in constant communication with Dr. Hursh since 1978.

Dr. Taylor said Raynaud's disease was easily distinguishable from secondary Raynaud's phenomenon in that the disease is usually bilateral and symmetrical and includes cold feet and a history of blanching attacks before coming to industry.

A table of the stages of Raynaud's phenomenon, mainly clinical in nature, including conditions of the digits and work and social interference has been developed and is reproduced below:

Stage	Condition of Digits	Work & Social Interference
0	No blanching of digits	No complaints
OT	Intermittent tingling	No interference with activities
ON	Intermittent numbness	No interference with activities

1	Blanching of one or more fingertips with or without tingling and numbness	No interference with activities
2	Blanching of one or more fingers with numbness. Usually confined to Winter.	Slight interference with home and social activities. No interference at work.
3	Extensive blanching. Frequent episodes Summer as well as Winter.	Definite interference at work, at home and with social activities. Restriction of hobbies.
4	Extensive blanching. Most fingers; frequent episodes Summer and Winter.	Occupational changed to avoid further vibration exposure because of severity of signs and symptoms.

NOTE: Complications are not used in this grading. (Taylor deposition, exhibit 4.)

Dr. Taylor explained the staging process as beginning with tingling in the hands and fingers followed by numbness. After an interval of months or years, depending on the vibration stimulus, continuity of exposure or grip force, blanching or whitening occurred in one or more fingertips. According to Dr. Taylor, this "is the first indication that the vibration has affected the artery and has given sensitivity to a cold stimulus exactly similar to what we observed in Raynaud's Disease . . ." (Taylor deposition, page 35.) Dr. Taylor indicated that the shorter the latent interval, the greater the measured stimulus and the greater the damage.

If the vibration is continued, the blanching progresses from a fingertip to and down other digits. The sufferer may begin to complain of interference with home and social activities. Further progression leads to the involvement of most, if not all, digits on both hands and interference with work, domestic duties, and leisure and hobby activities. Interference could take the form of blanching, spasms, and attacks brought on by cold stimulus. Other difficulties would be the inability to do fine work and difficulty picking up or recognizing small objects. He concurred that persons who had no loss of sensation prior to the use of vibrating tools, but who after use of vibrating tools, had loss of sensation, could attribute the loss to use of vibrating tools. Dr. Taylor also recognized loss of grip. He said that it is coupling between the hand and the vibrating tool which is the key to the amount of damage done to the hand. He commented that all of the United States' NIOSH studies found no correlation between smoking and the condition in issue.

With regard to Stage II and Stage III, Dr. Taylor stated that a Stage II would be given if there was no evidence of white finger during the summer as only a Stage III would have summer involvement. He indicated that blanching only below 50 degrees would be suggestive of Stage II. He expected an improvement in a Stage II withdrawn from further vibration both occupationally and otherwise. In determining staging, Dr. Taylor said that emphasis would first go to the clinical degree of blanching and then to a description of what the patient could and could not do. With regard to such approach, Dr. Taylor and claimant's counsel had the following exchange:

A. Both conditions are associated with the changes in the arterial system. And what you are asking is this deadness and numbness, is that dissociated from the blanching attacks. And in our view it is not when the man is working. You have got to make the distinction between what are the signs and symptoms at work and what are the signs and symptoms and complaints at home or sitting or as you described, looking at television.

Now in the position in the factory we do not get this history of deadness and your description of what do we call it, pain or a certain dullness, we don't get that complaint from men at work as a seperate [sic] sign or symptom. If it is, it's in the ON/OT stage, and therefore it's early in our scheme. And if you now add white finger onto your complaints, then we think we are at stage one, which is a further hazard on the artery which is sensitized to spasm.

And the complaints we get are not in the area that you are describing to me. The complaints on the evidence that I have read here and in all the cases I have seen, the complaints are more on the ischemic attacks, the blanching attacks than on this other area which you are pursuing now.

Q. But whether they are more or whether they are less, and we will let the Commissioner decide that, my question is this: Are you saying, and I don't know if you meant to say this or not, that if somebody that again we know has been exposed to hand-held vibrating tools and that we know or have reason to believe that he is suffering some degree of Raynaud's Phenomenon, that if they go we'll say a period of time without a white finger attack that they can't suffer numbness and a deadness feeling of the hand during that intervening period?

A. They may be completely symptom-free even at stage three.

Q. How would you know whether they are symptom-free or not?

A. Only from the description from the subjective history. There would be no other tests as yet to prove these other signs and symptoms, which, for example, may arise in our situation in the cases we are considering from a carpal tunnel not associated with VWF at all.

Q. It could happen?

A. It could happen, yes. (Taylor deposition, pages 107-109.)

He disagreed that emphasis should go to light touch or point discrimination, but he agreed with the statement:

"A history of clumsiness due to loss of touch sensitivity in the fingers and a loss of sensitivity to temperature have been noted in chain saw operators whose VWF assessment has reached stage three. In the future, sensory tests may herefore prove more valuable than assessment of VWF by stages since loss of sensation to

pinprick and light touch often precedes trophic skin changes or even stage three assessments." (Taylor deposition, page 127 and Taylor deposition, exhibit 2.)

Dr. Taylor commented:

> The fact that the sensory loss you have described and the two discriminations, the two-point and the depth-sense aesthiosiometry, these both may well follow the arterial damage.
>
> May I point out that at the present moment we do not know what the underlying pathology in either primary Raynaud's Disease or secondary Raynaud's is, but we have absolute positive proof that the arteries are damaged and are closing up with cumulative exposure to vibration. Therefore, we are unable to separate the sensory loss aspect from the blanching process. That they are both occurring is agreed, that they may be separate entities we are agreed at the Ottawa Conference, but apart from that we don't know the interrelation between the two. (Taylor deposition, page 127.)

He gave the impairment rating for a Stage III as three to five percent, Stage II as two to three percent, and a Stage I as one percent of the body as a whole. Dr. Taylor verified that his ratings took into account blanching and interference with work, domestic activity, hobbies and social matters.

Included with Dr. Taylor's deposition were two published articles dealing with his work and a paper documenting his research. (Taylor deposition, exhibits 1, 2, and 3.) Those articles discuss the first description of whitefinger in 1911 in Italian workers using pneumatic tools.

Dr. Taylor described his eleven year study of chain saw operators predominantly forty-five to fifty-five years of age in 1981 and the introduction of low vibration saws to the forestry industry in England. Some of the study dealt with determination of reversibility defined as "coming from a stage back, either one, two or three back to stage zero. An improvement would be from stage three to stage two, or two to one." (Taylor deposition, page 37.) Out of sixteen men classified as Stage III in prior evaluations, only one remained in Stage III in January of 1981. Of twenty-eight ex-chain sawyers, twenty were found stationary, four were improving, and four were deteriorating. Checks were performed in the same week each year.

The doctor's present general conclusions as to reversibility were that Stage II cases reversed to zero and fifty percent of Stage III cases will improve. He indicated that improvement depended on time and there being no further exposure to vibration. He cautioned that Stage 0 did not imply an individual was symptom free since numbness and tingling might continue. Dr. Taylor explained that there is evidence from brachial arteriography of attempts to recanalyze vessels blocked by mechanical trauma and that there is more expectation of recanalization in younger workers. He explained:

> And that was one reason why I did not expect stage three cases ever to improve — not speak of reverse — because of that age factor. Now when it comes to our foundry survey people, my basis for the stage two cases reverting to zero, that's point one, and the stage three cases improving and some going back to reverse, the point I want to make is that we have evidence from artery injections, and if you just put in brackets "brachial arteriography" — I hate using these technical terms — this is pushing dye into the arm and outlining the arteries of the fingers, we have evidence of attempts made to recanalize the vessels which have become blocked, blocked because the artery coat has been subjected to a mechanical trauma and consequently the lumen is shut off —
>
> Q. The lumen being the hole that the blood goes through?
>
> A. The hole, yes, or that the vessel is blocked by a thrombus. Again, I apologize for the word, but this is a blood constituent which clots and blocks the vessel. When that happens we get evidence of what we call collateral circulation or new canalization and new artery vessels around this block. And the younger the subject is, sir, the more we expect recanalization and therefore more hope, more probability that reversal in its widest sense will be more prominent in the younger age group.
>
> Q. Complete improvement or back to zero, or improvement? At least improvement?
>
> A. I would say just improvement. (Taylor deposition, pages 42-43.)

The doctor did not believe tissue necrosis would occur after a worker was withdrawn from vibration absent some artery disease.

Dr. Taylor made comment regarding the Injuries Advisory Counsel which he said had been unable to decide the percentage of impairment and which he thought would set the impairment at a low percentage. Dr. Taylor testified:

> . . . at the Ottawa Conference we are nearly convinced, but we have no good evidence to present to you, that we are dealing with two distinct phenomena here, namely vibration effect on nerves on one hand and the vibration effect on the arterial system on the second hand, admitting there is a relation between those two and that the nerves themselves may be regulating — in fact, they do, we know they regulate the amount of spasm. But it's becoming clear that we mustn't now consider this to be a simple pathological process as we assumed in the past. (Taylor deposition, pages 135-136.)

As to what part of the body is impaired, the doctor testified:

> I am convinced . . . [attacks of numbness at night] are due to a restriction in blood supply and not a neurological complaint. But this area is not separated into two different entities. There's a combination, and I

> couldn't say that the nervous system wasn't involved in that. But that you can get it from the blood supply restriction alone is well known in subjects without vibration. (Taylor deposition, pages 163-164.)

He asserted that blanching "is an indication of damage done from the vibration stimulus to either the nerves separately or the arteries separately or both together . . ." And again, "It's a slow, progressive process" resulting when "you have sensitized the arteries and . . . these have contracted down and the blood supply has gone from the subcutaneous vessels and the veins, giving you a white picture." (Taylor deposition, page 165.) Although the condition is presently referred to as vibration white finger, Dr. Taylor cautioned that later evidence may substantiate involvement of the wrist, elbows, and shoulder and therefore urged that secondary Raynaud's phenomenon be referred to as the Vibration Syndrome.

Dr. Taylor stated that brachial arteriography showed a physiological adaptation going on. Other adaptation could take the form of refusing to do a task done before, avoiding exposure to cold, and wearing protective devices. However, the doctor observed that even using thick gloves to insulate the hand could be countered by exposing the entire body to cold. As to blanching, which he stated occurred when the arteries, veins, and the subcutaneous tissue close off, he said:

> But we make a distinction between the numbness and the absence or presence of white finger for the following reason: That the ischemia, the bloodlessness, the damage to the arteries is the primary factor in that evening feeling of numbness and deadness of the hands, whether there be white finger or not. (Taylor deposition, page 104.)

And he agreed with claimant's counsel in the following interchange:

> Q. Well, but if this individual, if he says, "Look, my fingers blanch, but for a year they haven't blanched but I haven't exposed them to cold, either, I've had enough of that they hurt so damn much," something to this effect, "I wasn't going to expose them to cold and I kept them very, very warm" —
>
> A. Agreed.
>
> Q. — we don't know then whether he was going to have occasional winter blanching or not, do we?
>
> A. No, we would not. Agree. (Taylor deposition, page 121.)

Blanching of the thumb, according to the doctor, would indicate an advance case as the blood supply to the thumb is three times that of the supply to the digits — it would indicate that "the arterial tree is damaged to quite a severe extent." (Taylor deposition, page 183.) He had never observed blanching of the hand.

More specifically, the doctor was questioned and responded:

> Q. And so if we have an individual who says he could do anything out in the open, you know, summer, winter — you know, everybody's hands get cold — but without the blanching, without the numbness and these unique problems prior to coming to work, and then he had interference with gardening and the like, would that lead you to a conclusion?
>
> A. It would.
>
> Q. And what conclusion is that?
>
> A. That the vibration has caused the sensitivity of the arterial system to a cold stimulus. (Taylor deposition, page 118.)

Dr. Taylor's testimony about the claimants in the earlier cases was based on his own examination in 1978, defendant's medical records, Dr. Hursh's testing, Northwestern testing, NIOSH testing, the report from Dr. Delbridge, and the testimony of those claimants at the time of hearing. (Dr. Taylor was unable to understand the testing done by Dr. Delbridge, both as to the method used to arrive at the two point discrimination values and as to any objective basis of the impairment scale that would be transferrable to the staging approach.) Dr. Taylor did not assess the individual claimants in the present set of casses.

Dr. Taylor and claimant's counsel had the following exchange regarding carpal tunnel syndrome:

> Q. Use of vibrating tools can also have an effect on carpal tunnel?
>
> A. Well, now let dissociate — I wouldn't agree with that remark. Vibration per se has no effect whatsoever on tendon sheaths or inflammatory processes of tendon sheaths. What does have an effect on them is muscular repetitive movements. And I like to dissociate the two, vibration from this, because I have a population of chain saw workers and we never see — and I have never seen carpal tunnel because the saw is guided, no muscular movement, the saw is doing the work.
>
> When we come to chipping, now we are introducing a second element of force and many repetitive movements and we may get — not always, we may get carpal tunnel, in which case some of the signs and symptoms you have described to me would be directly attributable to the synovial sheath inflammation.
>
> Q. And if that were the case that they developed carpal tunnel problems, you wouldn't consider that in your assessment that you have given today?
>
> A. Not at all.
>
> Q. And in bouncing up against people that are chippers and grinders, do you also find out that they develop tendonitis?
>
> A. Initially, yes, but keeping in mind that in my opinion of carpal tunnel that 80 percent of it is reversible without treatment. And so you pass through this phase that

you have been describing to me in the chipping population.

Q. But you did leave us with 20 percent of them, anyway?

A. Well, it's difficult to dissociate that carpal tunnel from mechanical movements and the association of it. I said 90 percent. Somewhat between — the figure quoted by Dr. Phalen in the constructive videotape presentation which I saw last week, he put the figure at 90 percent.

Q. But I think the other question was tendonitis. Is that the same as carpal tunnel?

A. Well, it's part of the picture of carpal tunnel in that the tendon sheaths within the carpal ligament are inflamed and expand and the tension developed then compresses the median nerve and we get numbness. (Taylor deposition, pages 109-110.)

Applicable Law

The supreme court of Iowa in *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934) discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury * * * The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> * * *
>
> 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. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

The injury must both arise out of and be in the course of the employment. *Crowe v. DeSoto Consol. Sch. Dist.*, 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also *Sister Mary Benedict v. St. Mary's Corp.*, 255 Iowa 847, 124 N.W.2d 548 (1963) and *Hansen v. State of Iowa*, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. *Crowe v. DeSoto Consol. Sch. Dist.*, 246 Iowa 402, 68 N.W.2d 63 (1955).

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." *Cedar Rapids Comm. Sch. Dist. v. Cady*, 278 N.W.2d 298 (Iowa 1979), *McClure v. Union et al. Counties*, 188 N.W.2d 283 (Iowa 1971), *Musselman v. Central Tel. 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 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., supra*. 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, supra*. 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*.

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. *Ziegler v. U.S. Gypsum*, 252 Iowa 613, 620, 106 N.W.2d 591 (1961), and cases cited.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover 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); *Yeager v. Firestone Tire & Rubber, Co.*, 253 Iowa 369, 112 N.W.2d 299 (1961); *Ziegler v. U.S. Gypsum Co.*, 252 Iowa 613, 106 N.W.2d 591 (1961). See also *Barz v. Oler*, 257 Iowa 508, 133 N.W.2d 704 (1965); *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934).

The work injury need not be the sole proximate cause of the disability as long as the disability is directly traceable to the work injury. *Langford v. Keller Excavating and Grading Inc.*, 191 N.W.2d 667 (Iowa 1971).

The concept of "permanency" is not the equivalent of absolute perpetuity but rather suggests an indefinite and undeterminable period. *Garden v. New England Mutual Life*

Insurance Co., 218 Iowa 1092 (1934); *Wallace v. Brotherhood of Locomotive Firemen and Enginemen*, 230 Iowa 1127 (1941). Compare the Iowa Supreme Court's Order filed April 17, 1980 pursuant to a request for rehearing in *Blacksmith v. All-American, Inc.*, 290 N.W.2d 348 (Iowa 1980).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 110 N.W.2d 660 (1961); *Dailey v. Pooley Lumber Co.*, 233 Iowa 758, 10 N.W.2d 569 (1943).

If a claimant contends he has industrial disability he has the burden of proving his injury results in an ailment extending beyond the scheduled loss. *Kellogg v. Shute and Lewis Coal Co.*, 256 Iowa 1257, 130 N.W.2d 667 (1964).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). *Barton v. Nevada Poultry Company*, 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. *Moses v. National Union C.M. Co.*, 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. *Blizek v. Eagle Signal Company*, 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. *Soukup v. Shores Co.*, 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has no claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. *Schell v. Central Engineering Co.*, 232 Iowa 421, 4 N.W.2d 339 (1942).

Code Section 85.34(2)(s), as amended in 1973, provides:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such, however, if said employee is permanently and total disabled he may be entitled to benefits under subsection 3.

If an injury coming within the purview of Code Section 85.34(2)(s) results in anything less than a permanent total disability, such loss shall be compensated as a scheduled disability using a 500 week schedule. See *Michael Saylor V. Swift and Company and Second Injury Fund*, 34th Biennial Report of the Industrial Commissioner, page 282.

Code section 85.23 provides:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury or unless the employee, or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

The discovery rule applies to Code section 85.23 *Jacques v. Farmers Lumber and Supply Co.*, 242 Iowa 548, 47 N.W.2d 236 (1951).

The purpose behind Code section 85.23, is to afford the employer an opportunity to investigate the facts surrounding an alleged injury. Notice is not necessary where the employer or the employer's representative have actual knowledge of the occurrence of the injury. *Hobbs v. City of Sioux City*, 231 Iowa 860, 2 N.W.2d 275, 276 (1942). Notice and actual knowledge contemplate that the injury will be presented as being work related. *Robinson v. Department of Transportation*, 296 N.W.2d 809 (Iowa 1980).

Code section 85.26(1) provides:

> No original proceedings for benefits under this chapter or chapter 85A, 85B, or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of occurrence of the injury for which benefits are claimed except as provided by section 86.20.

The discovery rule applies to Code section 85.26(1). *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256 (Iowa 1980).

Analysis

At the outset it must be noted that the decisions in the seven prior cases were not appealed and became final agency decisions pursuant to Code Section 17A.15. Accordingly, the adjudications made in those decisions are deemed controlling insofar as they are applicable in the six present cases. That is, vibratory syndrome satisfies the concept of "injury" under Iowa law; the claimants were engaged in chipping and grinding for defendant and the medical authorities were in agreement that vibratory syndrome followed as a natural incident to such activity, thereby establishing that these claimants suffered an injury in the course of and arising out of their employment with defendant; and that vibratory syndrome resulted in permanent loss to the upper extremities and not to the body as a whole.

With respect to the issue of causal connection, Dr. Hursh testified that it was her belief smoking cigarettes delayed recuperation from vibratory syndrome. However, she acknowledged that whether smoking had an additive or synergistic effect was unknown. Furthermore, Dr. Taylor indicated that NIOSH studies failed to reveal any connection between smoking and vibratory syndrome. Accordingly, the fact that claimant smokes cigarettes does not obviate a finding that his alleged disability is directly traceable to the work related vibratory syndrome.

The medical experts noted that carpal tunnel syndrome and tenosynovitis may be responsible for some of the symptomatology attributed to vibratory syndrome. Dr. Taylor and Dr. Delbridge acknowledged that such conditions may be the result of exposure to vibration. Dr. Hursh emphasized

that such conslusion could be reached only if the history was suitable. In the present case, the medical evidence and lay record establish that both claimant's epicondylitis and carpal tunnel syndrome are directly traceable to the chipping and grinding. While defendant's medical department determined that claimant's epicondylitis was aggravated by the non-work incident and while Dr. Kothari, Flage, Dobyns and Delbridge do not record such episode in their histories, claimant's testimony that he had been experiencing gradually increasing problems with his elbow since he began chipping and grinding was corroborated by the defendant's medical notations prior to May 23, 1977. The fact that the non-work incident may have caused claimant similar pain, for which he initially took two weeks off, does not support finding that such event per se materially aggravated the condition so as to result in a disability. The medical experts were in agreement that chipping and grinding may aggravate tenosynovitis.

Likewise, although Dr. Hursh did not causally relate claimant's carpal tunnel syndrome to either chipping and grinding or to the work he did in the pangborn and although Dr. Coates and Dr. Delbridge mentioned claimant's chipping and grinding but not the hooking and hoisting in their histories, the record reviewed as a whole indicates that the carpal tunnel syndrome is directly traceable to the chipping and grinding. Claimant testified that the hand symptoms he experienced after working in the pangborn were identical to those he suffered while chipping and grinding. Defendant's medical notations reveal at least one complaint of right wrist complaint when claimant was chipping and grinding. With the exception of Dr. Hursh, the medical experts are in agreement that carpal tunnel syndrome may result from exposure to vibratory tools. Parenthetically, it should be noted that, unlike Mr. Brackin, claimant's carpal tunnel syndrome essentially has been resolved but his vibratory syndrome symptomatology has, except for finger cramping, continued and is indicative of the severity of the exposure from March 11, 1977 to June of 1978.

The common record in these cases and the additional evidence in the present proceedings establish that the claimants have suffered a permanent impairment. While Dr. Hursh was of the opinion a person could improve to the point of no impairment if removed from all vibration, she cautioned that this was a gradual process, of which the actual time frame was unique to each claimant. Dr. Taylor's theories on improvement versus reversibility were sometimes intermingled and thus left a nebulous impression as to meaning. However, he too conditioned amelioration on total removal from exposure to vibration. Both Dr. Hursh and Dr. Taylor acknowledged that symptomatology, such as tingling and numbness, could continue even after episodes of blanching ceased to occur. Dr. Delbridge was patently dubious about vibratory syndrome being reversible. In summary, it appears that whether the claimants will ever reach a totally symptom free state is at present undeterminable and, moreover, it is implied by the conditional removal from vibration, as a premise for improvement, that these claimants will always have a propensity to suffer from vibratory syndrome.

While much of the common medical evidence alluded to involvement of the circulatory and neurological systems, the prior decisions confined the impairment to the hands based on the record as a whole and after taking into consideration that "[m]any other injuries involve these systems, but compensation is limited to the scheduled member". Dr. Delbridge's testimony in the present cases, which was not part of the record in the prior proceedings (nor was his prior testimony offerred in the present cases), supports a finding of scheduled impairment versus body as a whole involvement. He clearly distinguished the effect of arterial occlusion from that of a venal thrombus. Such explanation is consistent with Dr. Taylor's discussion of recanalization in that the examples Dr. Taylor used, of occlusion and thrombus, were in the disjunctive and the latter was not otherwise related to vibratory syndrome by Dr. Taylor. Dr. Delbridge's testimony in the present cases also supports a finding of impairment at least to the hand insofar as he explained that blanching of the fingers indicates a shut down of the blood supply in some arteries distal in the palm or proximal in the fingers. He noted that sometimes the occlusion was in the radial artery of the forearm.

With regard to the actual rating of the permanent impairment, Dr. Hursh found it difficult to capture the condition with such a numerical figure because she considered the symptomatology to be intermittent, fluctuating and nonpermanent. Dr. Delbridge based his impairment ratings of the fingers on each claimant's history, examination findings and laboratory data and then using the AMA Guides translated those ratings to the hand, arm, body as a whole and combined body as a whole value. Insofar as Dr. Delbridge's ratings mirrored a claimant's history and present complaints and the undersigned's observation at the time of the hearing, his impairment figures will be adopted in determining the amount of compensation to which a claimant is entitled pursuant to Code Section 85.34(2)(s). (Dr. Taylor did not testify regarding the present claimants' stages of vibratory syndrome as he did in the earlier proceedings. The undersigned does not deem it proper to speculate what those stagings might have been based on the present record. Parenthetically, it is noted that the undersigned would not have adopted the methodology of computing impairment found in the prior decisions in that such computation does not amount to a binding adjudication of an issue; Dr. Taylor was not familiar with the AMA approach of evaluation and could not otherwise verify that his staging assessment was interchangeable with the AMA ratings; Dr. Taylor did not at present appear to accept the two-point discrimination test utilized by Dr. Delbridge, seemingly because of Dr. Taylor's difficulty in separating sensory loss from the blanching process [hence, a Stage 0 would be given no percentage of impairment even though symptomatology of numbness and tingling might remain]; and because, as indicated above, Dr. Delbridge's assessment was most compatible with the record as a whole in each case.)

While it is true that Dr. Delbridge's history was incorrect as indicated in the recitation of the evidence and that his ratings, which took such history into account, might be suspect because claimant had not observed blanching of all his fingers and had noted some improvement in his condition, nevertheless the ratings given will be accepted because, in the same vein, Dr. Delbridge was unaware of the fact that

claimant was unable to hook iron and run hoists without manifestation of the vibratory syndrome symptomatology. Hence, his impairment ratings are deemed to be reflective of claimant's disability as it appears upon review of the record as a whole.

With respect to the issue of notice, joint exhibit 1 contains a copy of the first report of injury filed in this matter. Such report indicates that as of November, 1977 defendant first knew that claimant was alleging a work related injury in December of 1979 to his hands and elbows from working as a chipper and grinder. (The parties should note that Code section 86.11 provides that the first report of injury is not admissable evidence except as to notice under Code section 85.23.) Indeed the record otherwise verifies that claimant timely reported symptoms referrable to the vibratory syndrome, epicondylitis and carpal tunnel syndrome to defendant's medical department who in turn decided claimant's complaints of injury were not work-related and referred him to his own physicians.

Such interplay is important when analyzing defendant's argument that claimant did not timely file his application in arbitration. Defendant's apparent theory that claimant knew early on that his various problems were related to the chipping and grinding and therefore should have filed his original notice and petition within two years of the time he performed such work is not persuasive. Claimant was referred to his own doctor for treatment of the epicondylitis because defendant deemed his problem to stem from a non-work aggravation of an underlying condition. Claimant was advised by Dr. Hursh to pursue the carpal tunnel release by Dr. Coates after she concluded his carpal tunnel syndrome was not causally related to his work. Claimant was referred to his own doctor for treatment of what defendant considered to be chronic tenosynovitis when he again complained of hand discomfort following his return to the pangborn in early March of 1980. While claimant may have had general discussions with some of his own doctors about the "break in" period for the hands of a chipper and grinder, the record does not reflect where he was advised, contrary to the signals being given by defendant, that he had sustained a work injury from chipping and grinding. Rather, even as late as the spring of 1980, claimant's doctors were exploring the possibility that claimant was suffering from some form of arthritis. Hence, claimant knew he was not suited to work as a chipper and grinder but he did not know that he had sustained a work injury. Under the circumstances just delineated, there is no reason why he should have known of the probable compensable nature of his claim prior to January 5, 1979, two years prior to the filing of this action.

Findings of Fact and Conclusions of Law

WHEREFORE, for all the reasons set forth above, the undersigned hereby makes the following findings of fact and conclusions of law:

Finding 1. Claimant worked as a chipper and grinder for defendant from March 11, 1977 to June of 1978.

Finding 2. Claimant noticed that his fingers became numb and locked and his hands ached immediately after he began chipping and grinding. He also noticed right elbow discomfort which gradually grew worse.

Finding 3. In November of 1977 he reported his elbow and hand problems to defendant's medical department. In February of 1978 he mentioned some discomfort in the left elbow and in the following month he added right wrist pain to his complaints.

Finding 4. Sometime in the spring of 1978 claimant experienced right elbow discomfort, similar to that he had been noticing upon chipping and grinding, when he helped his brother lift a 75 to 100 pound incubator. He was off work two weeks.

Finding 5. Claimant was off work from June of 1978 to May of 1979 for conservative treatment of the right elbow epicondylitis. Both his elbow and hand problems improved. He was permanently restricted from chipping and grinding.

Finding 6. Claimant hooked iron and ran hoists for defendant from May, 1979 to December, 1979.

Finding 7. Claimant again noticed hand numbness and cramping. His hands became sensitive to the cold.

Finding 8. In January of 1980, claimant was diagnosed as having bilateral carpal tunnel syndrome. He underwent a carpal tunnel release on the left.

Finding 9. Claimant returned to hooking iron and running hoists in early March of 1980.

Finding 10. Claimant experienced the same symptomatology in his hands. He was off work during June, July and August of 1980.

Finding 11. Claimant returned to work in September of 1980 and transferred to an assembly line loading, masking and unloading tractors as part of the painting process. Since December of 1980 claimant has been painting for defendant.

Finding 12. Defendant referred the claimant to his own physicians for treatment of symptomatology related to the epicondylitis, carpal tunnel syndrome and vibratory syndrome. They gave claimant the impression that such matters did not constitute work related injuries.

Finding 13. Claimant filed his application in arbitration on January 5, 1981.

Finding 14. As of January 5, 1979 claimant did not know nor did he have reason to know that he had suffered work related injuries.

Finding 15. Claimant continues to experience hand numbness when he is sitting or driving and his hands generally feel cold. (His wife observed his hands turn pale in 50° temperatures.) He no longer notices finger locking or elbow pain. He has little left wrist discomfort and no right wrist complaints.

Finding 16. Claimant has a history of smoking ½ package of cigarettes per day.

Finding 17. Claimant's recent temperature testing was normal, pressure testing on the right was normal and pressure testing on the left was borderline. He has reduced sensation to light touch and somewhat decreased sensation of pain. Two point discimination is abnormal for both thumbs and all fingers except the left index, long and ring fingers. Immersion of claimant's hands in ice water reveals blanching of both thumbs and the tips of the right index and ring fingers but prompt capillary fill.

Finding 18. The weight of the medical evidence indicates that the epicondylitis, the carpal tunnel syndrome and the vibratory syndrome are causally related to the chipping and grinding claimant performed for defendant (any effect the hooking iron and running hoists had upon claimant's carpal tunnel syndrome was contingent to the resultant injury from chipping and grinding); that the symptomatology he experiences today is directly attributable to the work related vibratory syndrome; and that he has sustained twelve percent loss to both hands which converts to a combined loss of fourteen percent to the body as a whole.

Conclusion A. Claimant sustained injuries (epicondylitis, carpal tunnel syndrome and vibratory syndrome) arising out of his employment as a chipper and grinder.

Conclusion B. Defendant received notice of claimant's injuries as contemplated by Code section 85.23.

Conclusion C. Claimant's application in arbitration was timely filed as contemplated by Code section 85.26(1).

Conclusion D. Claimant sustained his burden of proving that the permanent twelve percent loss to both hands is causally related to the work injury.

Conclusion E. Pursuant to Code section 85.34(2)(s), claimant is entitled to 70 weeks of permanent partial disability.

Conclusion F. Pursuant to Code section 85.34(1) claimant is entitled to healing period benefits for the period of time he was off work for treatment of the epicondylitis. Pursuant to Code section 85.34(2) claimant is entitled to permanent partial disability benefits as of the date he returned to work in May of 1979. Payment of permanent partial disability benefits shall be interrupted for payment of healing period benefits for claimant's actual time loss for treatment of the carpal tunnel syndrome and during June, July and August of 1980.

Conclusion G. The rate of compensation based on claimant's work as a chipper and grinder shall apply to all benefits.

Order

THEREFORE, it is ordered that the defendant pay the claimant seventy weeks of permanent partial disability at the rate of two hundred twenty-two dollars and sixty cents ($222.60) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of the date claimant returned to work in May of 1979.

Defendant is ordered to pay the claimant healing period benefits for the period of time he was off work for treatment of the epicondylitis, for treatment of the carpal tunnel syndrome and during June, July and August of 1980 at the rate of two hundred twenty-two dollars and sixty cents ($222.60) per week.

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

Credit is to be given to defendant pursuant to Code section 85.38(2).

Costs of the proceeding are taxed to the defendant. See Industrial Commissioner's Rule 500—4.33.

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendant when this award is paid.

* * *

Signed and filed this 11th day of June, 1982.

LEE M. JACKWIG
Deputy Industrial Commissioner

No Appeal.

WILMA WILLETT,

Claimant,

vs.

BECHTEL POWER CORPORATION,

Employer,

and

U.S. INSURANCE GROUP,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from an interlocutory order filed January 8, 1982 wherein claimant's motion to compel discovery pursuant to Iowa Rule of Civil Procedure, rule 122(2) was sustained.

In a "Request for Production of Documents" filed August 28, 1981, claimant requested in part the following:

1. All statements of witnesses taken in connection with the Defendant's investigation of the subject matter of Claimant's Petition, including but not limited to the following:

A. All statements signed by witnesses and persons interviewed by Defendants.

B. Where statements were not taken from witnesses, all memorandums or reports prepared in connection with the information acquired during the interview of such witnesses.

C. Transcripts of any recordings taken from witnesses.

In a "Response to Claimant's Request for Production of Documents" filed October 2, 1981, defendants alleged that the only statements in their possession were statements taken from employees of defendant employer prepared in anticipation of litigation and therefore protected against discovery under Rule 122(c).

In defendants' answers to claimant's interrogatories filed October 19, 1981, defendants supplied the names and last known addresses of W. F. McGrath, John Moyer, George Letson, Don McCallister, Charlene Wescott and G. F. Burkette. These individuals were apparently interviewed in connection with defendants' investigation into the incident upon which this action is based.

In their motion for an order to compel production of documents filed October 22, 1981, claimant narrowed the demand to the statements of four of the employees mentioned above. Claimant contended that there existed "substantial need" for the statements and that claimant was unable "without undue hardship to obtain the substantial equivalent of such statements by other means for the reason that the said persons are no longer employed by Bechtel and for the reason that Bechtel is unable to supply any information at to the current whereabouts of the said persons."

In their resistance to claimant's motion to compel production filed October 30, 1981, defendants stated in part:

1. That the U.S. Insurance Group as part of its investigation of this matter took written statements from certain employees of Bechtel Power Corporation. That the names of the employees are John Moyer, George Letson, Don McCallister and G. F. Burkette.

2. That the above mentioned statements were prepared in anticipation of litigation and the employer and insurance carrier object to their production citing as authority Rule 22(c) [sic] of the Iowa Rules of Civil Procedure.

3. That claimant alleges that she has a substantial need of the material in the preparation of her case and that she is unable without undue hardship to obtain the substantial equivalent of the statements by other means, however, claimant has not made any real effort to depose the persons who gave those statements.

4. Although none of the persons involved are still employed by the Bechtel Power Corporation their last known addresses are listed in defendants' answers to interrogatories except for G. F. Burkette whose last known address is 113 Sunrise Village, Iowa City, Iowa 52240. In addition, all of the above named persons were hired from Local 125 of the Pipefitters Union in Cedar Rapids, Iowa and the union would be able to help locate these persons for claimant.

In his order of January 8, 1982, the deputy granted claimant's motion by ordering without discussion defendants to provide copies of the statements sought.

In her brief on appeal, claimant attempts to narrow the issues to whether there exists "substantial need" and "undue hardship" detailed under Rule 122(c).

Prior to any discussion regarding discovery under the Iowa Rules of Civil Procedure, it must be noted that rules of discovery should be liberally construed to effectuate the disclosure of relevant information. *Pollock v. Deere and Co.*, 282 N.W.2d 735 (Iowa 1979).

The relevant portions of Rule 122 state:

(c) Tiral Preparation: Materials. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

. . .

(e) No motion relating to depositions of discovery shall be filed by the clerk or considered by the court unless the motion alleges that counsel for the moving party has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court.

Defendants assert that statements sought are not discoverable under Rule 122(c) because they were prepared in anticipation of litigation. Claimant apparently does not dispute the assertion that the statements were taken in anticipation of litigation.

Rule 122(c) sets forth the general rule that material prepared in anticipation of litigation is discoverable. See, *Speed v. AMF, Inc.*, 32nd Biennial Report, Iowa Industrial Commissioner, page 24.

Given this, claimant still has the burden of proof under Rule 122(c) that there exists substantial need for production of the statements sought and that they are unable to obtain a substantial equivalent without undue hardship.

In their brief on appeal, claimant states:

. . . Claimant asserts that the cost of deposing the said witnesses, even if located and even aside from travel

expense and counsel fees, could very well exceed the amount $1000.00. Aside from Claimant's financial condition, Claimant asserts that incurring such an expense to depose the said witnesses without first attempting to discover the existing statements of the said witnesses would result in a situation of something less than financial responsibility.

That claimant would suffer cost or inconvenience by conducting their own discovery in order to obtain the substantial equivalent sought to be produced from defendants does not establish their burden under Rule 122. *U.S. v. Chathan City Corp.*, 72 F.R.D. 640 (D.C. Ga., 1976). Moreover, the fact that production of the statements sought would help determine the necessity of deposing the employees involved does nothing more to meet claimant's burden.

In that defendants informed claimant that statements of employees were taken in connection with the investigation of the death of claimant's decedent, claimant may have a "substantial need" for the discovery of such statements. However, claimant must show that she cannot acquire a substantial equivalent without "undue burden."

Defendants have stated that the individuals who made the statements sought are no longer employees of defendant employer and that their whereabouts are unknown. Defendants did, however, give the individuals' last known addreses. Apparently, the addresses of the union halls through which the individuals were hired have also been applied.

Claimant has failed to assert that unsuccessful efforts have been made to locate the individuals sought through sources provided by defendants. Nor has claimant even suggested any reason, other than cost, why defendant is in any better position to locate individuals hired through a union hall on a temporary basis.

Moreover, defendants state in their brief on appeal that Bud McGrath and Charlene Wescott were deposed by claimant on October 22, 1981. Defendants also state, without refutation, that claimant has even carried discovery efforts to California. Given the above, it is difficult to imagine how the location of the remaining individuals sought presents an undue hardship upon the claimant.

Furthermore, the record gives no indication that the individuals now sought have since moved out of the state or are otherwise unreachable. Nor has such a period of time elapsed that there would be a danger of faded memories.

In their brief on appeal, claimant states:

> . . . Claimant concedes that Iowa Rule of Civil Procedure 122(c) is very similar to Federal Rule of Civil Procedure 26(a)(3); however, the *Hanley* case cited by Defendants is a judicial interpretation of former Federal Rule of Civil Procedure 34, which is the immediate predecessor to Federal Rule of Civil Procedure 26(a)(3). There is a substantial difference in the two federal rules — the old Rule 34 requiring "good cause" before production of any documents can be obtained. In 1970 the said Rule 34 was amended and is now encompassed in Federal Rule 26(a)(3), the primary change being the fact that the "good cause" requirement has been deleted.

Such a statement is only partially correct. Iowa Rules of Civil Procedure, rule 122(c) is nearly identical to Federal Rules of Civil Procedure, rule 26(a)(3). These rules were amended in 1973 and 1970 respectively. However, Federal Rules of Civil Procedure, rule 34 is not now encompassed by Rule 26(a)(3). Rule 34, prior and subsequently to 1970, dealt with entry upon land for inspection. Rule 26(a)(3), prior and subsequently to 1970, dealt with discovery of materials used for trial preparation. Rule 34 has its counterpart in Iowa Rules of Civil Procedure, rule 129 and is not at issue in this matter. All parties agree that the present issue is whether the statements sought are protected from discovery under Rule 129 because the statements were taken in anticipation of litigation. Such an issue is controlled by Rule 122(c).

The matter presently on appeal seems primarily to be based on a definition of terms. Rather than reach an accord, the parties have time and again resorted to this agency for resolution of matters of relative triviality. This is needlessly and heavily burdensome upon the system. The actual issues in the case remain unaddressed and all parties involved in the contest as well as members of this agency have spent countless hours litigating and resolving superfluous issues. Discovery from the individuals sought could have been accomplished much more quickly and economically than by compelling production through the defendants.

Finally, it is noteworthy that claimant's motion to compel discovery filed October 22, 1981 fails to allege "good faith but unsuccessful attempts to resolve the issues raised by the motion with opposing counsel without intervention of the court," as required by Rule 122(e). In that defendants have apparently disclosed all known information sought, the record fails to provide any reason why defendants are now in a more knowledgeable position than the claimant such that defendants should bare the burden of claimant's discovery.

WHEREFORE, claimant is found to have failed in her burden under Iowa Rules of Civil Procedure, rule 122(c) and (e).

THEREFORE, the order of the deputy is reversed and claimant's motion to compel discovery is hereby overruled.

* * *

Signed and filed this 23rd day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

HAZEL WILLIAMS,

Claimant,

vs.

HLV COMMUNITY SCHOOL DISTRICT,

Employer,

and

IOWA NATIONAL MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

Appeal Decision

Defendants appeal from a commutation decision approving claimant's application for a full commutation.

The record on appeal consists of a first report of injury filed December 21, 1978 and a memorandum of agreement filed April 8, 1980 showing a weekly rate of compensation of $119.36 together with the pleadings for commutation, the transcript of the hearing with claimant's exhibits A, B and C and defendants' exhibit 1, defendants' hearing brief and claimant's letter reply as well as the briefs of the parties on appeal.

Defendants state the issue on appeal thus; "Does Iowa Code Section 85.45 permit commutation of scheduled periodic benefits solely on the basis that the income produced by the commuted lump sum would accumulate at a rate greater than the five percent statutory discount rate applied to arrive at the present value figure?"

Findings of Fact

Claimant was age 61 at the time of her husband's death which arose out of and in the course of his employment on December 11, 1978. She has no dependent children.

At the time of the hearing claimant had monthly income, excluding investment income, of $477 in workers' compensation benefits, $380 in Social Security benefits and $43 in IPERS benefits. Her monthly income is sufficient to meet her needs without employment. Her current investments included $10,000 in money market funds, $5,200 in a savings account, a $5,000 certificate of deposit and $4,200 in a checking account. The only outstanding expense was $572 for repairs to her home.

The sole purpose of the commutation is to protect against inflation by deposit of the lump-sum in short term, income producing investments. Claimant has been advised that income produced would accumulate at a greater rate than the five percent discount rate applied to the present value figure. Claimant is considered to be a prudent investor and conservator.

Analysis

The supreme court in *Diamond v. The Parsons Co.*, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In *Diamond* the court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." *Id.* at 929, 129 N.W.2d at ____. A reasonableness test was applied by the court in *Diamond* to determine whether a commutation would be in the best interest of the person or persons entitled to the compensation.

Professor Arthur Larson's philosophy on granting commutation is much more restrictive than that of the Iowa Supreme Court in 1964. He warns that:

> In some jurisdictions the excessive and indiscriminate of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system. Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings.... The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will be best served by a lump-sum award. The beginning point of the justifiability of the lump-summing in a particular case is the standard set by the statute. This is usually so general, however, as to supply little firm guidance and control, turning on such concepts as the best interests of the claimant or the avoidance of manifest hardship and injustice. *Larson, Treatise on the Law of Workmen's Compensation*, §82.70.

Professor Larson indicates that experience has shown that a claimant is often under pressure to seek a lump-sum payment, and once the payment is received it is soon dissipated.

Additionally, Iowa's first industrial commissioner, in the first *Biennial Report of the Workmen's Compensation Service* (1916) at page 12, pointed out that, although in exceptional cases commutation promotes personal welfare, weekly payments should be regarded as a general rule better adapted to the real needs of compensation service since large lump sums are often unwisely used by beneficiaries.

Despite the rational reasoning in support of the more restrictive views on commutation of compensation benefits, the *Diamond* guidelines still prevail in Iowa. Relying on *Diamond* and claimant's substantial monetary resources, excluding weekly compensation benefits, this commissioner would be hard-pressed to conclude that a lump-sum payment would not be in the best interest of claimant, notwithstanding the periodic payment philosophy of wage replacement upon which the theory of workers' compensation is based.

Although workers' compensation benefits differ from the benefits claimant is receiving from Social Security and IPERS they are philosophically for the same purpose — periodic payments to partially replace lost earnings. In this economic era few would not jump at the chance to have their future earnings paid to them in advance so they could invest them in a lump-sum and live off the income thereof. The

difference in the workers' compensation law is that it provides a vehicle-commutation-for doing just that.

That $70,000 invested at today's prevailing interest rates would yield considerably more than the $477 per month claimant is now receiving in workers' compensation benefits (even after taxes) is elementary. That the discount rate for commutations is still at five percent is archaic. Nevertheless it is the law and as this agency is a creature of statute it must be guided by the statute and decisions of the supreme court which interpret the statutes and define the authority of the agency.

Lump-sum awards in this and most other cases gives workers' compensation the appearance of damages in a tort action. Workers' compensation was implemented to replace tort damage cases. Until action is taken either by the courts or legislature this agency is duty bound to follow the current authority. As previously mentioned for this agency to say that a commutation which would produce considerably more money than the claimant is currently receiving would not be in her best interests would be incredible.

Although lump-sum awards could have a deleterious effect on workers' compensation insurance premiums this is not one of the options this agency has the authority to consider. (It must be noted, however, that this impact does not deter insurance carriers from using the same vehicle when they want to settle a case and avoid all further potential liability on a claim).

Findings of Fact

1. That claimant is the surviving spouse of decedent and entitled to benefits pursuant to Code section 85.31(a).

2. That the period during which compensation is payable can be definitely determined by using IAC Rule 500—6.3(3).

3. That presumably benefits have continued on a weekly basis and if so the number of weeks of benefits paid since December 11, 1980 (date of the second anniversary of decedent's demise) should be multiplied by .691923 and deducted from 894.06 to arrive at the present expected duration of life expectancy and remarriage. [The factor of .691923 is the difference between the expected duration for "through the second anniversary" (894.06) and "through the third anniversary" (858.08) or 35.98 divided by 52.]

4. That if benefits have not been continued then interest shall be paid according to Code section 85.30 on any past due amounts.

5. That the number of weeks of expectancy be converted to present value by use of the table in IAC Rule 500—6.3(2).

THEREFORE, claimant's application for a full commutation is hereby approved subject to the computations set out herein.

Costs of this proceeding are taxed to defendants.

Defendants shall file a final report upon payment of the commutation.

* * *

Signed and filed this 2nd day of July, 1981.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court, Affirmed.

HELEN ARLENE YENCK,

Claimant,

vs.

WEBSTER CITY COUNTRY CLUB,

Employer,

and

AUTO OWNER'S INSURANCE CO.,

Insurance Carrier,
Defendants.

Appeal Decision

Claimant appeals from a proposed arbitration decision in which the claimant was awarded temporary total disability benefits and medical expenses as a result of an injury arising out of and in the course of employment on March 29, 1980.

The record on appeal consists of the transcript of the hearing which contains the testimony of the claimant, Helen Arlene Yenck; previous fellow employees, Chris Kliegl and Kimberly Woodall; employer company president Verne K. Foster; deposition of William R. Boulden, M.D.; claimant's exhibits 1 through 5; and defendants' exhibits A through G as well as the defendants' appeal brief.

The claimant did not submit an appeal brief within the allowable period as provided under Rule 500—4.28. Claimant's motion for extension of time to file such a brief was denied because the application was made after the due date and no cause was shown to justify granting an extension.

Nevertheless, claimant's notice of appeal prayed for modification of the deputy industrial commissioner's decision concerning the extent of disability, rate of compensation and industrial disability. As more fully stated by the defendants' brief, the issues on appeal are: "(1) the extent of temporary disability; (2) the applicable rate of compensation; and (3) the extent of industrial disability, if any."

Both parties agree that the claimant was suffering from a preexisting disease at the time of injury. Therefore, the fundamental issue is whether the employment injury caused a permanent acceleration or aggravation of claimant's preexisting condition, or whether she only suffered a temporary exacerbation for which she was fully awarded compensation.

At the time of the hearing, claimant was a 52 year old widow who had responsibility for a 12 year old daughter. (Transcript, pages 5-6.) Claimant went through regular school to the 11th grade, obtained a G.E.D. certificate when she was 40 years of age and has not received any other

special training or developed any special skills. (Transcript, page 21.)

On March 27, 1980, claimant was employed as a cook by the Webster City Country Club, located in Webster, Iowa. Prior to actual employment she informed the employer's general manager who possessed the power of hiring employees that she had a preexisting condition of deteriorating discs in her back and arthritis of the spine. (Transcript, pages 7, 55.) Apparently the claimant was hired with the understanding that due to her back condition she was not expected to do any lifting of heavy objects, such as larger cooking pots filled with water, and it would be permissable for her to occasionally sit down to rest. (Transcript, pages 25, 30.) Previously claimant held four similar cooking positions in different restaurants in which she was placed under the same restrictions (Transcript, pages 24-25, 30.) Due to these limitations the claimant was given the assistance of a cook's helper for moving heavy pots. (Transcript, page 25.)

On March 29, 1980, the claimant was standing upon rubber floor mats in front of the grill and fryer and she was cooking steaks. (Transcript, page 39.) When she was near completion of a large cooking order, she turned around to reach a plate and fell downward hitting her arm upon the hot grill and burning it. (Transcript, pages 8-9.) Claimant testified she fell completely down on to her buttocks and the lower part of her back and "felt something snap" in her back, but was able to hold her head up so it would not hit the floor. (Transcript, page 9.) Her cook's helper, Chris Kliegl, saw the claimant start to fall and was able to partially break her fall, however, he could not remember if claimant's body hit the floor. (Transcript, page 41.) Claimant said she slipped upon some grease which unknowingly slipped out from under the rubber mats. (Transcript, pages 8-9.) Kliegl testified that the claimant may have tripped over a wrinkled corner of one of the rubber mats. (Transcript, pages 39-40.)

The acting manager of the restaurant, Kimberly Woodall, testified she saw the claimant within five minutes of her fall and accompanied her by ambulance to the Hamilton County Public Hospital. (Transcript, pages 47-48.) Woodall stated the claimant was crying and complaining of pain while referring to her arm and back. (Transcript, page 48.)

Claimant was admitted to the hospital on the night of her injury by the emergency room physician, Joseph X. Latella, D.O., who treated the claimant during her hospital stay which lasted approximately five days. (Transcript, page 11.) Claimant was treated for a second degree burn on the right forearm which healed with no complications. According to Dr. Latella upon arrival to the emergency room, the claimant had symptoms of a "traumatic low back syndrome with no radiation down her legs" and x-rays showed the claimant did not have a fracture of her lumbar spine. (Defendants' exhibit E.) However, Dr. Latella reported she was suffering from a degenerative disease of the spine. (Defendants' exhibit E.) The admitting history noted the claimant had a slipped disc for a number of years along with arthritis and her discharge summary stated she was treated for traumatic low back syndrome and sciatic neuralgia through traction and ultra sound treatment plus medication. (Claimant's exhibit 2.) Dr. Latella also reported the claimant's pain subsided within 24 to 48 hours and was ambulatory upon discharge and within his medical judgment she did "substain [sic] a fall, and did have an injury to her back, but, since she has had pathology in the past pertaining to her spine, and degenerative disease of long standing, then amy [sic] problems in the future cannot be due to this injry [sic]." (Defendants' exhibit E.) Furthermore, Dr. Latella believes her current problem is not due to her fall, rather the "problem was caused many years ago when her body started to have this deteriation [sic] problem" and the claimant's condition is a "structural problem of long standing and no medical person is going to reverse years of personal neglect." (Defendants' exhibit E.)

The morning after her discharge, the claimant was in as much pain as the night of the injury and sought further medical treatment from her family physician, Richard A. Young, M.D. (Transcript, pages 11-12.) Dr. Young had treated the claimant for arthritis like symptoms for her spine since 1974. (Claimant's exhibit 1.) Upon examination of the claimant, the day after her discharge, Dr. Young found she had "severe tenderness, pain in both sacroiliac areas & in the left sciatic nerve area." (Claimant's exhibit 1.) He then scheduled an appointment for the claimant to be examined that same day by an orthopedist specialist, Dr. Allen G. Lang, M.D., at the McFarland Clinic in Ames, Iowa. (Claimant's exhibit 3.) Dr. Young believes the claimant had a "preexisting condition of arthritis at the time of her March 29th, 1980, injury which, of course, was aggravated considerably at the time by her injury in the fall." Also, Dr. Young stated "[n]ot saying anything against Dr. Latella, but she was discharged still having pain..." (Claimant's exhibit 1.) He referred the question of whether the employment injury further worsened the claimant's arthritic condition to Dr. Lang.

Dr. Lang's report indicates he was knowledgable of the claimant's past history of back pain and previous x-rays showing degenerative disc disease with some minor arthritis. (Claimant's exhibit 3.) He examined claimant's walking ability, legs and feet diagnosed the claimant was suffering from a "probable left sciatic, acute" and recommended "relative bedrest at home," plus continuation of present medication with utilization of heat. (Claimant's exhibit 3.) Dr. Lang reported that the claimant had a "left sciatic nerve irritation, which by history developed following a fall one week previously," however, he did not express any opinion as to possible recovery or disability since the claimant had not been examined beyond the initial examination. (Claimant's exhibit 3.)

Claimant testified she followed Dr. Lang's recommendations, but she said the treatment did not give her much relief. (Transcript, page 14.) She then returned to Dr. Young and he prescribed medication including Extra Strength Tylenol. (Transcript, pages 15-16.) Claimant has been accustomed to doses of Extra Strength Tylenol and prior to her fall she had to take five tablets per day, however, after her fall she had to take five tablets every day to obtain the same amount of relief. (Transcript, page 36.)

Dr. Young's notes indicate that subsequent to the claimant's fall she had symptoms of "numbness and tingling in her arm and leg, left side... due to pinched nerves." (Claimant's exhibit 1.) In addition his notes indicate a long history of problems with her lower back, left shoulder, left arm, and

left leg, plus her posterior neck. (Claimant's exhibit 1.) For example she injured her back in a wrestling match with her daughter in October 1978 (claimant's exhibit 1), although the claimant testified pain from this incident subsided within one week with no lasting effects (transcript, page 27); and on June 11, 1979, approximately nine months before her fall, the claimant's physician recorded "pain in the lower back, around the left posterior thigh, and tenderness in the sciatic area" and "developing pain in the internal portion of the left thigh and down into the calf." (Claimant's exhibit 1.)

When the claimant felt she may have been ready to return to work as a cook, she learned the employer had already hired a cook to replace her. (Transcript, page 16.) However, the claimant never personally informed the employer that she was ready to return to her position (transcript, page 26), because she felt she would be unable to fulfill the duties and since her job had already been filled. (Transcript, page 33.) Approximately three months after her fall the claimant accepted a waitress position at another restaurant, however, this job only lasted four days because she did not have any strength in her left hand. (Transcript, page 17.) Claimant then began a babysitting job at a salary of $1.00 per hour and worked approximately 40 hours per week, even though she testified she still has continuous back pain down into her leg and numbness of the left hand. (Transcript, page 19.) Also, the claimant testified she is no longer able to perform her house keeping activities without assistance by her 12 year old daughter who now does the majority of the housework. (Transcript, page 19.)

Besides Dr. Lang, claimant was examined by two additional orthopedic specialists: John P. Walker, M.D., and William R. Boulden, M.D.

Dr. Walker examined the claimant on January 19, 1981 and based his findings in part upon the presumption that the claimant fell backwards hitting her occipital region, i.e., the back of head. (Claimant's exhibit 4.) Dr. Walker's x-ray views of the cervical spine showed the claimant had a "definite spondylosis of the 6th cervical disc" which "undoubtedly pre-existed her fall," also x-ray views of the upper and lower dorsal spine found "a good deal of osteoarthritic spurring and some definite degenerative arthritis" plus x-ray views of the lumbar spine revealed a scoliosis. (Claimant's exhibit 4.) In Dr. Walker's opinion the claimant was suffering from an "injury to the cervical spine in the form of a sprain and a lighting up of a cervical spondylosis which is causing her radicular pain in the left upper extremity" and "a lumbosacral sprain with aching pains shooting down the posterior thighs and calves into the feet" which did not appear to Dr. Walker to be "true sciatica, but more of a so called telalgic type of radiation of pain due to her low back sprain." (Claimant's exhibit 4.) Most importantly, Dr. Walker's opinion is the claimant will "undoubtedly have some permanent disability due to the sprains" and, if the claimant would lose weight and undergo proper treatment it would be his opinion that "she would end up undoubtedly with a permanent, partial disability of approximately 16 to 18 percent of the body as a whole." (Claimant's exhibit 4.)

Dr. Boulden's examination took place approximately June 1, 1981. (Defendants' exhibit B.) He reported the claimant said she did not strike her neck or head, his physical examination revealed a "diffuse tenderness in the lumbosacral area" and lumbar spine film showed "mild degenerative arthritic spurring of the anterior bodies but the disc spaces were well maintained. (Defendants' exhibit B.) Based upon these findings, plus the medical history of the claimant, Dr. Boulden's impression was that claimant suffered from "mechanical back syndrome with no evidence of disc pathology causing her symptoms." (Defendants' exibit B.) In a deposition Dr. Boulden explained his diagnosis of the claimant's "mechanical back syndrome":

> That is a diagnosis that we use and coin for people that have mild facial pain or muscle ligament pain secondary to the mechanics of their back, and in this patient's case, her arthritic problems with her lumbar spine, as well as being overweight, were causing a lot of — most of her symptoms. . . .

Dr. Boulden continued:

> [B]y carrying excess weight in the front of the abdomen, an excessive amount of stress is put across the lower part of the back to, so to speak, balance the spine. This is an abnormal stress. It's not meant to be; and therefore, through the mechanics you can develop muscle ligament pain, and with long term obesity, you can develop degenerative changes.
> (Boulden deposition, pages 7-8.)

Dr. Boulden's examination did not find a neurological deficit, therefore he concluded the claimant did not suffer any permanent impairment of her preexisting condition and rated her "with a 0 disability since her x-ray findings were there present to her injury." (Defendants' exhibit B.)

However, Dr. Boulden did find the claimant's trauma caused an aggravation of her existing degenerative arthritis of the lumbar spine which based upon the symptoms the claimant elicited to him, would "cool off" within a 2-3 month period. (Boulden deposition, pages 8-9; defendants' exhibit B.) Furthermore, Dr. Boulden stated the claimant's symptoms at the time of his examination were not connected to her injury, but were connected to her preexisting condition. (Boulden deposition, page 20.) In response to Dr. Walker's finding of a cervical spine sprain caused by the injury, Dr. Boulden testified that the claimant did not mention any such complaints and that symptoms relating to a cervical spine problem would definitely arise within 24 to 74 hours after such an injury. (Boulden deposition, pages 13-14.)

Dr. Boulden further determined that the claimant could return to work as a cook if she was placed under the same limitations in her ability that were imposed prior to her injury, however, he would reassess this opinion after the claimant did in fact attempt to function in such an employment situation. (Boulden deposition, pages 23-24.)

The deputy found the claimant did sustain an injury on March 29, 1980, and determined the greater weight of the evidence supported a finding that claimant's employment caused a temporary aggravation of her preexisting condition rather than a finding of a permanent disability or a cervical condition.

The deputy found the claimant's temporary total disability period lasted from March 30, 1980 to June 20, 1980 and awarded payment of benefits for 11 5/7 weeks.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 29, 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).

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 (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. * * * *

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 91963). 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 Co., supra*, 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 expert medical opinions, except Dr. Walker's, clearly demonstrate a finding of absence of any permanent aggravation of the claimant's preexisting disease as a result of the injury. Although the claimant may be exhibiting more severe symptoms at present, the evidence is insufficient to establish that her current deterioration is causally connected to the employment injury. The greater weight of expert testimony establishes that claimant's preexisting condition was only temporarily exacerbated by the injury.

All of the physicians, except Dr. Walker, found a temporary aggravation of the claimant's preexisting arthritic condition of her lumbar spine. Specifically, Dr. Latella and Dr. Boulden found a temporary aggravation and no permanency, while Dr. Young and Dr. Lang found a temporary aggravation and refused to express an opinion as to permanency due to lack of information. Dr. Walker was the only physician to find a low back sprain while Dr. Latella, Dr. Lang and Dr. Young found temporary aggravation of the left sciatic nerve area.

Furthermore, Dr. Walker's disability rating of 16 to 18 percent of the body as a whole can not be given much weight because it was clearly based on erroneous medical history of the claimant's neck problems and the circumstances of the claimant's fall.

In his report, Dr. Walker states that the claimant informed him she never had any neck problems before the injury while her personal physician's records clearly indicate neck problems arising in early 1979. Also, Dr. Walker reported that the claimant told him she hit her head when she fell, while the claimant's personal testimony clearly states she held her head up so as to not hit it upon the floor. Dr. Walker's findings of a connection between the claimant's cervical sprain and her injury must be further diluted because, according to Dr. Boulden, any problems related to the cervical spine from such an injury sustained by the claimant should have arisen within 24 to 72 hours after the injury. The claimant was hospitalized during this period and no reference to such a difficulty arose during that time.

Dr. Walker did not separate his rating as relating to the claimant's cervical and lumbar spines. Regardless, his findings of permanent disability to her lumbar spine is outweighed by the other physician's opinions of a temporary aggravation.

Claimant's medical history indicates recurring problems with numbness and pain within her left shoulder, left arm, left thigh and left calf. It cannot be said that there is a likelihood that any present or future complications with these parts of the claimant's body will be causally connected to her employment injury. Based upon the medical opinions it is unreasonable to presume that the injury will bring any such pain or suffering into existence. Assuming the claimant is in fact suffering from increase severity of her degenerative disease of her lumbar spine, the weight of the medical evidence demonstrates that the claimant's obesity and continual degeneration are more likely causing her worsening condition.

Dr. Boulden testified that an aggravation sustained by the claimant would normally "cool off" within 2-3 months. The deputy then appropriately determined the claimant's temporary disability period as starting at the time of her fall on March 29, 1980 through June 20, 1980. In support of Dr. Boulden's testimony and the deputy's findings, this record indicates that sometime after June 20, 1980 the claimant became employed as a babysitter. Although the claimant may be unable to function in part-time employment as a cook under the same work restrictions against heavy lifting as previously imposed on her ability, it cannot be said that a preponderance of the evidence supports a finding that this impairment was caused by her employment injury.

Lastly, claimant's notice of appeal apparently challenges the deputy's determination of compensation. In his decision the deputy states:

> 4. Section 85.36, Code of Iowa, regulates the determination of the claimant's gross weekly wage. The correct determination of the wage in the instant case is that claimant was employed for less than thirteen weeks, entitling her to be compensated pursuant to Section 85.36(7), Code of Iowa. The gross wages indcate [sic] that claimant had a gross weekly wage of $113.00. This figure is arrived at by adding the pay periods ending March 3, 10, 17, and 24 by 4, because the first and last pay periods are obviously "short" in that all hours available were not worked. Claimant is single (widowed) and has one dependent which entitles her to be compensated at the rate of $75.58 per week.

The record supports a finding that the deputy properly made his determination in accordance with section 85.36, Code of Iowa.

Findings of Fact

1. Claimant was 52 years old at the time of the hearing. (Transcript, page 5.)

2. Claimant is a widow and has one dependent daughter who is 12 years old. (Transcript, pages 5-6.)

3. Claimant has been treated for arthritis-like symptoms of her spine since 1974. (Claimant's exhibit 1.)

4. Claimant hurt herself at work on March 29, 1980 when she fell backwards hitting her arm and injuring her lower back, however, the claimant prevented her head from hitting upon the floor. (Transcript, pages 8-9.)

5. Claimant suffered from obesity and had a preexisting condition of a degenerative disease of the lumbar spine at the time of her fall. (Defendants' exhibit E.)

6. Claimant is still suffering from obesity and her preexisting condition. (Defendants' exhibit B.)

Conclusions of Law

1. Claimant sustained an injury arising out of and in the course of employment in the nature of a temporary aggravation of a preexisting condition as a result of her fall on March 29, 1980.

2. Claimant, as a result of her injury on March 29, 1980, had a temporary total disability which ended on June 20, 1980.

3. Claimant has not suffered any permanent aggravation to her preexisting condition.

WHEREFORE, it is held:

Claimant is entitled to temporary total disability compensation for the period of his disability beginning from the date of her injury, March 29, 1980 to June 20, 1980.

THEREFORE, it is ordered:

That defendants pay unto claimant eleven and five-sevenths (11 5/7) weeks of temporary total disability at the rate of seventy-five and 58/100 dollars ($75.58) per week.

That defendants pay claimant for the following authorized medical expenses:

John R. Walker, M.D. (including report)	$ 259.00
Hamilton County Public Hosiptal	1,798.15
Joseph X. Latella, D.O.	160.00
McFarland Clinic	31.00
Dr. Young	151.00
Webster City Rescue Service	25.00

Payments that have accrued shall be paid in a lump sum together with statutory interest pursuant to section 85.30, Code of Iowa.

Costs of the proceeding are taxed against defendants.

Defendants shall file a first report within twenty (20) days from the signing and filing of this decision.

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

* * *

Signed and filed this 15th day of March, 1982.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed.

PAULA MARY ZIMMERMAN,

Claimant,

vs.

L. L. PELLING COMPANY, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Nunc Pro Tunc Order

By agreement of the parties the order of payment is hereby amended to state that defendants are to have credit for all weekly compensation payments heretofore made.

* * *

Signed and filed at Des Moines, Iowa this 21st day of April, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

PAULA MARY ZIMMERMAN,

Claimant,

vs.

L. L. PELLING COMPANY, INC.,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carrier,
Defendants.

Appeal Decision

By order of the industrial commissioner filed January 13, 1982 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 decision of the deputy industrial commissioner filed October 27, 1981.

The record on appeal consists of the transcript; the depositions of James R. Stilwell, M.D., and H. Dudley Noble, M.D.; claimant's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14; and defendants' exhibits A and B, the latter being the deposition of Ralph L. Marx, M.D.

The result reached in this final agency decision will modify to that of the deputy who heard the case.

Findings of Fact

1. Claimant began work with the employer in December of 1976 and worked as the driver of a 15 ton asphalt truck. (Tr. 6)

2. On May 16, 1977, claimant was involved in a motor vehicle accident while working.

3. Claimant's injuries in the accident were a fracture of the left upper arm with a paralysis of the radial nerve; a fracture of the right tibia and fibula with considerable skin loss over the leg; a severe wound of the inner left thigh with loss of skin, dead skin, mixed with dirt and grass. (Noble depo., 5)

4. Dr. Noble instructed claimant to find another doctor when she moved to the state of Washington in September 1977. (Tr. 10)

5. The injury caused chondromalacia patella to both knees. (Marx depo., 24-25)

6. On March 14, 1978, Dr. Marx did surgery, a patella tendon transfer bilateral. (Claimant's exhibit 12)

7. Because of knee trouble, claimant has difficulty squatting, has swelling in her left leg and foot and some pain. (Tr. 9, 17-19)

8. Claimant has four years of college education. (Tr. 5)

9. At the time of the hearing, claimant lived in Seattle, Washington and was employed as a veterinary technician. (Tr. 5)

10. While going to college after some recuperation, claimant also worked 32-40 hours per week as a veterinary technician. (Tr. 9)

11. Claimant has been a cocktail waitress in the past. (Tr. 16)

12. Claimant's loss of total activities because of the injury is no less than 5%. (Marx depo., 37)

13. Claimant has normal muscle function in her left leg. (Stilwell depo., 9)

14. Claimant's left leg could be improved significantly by a minimum of three plastic surgeries. (Stilwell 11)

15. The recommended surgeries would not improve the function of claimant's left leg. (Stilwell 19)

Issues

As a result of the record made at the hearing, the hearing deputy ordered defendants to pay for the proposed plastic surgeries and to pay 60% permanent partial disability for industrial purposes. In their appeal, defendants present four issues which will be discussed separately below.

Analysis

(1) Defendants claim that the injury did not necessitate the knee surgery, a position which finds support in the testimony of Dr. Noble. Dr. Marx, the surgeon who did the operation, connects its necessity to the injury. Also, throughout their brief, defendants disassociate themselves from Dr. Marx when actually (as the deputy remarked) they may be held to have at the very least acquiesced in his treatment: Section 85.27 gives defendants the choice of doctor, hospi-

tal, etc.; the right to the care implies an obligation to manage the treatment actively. Here, claimant left Iowa in September of 1977 and was told by Dr. Noble to find another doctor in Washington. It was some six months until claimant had the surgery which was ample time for defendants to participate in claimant's treatment.

Thus the question is not one of relative qualifications of the physicians, both being well qualified; rather the issue is one of choice of medical care. Claimant had severe and terrifying injuries, and defendants provided her with excellent care in Iowa. They likewise have the obligation to continue to furnish that care in the state of Washington.

(2) Defendants contend that 60% industrial disability rating is too high and one agrees. Industrial disability includes such elements as functional impairment, age, education, experience, and relative ability to the same work as prior to the injury. *Olson v. Goodyear Service Stores,* 255 Iowa 1112, 125 N.W.2d 251 (1963); *Martin v. Skelly Oil,* 252 Iowa 128, 106 N.W.2d 95 (1960); *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). This is a case, as stated above, of severe trauma, but it is trauma which has produced but little functional impairment, perhaps 5% of the body as a whole. Of course, claimant can no longer do work which might open her left thigh to view, such as being a cocktail waitress. On the whole, claimant seems to be bright, young (mid-20s), and well educated. Of the various elements of industrial disability, only the physical impairment works against her. Considering all the elements of loss of earning capacity, her disability is found to be 15% of the body as a whole.

(3) As a result of the injury, claimant's left thigh and buttock are truncated, removing the differentiation between the parts and destroying the "well known and distinctive curve" (Stilwell depo., 21). The proposed reconstructive surgery would restore this "extremely attractive" curve so that claimant's figure again would be in balance. (Stilwell 21.) Further, the surgeries could be beneficial to the lymphatic structure of the left leg.

Defendants state that Westlaw reveals only two cases which discuss the question of whether or not such surgery is covered under the workers' compensation law: *Eckert v. Yellow Freight Systems, Inc.,* 351 N.E.2d (Indiana, 1976), and *Akers Auto Salvage v. Waddle,* 394 p. 2d 452 (Oklahoma, 1964). in *Eckert,* the court denied recovery, stating *inter alia,* that claimant had not presented evidence that the disfigurement impaired his useful earnings (apparently leaving open the question of the result if a claimant did present such evidence). In *Akers,* the cost of such surgery was held to be compensable, the court ruling of the question was one of fact for the Industrial Court.

Actually, it should be pointed out that at least two other cases exist which discuss the question. In *Los Angeles County v. Industrial Accident Board of California,* 261 p. 295 (California, 1927), the Supreme Court of California ordered payment of medical expenses for cosmetic surgery to the eye and cheek because "a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power irrespective of its affect [sic] upon his mere capacity for work." (p. 297) In *Whitaker v. Church's Fried Chicken, Inc.,* 373 So. 2d 1371 (Louisiana, 1979), the court denied recovery of weekly compensation for disfigurement of a body area other than the face or head (as per statute) but added:

> We cannot believe that the legislature of this state could have ever intended that only medical treatment necessary to alleviate the employee's disability was required to be paid. As in the instant case, where there is extensive scarring which does not cause any work disability, and which can be corrected by surgical procedure, we conclude that the legislature intended such to be covered by La.R.S.23:1203. Therefore, we amend the judgment of the trial court to award future medical payments as they become necessary.

Thus, three cases award the surgical costs and one denies such costs but perhaps only because of a lack of evidence. Like Louisiana, Iowa has a stutute which provides compensation for disfigurement to the face or head (§85.34[2][t]). One would agree that the *disability* statute was not intended to restrict treatment to that which would alleviate disability or even impairment. Section 85.27 of the Iowa Act says only that the employer "shall furnish reasonable, surgical" etc. services, not that such services be for the purpose of reducing disability or impairment.

The employer ought to reimburse claimant or pay for the proposed three surgeries.

(4) The last issue in defendants' brief argues that the industrial commissioner should not admit reports of out of state practitioners under what is now rule 500—4.18, I.A.C., which states:

> In any contested case commenced after July 1, 1975, a signed narrative report of a doctor or practitioner setting forth the history, diagnosis, findings and conclusions of the doctor or practitioner and which is relevant to the contested case shall be considered evidence on which a reasonably prudent person is accustomed to rely on the conduct of serious affairs. The industrial commissioner takes official notice that such narrative reports are used daily by the insurance industry, attorneys, doctors and practitioners and the industrial commissioner's office in decionmaking concerning injuries under the jurisdiction of the industrial commissioner.
>
> Any party against whom the report may be used shall have the right, at the party's expense, of cross-examination of the doctor or practitioner. The cross-examination shall be performed no later than thirty days after the hearing. Nothing in this rule shall prevent direct testimony of the doctor or practitioner.

In support of their position, defendants assert that they did not acquiesce in the treatment by Dr. Marx and that they should be reimbursed deposition expenses such as travel because Dr. Marx and Dr. Stilwell resided in Washington. Further, in support of their argument, defendants refer to an objection beginning at p. 51 of the transcript (and going on

to p. 54). There they also objected to Dr. Stilwell being allowed to testify by written interrogatory, thereby forcing defendants to send an attorney to Washington for cross-examination. Also, defendants argue that the hearing deputy should have issued a protective order under rule of civil procedure 123 which provides relief from discovery in case of undue burden of expense, etc.

On the one hand, there are reports from Dr. Marx and written interrogatories from Dr. Stilwell, both devices having forced defendants, they claim, to incur great expense to obtain cross-examination. On the other hand is the plain fact that claimant moved to the state of Washington, not unreasonably, and that she is there gainfully employed. It is not surprising that evidence should arise there. On balance then, the rules and statutes do not prohibit the introduction of reports and written interrogatories from out of state practitioners, such evidence having definite probative value, and the obtaining of counter-evidence (although expensive) is simply a part of being in the workers' compensation contested case action. Therefore, any and all objections to the introduction of the written reports (claimant's exhibits 12, 13 and 14) and the introduction of the deposition upon written interrogatories of Dr. Stilwell are hereby overruled.

Conclusions of Law

The knee surgery performed by Dr. Marx on March 14, 1978 was reasonable under §85.27. There was a causal relationship between the injury and the necessity for said surgery.

Claimant has an industrial disability as a result of the injury of fifteen percent (15%) of the body as a whole, entitling her to weekly compensation for seventy-five (75) weeks.

The surgical procedures suggested by Dr. Stilwell are reasonable under §85.27 and are made necessary by the injury.

Claimant's exhibit 12, 13 and 14 and the deposition of Dr. Stilwell upon written interrogatories are a proper part of the record.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of seventy-five (75) weeks at the rate of one hundred fifteen and 39/100 dollars ($115.39) per week for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest.

Defendants are further ordered to pay the reasonable costs under §85.27 of the surgical procedures described by Dr. Stilwell in his testimony, in the event claimant selects to have such surgery.

Costs of this action are taxed against defendants.

Defendants shall file a final report upon payment of this award.

* * *

Signed and filed at Des Moines, Iowa this 29th day of March, 1982.

BARRY MORANVILLE
Deputy Industrial Commissioner

No Appeal.

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SUBJECT INDEX

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