Volume III

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IOWA INDUSTRIAL COMMISSIONER REPORT

Decisions on Selected Cases

July 1, 1982 — June 30, 1983

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
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TABLE OF CONTENTS

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA CLARK ADAIR, Claimant, vs. FURNAS ELECTRIC COMPANY, Employer, and AMERICAN MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 468417 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision, entered March 19, 1982, wherein a deputy found the claimant had not yet recuperated from a work related aggravation of a pre-existing psychological impairment; awarded continuing healing period benefits under section 85.34(1), Code of Iowa; and decided that evaluation of the precise extent of disability can only be made after the claimant has received psychotherapy treatment.

This case arises from a work related injury sustained on January 31, 1977 to claimant's right upper extremity. Claimant subsequently underwent surgical procedures for this injury. Defendants voluntarily paid medical expenses and temporary total disability benefits during the periods of February 14, 1977 to May 14, 1978 and September 26, 1978 to July 9, 1979; and permanent partial disability payments as of July 10, 1979 ending on December 31, 1979.

The record on appeal consists of the record of the review-reopening proceeding which includes the transcript of the hearing; claimant's exhibits 1, 2 and 3; defendants' exhibits 1 and 2; and the deposition of Todd F. Hines, Ph.D.

ISSUES

Defendants' appeal brief recites the issues as: (1) whether the deputy erred in determining the claimant has a preexisting psychological impairment which was aggravated by the work injury, and (2) whether the deputy erred in determining the claimant has sustained an industrial disability.

REVIEW OF THE EVIDENCE

Claimant, at the time of the hearing, was a 24 year old married woman with three dependent children. Claimant began employment in the defendant employer's factory in November 1975, approximately six months after her high school graduation. (Tr., p. 8)

During claimant's high school years she actively participated on the cheerleading and gymnastics teams with a history of no injuries. Before employment with the defendant employer, claimant worked as a restaurant waitress for a short time. (Tr., pp. 7-8)

When claimant started employment with the defendant employer she was 18 years of age and single. (Tr., p. 8) Claimant testified she noticed pain in her right arm and right shoulder one year after she became a "power screwdriver" operator under the employ of the defendant employer. Claimant testified the pain became disabling in January 1977. (Tr., p. 10)

In the subsequent four years, as highlighted hereafter, the claimant underwent a right transaxillary first rib resection for a right thoracic outlet syndrome in March 1977 and decompression right carpal tunnel surgery in September 1978. Each of these surgeries were followed by physical therapy and vocational rehabilitation efforts. The latest diagnosis of a physical problem within the claimant's upper right extremity is a cubital tunnel syndrome. Claimant has had two clinical psychological evaluations and one psychiatric examination during this time period.

At the hearing, claimant described several current physical and mental difficulties. (Tr., pp. 22-29, 39-40) Claimant said she has a great deal of numbness, aching and throbbing in her right arm which causes an inability to sleep well and inability to wash dishes or vacuum without pain. Claimant also said she is now unable to write a complete letter. She said when she attempts to write, the pencil fumbles in her fingers and the wrist and palm of her right hand start to throb and eventually become numb. She said she cannot stand and hold any object over 10 pounds. Claimant said she has difficulty in picking up small objects because she cannot feel the object in her fingers very well. Claimant said the sensations she feels in her hands are as if she has an extra finger or is minus a finger. (Tr., pp. 22-23)

Claimant said numbness starts in her right shoulder, runs down the arm through her elbow and wrist and into the palm of her hand and fingers. She said this numbness process occurs hour to hour every day. Claimant said this happens whenever she does anything that requires back and forth motion or reaching above her head. She testified this numbness will remain for 5 to 10 minutes each time. Claimant also stated that when she turns her body too quickly pain will shoot up her arm and into the side of her neck. She said that atrophy in her pectoral and scapular muscle as diagnosed by a physical therapist in May 1979, makes clothes buying difficult. (Tr., pp. 23-26)

Claimant said she is no longer taking medication for relief because she thought she was becoming addicted to the pain relieving medication. Instead, claimant now uses heating pads and hot baths to relieve her symptoms. (Tr., pp. 26-27)

Claimant testified she has had a change of emotional state since her work related injury of January 1977; she testified:

> Q. Have you noticed any emotional differences since the injury as compared to prior to the injury?
>
> A. Yes, a great deal.
>
> Q. What have you noticed about yourself?
>
> A. Get very depressed and upset and frustrated, very frustrated. I drop something or I want to write a letter and I get a quarter of the way through the letter and I have all these things I want to say and I can't write them because my hand's bothering me so bad. I tend to get real frustrated and it depresses me because I should be able to do these things and I can't do them. I tend to kind of get mad at the world.
>
> Q. How does it affect your ability to perform your duties around the home?
>
> A. I'm much slower. Simple things such as washing dishes and vacuuming -- most always I have to stop vacuuming and rest a little while before I can start up again. I always do this while I am vacuuming and washing dishes.
>
> Q. How does it affect your care of the children?
>
> A. It limits my lifting and carrying them. I don't lift both of the babies unless I absolutely have to and then I have to brace my right arm with my left arm. Now that they're getting big enough to where they can kind of climb up on my lap I encourage them to climb up rather than lifting them because it does bother me to lift them. To go to the grocery store or something I have to use the backpack and even wearing the backpack puts strain on my right arm and shoulder. By the time I'm done with my grocery shopping, my shoulder and arm is bothering me. (Tr., p. 27, l. 22 - p. 28, l. 25)

The first hospitalization commenced on January 30, 1977 when claimant's family physician, Dennis D. Wilken, M.D., admitted the claimant for conservative treatment. Claimant testified she had severe aching, throbbing, and muscle spasms in her right arm at the time of admission. She stated her hand would shake uncontrollably. (Tr., pp. 10-11) This hospitalization lasted only three days. (Cl. ex. 1, Wilken 3/10/77) Dr. Wilken reported the conservative treatment did not improve claimant's condition. (Cl. ex. 1, Wilken 3/10-77)

Claimant was referred to Arnis B. Grundberg, M.D., an orthopaedic specialist, who examined the claimant on two occasions during February 1977. (Cl. ex. 1, Grundberg 2/8/77-2/25/77) When claimant's condition failed to improve, Dr. Grundberg's final diagnosis was a "significant thoracic outlet syndrome" and he referred the claimant to Ralph A. Dorner, M.D., a specialist in thoracic and vascular surgery. Dr. Dorner's examination on March 2, 1977 found a "complete obliteration of the right radial pulse." (Cl. ex. 1, Dorner 3/2/77) Claimant's transaxillary first rib resection surgical procedure was subsequently performed on March 21, 1977. (Cl. ex. 1: Dorner 3/2/77; Methodist Hospital 3/20/77 - 3/26/77) Dr. Dorner's notes reflect the claimant was advised prior to surgery of possible post-operative complications of numbness in her right arm and possible damage to her right brachial plexus artery and vein. (Cl. ex. 1, Dorner 3/2/77) At the hearing, claimant acknowledged she acquiesced to these potential problems. (Tr., pp. 34-35)

Claimant received some relief as a result of the transaxillary first rib resection. (Tr., p. 12) Claimant said the muscle spasms and the uncontrollable shaking in her right hand had cleared, and the aching in her right shoulder was no longer as painful as prior to the surgery. (Tr., p. 36)

In a letter to the state vocational rehabilitation agency, Dr. Dorner stated that heavy muscular exertion involving claimant's right arm was undoubtedly involved in the etiology of claimant's thoracic outlet syndrome and suggested vocational consideration limit vigorous physical activity involving the right arm. (Cl. ex. 1, Dorner 4/25/77)

The first psychological evaluation of the claimant took place at the request of the state vocational rehabilitation agency for an appraisal of claimant's psychological functioning level and for rehabilitative recommendations. (Cl. ex. 1, Geshuri 5/19/77) This evaluation was performed in May 1977 by Yosef Geshuri, Ph.D., in clinical psychology.

Dr. Geshuri used six psychological tests within his evaluation battery in addition to the personal interview process. Dr. Geshuri found that the claimant intellectually functions on the average level, "while exhibiting wide scatter which renders her performance problematic." Dr. Geshuri also found "indications of perceptual difficulties" and "[e]motionally, the subject has apparently experienced prolonged stress due to family difficulties involving interpersonal conflicts, which left her depressed, weary of interpersonal difficulties and helpless." He stated the claimant was looking for a dependable relationship with paternal ingredients and needed to gain some self-confidence and enhancement of her self-esteem. Dr. Geshuri recommended that claimant be rehabilitated toward her goal of becoming a teacher and this goal was feasible if her emotional needs were treated. (Cl. ex. 1, Geshuri 5/19/77)

Claimant was determined to be eligible for vocational services. (Tr., p. 13; cl. ex. 1, RESB Medical Consultant's Review) Vocational training consisted of enrollment in a two-year college program of liberal arts. (Tr., p. 13)

Claimant was married in July 1977 at the age of 21 years. (Tr., p. 13) She had known her husband three to four years prior to their marriage. (Tr., pp. 13, 47)

Prior to college enrollment, claimant received extensive physical therapy treatments on a frequency of two to three times per week during May to July 1977. (Tr., pp. 13 and 31; Cl. ex. 1, Creston Comm. Hosp. 5/1/79) This physical therapy treatment caused some gradual improvement. (Cl. ex. 1, Dorner 7/5/77) The physical therapist's notes indicate claimant withdrew from these treatments due to her new marriage. (Cl. ex. 1, Creston Comm. Hosp. 5/1/79).

Dr. Dorner referred the claimant back to Dr. Grundberg in July 1977 for treatment of a possible arthritic problem in her right shoulder area. (Cl. ex. 1, Dorner 7/5/77) At this time, claimant complained of numbness and severe aching and throbbing in her right hand which caused loss of sleep and inability to hold small objects. (Tr., pp. 13-14) Dr. Grundberg's examination notes of August 19, 1977 reflect the claimant had a positive Tinel sign and Phalen's test at her right wrist. He diagnosed carpal tunnel syndrome and recommended decompression surgery. (Cl. ex. 1, Grundberg 8/19/77)

Dr. Grundberg examined the claimant three months after he suggested carpal tunnel decompression. At this time claimant was pregnant with her first child. (Tr., p. 14) Upon this examination, Dr. Grundberg found, in part, a decreased sensation in the median and ulnar nerve distribution. (Cl. ex. 1, Grundberg 11/15/77) He noted that claimant's carpal tunnel syndrome was connected to her prior thoracic outlet syndrome. (Cl. ex. 1, Grundberg 7/11/78) He again recommended a decompression, however, delayed surgery until after the claimant's child was born and breast feeding was not required. (Tr., pp. 14-15; cl. ex. 1, Grundberg 11/15/77-7/11/78) Surgery was performed September 27, 1978, at which time the nerve in claimant's carpal tunnel was found to be mildly compressed. (Cl. ex. 1, Meth. Hosp. 9/27/78)

After surgery for her carpal tunnel syndrome, the claimant testified her condition did not improve. (Tr., p. 16) Claimant returned to Dr. Grundberg for post-operative care. (Cl. ex. 1, Grundberg 10/10/78-10/31/78) Dr. Grundberg noted that claimant no longer had as much numbness and tingling in the hand as she had before the surgery. (Cl. ex. 1, Grundberg 10/31/78) Two weeks later, claimant returned to Dr. Grundberg with complaints of aching in her forearm mostly distal to her right elbow and to some extent in the palm and her fingers were going numb but better than before. Upon examination, Dr. Grundberg noted the claimant may be suffering from a "compression of the median nerve at the elbow." He recommended the claimant return in three months for further evaluation. (Cl. ex. 1, Grundberg 11/14/78) Claimant returned in two months with the same complaints and Dr. Grundberg primarily made the same findings. (Cl. ex. 1, Grundberg 1/30/79) Claimant was sent for an EMG evaluation, which showed normal findings, thus Dr. Grundberg told the claimant there was no serious problem in her upper right extremity and advised the claimant to return in six months. (Cl. ex. 1, Grundberg 3/2/79)

In the meantime, claimant returned for additional physical therapy treatments during April and May of 1979 from the therapist she previously visited during May 1977. The physical therapist's examination notes and report indicate the claimant was cooperative and her major complaint was pain and weakness in the right arm. The physical therapist found: claimant's "pectoral and scapular muscles appeared atrophied"; when claimant picked up small objects with her thumb and first finger "she heavily relies on visual cues because tactile sensation is poor"; when buttoning her clothes or writing the claimant "seemed to tire rapidly"; claimant was "very shaky when using the arm" and shoulder exercises were "painful"; claimant had "full mobility" in her hand, but could not complete the "motion against resistance" test; and the claimant's "range of motion seems to be limited by pain which has lead to muscle shortening." (Cl. ex. 1, Creston Comm. Hosp. 5/1/79

Defendant insurance carrier received a letter from Dr. Grundberg dated July 6, 1979 which estimated claimant's permanent impairment as "10% of the left [right] upper extremity dut [sic] to weakness and pain." (Cl. ex. 1, Grundberg 7/6/79) The carrier notified claimant's counsel that on the basis of Dr. Grundberg's report, the claimant's condition had stabilized with a 10 percent disability rating, and permanent partial disability benefits were to terminate in December 1979. (Def. ex. 1) A review of the industrial commissioner's office file shows no payments have been made since December 1979.

Claimant subsequently became pregnant with twin children. (Tr., p. 18)

Claimant returned to Dr. Grundberg, one year after her last examination on the request of claimant's counsel for an up to date medical evaluation. (Cl. ex. 1, Grundberg 4/22/80; Tr. p. 46) This evaluation took place on April 22, 1980 at which time Dr. Grundberg found a "right cubital tunnel syndrome" in addition to residuals from the right thoracic outlet syndrome and the right carpal tunnel syndrome. (Cl. ex. 1, Grundberg 4/22/80)

The development of claimant's cubital tunnel syndrome, according to Dr. Grundberg's report, became worse just before claimant became pregnant and "probably has nothing to do with her employment." At this time, Dr. Grundberg reaffirmed his disability rating of 10 percent caused by the residuals of claimant's prior surgeries. Dr. Grundberg advised claimant to treat her cubital tunnel syndrome symptomatically with analgesics. (Cl. ex. 1, Grundberg 4/22/80) Claimant said Dr. Grundberg informed her that she would have to learn to live with her problem. (Tr., p. 38)

Claimant's twin children were subsequently born in August 1980. (Tr., p. 18)

Claimant's second psychological evaluation was then performed by Todd F. Hines, Ph.D., in clinical psychology. Dr. Hines conducts all the psychological evaluations at the Medical Occupation Evaluation Center at Mercy Hospital in Des Moines, Iowa. (Hines dep., pp. 3-4)

Dr. Hines rendered a written evaluation based upon psychological testing conducted on September 20th and 29th of 1980. Dr. Hines also evaluated the claimant in July of 1981, and rendered his further opinion of the claimant's condition in relation to his earlier findings by deposition held subsequent to the hearing. (Hines dep., p. 5)

A report of claimant's 1980 psychological evaluation is included in the record on appeal. Dr. Hines reported a history consistent with the record, plus recent diagnostic impressions which include "low pain tolerance." (Cl. ex. 1, Hines) The report describes physiological and psychological complaints by the claimant that are substantially similar with the type of complaints claimant described at the hearing. (Cl. ex. 1, Hines; Tr., pp. 22-29, 39-40) Dr. Hines testified his 1980 evaluation utilized seven types of psychological tests that compose a standard psychological battery for evaluation, as well as a clinical structured interview which involved standardized questions on family history, current status, sense of future, and present symptoms. (Hines dep., pp. 5-6)

Dr. Hines' 1980 psychological evaluation opinion postulates existence of a physiological process that is being "greatly exacerbated" by a psychological process which is "clearly a process of somatic conversion." Somatic conversion, according to Dr. Hines, means the claimant has some significant psychological problems that are causing her physical problems to become worse. He testified that "very likely" claimant's physical problems are being aggravated by her psychological problems, and her psychological problems are being aggravated by her physical problems. Thus, Dr. Hines testified his 1980 evaluation showed a "circular process" to claimant's condition. (Hines dep. pp. 8-9)

Dr. Hines' 1980 report indicated his opinion that the claimant's industrial injury and related sequela have "precipitated and triggered the emergence of historical emotional conflict which is now expressed through physical pain and disability." Dr. Hines' 1980 report also contains his belief that claimant is "completely disabled in the sense of being overwhelmed by emotional issues and, hence, unable to adequately participate in rehabilitation efforts or in vocational pursuits." (Cl. ex. 1, Hines)

Claimant returned to Dr. Dorner on February 19, 1981 for another up to date evaluation. Dr. Dorner reported a history consistent with the record and noted that the claimant was presently at home with three sons, one 3 years old and 6 month old twins. Dr. Dorner's records note the claimant "obtained no symptomatic relief" as a result of Dr. Grundberg's right carpal tunnel release procedure and that claimant has had persistent symptoms in her upper right extremity since this surgery. (Cl. ex. 1, Dorner 2/19/81)

Claimant's complaints to Dr. Dorner at the February 19, 1980 examination were that her "entire hand tingles and goes numb with any persistent motions"; "occasional discomfort" in her axilla on the right side; and "persistence of numbness" in the medial right upper arm in the area of the distribution of the intercostal brachial cutaneous nerve. Dr. Dorner attributed claimant's last complaint to her previous transaxillary surgery. Claimant also complained that she could not work with her arm for any length of time without her hand throbbing and dropping objects. Upon examination, Dr. Dorner found no evidence of a recurrent thoracic syndrome, however, he noted that the claimant had rather "significant limitation of motion of her right shoulder" which she had apparently favored for some period of time. Dr. Dorner suggested that this condition may be treated with physical therapy and concurred with Dr. Grundberg in not suggesting any further surgery at the present time. (Cl. ex. 1, Dorner 2/19/81)

Physical therapy, as recommeded by Dr. Dorner, was once again pursued by the claimant. Claimant underwent therapy on three occasions during May 1981 by a different physical therapist than previously mentioned in this case. (Tr., p. 18; Cl. ex. 1, Clark Co. Hosp. 5/1/81 to 6/1/81) This therapist reported a history consistent with the prior record and similar to claimant's complaints at the time of the hearing. The therapist reported finding claimant's right shoulder, thumb, wrist, elbow as "generally F grade" (i.e., fair, complete range of motion against gravity), and claimant's left side was found to be normal and her neck flexion was a grade less than normal. (Cl. ex. 1, Clark Co. Hosp. 5/1/81)

Claimant did not return for additional physical therapy because, according to the claimant, her children were interchangeably ill with chicken pox for three months and she could not afford the expense of day care services. However, the claimant testified she continues to perform in-home therapy exercises, but she has not noticed any improvement. (Tr., pp. 19-20)

A psychiatric examination was performed by Oscar Barillas, M.D., specialist in psychiatry. Dr. Barillas' examination was held on the request of the defense. (Tr., p. 20; def. ex. 2, p. 3) This examination consisted of a single interview which consumed 1 1/2 hours. The examination did not involve any written tests. (Tr., pp. 20-21)

Dr. Barillas reported a history that is consistent with the record including the following list of surgical interventions: "T. and A. at age 13; Appendectomy and left oophorectomy (ovary) at age 14; hemorrhoidectomy at age 19"; cesarean delivery of her

three children; and abdominal surgery for "adhessions" in 1981. Dr. Barillas also received from the claimant a history of her family, early development, school, psychosexual, marital and work history. (Def. ex. 2)

Dr. Barillas reported his findings of the claimant's "mental status" in the following manner:

> The patient is a tall; slender built; fairly attractive; blond-haired; young-woman; casually but tastefully attired; who keeps the right arm laying on her lap during most of the sesion [sic] that lasted over an hour and a half. She cooperated readily; relating in a goal directed manner, and without thinking difficulties.
>
> Her affect is appropiate [sic]; and her mood gets saddened when voicing some of her current limitations.
>
> Her thought content fails to reveal any psychotic symptons [sic] (no delussions [sic], nor any type of hallucinations), and translates existance [sic] of somatic concerns which have realistic bases. This latter conclusion is arrived to by the facts she has undergone various surgeries since her getting injured, as well as, existing limitations. When consciously aware of these a lowering of self-esteem occurs ("...I cry then because I can't even throw things...") She has a fair abstract thinking capacity judging by the interpretations she gives to popular proverbs. Is capable of giving back correctly up to six numbers backward, which rules out distractibility. Her sensorium and Orientation [sic] are intact; and her fund of general information is adequate.
>
> A grossly performed neurological tests [sic] on her affected right arm discloses an existing anatomo-physiological deficit on it, the extend [sic] of which is out of my realm/specialty to determine. (Def. ex. 3)

Without explanation or elaboration, Dr. Barillas stated his diagnosis as:

> Diagnostic Impressions(DSM-III):
> Axis I:- Life-circumstance Problem.
> Axis II:- No Diagnosis
> Axis III:- Peripheral neuropathy. (Def. ex. 3)

Claimant attempted to return to restaurant work in March 1981. (Tr., p. 21) This restaurant was apparently recently purchased by her mother at the time the claimant attempted to return to work. (See Hines dep., p. 17) The claimant was unable to function in a variety of positions which included waitress, dishwasher and salad girl functions. According to the claimant, she was unable to do this work because she could not carry trays, dishes or hold a knife. She worked for a couple of months at two to three days per week as a cook's helper in a capacity that involved performance with only one hand. (Tr., p. 21-22)

Claimant also attempted aerobic dance lessons, however, was unable to complete the course. (Tr., p. 29)

A few days subsequent to the hearing, claimant was once again examined by Dr. Dorner, along with Dr. Dorner's associate David H. Stubbs, M.D., who is also a specialist in thoracic and vascular surgery. This examination was held on August 6, 1981. Dr. Dorner reported that claimant's complaints and examination findings were "very similar" to those of his February 19, 1981 examination. Dr. Dorner reported that Dr. Stubbs and he were in agreement that at the present time claimant had some "significant residual problems" with her upper right extremity and appeared to have "developed some limitation of right shoulder movement," and that it was their opinion that this condition was "aggravating her present symptoms." (Cl. ex. 2)

An appointment was scheduled by Dr. Dorner, for the claimant to receive a diagnostic assessment from Marvin M. Hurd, M.D., specialist in physical medicine and rehabilitation at the Iowa Methodist Medical Center. Dr. Dorner noted the "most striking feature" in examining the claimant on August 6, 1981 was "her abnormal posturing and the degree of protection she gives to her right shoulder." He stated he hoped Dr. Hurd would "help her break through this problem." Dr. Dorner characterized her "present difficulties" as a part of a "condition dating from her original symptoms of a thoracic outlet syndrome." (Cl. ex. 2)

Dr. Hurd's treatment plan, formulated on the basis of his examination, was to continue physical therapy for one additional week, and if no improvement occurred, x-rays were to be taken or he would suggest further orthopaedic evaluation. Dr. Hurd made this conclusion because he did not find any specific reason connecting claimant's shoulder limitation on the basis of neuromuscular function. Claimant canceled her following physical therapy appointment due to lack of transportation expense. [Cl. ex. 3, (deputy declared report as cl. ex. 3, although marked def. ex. 3)] The record reveals that claimant has not since been examined by Dr. Hurd nor received any further physical therapy.

Claimant's deposition of Dr. Hines was apparently held before the findings and opinion of Dr. Hurd were made available to claimant's counsel. (Cl. ex. 2, dated 9/17/81)

Dr. Hines opines there is a high degree of reliability between his 1980 findings and the findings of claimant's 1977 psychological evaluation. He hypothesized that claimant "chronically over time has had a great deal of vulnerability and fear and sensitivity very likely out of her family situation." Dr. Hines said this process has been "essentially aggravated or heightened or lighted up" by claimant's 1977 industrial injury. Dr. Hines believes this aggravation has endured to the present time and is causing her physical problems to become worse by aggravating her experience of pain. He believes that claimant's numbness, stiffness and inability to use her right upper extremity is being aggravated by a psychological cause. (Hines dep., pp. 9-10)

Dr. Hines stated that an inconsistency of findings between the 1980 and 1981 evaluations show that claimant's anxiety level was higher in 1981 as opposed to 1980, but her level of energy, which could be directed toward recovery and motivation was lower in 1981 as opposed to 1980. Thus, Dr. Hines concludes, in light of the reliability between the 1977 and 1980 findings, an increasing anxiety level and decreasing energy level indicates that claimant's circular process of physical-psychological aggravation is becoming increasingly permanent. (Hines dep., pp. 10-11)

Dr. Hines believes that claimant's psychological condition was existent at the time of her injury, however, even though her coping skills were "marginally adequate" and her defensive system "very brittle," claimant was able to adapt and become functional. Dr. Hines believes that claimant's injury of January 1977 and her resultant inability to work, pain and numbness caused the claimant "to see in very concrete terms her vulnerability" and this caused her to be overwhelmed emotionally. He opines claimant's emotional reactions of fear and apprehension caused her to experience more pain, then as she experienced more pain, the physical aspect of claimant's injury became more aggravated. (Hines dep., pp. 13-15)

On direct examination of Dr. Hines:

> Q. Do you feel that the treatmenat [sic] of her physical symptoms without the treatment of her psychological symptoms has much a chance of success?
>
> A. No, I do not. I think those two things have to run concurrently. I think because of the circularity, this circle does, in fact, have to be broken. You see, the problem is -- because Doctor Grundberg, as I read the records, has already indicated his belief that there is some permanent, partial disability -- that some physical impairment will go on.
>
> As I understand the situation without endeavoring to step outside of the bounds of my professional expertise, there will always be some physical anomaly there. Because of that, you are always going to get some psychological reaction to it. That means very clearly that these two things have to be treated together. They have to be mitigated. They have to be alleviated simultaneously as much as that is possible. If one were to reduce her physical condition to the lowest possible level of pain and discomfort, she will go on then with the fear and the apprehension that she has psychologically had, and that will continue to produce aggravation, pain responses. That will continue to produce disability. These aggravated pain responses will cause her to be less able to use that arm and that shoulder and her neck as she might otherwise. (Hines dep., p. 15, l. 11 - p. 16, l. 12)

Dr. Hines indicated he believes claimant's experience of pain and inability to effectively use her dominant right arm was the cause of termination of claimant's vocational education program, as well as her inability to maintain an interest in art, her fear and apprehension to adequately care for her children, and the inability to do effective domestic activities. (Hines dep., p. 17)

Dr. Hines recommends the claimant undergo approximately one year of weekly psychotherapy intervention in order to return the claimant to the state in which the industrial injury found her. (Hines dep., pp. 18-19)

On cross-examination Dr. Hines described his proposed treatment plan and its possible effects on the claimant's condition:

> Q. Now, when we talk about treatment for Mrs. Adair, what are we talking about? What do you treat?
>
> A. Well, I think common sense terms...is how do you treat the fear, the anxiety and the apprehension that have been opened up by the physiological condition. You treat the pain responses. You treat in a sense her inability to function both vocationally and domestically, and I will give you an example. You begin to work with a patient in this situation around the limitations of their complaints. You get a patient to specify exactly -- When I say exactly, I underscore that. It sometimes takes weeks to do it. You get them to specify exactly what their limitations are, specifically, what it is they can and cannot do and the kinds of pain responses and reactions that they have. Then very carefully you begin to boost what it is they can do. So you work on an action that gets the person to do just a little bit more.
>
> Initially, it would be in the domestic situation, and as they do just a little bit more, you get from them their increasing fear and apprehension responses, and you work on relaxing those responses.
>
> So you do two things simultaneously. You increase their activity in the world, and you work

at relaxing and decreasing the associated apprehension and fear responses and the anxiety levels. As you do that simulatneously [sic], they are able to do more with less anxiety which means they are able to do more with less pain. The final outcome of that is to get an individual to the point where they are doing the maximum against whatever physical disability they have. They are producing the minimum emotional reaction and pain response.

* * *

Q. If we get a successful recovery, where will she be?

A. I think it is conceivable and it would be my opinion that it is feasible to psychologically return her to the point at which the accident found her.

Q. In other words, she would be able to go back to gainful employment?

A. Within the boundaries of her physical limitations, and at that point we really go beyond my expertise. Whatever her permanent, partial physical limitations would be, she would be returned to the point where she could operate within those boundaries. (Hines dep., p. 26, l. 15 - p. 28, l. 21)

Dr. Barillas' psychiatric findings and opinion were evaluated by Dr. Hines on deposition. Dr. Hines stated that Dr. Barillas' report did not contain essential history. For example, Dr. Barillas' report does not contain any information on claimant's discovery of her father in the midst of an extramarital affair and that upon disclosure to her mother, both parents "converged" on her; nor any information regarding claimant's family history of geographical mobility and insecurity in relation to male figures with dependence on strong parental figures. (Hines dep., p. 21-24)

Dr. Hines pointed out that Dr. Barillas did not perform any psychological testing. Dr. Hines stated that he would not reach any conclusion on the basis of a single interview as done by Dr. Barillas. Dr. Hines opinion is that Dr. Barillas' election to not use multiple measures, precluded him from "seeing some of the things that existed that relate to the personality disorder." (Hines dep., p. 23)

Dr. Hines stated that Dr. Barillas' "Diagnostic Impressions (DSM-III)," (see Def. ex. 2, p. 3), is the use of the Diagnostic and Statistical Manual III, which is a system used to categorize emotional problems. (Hines dep., p. 22)

Regarding Dr. Barillas' report of "Axis I:- Life-circumstance Problem," (Def. ex. 2, p. 3), Dr. Hines stated this means the claimant has a "reactive process that is reactive to some trauma" and that "it is this long-standing pattern that has been precipitated, and it is that precipitation that is a reaction." (Hines dep., p. 24, ll. 3-6) Dr. Hines contends this interpretation of Dr. Barillas' diagnosis is the same as his opinion in regards to claimant's 1977 psychological evaluation. (Hines dep., p. 24) Regarding Dr. Barillas' diagnosis of "Axis II:- No Diagnosis," (Def. ex. 2, p. 3), Dr. Hines said that this level relates to permanent disorders and he believes Dr. Barillas did not have a diagnosis because he was "precluded from adequately collecting information." (Hines dep., p. 23) Finally, Dr. Hines stated that Dr. Barillas' impression of "peripheral neuropathy" on the level of Axis III means the claimant has some "anatomical impairment." (Hines dep., p. 24)

Claimant's husband, David Adair testified on behalf of the claimant. His testimony supported claimant's testimony in all respects, especially in relation to claimant's alleged reduction of domestic cleaning activities and propensity to drop household objects. (Tr., pp. 46-50) Although her husband is not a psychologist, he stated he did not notice any psychological termoil within the claimant before her alleged employment injury. (Tr., pp. 51-52)

APPLICABLE LAW

A personal injury contemplated by the Iowa workers' compensation law means an injury to the body, the impairment of health or a disease which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 732, 254 N.W. 35 (1934).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 30, 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 Hosp., 251 Iowa 375, 383, 101 N.W.2d 167, 171 (1960). However, the weight to be given to the expert testimony is for the finder of fact, and the provision of evidence weight will be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa at 521, 133 N.W.2d at 870.

The finding of a causal connection must be based upon testimony or evidence that tends to establish the connection, or upon proper inferences that may be drawn therefrom, and cannot be predicated upon conjecture, speculation or mere surmise. Burt, 247 Iowa at 701, 73 N.W.2d at 737-38. Expert opinions, even if uncontroverted, may be accepted or rejected, in whole or in part by the industrial commissioner as the ultimate finder of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903, 906 (Iowa 1974).

A claimant is not entitled to compensation for the results of a preexisting injury or disease. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756 (1956). However, if the claimant has a preexisting condition that is aggravated, accelerated, worsened, or "lightened up" by claimant's work activities which results in a disability, the claimant is entitled to compensation to the extent of the disability found to exist. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962), Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

An employee who has suffered a permanent partial disability is entitled to compensation for a healing period beginning on the date of injury until the employee has returned to work, or when "it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1) [as amended by enrolled Senate File 539, section 8 (1982)].

The Iowa Supreme Court has characterized healing period as "that period during which there is reasonable expectation of improvement of the disabling condition." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa 1981) [citing Boyd v. Hudson Pulp & Paper Corp., 177 So.2d 331, 330 (Fla.1965)]. Thus, the healing period terminates at the time the injured employee is restored as far as the permanent character of the injury will permit. Armstrong Tire & Rubber Co., 312 N.W.2d at 65.

ANALYSIS

I. The first issue on appeal is whether the deputy erred in finding a preexisting psychological impairment aggravated by claimant's work related physical injury.

The deputy, as the initial trier of fact, "closely observed" the claimant's demeanor on the witness stand and found the claimant credible in her testimony. Review of the record discloses no reason to disagree with this. The deputy concluded the claimant has not recuperated from a psychological injury sustained as a result of the January 30, 1977 work incident. In formulating this finding, the deputy placed greater evidentiary weight upon the testimony of Dr. Hines, Ph.D. in clinical psychology, as opposed to the report of Dr. Barillas, specialist in psychiatry. The deputy based this evidentiary evaluation upon the fact that Dr. Hines conducted several interviews and administered a battery of psychological tests while Dr. Barillas based his entire report on a single interview without performing any psychological testing.

The defense brief on appeal argues Dr. Hines, as a psychologist, was not qualified to conclude it is "very likely" that psychological problems are causing claimant's physical problems to become worse and her physical problems are causing her psychological problems to become worse. Defendants also contend claimant's husband's testimony of noticing increased emotional problems is without foundation because he testified he did not observe any psychological difficulty prior to claimant's injury. Defendants assert the claimant has reached the point where she now must live with a certain amount of physical pain and that claimant's psychology expert failed to causally connect a psychological injury to the physical work related injury. Defendants' brief also argues claimant's expert testimony did not satisfy the probability standard when he stated claimant's psychological process "may" be getting worse.

Claimant, at one time, was a physically active high school teenager. Her subsequent employment activity after high school resulted in a work injury which defendants have agreed caused at least a ten percent permanent partial disability to her right arm. At the hearing the claimant testified to a continuing depressed emotional state when performing domestic and other activities caused by an awareness of physical limitations. Most of these physical limitations are causally connected to her work injury.

The record contains a strong presumption of a preexisting psychological impairment. For example, the 1977 psychological evaluation requested by the vocational rehabilitation agency found the claimant to have experienced prolonged emotional stress due to family difficulties involving interpersonal conflicts which left her depressed. In Dr. Hines' opinion, his 1980 and 1981 psychological evaluation findings as compared to the 1977 psychological findings show a chronic vulnerability and fear likely arising out of claimant's family situation. Also, Dr. Barillas' unexplained psychiatric examination finding of "Axis I:- Life-circumstance Problem," at least as interpreted by Dr. Hines, shows a long standing reactive process.

A presumtion of a casual connection between an exacerbation of claimant's preexisting psychological impairment and the physical results of the work injury arises from a review of both Dr. Hines deposition and the psychiatric examination report of Dr. Barillas. On deposition, Dr. Hines emphatically stresses his findings that claimant's emotional problems were lighted up by her concrete realization of existing fear and vulnerability in response to the physical limitations caused by her thoracic outlet syndrome and further work related disorders. While Dr. Barillas did not explain his diagnostic abbreviations found within his report, he stated the claimant translated existence of somatic concerns which have realistic bases. Dr. Barillas also stated claimant had lowering of self-esteem when consciously aware of her existing limitations. Dr. Barillas' diagnosis, at least as explained by Dr. Hines, shows that claimant's life-long reactive pattern had been precipitated by some trauma.

The defense contends Dr. Hines is unqualified to express an opinion of an accelerating circular process between claimant's physical injury problems and a psychological injury. While this may be so this point is not sufficient to reject the remaining portions of Dr. Hines' opinion relating to causal connection.

Defendants' arguments regarding claimant's husband's observations are rejected because the witness in question did not possess any specialized knowledge to evaluate existence of a psychological impairment.

On careful review of the expert testimony coupled with the credibility attached to claimant's testimony and that of her husband, it is determined that there is a strong probability of a material aggravation of a preexisting psychological impairment caused by the results of the work injury of January 30, 1977.

II. Defendants' second issue on appeal is whether the deputy erred in determining the claimant sustained an industrial disability.

The defense contends, if there is a psychological problem, it may stem from the right cubital tunnel syndrome which Dr. Grundberg evaluated as probably not work related. Implicitly

the defendants argue the claimant is not entitled to any additional benefits beyond the 10 percent scheduled loss to the right arm for the result of her injury.

The evidence suggests claimant's psychological injury aggravation is preventing her from realizing her full potential for rehabilitation. It is Dr. Hines' opinion that the rise in emotional difficulty was the cause for claimant's withdrawal from vocational rehabilitation educational placement. Dr. Hines' opinion must be considered in light of the earlier 1977 psychological evaluation conclusion that claimant could pursue a career in education if her emotional needs were treated.

At this time, as the deputy held, it would be premature to attempt to evaluate the extent of claimant's permanent condition. It is found the claimant, psychologically has not reached the point where there is not reasonable expectation of improvement in her disabling condition. The injured claimant is entitled to rehabilitation services to attempt to restore her as far as the permanent character of her injury will permit. Armstrong Tire & Rubber Co., 312 N.W.2d at 65.

Based upon the findings in this appeal decision, it is held the deputy did not err in awarding running healing period benefits. The deputy's finding that psychotherapy treatment as outlined in this appeal decision could improve the claimant's permanency rating is hereby affirmed.

FINDINGS OF FACT

1. Claimant sustained an injury arising out of and in the course of her employment.

2. Claimant's work related injury has resulted in a permanent physical impairment to some extent.

3. Claimant's work related injury caused an aggravation of a preexisting psychological condition resulting in a psychological impairment.

4. Claimant's psychological impairment is preventing effective vocational rehabilitation efforts to restore the claimant to maximum recuperation.

5. Claimant's disabling condition may be improved through psychotherapeutic treatments.

CONCLUSIONS OF LAW

1. Claimant remains in a state of healing as contemplated by section 85.34(1), Code of Iowa.

2. Claimant's extent of physical and psychological disability cannot be determined at this point in time.

ORDER

Defendants, in accordance with the proposed review-reopening decision, shall pay unto claimant a running healing period from January 31, 1977 until such time as the requirements of section 85.34(1), The Code, have been met.

Defendants shall furnish unto claimant psychotherapeutic treatment as outlined within this appeal decision. This order is premised upon the finding that claimant's permanent condition may be improved through psychotherapy treatment and conditioned on the offer and acceptance of such therapy with which the parties are strongly urged to comply.

Defendants shall furnish reasonable necessary transportation expenses incurred for undergoing the psychotherapeutic treatments.

Defendants, at this time, shall pay unto claimant the following mileage expenses:

January 3, 1977 to July 1, 1977
2,016 x .15 = $302.40
July 1, 1977 to July 1, 1978
300 x .15 = $45.00
July 1, 1978 to July 1, 1979
700 x .15 = $105.00
July 1, 1979 to July 1, 1980
164 x .18 = $29.52
July 1, 1980 to July 1, 1981
300 x .20 = $60.00
July 1, 1981 to present
200 x .22 = $44.00

Defendants are given credit for all benefits previously paid.

Interest shall accrue pursuant to section 85.30, The Code, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

The costs of this action are taxed to the defendants pursuant to Industrial Commissioner Rule 500-4.33

Signed and filed this 14th day of September, 1982.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Appealed to District Court; Affirmed

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. AGREN,	:	
Claimant,	:	File No. 700347
vs.	:	A R B I T R A T I O N
UNITED PARCEL SERVICE,	:	D E C I S I O N
Employer,	:	
and	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Robert A. Agren, the claimant, against his employer, United Parcel Service, and the insurance carrier, Liberty Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries he sustained on January 6, 1982 and April 8 and 9, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Scott County District Courthouse in Davenport, Iowa on February 10, 1983. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file reveals that a first report of injury was filed April 16, 1982. There are no other official filings.

The record in this case consists of the testimony of the claimant and claimant's exhibit 1.

ISSUES

The issues to be resolved include whether the claimant, Robert Agren, sustained a personal injury which both arose out of and in the course of his employment; the existence of a causal relationship between the injury and the resulting disability; and the nature and extent of that disability. In terms of disability the claim is only for temporary total disability. There is also an issue as to the appropriateness of certain medical charges under section 85.27, The Code.

RECITATION OF THE EVIDENCE

At the time of hearing the parties stipulated that an applicable rate in the event of an award is $324.48 per week. The parties agreed that the claimant was off work from April 9, 1982 to July 13, 1982. Additionally, the parties stipulated that the medical bills involved in this proceeding are fair and reasonable.

Claimant, Robert A. Agren, testified that he commenced his employment relationship with the defendant in February 1976. He has been continuously employed by them since that date. Claimant's position requires him to drive semi-trailer trucks over the road for United Parcel.

Mr. Agren stated that on January 6, 1982 he was using a dolly to hook up trailers in the course of his employment. The dolly in question weighs in the vicinity of 100 to 150 pounds and must, according to the claimant, be moved by hand. In the process of moving this dolly claimant slipped and fell on the wet ground and the dolly struck him in the groin. Claimant stated the dolly landed on one of his testicles. Immediate swelling of the right testicle and pain was noted.

Claimant was able to drive to Davenport and report the incident to his employer. Medical attention was offered but claimant elected to delay medical intervention until his D.O.T. physical, which was to occur on January 22, 1982.

Between January 6 and 22 claimant continued to drive for the employer. He stated he experienced pain in the injured area when driving. The D.O.T. physical was administered by L. J.

Twyner, M.D., and apparently no physical defect was noted. Claimant continued to work after the physical exam.

On April 8, 1982 claimant was using a dolly to hook up trucks when he again noted pain in his groin and testicles. Claimant was lifting and pulling when the second episode of pain surfaced.

After this second onset of pain claimant attempted to drive a load but noted extreme pain due to the rough ride of the truck. Upon return to Davenport, claimant was examined both at the Mercy Hospital emergency room and by Dr. Twyner.

According to the testimony, Dr. Twyner referred claimant to Dr. McKay. Claimant was examined by Dr. McKay and remained off work pursuant to his instructions. Again, according to the claimant, Dr. McKay referred claimant to Dr. Weiss, a urologist. Claimant was examined by this physician and several discussions ensued regarding possible removal of a testicle. Claimant desired a second opinion, and, according to him, was referred by Dr. Weiss to Dr. Gerber at University Hospitals in Iowa City. At this point, Dr. Gerber took over as the primary treating physician. Treatment was undertaken by Dr. Gerber with apparent successful results. Claimant indicates he was treated by Dr. Gerber on three or four occasions. Dr. Gerber released claimant to return to work on July 13, 1982.

Claimant confirmed he was off work from April 9 to July 13, and had no other employment during this period of time. Claimant confirmed there were no intervening injuries of any natue or description between the aforementioned dates.

Mr. Agren testified that he has no lingering or residual problems with this condition. No surgery was performed. A good result was secured via the treatment of the physicians.

On cross-examination, claimant re-confirmed the referral from physician to physician as previously testified to. Apparently, on June 1, 1982 Dr. Gerber indicated claimant could return to light duty on June 15. Claimant indicated he personally did not feel he was able to work on that date and no return to work slip was secured. Claimant may have been released for light duty on July 1, 1982. However, it appears no return-to-work slip was given claimant on that date. This slip is required by the employer for an employee to return. A slip was eventually secured on July 13, 1982.

Mr. Agren confirmed that the pain noted in January and April 1982 was always on the right side of the groin.

Claimant admits he never told a physician he was hit by a dolly, but only that he strained himelf. He confirmed he was only hit by the dolly in January. Claimamt also confirmed that a diagnosis of funiculitis was eventually made.

The balance of this witness' testimony was reviewed and considered in the final disposition of this case.

Dr. S. G. Weiss, a urologist, indicates in his report marked claimant's exhibit 1:

> Your client, Robert Agren, was seen on urological consultation on 4/30/82, having been referred by his company doctor, Dr. L. J. Twyner. He was seen at that time and was felt to have a left funiculitis. See the letter to Dr. Twyner regarding his treatment. He was placed on no work activity until seen on 5/7/82. His CBC and urinalysis as well as IVP was within normal limits. The left funiculitis had largely cleared. The patient was continued on Minocin and told to return to work in two weeks. However, the patient desired another opinion and was seen by Dr. Walter Gerber at the University of Iowa on June 1, 1982. Dr. Gerber agreed with the diagnosis and felt that 6 weeks of additional "no work activity" should be recommended. He continued to treat the patient with long term low dose antimicrobial agents and released the patient back to full activity as of July 28, 1982.

Dr. Walter Gerber, assistant professor of urology, at the University Hospitals in Iowa City, reports in his letter of July 2, 1982:

> I saw Mr. Robert Agren on June 1, 1982, for evaluation of left groin, inguinal, and scrotal problems. He reported that he has had problems in that area since January, 1982, after lifting a heavy object at work. He reported that he had been treated with antibiotics without resolution. My physical examination showed a possible funiculitis. I placed him on strong antibiotics and recommended that he wear an athletic supporter four hours a day, use ice packs, and avoid all straining.
>
> The patient has asked me whether this is possibly a work related injury. Inflammations in the spermatic cord and epididymus are known to be accentuated by straining such as might occur with heavy lifting. If this took place while the patient was working then it could be considered a work related injury. If you have any questions, please do not hesitate to contact me.

A letter from Dr. L. J. Twyner dated June 21, 1982 confirms the series of referrals in this case. That letter also contains the following information:

> Funiculitis is an infection of the spermatic cord which is usually secondary to an infection descending from the prostate gland to the epididymus. The origin of the infection is bacterial, tubercular, or gonorrheal, and although the condition may be agrivated [sic] by working the condition did not originate as an on-the-job injury.

In a surgeon's report, signed by Dr. Gerber, and dated June 21, 1982, he notes in part:

> 1. Date of accident: January 82
>
> 2. State in patient's own words where and how accident occurred: Felt something rip in the left groin with a burning sensation in the groin. This gradually subsided over a one month period.
>
> ....
>
> 4. Give accurate description of nature and extent of injury and state your objective findings: Funilulitis.
>
> 5. If accident above referred to the only cause of patient's condition? yes....
>
> ....
>
> 18. Patient will be able to resume regular work on: 7/1/82.
>
> 19. Patient was able to resume light work on: 6/15/82.

Dr. Weiss notes in a surgeon's report dated May 12, 1982 as follows:

> 4. Give accurate description of nature and extent of injury and state your objective findings: January 1981 - strain pulling truck dolly on ice.
>
> 5. Is accident above referred to the only cause of patient's condition?___If not, state contributing causes: probably.
>
> ....
>
> 9. Has normal recovery been delayed for any reason? Yes Give particulars: another similar strain in April, 1982.
>
> ....
>
> 13. X-Ray diagnosis: normal IVP; some prostate calcification.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries in January 1982 and April 8 and 9, 1982 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).

"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, 261 Iowa 352, 154 N.W.2d 128 (1967).

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.
>
> ....
>
> 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 claimant has the burden of proving by a preponderance of the evidence that the injuries of January 1982 and April 8 and 9, 1982 are causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id. at 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, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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., 252 Iowa 613, 620, 106 N.W.2d 591, (1960).

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., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

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, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist, 218 Iowa 724, 254 N.W. 35.

> "....[W]hile expert testimony that a condition could be caused by a given injury is in itself insufficient to support a finding as to cause or connection, such testimony coupled with additional nonexpert testimony that claimant was not affected with the same condition prior to the accident or injury in question is sufficient." Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 1072; 146 N.W.2d 911, 915 (1966). See also: Iowa Beef Processors, Inc. v. Burmeister, 301 N.W.2d 768, 770 (Iowa 1980).

The opinion of an expert witness need not be couched in definite, positive or unequivocal language. Dickinson v. Mailliard, 175 .W.2d 588, 593 (Iowa 1979). An expert may testify to the possibility of a causal connection, but the possibility, standing alone, is not sufficient-- a probability is necessary to generate a question of fact or to sustain an award. Burt, 247 Iowa 691 73 N.W.2d 732. However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Id. The Iowa Supreme Court in Becker v. E & 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 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.

ANALYSIS

Based on the record as a whole it appears there is no real dispute in this case that the claimant, Robert A. Agren, was on the alleged dates of injury an employee of the defendant. Additionally, based on the record there is no dispute that an incident occurred while claimant was in the course of his employment with this defendant. That is, the incident occurred at a time and place where claimant could reasonably be expected to be located in the furtherance of his employer's business and the performance of related duties.

The analysis must now turn to whether the injury sustained arose out of the employment. Claimant's condition has been diagnosed as funiculitis. Funiculitis is, as defined by Dr. Twyner in his letter of June 21, 1982, "an infection of the spermatic cord which is usually secondary to an infection descending from the prostate gland to the epididymus." He notes that the origin of the infection is bacterial, tubercular, or gonorrheal...." Both Dr. Twyner and Dr. Weiss indicate that the conditions may be aggravated or accentuated by working or straining. Neither physician takes the position that the funiculitis was in any way directly caused by the work incident or activity.

In an excellent article entitled "Inquiries Arising Out of and in the Course of the Employment," Drake Law Review Vol. 30 No. 4, Marvin Duckworth notes:

> The employee has the burden of proving that he has sustained a personal injury arising out of and in the course of his employment. This requires proof that an employment-related incident was a proximate cause of the health impairment upon which the claim is based. For a cause to be "proximate" it need only be a substantial factor in bringing about the result, and need not be the sole cause."
>
> ....
>
> The aggravation of a preexisting health impairment may also constitute a personal injury, because the employer takes the employee subject to all active and dormant health impairments."

The medical testimony provided by Dr. Weiss is lodged in terms of "could be considered a work related injury," Dr. Twyner speaks in terms that indicate "the condition may be aggravated by working."

As noted in the previously cited cases, this testimony standing alone will not be sufficient to sustain an award. However, if this testimony is buttressed by other facts in the record which lead the finder of fact to believe that claimant did not suffer from this condition before the work incident, it is sufficient to support a finding of proximate cause.

Two work incidents occurred in this case, the first in January when claimant received a direct trauma to the groin from the dolly he was using. The second occurred in April when he was moving another dolly. The uncontroverted facts are that the dolly weighed between 100 to 150 pounds. The record establishes that claimant recovered from any aftereffects of the first incident. He continued driving for the employer. He underwent and passed a D.O.T. physical in late January which apparently did not detect funiculitis. Based on these facts it can, at a minimum, be inferred from the record that either the claimant did not suffer from funculitis, of if he did have it and it went undetected, it certainly was not disabling until after the second incident in April.

Based on the record and the aforecited case law, the undersigned is of the opinion that the employment-related incident of moving a 100 to 150 pound dolly in April was a proximate cause of the injury, the injury being an aggravation of the funiculitis. The close proximity in time between the lifting, the immediate onset of symptoms and the diagnosis of the condition lend credence to this position.

The medical testimony is clear that claimant was kept off work from April 9, 1982 until at least July 13, 1982 for treatment of the condition. Dr. Weiss reports in his letter of September 10, 1982 that the patient was released "to full activity as of July 28, 1982. The parties stipulated that the period of disability terminated as of July 13, 1982, apparently with the claimant returning to work on that date.

FINDINGS OF FACT

That in January and April 1982 the claimant was an employee of United Parcel Service.

That the claimant is an over-the-road truck driver for the defendant.

That in January 1982 the claimant was using a dolly weighing 100 to 150 pounds to hook up his truck, when he slipped and was struck in the groin by the dolly.

That immediate discomfort was noted.

That claimant continued working for the employer.

That a D.O.T. physical was administered in last January 1982 and claimant passed this exam.

That on or about April 8, 1982 the claimant, while lifting and pulling a dolly, experienced the immediate onset of pain in the groin.

That claimant was then examined or treated by a number of physicians.

That initially claimant's condition was diagnosed as funiculitis.

That the funiculitis condition was aggravated by the incident of April 8, 1982.

That claimant was never disabled by this condition prior to April 8, 1982.

That claimant remained off work as a consequence of the condition from April 9, 1982 to July 13, 1982.

That claimant was temporarily totally disabled during this period of time.

That no permanent disability has been established as a consequence of the work incident.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and established that on April 8, 1982 he was an employee of the defendant.

That on that date he sustained a personal injury which both arose out of and in the course of his employment.

That as a direct result of the work incident, the claimant was temporarily totally disabled from April 9, 1982 to July 13, 1982.

ORDER

THEREFORE, IT IS ORDERED

That the defendants shall pay claimant temporary total disability benefits at the rate of three hundred twenty-four and 48/100 dollars ($324.48) for the period April 9, 1982 to July 13, 1982.

That the defendants are given credit for all benefits previously paid.

That interest shall accrue pursuant to section 85.30, The Code.

That the costs of this proceeding 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 20th day of May, 1983.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY ALBERTUS Claimant, vs. ABELL-HOWE COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendents.	:	File No. 654282 R E V I E W- R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Roy E. Albertus, the claimant, against his employer, Abell-Howe Company, and the insurance carrier, Liberty Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on November 14, 1980. This matter came on for hearing before the undersigned deputy industrial commissioner at the Juvenile Court Facility in Cedar Rapids, Iowa on August 24, 1982. The record was considered fully submitted on September 13, 1982.

An examination of the industrial commissioner's file reveals that a first report of injury was filed November 24, 1980. Subsequently, a memorandum of agreement was filed February 23, 1981. Later, a Form 2 was filed revealing the extent of workers' compensation benefits paid.

The record in this case consists of the testimony of the claimant, Jeanette Albertus, Verna Murry; claimant's exhibits A, B and C; and defendants' exhibits 1 and 2.

ISSUES

The issues to be determined in this proceeding are whether there exists a causal relationship between the claimant's work related injury of November 14, 1980 and his present disability, the extent of that disability, as well as the length of healing period.

REVIEW OF THE EVIDENCE

At the time of hearing it was stipulated that the applicable rate in the event of an award is $309.67. There was no stipulation as to the time off work because of the alleged injury. The parties stipulated to the fairness of any medical bills involved in this proceeding. There was no stipulation that the services rendered and represented by those bills were in any way causally related to the work injury of November 14, 1980.

The claimant, Roy Albertus, testified that he is presently a resident of Port Wing, Wisconsin. He is 43 years of age, married and has four dependent children.

His educational background indicates he attended formal schooling through the 11th grade and later secured his GED Certificate.

His work history indicates that upon graduation from high school he served in the United States Army from 1956 through 1958. Upon discharge from the army he worked in a meat packing plant as a laborer, on a sporadic basis, for two or three years. He also worked in construction during this period of time. Next, he was employed at the Northwest Cement Plant in Mason City, as a laborer. He discontinued this employment in 1964. Subsequently, claimant attended a welding school in Waterloo, Iowa and received a certificate of completion of that course. He then was employed by the Iowa Manufacturing Company, in Cedar Rapids, as a welder and assembler. Subsequently he was employed as an ironworker doing construction work. The claimant was an employee of Abell-Howe Company as an ironworker on the date of injury, November 14, 1980. Claimant testified that the position of ironworker requires that you be able to weld, climb, carry heavy iron, bolts and tools. He indicates that to work as an ironworker an individual must be able to lift substantial weight without difficulty. Mr. Albertus indicates that as a building under construction proceeds upward an ironworker must be able to climb to great heights while carrying various amounts of weight. An individual in this line of work, according to the claimant, must be able to perform all functions related to the employment. He stated that there is no such thing as light duty work in this field of employment.

The claimant testified that he was working for the defendant, Abell-Howe Company, on November 14, 1980. While in the process of climbing up a ladder, the claimant slipped and grabbed the outcropping on the building to avoid a 40 foot fall. Mr. Albertus indicates he injured his low back as a result of this incident.

The record reveals that the defendants have filed a memorandum of agreement with respect to this incident. By that document they acknowledge that on November 14, 1980 claimant was their employee, and further acknowledge that on that date he sustained a personal injury which both arose out of and in the course of his employment with them.

The claimant testified that he was dispatched to Dr. Thaler, the company physician. After examination, Mr. Albertus returned to his home in Port Wing, Wisconsin. From the record it appears that he had been living in the Cedar Rapids area on a temporary basis while working for the Abell-Howe Company.

Upon return to his home in Port Wing, Wisconsin, the claimant came under the care of Harry Larson, M.D. Conservative treatment was initially pursued. Mr. Albertus stated that on December 1, 1980 he returned to work for Abell-Howe. He was assigned the same duties that he performed prior to injury. He continued to work for Abell-Howe through December, but indicated that at the end of that month he noted an inability to continue doing this type of heavy work. He was again directed to Dr. Thaler, the company physician. After examination he was again permitted to return to his home in Wisconsin and came under the care of Dr. Christensen, who is Dr. Larson's partner. Conservative treatment was given by Dr. Christensen and the claimant was subsequently permitted to return to work for the defendant on March 16, 1981.

Mr. Albertus indicated he received compensation payments for the period November 14, 1980 through December 1, 1980, and for the period December 31, 1980 through March 16, 1981.

On March 16, 1981 the claimant returned to work and, in fact, worked for the defendant one day. Late in the afternoon of March 16, 1981 he was laid off from his position by the employer. On this date Mr. Albertus alleges that he indicated to his foreman that he injured his back. He was again examined by Dr. Thaler and by Dr. John R. Huey, M.D., an orthopedic specialist. Claimant indicated he was released to return to light duty work by Dr. Huey. There were no light duty work positions available for an ironworker with the employer so he returned to his home in Wisconsin.

Mr. Albertus indicated that at this point in time he was in pain and upon returning to Wisconsin went to Dr. Larson, whom he has continued to see from that date forward.

The record shows that certain exercises were prescribed by Dr. Larson and the claimant has been doing these exercises. He indicates Dr. Larson has placed a weight lifting limitation on him of 20-25 pounds. The claimant is of the opinion that there are no positions available in ironwork which fall within this lifting limitation. Claimant stated that he is gradually getting better and his condition is gradually improving. He continues to take pain medication.

Mr. Albertus stated that he is unable to lift the welding equipment which he would be required to do as an ironworker. He also has difficulty standing in one place for any length of time. Additionally, riding in an automobile causes back discomfort. The claimant remains optimistic on his abilities and opportunities to return to employment as an ironworker.

On cross-examination, the claimant acknowledged that on March 16, 1981 he was laid off at the end of the day because of lack of work available for employees. He acknowledged that other individuals were also laid off at that time. The claimant denied any memory of a phone call to the office manager, Verna Murry, on March 16, 1981, requesting that she have the records indicate that he was injured on the job on that date. He did state, however, that he spoke with his foreman and supervisor concerning his alleged injury.

The record establishes claimant applied for unemployment compensation in Iowa as soon as he reached his home in Wisconsin. Additionally, the claimant acknowledged that he was paid 21 weeks of unemployment compensation benefits, which is the maximum available.

Mr. Albertus acknowledged that he sustained a prior injury working for the Iowa Manufacturing Company in Cedar Rapids. This was, according to him, an upper back injury. He was off a few months and received workers' compensation payments. He indicates that there was no permanent disability attributable to this injury. He was able to return to work without restriction or limitation. On closer examination, he testified that the prior injury was in the area below his rib cage, and he states that this injury is in the lower portion of his back. Mr. Albertus denies having problems with his low back all of his life but does acknowledge missing an occasional day because of backache. This may have happened six or eight times over a ten year period.

This witness acknowledged that Dr. John R. Huey, M.D., an orthopedic specialist, examined him the day prior to hearing in this case. He is also aware that Dr. Huey could find no disc involvement in his case. Mr. Albertus denies being employed or working at a summer camp in Wisconsin. On redirect examination, however, he conceded that his wife owns a campground in Wisconsin and on occasion he has mowed the grass at that facility. He

re-emphasizes that on March 16, 1981 he stated to his foreman, at noon, that his back hurt and that the foreman said if it got too bad he could go to a physician.

On re-cross-examintion, Mr. Albertus acknowledged there is no work available for ironworkers today in Wisconsin or Cedar Rapids. He stated, however, that he could have worked in the Twin Cities if he had not been injured. He further acknowledged that no surgical intervention has been undertaken to rectify his condition. Claimant was not employed as of the date of hearing.

The claimant's spouse, Jeanette Albertus, testified on his behalf. She generally confirms the claimant's testimony. The family is now living on "unemployed fathers benfits" and has received this aid for approximately one year. She indicated that Mr. Albertus has attempted to do some work around the house but with some difficulty due to pain. She also confirmed that he has difficulty riding in a car. On cross-examination, this witness denied that the claimant has had chronic back pain his entire adult life. She did, however, acknowledge that on occasion he has had flareups of back pain, which have been alleviated with bed rest and the use of a heating pad.

Verna Murry testified on behalf of the defendants. She is employed by the defendant as the office manager and has been in their employ for twenty years. This witness testified she received a call from claimant on March 17, 1981, at which time he told her that his back was causing him pain. An inquiry was made by this individual as to whether the claimant had reported the incident to his foreman. He indicated that he had not and was instructed by Mrs. Murry to report the incident to his foreman. This witness testified that she never, subsequent to this phone call, received any report from the foreman regarding a March 16, 1981 injury. On cross-examination, this witness testified that the claimant did not advise her that he had sustained a new injury. This witness indicated that the foreman would file a report of injury even if the injury complained of was only a continuing pain. No such report was ever filed.

The claimant was called to the stand on rebuttal. He testified that his foreman was Mr. Sutton, and he stated that he told Mr. Sutton he had back pain on March 16, 1981. The claimant is also of the opinion that Dr. Christensen's bill has been paid by Liberty Mutual, but apparently Dr. Larson's bill has not. Additionally, the St. Luke's Hospital bill remains unpaid.

Harry H. Larson, M.D., testified by deposition on behalf of the claimant. He has been involved in the practice of medicine for over 30 years. He indicates that the first time he saw the claimant for the back injury in question was November 21, 1980. The history reported by the claimant by Dr. Larson is consistent with his testimony in this case. An examination was conducted which indicated:

> Q. And would you tell us what the results of that examination were?
>
> A. He had at that time muscle spasm in the paravertebral muscular mass of the spine on the left. He had some discomfort in straight leg raising both on the right and left leg but there was no really great restriction. It was more of a sensuation (sic) of the discomfort in his back, just precipitated the pain the left side primarily. He had limitation of motion of the spine in all directions. There was no neuromuscular deficit. His reflexes were equal and physiologic basically.

Conservative treatment was undertaken and muscle relaxants were prescribed. Claimant was next examined by Dr. Larson's office on December 1, 1980, and significant improvement was noted. The claimant requested a return-to-work slip on December 9th and this was given to him. The next examination conducted at Dr. Larson's office was in early January 1981. This examination was conducted by his partner, Dr. Christensen. In conjunction with this examination, Mr. Albertus was hospitalized. An eventual diagnosis of low back pain was reached. Conservative treatment was undertaken, including the application of heat, the use of traction and exercise. Claimant remained hospitalized until January 9, 1981. Dr. Larson had occasion to see the claimant shortly before discharge and indicated: "No evidence to indicate sciatic nerve and/or disk initially when I saw him nor at present. Negative straight leg raising at that date." On discharge on January 9, 1981, Dr. Larson stated that the claimant was feeling much better.

Mr. Albertus was subsequently examined several times in January, February and March of 1981 on a follow-up basis. No treatment was administered but the back exercises were continued. There is a notation in the records made by Dr. Christensen that the claimant admits slipping and falling at home, injuring his back on or about March 5, 1981. This fall incapacitated him for a day or two. Claimant was released to return to work by Dr. Larson's office on March 16, 1981. Claimant was next seen by Dr. Larson's office on June 3, 1981 and reported the following history on that date.

> A. My notes are as such: He comes back in for a follow-up. He tried to go to work. Was only able to work a part of the day and couldn't handle it, so they laid him off. He hasn't been called back since. Apparently he is having problems yet with the back pain and discomfort with radiation at times into the leg. He has been treating it symptomatically at home. He hasn't seen anybody now here since March but he was down and hospitalized apparently in the cities for a period of time.
>
> I think right now he should continue with local heat and we will observe further. I don't think there is anything further we could do at this tiwe. Should have the records available at this interval -- of his interval history so we can see what, if anything, is different. Now, this apparently was --
>
> Q. At that time he was -- was he able to go to work at that time?
>
> A. At this time when I saw him in June?
>
> Q. Yes.
>
> A. No.

Conservative treatment was undertaken and claimant was subsequently reexamined on June 26. The back condition was about the same as the prior examination. Tenderness in the lumbosacral and sacroiliac area were noted. There is mention by Dr. Larson of some treatment administered in Minneapolis; however, there is no data in the record to indicate when this treatment was administered or what was actually done.

Conservative treatment was continued and the claimant was again examined on July 31. Concerning the claimant's status on that date, Dr. Larson indicates:

> A. Comes in for a recheck. No change as far as the symptoms. Gave him some Percodan because he isn't getting to sleep at night sometimes because of the pain in his back. Should try his exercises as tolerated. Avoid any heavy lifting. We will have him in back for a follow-up in a month to six weeks.
>
> Q. Now, as of July 31, 1981, could he work at his normal occupation?
>
> A. I didn't think he could at that time.

Claimant was again examined on August 28, 1981 and no change in his condition was noted. Treatment was continued. This physician is of the opinion that the claimant could not return to "that type of work." Mr. Albertus was reexamined on October 5, 1981, which revealed tenderness over the spinous processes at L2, 3 and 4. Tenderness paravertebrally on both sides was noted accompanied by mild limitation in motion in all directions. The diagnosis at that time was chronic low back syndrome with possible disc disease. The same form of conservative treatment was prescribed.

Mr. Albertus was again examined on November 6, 1981 with basically the same complaints of back discomfort. Any repetitive activity caused the onset of discomfort. Another examination was conducted on January 8, 1982. Continuing complaints of back pain, limitation of motion and resulting restriction of activity were made. Conservative treatment continued to be pursued and a medication change was made. Follow-up examinations continued to be conducted and the complaints of the claimant appear to be consistent from one examination to the next. Possible referral to an orthopedist was discussed but was not undertaken. The last examination by this physician was conducted on June 15, 1982 and the claimant's condition had not improved or changed. Conservative treatment was again prescribed and the claimant has not been seen since June 15, 1982. As of that date the physician was of the opinion the claimant could not return to his employment as an ironworker. On that date the physician advised claimant to avoid heavy lifting and avoid repetitive constant-type motions, including twisting and bending. The doctor then testified:

> Q. Now, Doctor, do you have any opinion as to whether or not further medical treatment can be given him that would make him improve?
>
> A. I think that he can continue to improve. He is still in the healing period; at least in my experience, sometimes these back injuries will last two years before they stabilize and go away. That's a little long, but still I have seen it.
>
> Q. And do you anticipate that in this case?
>
> A. Every case is individualized. I can't give an answer to that.
>
> Q. Do you think he at the present time is as well healed as he is ever going to be?
>
> A. Again, I would not want to state an answer to that either.
>
> Q. Has he at any time in the past reached plateau or as high or best healing he is ever going to be?
>
> A. Not to my knowledge, other than from what I read in the report here today that we did try to let him go back to work on those occasions when he felt -- when he felt better and the findings were minimal.

Dr. Larson is of the opinion that claimant should be evaluated by an orthopedic specialist and possibly a neurologist. He also recommends a CAT Scan.

The physician did not have an opinion as of the date of his deposition as to the extent of any permanent disability. He indicated, however:

> A. Well, I am going to continue to treat him and see him as much as we feel is necessary. It's -- Right now, it's -- we are at a standstill. I don't think he has improved or gotten worse or better. At least the way it has been, it has been a constant thing, He feels better, feels worse. I think that you get that from the findings. You can get that impression from the visits.

On cross-examination, it was established that Dr. Larson is board-certified in family practice, but is not an orthopedic specialist. He confirms that his diagnosis after the initial examination was that of a "sprain and contusion of the lumbar

sacral spine, primarily on the left side." He describes this as an injury to the muscular or ligament area. In layman's terms he indicates that diagnostic tests showed that he had a strained muscle on the left side of his back. He confirms that the claimant was released to return to work on December 9, 1980, as his condition appeared to have improved. He confirms that the claimant alleges a second injury on or about December 29, 1980, when he bent down to pick up some welding rods. Since that date substantial discomfort was noted. Subsequently, he was hospitalized by Dr. Christensen. Dr. Larson concedes that a fall such as claimant experienced in March of 1981 could aggravate a pre-existing soft tissue injury to the low back. He confirms the claimant was released to return to work on March 16th. This physician indicates that during the period of continuing treatment he did not tell the claimant not to work but encouraged him to try and continue activity as tolerated. The record is unclear whether by the word "work", Dr. Larson means gainful employment or simply work at various activities to to keep active. With respect to the claimant's improvement, the following exchange took place:

> Q. I take it that right at the present time during this whole year, he hasn't improved very much, has he?
>
> A. Well --
>
> Q. And I don't mean at the present time. I mean as of June 18th.
>
> A. No, it has been pretty static. I mean, I think that he has learned not to overdo. He has tried to go out and hit it hard, at least from the story I have, and so I think that, no, he has been pretty much the same. I think that refers substantially
>
> -- it's the impression from my records.

As of his last examination the physician's diagnosis remains the same.

John R. Huey, M.D., a board-certified orthopedic specialist, testified on behalf of the defense. He had occasion to examine the claimant on March 17, 1981. A report was generated on March 25, 1982 and is marked exhibit 3 and attached to defense counsel's brief. That report is considered part of the evidence in this record, as it was marked and received as an exhibit in conjunction with Dr. Larson's deposition. Dr. Huey indicates in that report:

> In response to your letter of February 16, 1982 regarding Mr. Albertus. He was first seen in my office March 17, 1981 because of back pain. He stated at that time that he had hurt it some time prior and was off work for two months. He was in traction in Wisconsin and did exercises to build it up. He was feeling pretty good and then went back to work and developed pain in his low back. He had some pain down his left leg but not so much this time.
>
> On examination, it hurt him to bend to the left. He didn't have much spasm or rigidity but had some tenderness in this area apparently. Straight leg raising tests were negative, reflexes physiological. No muscle weakness and no sensory changes.
>
> I felt he had a lumbosacral strain on the left, mainly musculature which is probably from inactivity and then going back to work. He isn't in shape and this will hurt. He was placed on some therapy, phonphoresis daily and given some Parafon Forte to see if this will relieve some of the discomfort in his back. He was to gradually increase doing his exercises again, just for short periods.
>
> He returned to the office March 20, 1981 at which time he was moving better. Turning to the left still bothered him a little bit. He was advised to use some hot packs at home and to return to work but not try any heavy hard work for awhile.

Dr. Huey also had an opportunity to examine the claimant on August 23, 1982, just prior to the hearing in this case. An examination was conducted and x-rays examined. Dr. Huey testified by deposition, in part, as follows:

> He says it aches across the whole lumbar spine. I took recheck X-rays to see if there were any basic changes, and from the report I had in my file I don't see anything different. He still has a little asymmetry at the facets, -- These are the joints in the low part of the back. -- especially at the L4-5 level and 5-1 level on the right side. Otherwise no basic -- no changes at all. But that wasn't a change, that was just -- just a situation that he had previously, too. Fairly good-looking back, I thought, physically. And I at this time, at this examination, I could not find any evidence of a herniated disk. His reflexes -- His reflexes were physiological, and he demonstrated no muscle weakness. He hurt in his back when he would do straight-leg-raising, more like a facet. I did not find any reason clinically that I felt I should put him through a myelogram, because he didn't have any neurological deficits that I could ascertain. And unless I contemplate surgery, I generally don't do myelograms on these people. And I didn't feel that I could -- had any findings that would make me want to go back to that -- or would want to go to surgery, at least at this time.
>
> My recommendation to him, the only thing I could think that would help him would go back to rehabilitation. He stated that he was at Hurley, Wisconsin, rehabilitation area, but appraently [sic] didn't get too much help from them, according to the patient.
>
> Basically that's the story I got. I did not rate him, because I don't know how to rate someone that has symptoms without a lot of findings -- without findings. If you take a disk out, you have something physical to rate, but he says he can't work, and I have to believe him.
>
> Q. I take it your finds were negative as to disk involvement or disk injury?
>
> A. I could not find anything at this last two -- the two examinations -- major examinations that I did that he needed myelogram for disks.
>
> Q. And your findings of the man's physical body was essentially within normal limits, was it, as to the musculature structure?
>
> A. Musculature structure seemed within normal limits, yes.

Dr. Huey characterized the injury as one involving the soft tissue.

On cross-examination, Dr. Huey acknowledged that he had not read Dr. Larson's deposition, nor had he seen Dr. Christensen's medical statements. He had also not reviewed the hospital records in question.

The balance of the medical exhibits have been reviewed and considered in conjunction with the disposition of this case.

Claimant was evaluated by the "Look Up Workshop, Inc." The report for that organization is contained in the record and marked claimant's exhibit "C". That report indicates, in part:

> SUMMARY AND RECOMMENDATIONS:
>
> In summary, Roy is seen as an individual who exhibits good work behavior and has marketable aptitudes and skills, but whose disability imposes severe restrictions on his employment potential and prospects.
>
> Presently, Roy's inability to work at a standing or sitting position for any extended period of time make it unlikely he will be able to put his welding experience and skills to use.
>
> The 20-25# lifting restriction placed on him by his physician also greatly limits his prospects.
>
> If and when his back pain subsides he may be able to work as a production line welder if no heavy lifting is required.
>
> Further vocational education in the welding field would improve his ability to teach the subject, but employment chances would be minimal.
>
> Therefore, it is recommended that Roy seek a "light-duty" job not requiring extended periods of either sitting or standing at one time and which would allow for occasional breaks. Two such jobs which now exist in northern Wisconsin include a campground attendant and creel clerk (measures fishermen's success) both available through the Wisconsin Department of Natural Resources.
>
> It is also suggested that Roy have dental work performed to improve his appearance and improve his employment potential.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 14, 1980 is causally related to 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 (1955). 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 an employee has suffered a personal injury causing permanent partial disability...the employer shall pay to the employee compensation for a healing period...beginning on the date of injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first. Iowa Code section 85.34(1).

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. Iowa Industrial Commissioner Rule 500-8.3(85).

The Iowa court most recently addressed the issue of healing period duration in Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). 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. 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."

That a person continues to receive medical care does not alone indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond the point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period, particularly when the treatment does not, in fact, improve the condition. Castle v. Mercy Hospital, Appeal Decision of the Industrial Commissioner, filed August 26, 1980.

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 opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *
>
> Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, (1963).

ANALYSIS

As previously noted, it is undisputed that on the date of injury, November 14, 1980, the claimant was an employee of the defendant. Further, it is undisputed that on that date he sustained a personal injury which both arose out of and in the course of his employment. The record establishes that he was off work for a brief period of time and then released to return to work on December 9, 1980. He was paid healing period benefits during this period of time. Upon return to work he was able to function until December 29, 1980 and then was off work again due to a flareup in his low back condition. Mr. Albertus remained off work until March 16, 1981 and according to his testimony received benefits for this period of time. He returned to work on March 16, 1981 and was laid off later in the afternoon. The claimant has testified that on March 16, 1981 he had a renewed flareup of his back discomfort. He also stated he reported the incident to his supervisor. An examination of Dr. Huey's report of March 25, 1982 reveals that he advised this physician of the March 16th flareup. In addition, Dr. David Thaler's report of April 17, 1981 also lends credence to the claimant's comment that he experienced a flareup on March 16, 1981. It is noted from the pleadings that claimant has not claimed a new injury but only alleges one injury date, that being November 11, 1980.

Shortly after March 16 the claimant returned to his home in Wisconsin and immediately applied for unemployment compensation in the state of Iowa. By that application he acknowledges that he is ready, willing and able to return to some form of work. Claimant did, in fact, receive compensation for an extended period of time. It was not until June 3, 1981 that Dr. Larson's notes indicate the claimant returned to him with continuing complaints of back discomfort. Claimant remained under Dr. Larson's care until June 15, 1982, when the relationship was apparently discontinued. This date is the last from Dr. Larson substantiating the healing period issue. Particular weight will be accorded Dr. Larson's opinion on the healing period issue because he was involved in claimant's treatment on a regular basis during this time. A review of Dr. Larson's testimony and his office notes reveals that the claimant was gradually improving during this period of time and was on a continued course of medication and conservative treatment. It would appear to the undersigned that for the period June 3, 1981 through June 15, 1982, the claimant was in a state of healing and had not reached maximum recuperation under the Iowa Workers' Compensation Act. This position is substantiated by Dr. Larson's statement that the claimant was unable to return to work.

An examination of the medical documentaion in this case indicates that no permanent functional disability rating has been attached to the claimant's condition. However, as noted in the aforecited case law, the degree of functional impairment is only an element of the overall industrial disability determination. An industrial disability or loss of earning capacity can be found even if there is no testimony concerning functional loss. See Dinkel v. Department of Public Defense, Appeal Decision filed April 15, 1982. The record is clear that claimant is operating under a weight restriction. He has also been advised to avoid heavy lifting. Claimant attempted to return to work in his prior capacity but was unable to do so effectively. Mr. Albertus is an experienced ironworker and stated that he cannot perform this work because of his present physical condition. The record is clear that claimant did not suffer from his present affliction prior to the date of injury herein. Therefore, based on the record as a whole and taking into account the aforecited industrial disability considerations, it is determined that claimant has sustained an industrial disability of 20 percent of the body as a whole.

There are certain medical bills in the file which appear to have occurred in conjuction with this injury, and payment of those bills will be the responsibility of the employer and insurance carrier.

FINDINGS OF FACT

That on November 14, 1980 the claimant was an employee of the defendant.

That on November 14, 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 was off work for the period November 14, 1980 through December 1, 1980 at the direction of his personal physician, Dr. Larson, and was in a state of healing during that period of time.

That the claimant returned to work on or about December 9, 1980 and worked until December 29, 1980, when he noted a flareup in his low back condition.

That the claimant was in a state of healing from December 29, 1980 to March 16, 1981, when he returned to work.

That the claimant worked one day, on March 16, 1981, and made complaints of continuing back discomfort on that date.

That on March 16, 1981 the claimant was laid off from the employer's employ due to economic conditions.

That the claimant was examined by Dr. John Huey and Dr. David Thaler on or about March 16 or March 17, 1981, and their reports are consistent with the claimant's testimony concerning continuing discomfort.

That the claimant returned to his home in Wisconsin on or about March 17, 1981 and immediately applied for and received unemployment compensation from the state of Iowa.

That in conjunction with the receipt of employment compensation, the claimant certified that he was ready, willing and able to return to some gainful employment. He did not, however, return to any form of employment.

That the claimant returned to Dr. Larson for examination and treatment on June 3, 1981.

That the claimant was in a state of healing from June 3, 1981 through and including June 15, 1982, when the relationship with Dr. Huey was apparently discontinued.

That the services rendered by Dr. Harry Larson and Dr. D. Christensen are causally related to the work injury in question.

That the claimant testified that he was hospitalized in early January by Dr. Larson and/or Christensen in the Bayfield County Hospital and that hospitalization is causally related to the work injury in question.

That the claimant is now functioning under a weight lifting restriction of 20 to 25 pounds.

That the claimant has been advised to avoid heavy lifting.

That lifting substantial amounts of weight is required in the job of ironworker.

That the claimant was in good health and did not function under any physical restrictions prior to the date of injury.

That the claimant is 43 years old and has a GED Certificate.

That the claimant has historically been employed in positions requiring physical exertion and activity.

That claimant was employed as an ironworker prior to the date of injury.

That based on the record as a whole claimant has sustained an industrial disability of 20 percent of the body as a whole.

CONCLUSIONS OF LAW

That the claimant sustained his burden of proof and has established a causal relationship between the injury of November 14, 1980 and his present disability.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants shall pay unto claimant healing period benefits for the period November 14, 1980 through December 9, 1980; December 29, 1980 through March 15, 1981; and June 3, 1981 through June 15, 1982 at the stipulated rate of three hundred nine and 67/100 ($309.67) per week.

That defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred nine and 67/100 dollars ($309.67) per week.

That the defendants shall pay unto claimant the following medical expenses:

Dr. Harry H. Larson	$175.00
Bayfield County Memorial Hospital	836.65

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

That interest shall accrue pursuant to section 85.30, Iowa Code, as amended.

Costs of this action are taxed to defendants pursuant to Industrial Commissioner's Rule 500-4.33.

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

Signed and filed this 12th day of January, 1983.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARCHIE E. ANDERSON, Claimant, vs RALSTON PURINA, Employer, and AETNA CASUALTY & SURETY, COMPANY, Insurance Carrier, Defendants.	File No. 666012 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Archie E. Anderson, Jr., claimant, against Ralston Purina, employer, and Aetna Casualty & Surety Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury of April 18, 1979. It came on for hearing on January 6, 1982 at the Iowa Industrial Commissioner's Office in Des Moines, Iowa. It was considered fully submitted with the filing of the deposition of Mark Thoman, M.D., on May 25, 1982.

The industrial commissioner's file contains no filings.

The parties stipulated to a rate of compensation of $166.14.

The record in this matter consists of the testimony of claimant, Raynette Anderson, Jim Murra, Ted Williams, David Rieks and Dr. Thoman; claimant's exhibit A, a series of medical reports; claimant's exhibit B, scientific resources; claimant's exhibits C and C1, the bibliography and curriculum vitae of Dr. Thoman; claimant's exhibit D, medical expenses; claimant's exhibit E, a preemployment history and series of physical examinations; claimant's exhibit F, an Iowa Bureau of Labor record; claimant's exhibit H, the deposition of claimant; claimant's exhibit I, records of medical tests; defendants' exhibit 3, a letter from Lynn Newton dated November 7, 1979; defendants' exhibit 4, a letter from Paul W. Cundiff dated April 22, 1979; defendants' exhibit 5, employment records; defendants' exhibit 6, a portion of the Handbook of Poisoning; defendants' exhibit 7, a portion of Poisindex; defendants' exhibit 8, a portion of the Physician's Desk Reference; defendants' exhibit 9, a letter from Frank A. Bird dated May 19, 1980; defendants' exhibit 10, a letter from Bird dated December 7, 1979; the deposition of Jim VanEck; the deposition of Donald Morgan, M.D.; and the deposition of Dr. Thoman.

Defendants' objection to claimant's exhibit F and claimant's objection to defendants' exhibit 3 were considered in weighing the evidence. Claimant's objections to defendants' exhibits 1 and 2 are sustained. Claimant objected to defendants' exhibit 4. That objection will be overruled.

Iowa Code section 622.28 provides:

> Any writing or record, whether in the form of an entry in book, or otherwise, including electronic means and interpretations thereof, offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness, and if the judge finds that they are not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.

The Iowa Supreme Court in State v. Anderson, 159 N.W.2d 809, 814 (Iowa 1968) set out the requirements of admissibility under Iowa Code section 622.28 as follows:

> (1) that the record was made in the regular course of business, (2) that it was made at or about the time of the act, condition, or event recorded, (3) that the source of information from which the record was made and the method and circumstances of its preparation were such as to indicate its trustworthiness, and (4) that the record is not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.

The opinion of the court in State v. Fisher, 178 N.W.2d 380 (Iowa 1970) at 382 stated the purpose of the rule was "to liberalize the circumstances under which memoranda, reports, and other data may be admissible into evidence without the necessity of producing each person who contributed information to those records or who had a part in assembling them."

The undersigned appreciated the filing of a complete transcript. Briefs were submitted by the parties.

ISSUES

The issues in this matter are whether or not claimant suffered an injury arising out of and in the course of his employment; whether or not there is a causal connection between any injury claimant may have suffered and a present disability; whether or not claimant is entitled to temporary total, healing period or permanent partial disability benefits; and whether or not claimant is entitled to benefits under Iowa Code section 85.27.

STATEMENT OF THE CASE

Claimant testified at hearing and by way of deposition.

Thirty-three year old married claimant, father of two children, has a high school education, some courses in business at a community college and a four year agricultural course through the Veterans Administration.

After graduating from high school and prior to the time he entered the army where he served in the combat engineers as a clerk typist with one year in Viet Nam, he worked for defendant employer as a grinderman grinding soybean flakes into meal. When he got out of the army honorably discharged as a corporal, he returned to defendant employer first as a grinderman and later as a solvent operator. He described the latter job as taking the raw soybeans, cracking them, hulling them, flaking them and then using the solvent hexane to extract the oil. He recalled that in 1974 due to cutbacks at the plant, he went to work as a route salesperson delivering towels and uniforms. Eventually he moved to route supervisor. He was offered a manager's job in Minnesota, but he elected not to move and went to work delivering milk, a job for which he obtained a chauffeur's license. In 1976 he went back to work for defendant employer as a relief solvent operator. When he was not working as a solvent operator, he did painting and clean-up. Following the incident of April 18, 1979, he became a maintenance helper. He then progressed to a Class C maintenance man and was a Class B maintenance man at the time of hearing.

Claimant recalled that prior to the incident of April 18, 1979, he had bid on a job of maintenance helper because he was tired of being a solvent operator and because he felt he could learn skills which would be of greater use to him in the event of a future plant shutdown. His hesitation in taking the position before the incident was that he was taking a cut in pay and that he feared a lack of mechanical skills. After the incident, he gave consideration to being away from chemicals. Claimant refused to say that he would have accepted the job had the incident of April 18, 1979 not occurred.

Claimant, who asserted he was exposed to more hexane than usual on April 18, 1979, testified that hexane is pumped from a tank outside into the rotocell. The hexane is changed to vapor and eventually condensed back to liquid form to start the process again. He recalled the events of the day as follows: Between 7:00 and 8:00, he went into the extraction building to check for abnormalities or steam, water, hexane, oil or meal leaks. He said:

> I heard a thump in the rotocell, and it's probably nothing unusual. But anyway I looked inside of the rotocell through the sight glass that was leaking, and I watched approximately three to four baskets of soybean flakes dump into a conveyor and take them out of the rotocell. And the time between the baskets dumping was, I believe, four and a half minutes. Every four and a half minutes one was dumped, and I think I watched three, probably four. I am not sure.

The gasket inside the sight glass was broken or torn and allowed fumes to escape. He could smell the leak and see waviness in the air from the vapor. There was an air mask in the building, but it required another person to crank air for the wearer. He went to the roof and cleaned off some soybeans which had fermented up there over the winter. He was unsure whether or not hexane had been applied to those beans. He went home. He had a headache. He took no medication. He took a shower. He and his spouse were driving to Fort Dodge to celebrate their wedding anniversary. At the outskirts of Fort Dodge, he started seeing objects before his eyes. He pulled off the road and shut his eyes. When he opened them again, he still had the headache, but his vision cleared. They ate supper. They had no alcohol. They went to a shopping center. He said:

> And while in the shopping center, my wife went one way, and I went the other way. And when she came back, I had a whole armful of tapes that I wanted to buy, and I had a real high tremendous feeling. And I didn't think about what they cost or nothing. I

bought my girl two or three pairs of shoes, and then after that she told me to put all them back; we didn't need them. She didn't know nothing was wrong then.

When I got in the car, I went to find the ignition, and I couldn't find the ignition in the car. And I could understand what my wife was saying, but I could not form any words. I couldn't express myself. At that time she told me to get over on the other side and she would drive.

So she drove from Fort Dodge to Webster City where my aunt and uncle live and went there. And I don't recall -- I recall very little of being there. I recall seeing a foreign doctor, Dr. Reveiz, that came to the house to examine me. I can just visualize what he looked like, heard him talk, what he talked like. From there he called my doctor in Iowa Falls and told him what was going on, and my doctor said to bring me to the hospital. And my aunt and uncle drove me in their car to the Iowa Falls Hospital where -- I don't remember any of this. This is just what they have told me.

He had seizures in the car. He testified:

When I got to the hospital, I don't recall nothing of being in the Iowa Falls Hospital except possibly it seems like I can remember setting in a wheelchair. But like I say, I don't know for sure, and Dr. Graham said when he first came in, that I was laying on the floor in a grand mal seizure, and that's where he first sighted me.

Claimant thought that he was released from the hospital on April 26 and that he returned to work on Monday, April 30. He worked two days and was then off for three days with headaches and shaking. He missed work totalling seven additional days when he went to Mayo Clinic, to see Dr. Winston and to see Dr. Thoman Claimant testified to mileage expenses.

Claimant admitted he had been in minor accidents which resulted in no injuries. He denied whiplash, head injuries, prior convulsions and high blood pressure. He recalled losing the end of his finger in an industrial accident while he worked for the towel company and a broken ankle and torn cartilage as a result of wrestling. Claimant said he was unaware of a febrile seizure as an infant or that a maternal uncle had seizures. He thought Dr. Winston obtained that history from his parents.

He asserted that hexane fumes are always present in the plant. He recollected:

Before we got the rotocell -- it's a fairly new machine -- we used to have two upright extractors that had the baskets in them. And at the time when you are shut down, we would go inside the old extractors and dig out any flakes or meal that would fall out of the baskets and clean the bottoms of them out more or less. And if there was a pile of meal laying there, it would form sort of a crust. And when you open that crust up, then there would be hexane fumes come out. They would be captured underneath the crust, and then when you opened it, they would come out.

He said that in the preceding eight years, he had experienced feelings of lightheadedness and drunkenness and pounding in his ears. With these symptoms, he sought fresh air.

Claimant took Dilantin following the incident. At some point, he elected to stop taking it. At the time of his deposition he claimed he was taking headache pills each night to put him to sleep. He also had sleeping pills which he reported at the time of hearing he had used only one time.

His present physical complaints are headaches coming on as frequently as two or three times a week and averaging four times a month and lasting as long as all day, blurred vision, an inability to sleep without medication occurring two times per week, throat irritation, forgetfulness, leg cramps at night and shaking or trembling less frequent than headaches. Blurred vision and shaking accompany headaches. He stated that he has had no convulsions since April 18, 1979.

Raynette Anderson, claimant's spouse of eleven years, recalled the events of April 18, 1979 as follows: Claimant went to work at 6:15 a.m. He came home at 3:30 p.m. They took their daughter to dancing class and fed the pony. Claimant took a shower. The children were taken to their grandparents. Claimant had a headache. Claimant was talkative which was unlike him, but he was slurring his words which she attributed to tiredness. Claimant had to pull over when he experienced eye trouble. They ate and had no alcohol. Claimant was uncharacteristically liberal with his money at the shopping center. Claimant was not talking right. She decided she would drive. Claimant had a convulsion in the car. She drove to her aunt's home in Webster City and a doctor was called to see claimant. He was taken to the hospital in Iowa Falls and then transferred to Des Moines.

The witness observed that her spouse now has headaches, is forgetful and gets up at night.

Jim Murra, Class A maintenance man and president of the union local, testified to participating in monthly safety meetings where safety problems are brought to the attention of management. He said that he has noticed the hexane odor which varies in concentration. Murra was aware of reports of trouble with a gasket in the days or weeks before April 18, 1979.

The witness stated he was familiar with jobs done by the 50 workers in the plant and said that excluding someone from hexane would exclude them from twenty-four to twenty-six jobs. He thought that ten persons in the plant would have constant contact with the solvent. He stated that a Class A maintenance man has more knowledge than one classified as a B.

Ted Williams, an industrial administration major who has worked for defendant employer since 1964 and whose current title is director of soybean operations, testified that he knows claimant and of his claim. His testimony as to the manner in which the beans were processed was much the same as claimant's. In regard to the use of hexane, Williams said the flakes are placed in the extractor and washed with hexane. The oil and hexane are removed for distillation. He provided a description of the extractor area and recalled that the rotocell is placed in the annex, a building sixty by eighty and three stories high with metal gratings replacing floors. He characterized hexane as being volatile, easily vaporized and heavier than air. He claimed that employees were instructed about hexane and safety checks were performed periodically. There were also informal discussions between the men and their supervisors. He acknowledged that the company had received warnings about hexane.

Williams reported that both claimant and the company were looking for a cause of his incident. He recalled that claimant's original concern was with moldy soybeans. Samples were taken of the beans and tests were run in St. Louis. He accompanied Dewayne Knudson when testing was done to establish hexane concentrations at various places including the area of the sight glass. Later tests entailed having an operator actually wear a testing device. He said inspectors from both Iowa and Federal OSHA visited the plant.

The witness asserted it was common practice to have a document such as that prepared by Paul Cundiff drawn up at the time of an unusual occurrence. As Cundiff was claimant's supervisor and as claimant was in a relief slot, Cundiff arranged claimant's schedule. Williams said it was Cundiff's "direct responsibility to investigate claimant's incident."

Although the witness was unsure when it had been accomplished, he knew the site glass had been repaired and replaced from time to time because of leakage.

David Rieks, maintenance supervisor and claimant's supervisor from June 1980 to October 1, 1981 testified that pipe fitting, boiler operating, carpentry and millwright skills were needed to perform maintenance work. He rated claimant as a "pretty fair" welder, millwright and sheet metal worker, and a good pipe fitter and boiler operator. Rieks did not recall claimant's complaining of a headache or complaints relating to being sent to the extractor building. He found claimant physically capable of working and a good, reliable and honest worker. The witness admitted awareness of the danger of hexane.

Jim VanEck, certified rehabilitation counselor, testified to receiving information from the insurance carrier, claimant's deposition and claimant's employment record and to attending the hearing in this matter. It was his understanding that the seizure disorder was a one-time occurrence, that claimant was precluded from working at heights or around some types of machinery, that claimant should stay out of areas with high concentration of hexane and that claimant might have hypersensitivity to other chemicals. He found, based on the medical information, that claimant would not be precluded from doing work he had done in the past; however, he later ruled out work as a solvent operator and in jobs involving high concentrations of industrial chemicals. He described claimant as adequately motivated to seek out and perform work previously done.

Claimant's preemployment history dated January 11, 1972 lists three maladies--ear disease, indigestion and swollen feet. A physical by Robert Dunlay, M.D., includes three abnormal findings--a surgical scar on the right ankle, a scar on the left knee and an unhealed pilonidal cyst repair. Prior physicals in 1970 and 1966 listed claimant in excellent health; however, the 1970 exam noted he was "a little heavy."

Records from Ellsworth Municipal Hospital show claimant was admitted on April 18, 1979 and transferred after fifty minutes. The admitting diagnosis on the unresponsive claimant was grand mal convulsive seizure. The diagnosis on transfer was multiple grand mal convulsions of undetermined etiology. Thomas C. Grahm, M.D., noted in the discharge summary that he discussed the case with Dr. Winston who suggested toxicity or toxic drug inhalation as a cause.

Stuart R. Winston, M.D, neurosurgeon who admitted claimant to the hospital on April 19, 1979, reported to Dr. Graham in a letter of that same date that no abnormalities were found on a computerized brain scan and no evidence of increased intracranial pressure and claimant had been started on medication. An electroencephalogram was interpreted by Alfred Socarras, M.D., as showing no seizure discharges and no focal abnormality. Dr. Winston's history included a febrile seizure at age one and a family history of an epileptic maternal uncle. Claimant was seen in consultation by Steve Zorn, M.D., apparently because of a positive antinuclear antibody test. He found no evidence of a connective tissue disorder or of vasculitis. Later tests showed a nonreactive rheumatoid factor.

A note dated April 26 states: "I gave him slip: Seizures may have been due to chemical influence at plant--not certain--would be better to avoid hexene gas--may be sensitive to it."

In a follow-up letter dated May 2, 1979, Dr. Winston expressed the feeling that claimant should remain on the anticonvulsant for a year and stated that "[t]he exact etiology of his [claimant's] seizure is obscure at this time and . . . may be related to some toxin, to which he been exposed [sic]."

On June 11, 1979 Dr. Winston wrote to employer's medical director:

We are faced with a patient who has had adult onset

> of seizures of obscure etiology and would naturally look at the possibility of some environmental factor as playing a role. The only possibility that has been questioned is whether or not he had any exposure to Hexene fumes the day in question. Apparently he had been sweeping soybean products on the roof of the plant and whether or not he had additional exposure to Hexene fumes I cannot say. I certainly am not an epidemiologist. Certainly significant exposure to these materials are capable of producing a convulsive episode, as I am certain you are aware of and understand your concern. My only question is whether he had significant exposure to have either respiratory or transcutaneous absorption of Hexene in abnormal quantities to have caused this problem.

Dr. Winston reported to Dr. Graham on July 31, 1979 that claimant's serum dilantin level was low. He advised repeating the testing and increasing the dosage.

On April 27, 1981 Dr. Winston wrote:

> No tests were performed as related to neuropathy or polyneuritis since there were no complaints related to that situation at the time of his hospitalizations just the seizure activity for which we were never able to find a true explanation. Certaintly, the EEG which was normal might have picked up the kind of thing had it been abnormal that might have been related to the problem proximate, and those of which potentially then could have caused a peripheral neuropathy, etc..

Allan J. D. Dale, M.D., neurologist, recounted the findings of the Mayo Clinic in a letter dated July 10, 1979. A neurological was normal. X-rays of the skull were negative as was a CT scan. Waking and sleeping electroencephalogram showed no abnormalities. Laboratory investigations were negative. He expressed the opinion that "claimant suffered an acute encephalopathy two and one-half months ago, the cause of which remains unknown. It appears to have resolved. . . . He was advised to continue Dilantin, 100 mg. t.i.d. for another 6-9 months. Should he remain well at that time and neurologic studies then continue to be satisfactory, gradual discontinuation of Dilantin over two weeks could be considered."

Claimant was admitted to Iowa Methodist Medical Center by Dr. Thoman on November 20, 1981. Pulmonary function studies were done. The mid expiratory time, peak flow and residual volume were slightly increased. The expiratory reserve volume was somewhat decreased. Dennis H. Kelly, Jr., M.D., assessed the studies as normal. An electroencephalogram done December 10, 1981 also was found normal by Alfredo Socarras, M.D.

Mark Edward Thoman, M.D., board certified pediatrician and clinical toxicologist who is director of the Iowa Poison Information Center at Iowa Methodist Hospital and editor of the Journal of the Academy of Clinical Toxicology, testified that he frequently makes formal evaluations to determine causation and suspected intoxications and described his procedure in this case and in others as follows:

> A. The first thing one does is to sit down with a history of all known toxins or a toxin and see if the features that are documented in the individual's history as well as those physical findings that are consistent with that are, in fact, consistent with a profile of the toxin in question. Then once the review is made of the medical records, if that's available, and the history of the individual along with physical findings at the time or after the incident along with a review of any sequelae or aftereffects, and these were coordinated with known cases and these known cases are, as you mentioned earlier, cases which may have been reported to the national clearing house which filter down to the various poison centers.
>
> So we sort of give and receive from the poison center aspect. We give our information to the national poison center clearing house and then we get a rundown of what signs and symptoms might have been encountered by a toxin in question. In addition, there is literature, there is the microfiche system, the Poisindex and two other computer lines, a Toxline and Medline. These are computer modums where one can tap into a computer bank of information on bibliographies on certain types of toxins. Toxline is similar and it goes into the toxic area, not just the medical literature on a subject.

Dr. Thoman had available to him claimant's exhibit A, an OSHA record including the information in claimant's exhibit F, claimant's exhibit B and two portions of claimant's deposition.

The toxicologist first saw claimant on November 20, 1981 and talked with him about his history. Dr. Thoman was aware that claimant's uncle had a seizure disorder and that claimant had an infantile seizure and he incorporated that awareness in his opinion. He agreed exposure to agent orange also was significant. The doctor testified "that the physical conditions and the reaction of Archie Anderson at the time of the incident in April of 1979 was consistent with the hexane exposure that was given in history at that time." As a basis for that conclusion he said, "in going into the individual's medical history and background, there had been no significant problems neurologically prior to that time, in the incident where the signs and symptoms became consistent with hexane inhalation. . . ." Those signs and symptoms were listed as slurred speech, confusion, visual difficulties, impaired senses, irritability, memory lapses, convulsion problems and irritation of the upper and lower respiratory tract. As to where these symptoms would occur he cited the nasal and oral pharynx, the trachea and the lungs. Absorption would occur through the lungs and the chemical would go into the bloodstream to the various tissues. The doctor said he understood claimant's exposure occurred in a concentrated form over several minutes time. The time for onset of symptoms could be as short as a half hour or as long as ten to twelve hours. As hexane has a lower toxicity, it should have a higher concentration and take a longer period of time to manifest itself.

Dr. Thoman claimed that this sort of chemical has an affinity for neurological tissue--a neuropathic tendency which affects the nervous system and can cause cerebral edema.

The toxicologist recalled claimant's complaints at the time of his exam as sleeplessness, headaches, irritability and trembling--complaints consistent with hydrocarbon toxicity. A number of tests were performed. The complete blood count, the erythrocyte sedimentation rate, chest x-ray, S-12, drug screen, eletroencephalogram and pseudocholinesterace were normal or negative. Claimant's blood pressure and his triglycerides were elevated.

The doctor summarized potential problems as:

> One is the fact that there is a higher incidence, in my opinion, of convulsion occurring with physical and/or chemical trauma. Secondly, the sensitization or the chemical insult to the system can make this individual much more susceptible to other chemical irritations, even to the point of causing problems up to and including convulsions, so they are related.

Dr. Thoman was aware that claimant had been on Phenobarbital and Dilantin, that the Phenobarbital was discontinued and that the Dilantin had been discontinued about a year ago. Regarding the claimant's need for medication, the doctor said:

> I think if he is stable and has a reasonable degree of care in his environment and contact with certain toxins, particularly those that are straight-change [sic] hydrocarbons or other toxins such as insecticides, pesticides, that he probably would not need to be on an anticonvulsant unless such symptoms came up, but he would need to be monitored medically from time to time to make sure that there is no evidence that he might be setting himself up, shall we say, for a return to the neurological problems he had initially.

He acknowledged that some of the symptoms experienced by claimant are the same as those from an adverse reaction to Dilantin. Those manifestations include nystagmus, ataxia, slurred speech, mental confusion, dizziness, insomnia, transient nervousness, motor twitching and headache. The doctor testified that development of a serious system disorder would generally occur in a year, but that recovery could take up to four years. He agreed that claimant would need regular physical examinations including electroencephalograms. He suggested claimant should avoid chemicals and toxins, be in an area with good ventilation and avoid physical insult. The doctor recognized a host response in the manner in which persons respond to a toxin and thought claimant might be more susceptible to hexane in that an exposure of a shorter duration at a lower concentration could trigger this same affect.

Dr. Thoman admitted that the OSHA threshold limit value is five hundred parts per million, but stated that claimant could have been affected by two hundred parts per million. The doctor had access to test results from a test done September 5, 1980. He said that wind, temperature and humidity could affect the results.

Dr. Thoman provided a deposition after he reviewed the deposition of Dr. Morgan. He identified the points at which their opinions are divergent as whether or not hexane is a depressant or a convulsant and the extent of the latent period.

As a follow-up to his prior testimony, the doctor had talked with others about the mix in commercial grade hexane and confirmed his impression. He also checked a special issue of Clinic Toxicology which showed percentages of hexane in commercial hexane ranging from twenty to sixty. Usually associated with hexane were 2-methylpentane and cyclohexane. Dr. Thoman then consulted a local distributor to discover the chemical makeup of its hexane and was told methylpentane, cyclohexane and methycyclopentane was contained. The expert did not know the type of hexane used by defendant employer, but he assumed other chemicals were involved. Nor did he know the type used in the articles offered by claimant as exhibit B.

The doctor testified that the six carbon chain hexane would act as a central nervous system depressant with long-term nerve damage. However, he cautioned that it could cause reactions and more specifically inhaled hexane could cause damage to the nervous system or cardiac arrythmia accompanied by syncope. Dr. Thoman continued to believe that hexane alone might cause a convulsion in claimant's case, but he thought it more likely to have been an isomer mix. The doctor also pointed out that there are no good reasons either genetically or traumatically for the convulsion.

Dr. Thoman acknowledged that there was no reference in claimant's exhibit B to convulsions being a sign. He agreed with Dr. Morgan that peripheral neuropathy and seizures are different entities.

The toxicologist thought the latency period might be related to swelling of the brain. He said a CT scan would appear normal and brain swelling might still be present. An electroencephalogram would show convulsive waves and a characteristic pattern in persons with epilepsy or a convulsive disorder. A spinal tap could provide a tip-off to cerebral edema. He considered claimant's symptoms consistent with developing chemical insult and he said:

> Finally, in review of his charts, EEG scans, chemistries, all the tests I reviewed in the hospitals

> where he was a patient, there is no other good reason in the differential or the total exhaustion of all other possibilities of any other causes. He did not have meningitis, brain tumor, and except for the one questionable episode as a convulsion as a child and the distant family history I think of a convulsion in an uncle, there was no previous central nervous system problem that had been brought out of the history and that I reviewed.

Donald Morgan, M.D., board certified toxicologist with a Ph.D. in physiology and who is an assistant editor of Poisindex, testified that he is involved in research regarding the chronic effects of various chemicals on certain persons. The doctor had reviewed claimant's deposition; the hearing transcript; and claimant's exhibits A, B, F and I. He arrived at his opinion by investigating the toxicity of the chemical involved and the pharmacology in both animals and man and by inquiring into the use experience of the chemical.

Dr. Morgan described hexane as a clear liquid at room temperature which is highly volatile. It is a portion of all types of petroleum distillates and is an extracting solvent. The usual contact is made by inhalation. It is used in paint, the extraction of vegetable oil, degreasing, dry cleaning and curing hides. Overexposure, according to the doctor, would result most commonly in eye and nose irritation. Secondary manifestations would be dizziness and headaches. More severe exposure would lead to incoordination, stumbling gait and drowsiness. Protracted exposure could result in peripheral neuropathy. An enormous exposure could act as an anesthetic. The toxicologist was unable to find that seizures are a manifestation of hexane toxicity. He differentiated between hexane causing peripheral neuropathy and seizures saying that the two are distinct entities.

The doctor characterized peripheral neuropathy as follows:

> Peripheral neuropathy is a condition manifest as a slow progressive onset of numbness, tingling, pain, and weakness in the arms and legs. It comes on slowly, persists for weeks, sometimes months, then resolves slowly. In some cases it does not resolve entirely and the person is left with some defects in sensation, some weakness.

Based on the evidence he had reviewed, Dr. Morgan concluded that claimant's illness was not related to his hexane exposure in that hexane is not a convulsant, the time lapsed between the exposure and onset was long enough that the hexane should have been eliminated and that convulsants work promptly on exposure. The physician saw claimant's developing a headache after 5:30 as attributable to something other than hexane. He agreed to substantial variability biological reactions and in thresholds between individuals. The doctor was asked, "Could an exposure of this kind aggravate a person's pre-existing condition that had symptoms and trigger those symptoms at the time?" He responded, "Certaintly a reasonable idea. The feature of this case which makes me think that that is probably not true is the fact that it took seven hours. We usually think of a triggering mechanism as acting very, very promptly."

Again, based on the evidence he had reviewed, he thought it "very likely" claimant would not suffer any permanency from the exposure. Dr. Morgan explained:

> To begin with I don't think that the hexane caused his seizure in the first place. If he has subsequent ill health, I simply would be unable to relate it to his hexane exposure, and he does not manifest peripheral neuropathy. His symptoms and signs are not characteristic of neuropathy. If he had neuropathy, my opinion would be very different, but he doesn't.

He also cited claimant's period without convulsions and the "reasonably good" prognosis of his remaining seizure free. As to the possibility of sensitization occurring, the doctor said:

> Hexane is not a sensitizer, and I know of no basis in the clinical pharmacologic literature to indicate that people have less tolerance for it in the future. The only connection in which I can visualize some kind of sensitivity is if Archie Anderson is terribly anxious about his exposure to hexane; and if anxiety figures in it, then I can understand the basis for not allowing him to have excessive exposure to it in the future.

Later he said:

> It can go either way, as you say. People exposed to chemicals may develop a tolerance which means that they can be exposed to higher and higher levels without adverse effects. Basically, that's a mechanism which depends on effective metabolism of the chemical, its destruction in the body and excretion.
>
> The opposite phenomenon which I think you have in mind is an increased sensitivity. To my knowledge, that has not appeared in the case of hexane and neither has tolerance, for that matter.
>
> I might say you may have had in mind in addition that some people react qualitatively differently, and I think the variablity in that respect is much less than it is in threshold with respect to a single adverse effect. When we have it must be seventy-five years of use experience with hexane and you can't find a single record of seizures as a result of that, I have to take it as very exceptional that this one individual just happened to have a seizure seven hours later.

The toxicologist stated he would have reservations about placing claimant in positions where he might be a hazard to himself or others; however, he did not expect the episode would preclude his employment in chemical industries generally.

Dr. Morgan reported one hundred parts per milliliter as the safe level of hexane exposure according to the American Conference of Governmental Industrial Hygienists. He said that the five hundred level probably was not an acceptable safe level. He found the quantity of hexane to which claimant was exposed irrelevant as he did not think hexane induced convulsions.

Dr. Morgan saw claimant's maternal uncle's seizures as being suggestive. He attributed the same significance to claimant's childhood seizures.

Accompanying Dr. Morgan's deposition were a number of exhibits. Claimant made objection to these exhibits and those objections were considered in evaluating the evidence. A summarization of the toxicology in deposition exhibit 1 reports convulsions in rats at 35,000 to 40,000 ppm and that "[c]hronic effects have rarely been reported." Exhibit 2 is taken from Patty's Industrial Hygiene and Toxicology. It recognizes that hexane may be used in pure form or mixed with isohexanes and cyclopentane and that chronic exposure can result in motor polyneuropathy. It recounts peripheral neuropathy in research involving rats. Blockage of nerve impulse was seen in some research with toxic forms in frogs and structural change was noted in the myelin sheath in rats. Exhibit 3 is entitled Hazardous Chemicals Data 1975 and as Dr. Morgan pointed out deals primarily with the explosive hazard of common solvents. Exhibit 4 is taken from a text book, Clinical Toxicology of Commercial Products. The portion submitted refers to kerosene and mentions hexane as a portion of the fraction, benzine. The text at page 189 states: "Hydrocarbons of all types induce central nervous depression, but the aliphatic hydrocarbons [hexane] (which predominate in petroleum distillates) are said to produce profound coma with an inhibition of deep tendon reflexes, whereas the coma from aromatic hydrocarbons is characterized by motor restlessness, tremors and hyperactive reflexes (von Oettingen, 1940)."

Listed in claimant's exhibit as symptoms of hexane poisoning are "numbness of the face and other body parts; coldness, redness, roughness of skin; muscular weakness; underactive or overactive reflexes; impairment of sense of touch, smell, and other senses; loss of body weight; muscular decay, optic nerve decay and inflammation; facial muscle weakness; visual difficulties; anemia and urination disturbance."

Claimant offered a number of scientific articles which are well summarized in the final pages of claimant's offer along with the other hexane research. Only the Krasavage article is omitted. Relevant portions of that exhibit are included below:

> Hexane is three times as acutely toxic to mice as is pentane; concentrations of 30,000 ppm produced narcosis within 30 to 60 minutes, and convulsions and death resulted from 35,000 to 40,000 ppm. In man, 2000 ppm for 10 minutes resulted in no effects, but 5000 ppm caused dizziness and a sense of giddiness. Drinker et al found slight nausea, headache, eye and throat irritation at 1400 to 1500 ppm. Nelson and co-workers found no irritation at 500 ppm in unacclimated subjects.
>
> The preceding data relate generally to n-hexane, although the purity of the liquid was not always specified.
>
> Volatile petroleum solvents, such as petroleum ether and rubber solvent, which contain various isomers of hexane, as well as other alkanes, have been observed to cause narcotic symptoms, such as dizziness, when concentrations exceed 1000 ppm, but from levels below 500 ppm.
>
> Until recently, chronic intoxication from hexane had not been established. In 1967, Yamada described 17 cases of polyneuritis among workers exposed reportedly to n-hexane. Six worked in laminating plants where concentrations of hexane vapor ranged from 1000 to 2000 ppm. The hexane solvent contained 64% of the normal isomer. Eleven cases were from a pharmaceutical plant where concentrations of hexane (95% n-hexane) were between 500 and 1000 ppm.
>
> Yamamura, in 1979, reported that 93 of 296 workers exposed to hexane in the manufacture of sandals were classified as having polyneuropathy. Exposures ranged from 500 to 2500 ppm, for 48-hour or longer work-weeks. Inoue, reporting on the same study, indicated that some affected workers had exposures to n-hexane below 500 ppm.
>
> Herskowitz et al described three cases in 1971 of sensorimotor polyneuropathy in employees of a furniture factory. n-Hexane concentrations averaged 650 ppm.
>
> . . .
>
> Abritti and associates and Buiatti and co-workers reported upon polyneuropathy among Italian shoe workers. There was a correlation of incidence and intensity of signs and symptoms with the degree of exposure to glue solvents. Abbritti found these solvents to contain chiefly pentanes, hexanes and heptanes. Buiatti reported that the solvents apparently responsible for 86 cases of polyneuropathy among 338 workers contained 40-90% n-hexane, 7-54% other low-boiling hydrocarbons and 7-10% n-neptane.
>
> . . .

In 1973, Gaultier reported polyneuritis among workers exposed to the vapors of a solvent containing 85% pentane, 14% heptane and 5% hexane.

While many of the above reports specified n-hexane as the chief, if not the only, solvent used, some indicated that exposures were to mixtures in which n-hexane was, or may have been, a minor ingredient. It would be unusual, moreover, for n-hexane as such to be used for general solvent purposes. Even a very narrow boiling range solvent would be likely to contain as much as 95% of a single compound. In most instances it is probable that commercial hexanes were used, with normal hexane contents which might vary from 20 to 80%. Details of the analytical procedures in the above reports were not given.

It is not uncommon practice, when discussing paraffin compounds, to omit any prefix when referring to the normal isomer. Thus, on the one hand, hexane may in fact mean normal hexane, and on the other hand, it may be assumed to be the normal isomer when other hexanes are present and may even predominate.

. . .

Japanese investigators reported that neurotropic effects occurred in mice exposed at 250 ppm of hexane for one year. Exposures were for 24 hours/day, 6 days/week, and the hexane contained 65-70% of the normal isomer. Spencer exposed rats 21 hours/day, 7 days/week for up to 8 months at 129 ppm of n-hexane, and found their nervous systems structurally unaffected.

Truhaut et al exposed rats at 2000 ppm of commercial hexane (46% n-hexane) 5 hours/day, 5 days/week for 1 to 6 months. Evidence of neurotoxic effects was found, but similar changes were noted from 1500 ppm of technical heptane (52% n-heptane).

. . .

Occupational polyneuropathy has apparently resulted from hexane exposures as low as 500 ppm, and probably lower. Nearly continuous exposure of animals at 250 ppm has also caused neurotoxic effects. The provisional TLV of 25 ppm for n-hexane is based on the worst possible case, namely that many of these reports involved commerical hexane with a n-hexane content as low as 30%. A more detailed review of the references leads to the conclusion that in most instances the solvents were believed to contain 50 to 70% n-hexane. For this reason a TLV of 50 ppm as a time-weighted average would seem to be more logical than one of 25 ppm. No STEL is suggested at this time.

APPLICABLE LAW AND ANALYSIS

The first issue to be resolved is whether or not claimant suffered an injury arising out of and in the course of his employment.

In order to receive compensation for an injury, an employee must establish his injury arose out of and in the course of his employment. Both conditions must exist. Crowe v. DeSoto Consolidated School District, 246 Iowa 402, 68 N.W.2d 63 (1955).

In the course of relates to time, place, and circumstances of the injury. An injury occurs in the course of the employment when it is within a 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, 286 (Iowa 1971).

In addition to establishing that an injury occurred in the course of the employment, the 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 was 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). While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of his 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 a 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).

Preponderance of the evidence means greater weight of the evidence; i.e., the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 39 (1935). Claimant's burden is not discharged by creating an equipose. Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960). It is recognized that preponderance of evidence does not, however, depend on the number of witnesses on a given side. Ramberg v. Morgan, 209 Iowa 474, 218 N.W. 492 (1929).

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, 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 testimony of a medical expert may be rejected when the opinion is based upon an incomplete or inaccurate history. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The evidence must be based on more than mere speculation, conjective, and surmise. Burt v. John Deere Waterloo Tractors Works, 247 Iowa 691, 73 N.W.2d 732 (1956). Expert testimony coupled with nonexpert testimony is sufficient to sustain an award but does not compel one for "[i]t is for the finder of fact to determine the ultimate probative value of all the evidence." Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 1072-73, 146 N.W.2d 911, ___ (1966).

There are serious problems with the claimant's evidence in this case. The first of those problems is the nature of the chemical to which claimant was exposed. Was it hexane in a pure form or hexane in combination with other chemicals? The report from the Iowa Bureau of Labor lists the substance being investigated as n-hexane. At the time of hearing Dr. Thoman appeared to confine his testimony to hexane in a pure form when he said:

> I will say that hexane has often other isomers or other similar chemicals that can be complicating the matter. But hexane, assuming it's hexane alone, can cause the slurred speech which was exhibited, the irritability, the memory lapses, the convulsive problems which were cited earlier, and also consistent with irritation of the upper and lower respiratory tract.

Dr. Thoman, at the time of his deposition, appeared convinced that claimant's exposure was to hexane in combination with other things. The nature of the chemical, however, is only the first of claimant's problems.

Dr. Winston suspected the claimant's seizures were related to something in claimant's environment. He consistently referred to the chemical as hexene, another hydrocarbon unrelated to hexane. Dr. Thoman pointed out that hexene is a double bond carbon while hexane is a single string of carbons. He characterized the distinction between the two as significant. Because of Dr. Winston's thinking that claimant was involved with hexene, his testimony can be accorded scant weight.

Dr. Thoman was questioned about the history on which he based his opinion. He had the following exchange with defendants' counsel:

> A. We were going back in a retrospective history, so we had the deposition, we had the other information, I had the other prior information which I don't always have, and so I wanted to go over Mr. Anderson's story again and, apparently, there were several minutes and it could be as few, in trying to get both extremes, as low as three or four minutes or as high as 10 or 12 minutes, which is what he recalled, and there had been up to three or four hours actual exposure.
>
> The eight o'clock is what stuck in my mind, and I see that from my note and subsequently. Go ahead.
>
> Q. Excuse me. You said three or four hours actual exposure. It's your understanding that that is your understanding that is the exposure he had to hexane that day and it was concentrated for approximately that number of minutes?
>
> A. That's right.
>
> Q. And that was relative to you in reaching your conclusion with regard to the causal connection?
>
> A. That's right.

It was not until defendants had taken the deposition of Dr. Morgan and he had expressed the opinion that hexane is a central nervous system depressant that Dr. Thoman began to include discussion of hexane in combination with other chemicals as he seemed to agree at that point that usually hexane alone would not cause convulsions. Of the chemicals combined Dr. Thoman pointed to cyclohexane and cyclopentane as those which would cause convulsions. His notes regarding commercial grade hexane show that cyclopentane makes up three-tenths of one percent of that product and cyclohexane seventy-four hundreds of one percent. In spite of giving consideration to chemicals in addition to hexane, Dr. Thoman maintained that hexane alone could cause convulsions and was probably a convulsant in claimant's case.

As a counter to Dr. Thoman's testimony, defendants presented testimony from Dr. Morgan. In addition to being a certified toxicologist, Dr. Morgan has a doctorate in physiology. His testimony is consistent, reasoned and convincing that hexane alone could not cause convulsions.

Another persuasive aspect of Dr. Morgan's testimony is the temporal relationship which he cited. Claimant's exposure was early in the morning. His own testimony was that he had on other occasions sought fresh air following inhalation of the gas. In this instance, he worked in the open for much of the morning. Dr. Morgan points out that a triggering device would be immediate. Claimant's seizures occurred about twelve hours after his contact with the chemical.

The Mayo Clinic was unable to determine the etiology of claimant's problem.

The scientific evidence submitted is also unsupportive of claimant's claim.

Claimant's burden is a preponderance of the evidence. That burden claimant has not carried. In view of the conclusion, the other issues presented herein will not be discussed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is thirty-three years of age.

That claimant is married and the father of two children.

That claimant has a high school education, a four year agricultural course and some courses in community college.

That claimant was in the army and served in Viet Nam.

That claimant has worked as a grinderman, solvent operator, route salesperson and delivery person.

That claimant is currently working as a maintenance man.

That claimant's work as a solvent operator brought him into contact with some form of hexane.

That claimant was exposed to some form of hexane on April 18, 1979.

That claimant cleaned up some spilled soybeans later in the day.

That claimant experienced a headache after work and some visual disturbances.

That on evening of April 18, 1979 claimant had what appeared to be seizures.

That claimant was hospitalized until April 26, 1979.

That claimant returned to work on April 30, 1979.

That claimant missed an additional ten days when he went to see doctors and when he was ill soon after his return to work.

That claimant had a febrile seizure as an infant and has a maternal uncle who has seizures.

That following the seizures claimant took Dilantin until he elected to stop taking it.

That claimant continues to have headaches, blurred vision, difficulty sleeping, throat irritation, forgetfulness and leg cramps.

That claimant has had no convulsions since April 1979.

That Dr. Winston was uncertain of the cause of claimant's seizures and thought claimant was working with hexene.

That Mayo Clinic was unable to determine the etiology of claimant's problem.

That claimant had a normal electroencephalogram and normal pulmonary function studies in December 1981.

That Dr. Thoman related claimant's convulsions to his exposure to hexane gas.

That Dr. Morgan was unable to relate claimant's seizures to his exposure to hexane.

CONCLUSIONS OF LAW

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 on April 18, 1979.

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 12th day of October, 1982.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BLANCHE E. ARMSTRONG, Claimant, vs. GENERAL SERVICES, DIVISION OF BUILDINGS AND GROUNDS, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 674311 A P P E A L D E C I S I O N

INTRODUCTION

Claimant appeals from a review-reopening decision in which she was denied additional workers' compensation benefits related to an alleged occupational disease arising out of and in the course of her employment. The record on appeal consists of the pleadings and transcript of the review-reopening proceeding together with claimant's exhibits 1 (claimant's answers to interrogatories); 2 (medical report of Harry B. Elmets, D.O.; medical report of J. W. Hatchitt, D.O.; letter from defendants' attorney to Dr. Hatchitt; medical report of John S. Strauss, M.D. together with patient's chart); 3 (claimant's performance evaluation); and defendants' exhibit A (medical report of Dr. Strauss). A post hearing brief was filed by defendants. Appellant was directed to submit brief and exceptions on appeal after which appellee was allowed time for response. None were filed and the case was considered submitted on October 14, 1982.

ISSUES

As no specific issues were stated on appeal, the impropriety of the proposed decision of the deputy industrial commissioner is unknown.

REVIEW OF THE EVIDENCE

Review of the entire record indicates the recitation of the evidence was adequate with the following additions or corrections:

1. In addition to the G E D acquired by the claimant she obtained six credits for course work at Des Moines Area Community College, and

2. In the fourth paragraph of the Review of the Evidence in the proposed decision the reference to "Dr. Skeeves" should be "Dr. Steves."

APPLICABLE LAW

The recitation of applicable law in the proposed decision is appropriate except that the reference in the McSpadden case to section 85A."B" should be section 85A."8".

ANALYSIS

The analysis in the proposed decision is appropriate with the correction of the word "ethylenedamine" to "ethylenediamine" in line six of paragraph four.

FINDINGS OF FACT

1. That claimant was an employee of the defendant on August 18, 1980.

2. That claimant has a condition which is a form of dermatitis.

3. That claimant is allergic to ethylenediamine.

4. That no ethylenediamine was found to be involved in claimant's employment with defendant.

5. That claimant's work temporarily aggravated her dermatitis but was not the initial cause of it.

6. That claimant has flareups of her dermatitis in conditions of everyday life.

7. That any flareup of claimant's dermatitis caused by conditions of employment was temporary in nature and did not cause permanency.

CONCLUSIONS OF LAW

Claimant does not have permanent disablement from an occupational disease causally related to her employment.

ORDER

Therefore it is ordered that claimant take nothing further from these proceedings.

Costs of the review-reopening proceeding are taxed to the defendants and costs of the appeal are taxed to claimant pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 20th day of October, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE ARMSTRONG,

Claimant,

vs.

STATE OF IOWA BUILDINGS AND GROUNDS,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 515778

R E M A N D

D E C I S I O N

On July 15, 1981 the undersigned deputy industrial commissioner filed a final agency decision which awarded payment of industrial disability to the extent of ten percent, calling for a payment of 50 weeks compensation at the rate of $99.04 per week. Certain medical and hospital benefits were also ordered paid. Claimant appealed and the Iowa District Court for Polk County, James W. Brown, Judge, remanded the case to the Iowa Industrial Commissioner "for further findings and conclusions from the record made as to the extent of petitioner's permanent disability."

The record has been reviewed again in light of the court's analysis of the case.

No change will be made in the award. Briefly, the facts are these. Claimant sustained a compensable injury in the nature of a double hernia on July 26, 1978. The physical injury did not result in the award; rather, a psychological condition in the nature of an anxiety was found to be compensable to the extent of the disability mentioned above.

The final agency decision adopted the result reached by the hearing deputy and, based on the issues raised on appeal, enlarged upon the hearing deputy's decision.

The testimony of Remi Jere Cadoret, M.D., was taken over that of the other physicians and the psychologist, Todd F. Hines, Ph.D., because with his medical degree, Dr. Cadoret has expertise in both the physical and psychological or psychiatric dimensions.

Finding of fact No. 6 in the final agency decision is the one complained of: "Claimant's permanent psychological condition is not totally and permanently disabling." That finding of fact cited pages 25 and 28 in the Cadoret deposition as foundation. A review of the undersigned's notes indicates the pages probably should have been 23 and 28.

(a) The court quotes from page 28 of Dr. Cadoret's deposition: "Q. You mentioned and Mr. Hanssen mentioned anxiety. What level did you find Mr. Armstrong's anxiety to be at? A. You mean compared to some of the anxious patients we see over there? Rather low level." The court then stated on pages 4 and 5: "I am unable to draw from this, directly or by inference, that the petitioner's psychological disability is less than total." With all due respect to the court, the inference is taken that the disability is less than total. Dr. Cadoret had already established that claimant was not suffering from depression, which is a far more serious condition than anxiety. In this deputy industrial commissioner's experience concerning psychological testimony, anxiety is understood to be an apprehension or worry, something that most people suffer. A low level anxiety is thought to be one which is not very serious. It therefore seems that a not very serious anxiety would not be totally disabling.

The retaining of the deputy industrial commissioner's award was thought to be a liberal allowance, giving due significance to that deputy's first-hand hearing of the case. On the significance of the initial deputy's decision, see Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293 (Iowa 1982).

(b) The court also stated on page 5: "It could be surmised the commissioner is basing his finding and conclusion of limited disability on Dr. Cadoret's opinions regarding alcoholism or the later-discovered bladder cancer." On page 6, the court states that, if the cancer was not a significant part of the disability and not traceable to the injury, that fact should be pointed out in the decision. First, the alocholism was not felt by Dr. Cadoret to be any worse after the injury than before; therefore, it would be a neutral factor and have no effect on the industrial disability. Second, the cancer or fear of cancer was not shown to be disabling in any physical or mental way. Claimant had the tumor removed and was obviously afraid of a recurrence. However, the record did not support any finding that the fear of cancer made him unable to work. Therefore, neither the alcoholism nor the cancer or fear of cancer had a discernable effect on claimant's earning capacity.

(c) On page 6 the court states:

> An attempt is made by the State to justify the finding of limited disability on Dr. Cadoret's belated finding of possible depression which would be treatable. There are three problems with this. [1]First, the doctor initially refused to find clinical depression, but later thought the bladder cancer may have caused depression. The record is thus confusing as to whether he did or did not find significant depression. [2]Second, the commissioner found as fact number 5 that the psychological condition is permanent whether depression-based or otherwise, and therefore not amenable to treatment. [3]Finally, the commissioner did not say this was a basis for the decision.

With respect to [1] the depression, on page 10 Dr. Cadoret stated that he found no depression in claimant. Later, Dr. Cadoret hedged on that finding. The inference was taken that his first statement was the one that he meant and the finding will therefore be made to that effect. With respect to [2] the permanency of claimant's condition, one could not conclude that, because a condition is permanent, that it is total. One does not begin with the premise that permanent disability is total and must be proven otherwise for a permanent partial disability award. Claimant has the burden to prove the extent of the disability, which here is found to be permanent in nature but partial in extent. One concludes, therefore that [3] the basis for the decision was that claimant suffered no depression but, as stated, a low-level anxiety which produced permanent partial disability.

(d) Finally, beginning on page 7, the court states that the final agency decision did not sufficiently examine the elements of loss of earning capacity in claimant's case. Since the law in that area was stated in the hearing deputy's decision as well as the decision of the court, it will not be repeated. With respect to industrial disability, the industrial commissioner has stated:

> There are no guidelines which give, for example, age a weighted 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 1981); Enstrom v. Iowa Public Service Co., (Appeal Decision 1981).

Thus, the assessing of industrial disability in accordance with the guidelines laid down by the supreme court becomes an art, not a science.

In this case, one considers that a claimant who was 63 years old at the time of the hearing, with an eleventh grade education and who had a good work record as an unskilled laborer, would be disabled by a work-caused anxiety only to a certain extent, but not totally and permanently disabled.

FURTHER FINDINGS OF FACT

1. Claimant's anxiety is job related and produced a permanent partial impairment.

2. Claimant's psychological condition which was caused by the work injury is a low-level anxiety, not a depression.

3. Claimant's bladder cancer and any possible fear of its recurrence is not job related.

The conclusions of law will remain the same, as will the order.

WHEREFORE, defendants are ordered to pay weekly compensation benefits and benefits under $85.27 as ruled in the appeal decision filed July 15, 1981.

Costs are taxed against defendants.

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

Signed and filed at Des Moines, Iowa this 27th day of April, 1983.

Appealed to District Court:
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL ASHER,
Claimant,
vs.
POLK COUNTY, IOWA,
Employer,
Self-Insured,
Defendant.

File No. 666206

A P P E A L

D E C I S I O N

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By order of the industrial commissioner filed May 21, 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 1-7, inclusive; defendant's exhibit A; and the depositions of David B. McClain, D.O., and Marshall Flapan, M.D. Claimant's exhibit 7 and defendant's exibit A were not listed in the hearing deputy's decision; however, they are a part of the record and were considered in the making of this decision.

The result of this final agency decision will be the same as that reached by the hearing deputy. However, the findings of fact and conclusions of law are those of the undersigned deputy industrial commmissioner.

SUMMARY OF THE EVIDENCE

The facts are essentially not in dispute. Claimant, age 51 at the time of the hearing, was assistant chief jailer for Polk County, having been employed by the county in law enforcement jobs since 1972. On March 9, 1981 he was sitting and talking with the chief jailer, Floyd Jones. The testimony of claimant and Jones concerning the incident is as follows:

Asher Testimony

A. Well, I was sitting in the office that I share with Mr. Jones, and I always keep my ear tuned to things that are happening outside. And I thought I heard something that would require my presence from Mr. Jones' office into what we call a command center, desk sergeant's area of the office. And I spun around in a swivel-type chair and started to get out, and I felt something give, snap. I don't know.

All I know is I got about halfway out of the chair, and I couldn't get up any further. And I fell back in the chair, and Mr. Jones who was seated about as far as I am from you -- I think he said something like, "You got up wrong, didn't you?" And I said, "I guess so." And he said, "Well, you better keep moving. Otherwise you'll stiffen up" or something like that. And after a couple of minutes, I finally regained my composure.

I got out of the chair, and I was hurting, but I tried to do some bendovers, stretches, deep knee bends, much the same as somebody sitting in a chair too long, try to loosen myself up. And I continued working for the rest of the day. At that time I had this pain in my buttocks, and subsequently, I don't know exactly when, I started feeling the pain in my leg. (Tr. 14-15)

Jones Testimony

A. He started to get up out of his chair.

Q. Could you demonstrate that for us how he attempted to get out of the chair?

A. He normally grabs ahold of the arms and throws his body forward, uses his arms and his back as a rule to raise himself out of a chair.

Q. Do you know why Mr. Asher deemed it necessary to arise from his chair at that time?

A. No, I don't remember.

Q. Do you know if he was responding to anybody or anything?

A. Not that I recall, nothing of any consequence anyway.

Q. Do you know if anyone was calling him from the outer office?

A. I don't recall that, no.

Q. Was he chasing a prisoner? Was he responding to an emergency of any sort?

A. I don't believe he was.

Q. Now, again describing the incident that Mr. Asher says caused his injury, did it appear to you that he was making a type of sudden movement, or was it more of a normal unhurried movement arising from a chair?

A. We were facing each other talking about something, as I recall; and why he got up, I don't know.

Q. Would you say that it was a gradual unhurried everyday rise from a chair?

A. He has a habit of throwing his weight forward favoring his knees. He generally just gets up and starts to throw himself forward every time he gets up.

Q. Was there any twisting involved?

A. No.

Q. Did you hear anything pop such as a bone in his back or anything?

A. No, I didn't.

Q. Can you tell us how far Mr. Asher got off his chair before he sat back down?

A. Probably six, eight inches.

Q. Was he able to ease himself back into the chair or did he fall back down?

A. He eased himself back down.

Q. After he was able to sit back down in the chair, what did he do then?

A. Groaned a lot. (Tr. 81-82)

The back incident turned out to be quite serious and required surgery. David B. McClain, D.O., a qualified orthopedic surgeon, who was the treating physician, and Marshall Flapan, M.D., a qualified orthopedic surgeon, who was an examining physician, both testified by way of deposition and agreed that claimant's current back condition resulted from the above described incident. Both gave a permanent partial impairment rating for the injury of 25% of the body as a whole, as did Martin S. Rosenfeld, D.O., an orthopedic surgeon, whose report was claimant's exhibit 6.

ISSUES

In his arbitration decision the hearing deputy found that the above described incident was an injury which arose out of and in the course of the employment and that claimant had an industrial disability of 25%. In its brief, defendant cites several propositions:

I. The deputy industrial commissioner erred in finding that the injury complained of in this action was compensable under the Iowa Workmen's (sic) Compensation Act.

A. For an injury to be compensable under the Iowa Workmen's (sic) Compensation Act it must both occur during the course of the employment and arise out of that employment.

B. The claimant's injury did not arise out of his employment with Polk County since it was not the result of a peculiar risk or hazard of that employment, and since it flowed from a hazard to which the claimant would have been equally exposed apart from the employment.

C. The result of changes in the human body incident to the general processes of nature do not amount to a personal injury for the purposes of the Iowa Workmen's (sic) Compensation Act.

II. The deputy industrial commissioner's decision that the claimant had sustained an industrial disability of 25% of the body as a whole was erroneous, and did not consider certain factors necessary in determining the extent of such disability.

A. The claimant's employment relationship with Polk County was not altered as a result of his alleged injury.

B. The deputy industrial commissioner erred in not considering the claimant's preexisting condition in awarding any benefits for industrial disability.

C. The hearing officer improperly weighed the functional impairment ratings awarded by the three physicians.

D. In determining Polk County's liability in this matter, the deputy industrial commissioner should have accorded weight to the fact that Polk County was not given the opportunity to choose the physician who treated the claimant for his alleged disability.

There is no issue on appeal of the weekly compensation rate. The outstanding medical and hospital charges were agreed to by stipulation.

APPLICABLE LAW

Claimant has the burden of proof to show he sustained an injury which arose out of and in the course of his employment, and if so, to prove the extent of his disability. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934); Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945), Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

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).

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., 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).

Industrial disability includes considerations of reduction of earning capacity, not mere functional impairment. Other factors are age, education and relative ability to do the same type of work as prior to the injury. Olson, supra; Martin v. Skelly Oil Co., 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). Matters of causal relationship between the injury and the disability are essentially within the realm of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

A defense of lack of notice under §85.23 is an affirmative defense. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Other legal principles are discussed in the analysis below.

ANALYSIS

Defendant maintains that claimant's condition is not compensable because it did not arise out of and in the course of the employment. Defendant states: "Simply because the injury manifests itself while the employee is in the course of his employment does not satisfy the 'arising out of' test." (Brief, p. 5) Further, defendant says: "[F]or the purposes of the Iowa Workmen's [sic] Compensation Act it does not suffice that an employee was injured while in the service of his employer." (Brief 5) One cannot quarrel with these propositions; however, application of these principles to the facts does not necessarily obtain the result desired by defendant.

The arising out of cases cover two kinds of issues which are not always easy to distinguish, namely questions of which risks are attributable to the employment and medical causation in fact. Duckworth, "Injuries Arising Out And In The Course Of The Employment" 30 Drake Law Review 861, 864 (1981). As to both issues, in the instant case, defendant cites such cases as Cedar Rapids Community School District v. Cady, 278 N.W.2d 298 (Iowa 1979), Christenson v. Hauff Brothers, 193 Iowa 1084, 188 N.W. 851, 853 (1922), Griffith v. Cole Brothers, 183 Iowa 415, 165 N.W. 577, 581 (1917), Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35, 39 (1934), Smith v. Soldiers and Sailors Memorial Hospital, 210 Iowa 691, 231 N.W. 490 (1930), Jones v. Association, 92 Iowa 652, 61 N.W. 485 (1894), Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956) and Pace v. Appanoose County, 184 Iowa 498, 168 N.W. 916, 918 (1918). Of these cases, Cady concerns the issue of positional risk, Christenson concerns the issue of the unusual and rash act (and was, incidentally, overruled by the court in Hawk v. Hawk Chevrolet Buick Inc., 282 N.W.2d 84 (Iowa 1979)), Griffith concerns an injury by lighting, Jones concerns a suit on an accident and health policy over coverage for a violent death outside a bawdy house, and the real issue in Pace concerns whether claimant's decedent was an employee or an independent contractor.

These cases, then, discuss which risks are attributable to the employment. Except in Christenson, the agency or instrumentality which caused the harm emanated from outside the employee's person and the question presented is whether that risk arose from the employment.

Almquist on the other hand, is more to the point because it presents a question of cause as to whether or not an employee's death from a perforated ulcer is compensable. Also to the point are Smith, a hernia case and Burt, a lung case, as well as other cases which bear on the point.

Both Almquist and Smith discuss the necessity of proving a causal connection between the work and the condition in order to show that the condition, or injury, arose out of and in the course of the employment. In Almquist, compensation was awarded for a work-connected perforated ulcer, and in Smith, compensation was denied for a non-work connected hernia. (In Burt, compensation was allowed for a lung condition.) In Guyon v. Swift, 229 Iowa 625, 295 N.W. 185 (1940) the court allowed an award for compensation to stand where death occurred from a heart attack and stated that the mere fact that a coronary occlusion would ultimately occur does not bar compensation, so long as the death resulted from or was hastened by the injury. In Ziegler v. United States Gypsum Co., 252 Iowa 613, 621, 106 N.W.2d 591, compensation was allowed for a back injury, although the work was "not exceedingly heavy." There, also at 621 of the Iowa Report, the court stated: "It is said that if the rational mind is able to trace the resultant personal injury to a proximate cause, which is set in motion by the employment and not by some other agency, then recovery must follow." The question is one of fact, for the hearer to decide; the issue of sufficiency of evidence is for a reviewing court.

Here, the facts as to causation are not even seriously in dispute: both doctors clearly state that claimant's arising from the chair caused his back condition. (McClain depo., 22, Flapan, depo., 10) Defendant's conclusion that natural changes in claimant's back "may well have caused the injury" does not follow from Dr. Flapan's testimony that such changes "could possibly" have caused the injury. (Brief, 9, Flapan, 29) The doubly subjunctive effect of "could possibly" is not convincing. Claimant carries the causation issue.

A review of other of our supreme courts cases on this issue may be found in McConeghy v. Witt Mechanical Contractors, 33rd Biennial Report of the Iowa Industrial Commissioner 39 (1977), a heat exhaustion case. Also, see p. 864 of the Drake Law Review article mentioned above for cases cited to illustrate the problem of medical causation.

It is clear that claimant's injury also was in the course of his employment because he was arising from the chair in order to tend to an item of business in another room. That is to say, the injury occurred within the period of the employment, at a place where claimant could reasonably be, and while he was doing his work.

The issue of industrial disability is perhaps less difficult but not less important. Defendant maintains, inter alia, that claimant's preexisting knee and back problems contribute greatly to his functional disability. For example, Dr. Flapan testified (pp. 29-30) that claimant's radiating pain in the area of his right knee and thigh contributed heavily to the functional disability. Defendant ties this testimony to a knee injury of 1979 for which claimant was compensated (Brief 16-17). The fallacy is obvious in that Dr. Flapan referred to radiating pain (from the low back) in the area of the knee, whereas claimant's actual knee injury was of local, not radial, origin. Also with respect to the 1955 back condition, Dr. McClain flatly states that claimant's problems are not an aggravation of the 1955 condition (McClain, 25) and Dr. Flapan, while conceding some residuals existed from 1955, attributed the entire 25% permanent partial impairment to the 1981 injury. The plain fact appears to be that claimant has a serious permanent partial impairment from the 1981 work injury.

One realizes that a permanent partial impairment rating is only one element of industrial disability. Further, the permanent partial impairment rating is not a number that one adds to or substracts from in order to quantify an industrial rating. In other words, as an element of industrial disability, a permanent partial impaiment rating is important as it relates to the other factors of such disability, such as age, education, and experience. Thus a 25% permanent partial impairment is less serious to a person like claimant than to an illiterate common laborer in that claimant clearly has more options and a greater opportunity in the job market.

Also, in this case, claimant has rather good job security in his civil service status. Such job security lowers his industrial disability substantially. There was a slight conflict in the evidence in that claimant testified that he was less active in his work upon returning from the injury, whereas the chief jailer stated that claimant was not limited in his job performance. Under this state of the record, one can only conclude that claimant gets along pretty well in that particular job. On the whole, most of the other factors favor claimant in the job market. He is bright, articulate, and experienced. His age (51) could be a factor against him, but it is his bad back, his permanent partial impairment, which lessens his ability to compete. Here, then, 25% industrial disability is not a particularly high award for a quite severe condition.

Defendant also argues that the medical and allied costs should not be awarded because it had not the opportunity to choose the care, as is its right under §85.27. Defendant was in the position to choose the care if it liked. The county apparently had knowledge of the injury because the chief jailer witness did. In any event, lack of notice is an affirmative defense and was not proved.

FINDINGS OF FACT

1. Claimant was age 51 at the time of the hearing. (Tr. 7)

2. Claimant was a high school graduate of 1948, has two years of college, graduated from the Iowa Law Enforcement Academy, and attended a management course at said academy. (Tr. 8)

3. Claimant was in the army five years, 1948-53. (Tr. 8)

4. Claimant worked various jobs between his time in the army and helping his father with a combination store and bar. (Tr. 8-9)

5. Claimant worked with his father in the operation of a combination store and bar, 1959-1971. (Tr. 9)

6. Claimant was first employed by the Polk County Sheriff in September 1972 and worked various positions until he was at the time of the injury and at the time of the hearing assistant chief jailer. (Tr. 10-12)

7. On March 9, 1981, claimant was at work when he hurt his back while starting to get out of a swivel chair. (Tr. 14, 81, 98; McClain 22)

8. Claimant was arising from the chair because he thought he heard something that would require his presence at the command desk. (Tr. 14)

9. At the time of the injury, claimant weighed 270-280 pounds. (McClain 26)

10. Claimant returned to work August 31, 1981. (Tr. 25)

11. Claimant had prior low back surgery at L5-S1 in 1955. (Tr. 21; claimant's exhibit 5; McClain 7, 23)

12. At the time of the hearing, claimant had pain on the outside of his right leg in the area of the thigh, numbness on the inside of his right knee, and some numbness in the bone of his right leg. (Tr. 27)

13. Claimant is able to perform the work of assistant Polk county jailer. (Tr. 31, 87)

14. Claimant has some job security in that he has a permanent civil service rank of sergeant. (Tr. 92)

15. The history, tests, and examination by Dr. McClain, showed that claimant had a disc pinching on a nerve in the low back. (McClain 5-11)

16. Dr. McClain performed surgery on claimant in the nature of a laminectomy and disc removal. (McClain 12)

17. As a result of the work injury and subsequent surgery, claimant has a permanent partial impairment of 25%. (McClain 25; claimant's exhibit 6; Flapan 26)

18. Claimant's low back problems result from the work injury of March 9, 1981. (McClain 22; Flapan 10)

19. Claimant's low back problems do not stem from an aggravation of the 1955 low back condition. (McClain 25)

CONCLUSIONS OF LAW

On March 9, 1981, claimant sustained an injury which arose out of and in the course of the employment.

As a result of said injury, claimant incurred industrial disability of twenty-five percent (25%).

Defendant did not establish the affirmative defense of notice.

ORDER

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant for a period of twenty-five (25) weeks at the rate of two hundred sixty-seven and 98/100 dollars ($267.98) per week for the healing period and 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 statutory interest at the rate of ten percent (10%) per year pursuant to §85.30, The Code, as amended by Senate File 539, 69th General Assembly, Section 5 (1982) but subject to the provisions of §85.38.

Defendant is further ordered to pay or reimburse claimant in the amount of ninety-three dollars ($93.00) for the unpaid medical and hospital expenses.

Costs are taxed against defendant.

Defendant is ordered to file a final report within twenty (20) days of the last payment.

Signed and filed at Des Moines, Iowa this 22nd day of July, 1982.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LANNY BANKER,	:	
Claimant,	:	File No. 536391
vs.	:	R E V I E W -
FIRESTONE TIRE & RUBBER CO.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
INSURANCE COMPANY OF NORTH AMERICA,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines on December 3, 1982 at which time the record was closed.

A review of the commissioner's file reveals that an employers first report of injury was filed on April 24, 1979, along with a memorandum of agreement calling for the payment of $217.82 in weekly compensation. A final report was filed on January 13, 1981 showing that claimant was paid 71 5/7 weeks in weekly compensation at the aforementioned rate. The record consists of the testimony of the claimant, Robert Bianchi, Richard White and Dick Pinegar; the deposition of Ronald K. Bunten, M.D.; claimant's exhibit 1; and defendants' exhibits A, B and C.

ISSUE

The sole issue for resolution is the nature and extent of any permanent partial disability.

STATEMENT OF THE EVIDENCE

Claimant, age 41, was employed by defendant employer, Firestone, on April 9, 1979. On that date claimant was a forklift mechanic, and as such had to lift parts. On April 9, 1979 he was repairing an armature which weighed about 100 pounds and the armature started to roll on the bench. Claimant felt immediate low back pain upon reaching to stop the armature. Claimant went to the medical department at Firestone on that day. He first missed work on April 12, 1979 (he did not return until September 2, 1980). Claimant was treated by the company physician every day. When claimant's condition did not improve he was referred to Robert W. Merrill, M.D., a specialist in physical medicine and rehabilitation. Dr. Merrill examined claimant on April 18, 1979. At that time claimant was complaining of pain in the right lumbar and sacroiliac area which radiated into the buttock. It was noted that claimant's symptoms at that time were similar to those he had experienced in 1972. On examination, claimant showed a stooped posture and had difficulty getting up and down. He was unable to stoop or hyperextend beyond 15 to 20 degrees. All lateral movements of the spine also produced pain which was localized in the right paralumbar area. Straight leg raising was to 45 degrees on the right side with pain referred to the right lumbar area. On the left side, he could raise to 60 degrees with the pain referred to the same area. There was "inconsistent" spasm in the right paralumbar musculature. His impression was that claimant had a recurrent low back sprain. X-rays showed narrowing at the L4-L5 interspace. Claimant undertook a course of physical therapy, and claimant's back problems did not subside. Claimant was admitted to the Iowa Methodist Medical Center on June 6, 1979. An orthopedic consultation was conducted by Ronald Bunten, M.D., with the diagnosis of degenerative disc disease. A myelogram was taken and the orthopedist thought that it would be in claimant's best interest to be treated with physical therapy and rest. Claimant seemed to improve with physical therapy and conservative care. Claimant continued to see the plant physician, and continued to experience symptoms, so he was referred to Dr. Bunten, who saw claimant on August 24, 1979. Claimant also went to a back program at the YMCA.

When claimant's symptoms did not improve, claimant was admitted to the Iowa Methodist Medical Center on September 24, 1979. On September 25, 1979 Dr. Bunten conducted a laminectomy at the L3-4 and L4-5 interspace on the right. No definite disc rupture was encountered. Claimant continued to be treated by Dr. Bunten and was released to return to work on September 2, 1980. Dr. Bunten gave claimant a 10 percent permanent partial impairment to the body as a whole.

Upon his return to work in September 1980 claimant did the same job that he performed prior to the injury. Claimant left the employ of Firestone on June 1, 1982 in order to start his own business of renting and repairing forklifts. Claimant is a partner in the business. At the present time claimant complains of some sleeping difficulties and pain in his right leg. On cross-examination, claimant testified that his business started in 1979 as a part-time venture. He testified that 60 percent of his time is spent on mechanical work with the remainder of his time being spent in buying, selling and renting. Claimant states that the business is doing as well as can be expected.

Claimant's work experience includes some work as a laborer and heavy equipment operator. Most of his experience has been as a forklift repairman. Apparently, claimant missed no time from Firestone because of his back after his return. He was a good employee.

Claimant had some prior back problems. In 1970, 1972, 1974 and 1977 claimant had back problems.

Dr. Bunten, the treating physician, testified by way of deposition in the case that the 10 percent permanent partial impairment to the body as a whole was related to the April 9, 1979 injury. On cross-examination, Dr. Bunten explained the course of the degenerative disc disease. The following testimony is indicative of the tenor of that testimony:

BY MR. GIOVANNETTI:

Q. Doctor, what was the purpose of the surgery you carried out in September of 1979?

A. Well, we felt that he may have some nerve root irritation and compression most likely due to the ruptured disk.

Q. You never found a ruptured disk?

A. We didn't find a ruptured disk.

Q. Do you feel that the surgery you carried out was a success, Doctor?

A. Well it wasn't, I don't think, brilliantly successful. He didn't have the right kind of thing wrong. I felt that his nerve root irritation may have been due to the associated degenerative changes at this level perhaps due to the slight enlargement of the facet joints in the area of the nerve root. In the course of exploring an area like that, ligamentous tissue and bone tissues removed from around this sack of nerves and that allows the nerve to be decompressed.

Q. But you never found the point of compression?

A. Well, we thought in conclusion that the most likely reason for compression of the nerve root were these associated degenerative changes. It was difficult to define that at the time of his operation, so I guess you would say we did not find a big rupture of the disk which we were looking for.

Q. I think you have told us, Doctor, that those enlargements of the facet and those things you just described were an outgrowth of the degenerative disk disease, is that correct?

A. Yes.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon this agency in workers' compensation cases.

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

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of April 9, 1979 is causally related to 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 (1955). 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. 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).

4. 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."

ANALYSIS

The foregoing principles indicate to the undersigned that claimant sustained his burden of proof that he sustained an injury arising out of and in the course of his employment. Although not expressed as such the nature of the injury is an aggravation of the preexisting degenerative disc disease. The event causing the pain was a clear traumatic experience.

Claimant has had a good result from his surgery. He returned to work for over a year and a half and appeared to get along well. Considering the elements of industrial disability, it is found that claimant's disability for industrial purposes caused by the April 9, 1979 injury is 10 percent of the body as a whole. Claimant's good result and apparent employability dictates the result.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on April 9, 1979, when he hurt his back at work.

2. Defendants filed a memorandum of agreement concerning this injury.

3. Claimant's injury was in the nature of an aggravation of a preexisting condition.

4. Claimant is permanently and partially disabled to the extent of 10 percent of the body as a whole.

CONCLUSIONS OF LAW

1. Claimant was employed by defendant employer, Firestone, on April 9, 1979, when he sustained an injury arising out of and in the course of his employment.

2. Defendants should pay unto claimant 50 weeks of permanent partial disability compensation at the rate of $217.82 per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant fifty (50) weeks of permanent partial disability compensation at the rate of two hundred seventeen and 82/100 dollars ($217.82) per week.

Interest shall accrue pursuant to section 85.30, The Code, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

Costs of the proceeding are taxed aginst defendants.

Signed and filed this 25th day of January, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LESLIE C. BEELER,	:	
Claimant,	:	File No. 679961
vs.	:	A P P E A L
UNION ELECTRIC COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

By order of the industrial commissioner filed November 8, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of section 86.3, Code of Iowa, 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 Albert Edwin Cram, M.D.; and exhibits 1-7, inclusive, all of which evidence was considered in reaching the final agency decision. The result of this final agency decision will be the same as that reached by the hearing deputy.

SUMMARY

Claimant, an electrical mechanic, was badly burned in a work accident on April 24, 1981. As a result, he has severe scarring disfigurement over 75% of his face as well as scarring on the arms, hands, and neck; he has a sensitivity to heat and cold; he has a loss of some strength in his hands. The treating physician, Albert E. Cram, M.D., director of the burn unit at University Hospitals in Iowa City, assessed a permanent partial impairment of 10% of the body as a whole as a result of the injury.

More details about claimant's impairment are related in the analysis below.

ISSUES

The hearing deputy awarded an industrial disability of 35% which calculates to 175 weeks of indemnity payments at the rate of $277.25 per week over and above the healing period payments.

Defendant states the issues in its appeal:

1. Did the Deputy Commissioner err in awarding Claimant 35% Permanent Partial Disability?

2. Did the Deputy Commissioner err in not allowing Respondent credit for overpayment of temporary disability against the award for Permanent Partial Disability?

3. Should the Deputy Commissioner have disqualified himself from hearing the case due to the relationship with Claimant's attorney?

(The third issue has already been ruled upon, in claimant's favor, on November 30, 1982; no change will be made in that ruling.)

APPLICABLE LAW

Claimant has the burden to prove the extent of his disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

Claimant's disability is industrial, which is loss of earning capacity, and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and his inability, because of the injury to engage in employment for which he is fitted. Olson, 255 Iowa 1112, 125 N.W.2d 251; Martin v. Skelly Oil Co., 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 Company, 288 N.W.2d 181 (Iowa 1980).

More specifically, the supreme court stated in Olson, at page 1120:

> 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. (Citations)

The decision of the hearing deputy is entitled to significance. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d, 293 (Iowa 1982)

Other legal principals are discussed in the analysis below.

ANALYSIS

Defendant does not contest the proposition that claimant's disability as a result of the injury is industrial. Defendant does contest the weight placed by the hearing deputy on certain evidence.

(1) It is true, as defendant states, that great emphasis was placed by the hearing deputy upon claimant's permanent physical impairment, and it would be well to again review some of the testimony in Dr. Cram's deposition:

> A Well, he has scarring in those areas that were burned, primarily the arms, the hands, his neck and face areas. He did have some burn on his back when he came to the hospital. And although he has some mild scarring there, that scarring is not severe. He has some fairly marked hypertrophic scarring on lower areas of his face, around the lip, and on the hand and arm with, I believe, the left hand having some of the worst scarring.
>
> ....
>
> Q About how much a percent of his face will be disfigured?
>
> A Well, it's very difficult to put a number on disfigurement. Certainly the lower portion of his face is a cosmetically unacceptable result. And that's the reason he's continuing with therapy, not only the face mask but has undergone numerous steroid injections in an attempt to improve the lower portion of the face.
>
> ....
>
> A Well, I would say that he has a ten percent partial impairment in the sense that those areas that have been burned are subject to trauma that ordinary skin would easily sustain, but the burned skin may very well break down, lacerate or blister; that burned skin no longer controls body temperature well so that he'll have marked discomfort in any areas where he's exposed to any degree of heat or cold. And he's unable to sweat from those areas that have been replaced with graft and some of the areas of deep partial burn. So my estimate of his disability would be that it's in the neighborhood of ten percent.
>
> Q Would he be restricted in the future in terms of the type of cold weather that he might be able to go out in?
>
> A He will be restricted in the sense that he will have to take extreme care to protect any of the burned areas that might be exposed to cold temperature, and he will certainly have to limit his time of exposure to extreme cold. The degree to which this will be true is difficult to predict at this stage of recovery.
>
> Q What is the danger that he would expose himself to if he went out into the cold as a normal person might do?
>
> A Well, the severely burned tissue and areas of graft are not able to withstand the cold well, and he would be very subject to a frostbite injury, for instance, or otherwise tolerable wind chill conditions. Where normal skin might be okay, his burned areas would be more subject to frostbite.
>
> Q About what temperature would he be more likely to be more susceptible to now?
>
> A Well, I think it's difficult to put a number on temperature. Certainly we feel that anytime the temperature falls below 35 degrees or anytime it's in the, let's say, below 40 area where there's a wind chill index that would drive it below freezing, the burn patient is at great risk; and, therefore, Mr. Beeler would be at great risk.
>
> Q With respect to high temperatures, are there any limitations there?
>
> A With the burn his size, probably there's not a limitation in the sense that he will be at great risk of perhaps, let's say, dying from a heat stress situation. Certainly he will experience much more discomfort in those areas that are burned than he does in his normal skin and in the sense that this will affect his ability to tolerate that weather and work in that weather. He has some restriction in that sense. (Cram dep., p. 7 ll. 22-25, p. 8 ll. 1-3 and 18-24, p. 10 ll. 8-26, p. 11 ll. 1-24).

Defendant argues, basically, that claimant is young (35), a high school graduate, intelligent and has returned full time to his regular employment. These factors do portend well for claimant's employment future, with the possible exception of age (it can be argued that, since a younger claimant has to live longer with his work injury, that youth is a reason to grant increased compensation). Defendant argues further:

> The Deputy Commissioner placed weight on the ability of Claimant to find future employment that might impair his earning capacity.... This conclusion is highly speculative. The Claimant is a superior work performer and a reading of the record clearly indicates any employer would be anxious to employ such a person. There is no reason to think Claimant would change employment (Decision, page 2, paragraph 2 - plans to continue with company).
>
> Deputy Director [sic] found that Claimant's reemployment has been taken into consideration. (Decision, page 8). It should be a major factor and not speculation on future employability. Where can 35% disability be found in the Findings?
>
> ....
>
> The award was based to a large degree on the injury and sympathy and not earning capacity. There is no support in the evidence to make a finding of a 35% Permanent Partial Disability and it was error and should be set aside.

One cannot agree with defendant's implication that claimant will be able to work with the employer indefenitely; too many future variables exist for a person 35 years old to assume that he will stay with one employer the rest of his working life. Thus one must take into account claimant's employability, and, considering his impairment, it is clear that his sphere of employment has been limited: (1) his altered appearance may detract from his ability to find employment; (2) the decreased ability of his skin to withstand blistering and cold temperatures will restrict his employment in the active, outdoor jobs.

The last point, about claimant's low cold tolerance being a problem, is perhaps especially important. Thus, although defendant argues claimant could be a lineman, the record is at best equivocal:

> Q ... Has your injury restricted you in anyway from being able to, if you were to bid into, as a lineman, doing that kind of work?
>
> ....
>
> A [By claimant] No.
>
> Q ... Pardon?
>
> A No.
>
> Q Would you be able to climb those poles up there with the injuries that you presently have and the problem that you have?
>
> A I don't really know. I wouldn't want to expose myself to that, the conditions that they work under.
>
> Q Are there conditions you feel you could no longer handle because of your injuries?
>
> ....
>
> A Yes.
>
> ....
>
> Q ... How much more are they paid an hour than you?

A Thirty or Forty Cents. (Tr. pp. 17-18, ll. 20-25 and 1-13)

Claimant, instead of being secure in his present job is in fact limited because of his injury to jobs where the scarred area of his skin can tolerate the temperature and where his appearance will not detract.

An award of 35% industrial disability is realistic and will be adopted.

(2) The following colloquy occurred at the beginning of the hearing:

MR. HOFFMAN [Claimant's Attorney]: Yes. Actually, I think the temporary healing period, he was paid all the way until he, in fact, went back to work.

MR. CONCANNON [Defendants' Attorney]: It's been taken care of.

THE COMMISSIONER: All we're interested in is permanent partial disability.

MR. HOFFMAN: Yes.

THE COMMISSIONER: What was the date that permanent partial disability should start?

MR. CONCANNON: Are you looking for the date you went to work? You went to work on March 24th, '82. He went back on part-time duty on November 23rd. He went back on partial duty on November 24th, 1981.

He was released for full-time duty on April 24, 1982.

MR. HOFFMAN: April 24th, 1982.

THE COMMISSIONER: You have any problem with that?

MR. CONCANNON: March 24th.

MR. HOFFMAN: We'll stipulate to March 24th. (Tr. pp. 2-3, ll. 18-25 and 1-10)

Later, the employer's plant manager, G. Kenneth Matthews, testified in part as follows:

A Okay. We have a policy whereby this is an agreement with the union specified in our union contract that when a person is injured and they have accumulated sick leave, they are allowed to use their sick leave. In other words, they are paid as though they were off sick and they're paid their regular rate to the extent of their sick leave.

Now our sick leave is such that we have full-time sick leave and half-time sick leave. Les, at the time of his injury, had been with us six months. So he had forty hours of straight sick leave and forty hours of half-time sick leave coming.

The further stipulation is that we only reduce this sick leave by half of the time. So forty hours of sick leave, he was paid, initially, eighty hours of full-time pay and then he was paid eighty hours of half-time pay, and these payments resulted in more than the Workers' Compensation payments.

Then during the time that he was off, he achieved his one year anniversary, which entitled him to an additional 120 hours of sick leave, which would be both straight time and half-time and so as soon as he reached that point, we started again paying him the full rate of his job.

In the meantime, the union had gotten an increase in salary and so he was paid at that higher rate until he used up all of his full-time sick leave. Then before he was able to return back to work he was down to the half-time sick leave, so he received additional benefits over and beyond the Workers' Compensation rate of something like $2,000, I believe, little less than that. Nineteen Sixty-eight, I believe.

....

Q (By Mr. Concannon) What was the amount of that extra payment?

A I have the exact figure on a piece of paper there, Mr. Concannon.

Q On this one?

A No.

Q This one?

A One right there.

Q This one?

A Yeah. It's over on the right-hand column there.

Q Would it be $1,968.31?

A That's correct. (Tr. pp. 69-71, ll. 17-15, 1-18 and 4-15)

Defendant argues that the extra amounts (over and above the workers' compensation) in the form of sick leave pay should be credited toward the workers' compensation. In support, they cite Wilson Food Corporation v. Cherry, 315 N.W.2d 756 (Iowa 1982). In that case, the Iowa Supreme Court allowed an overpayment of healing period as credit against permanent partial disability.

The case here is different. Defendants are to pay workers' compensation at a weekly rate, no more and no less, so that the injured employee will have a stable income. Arthur Larson argues that sick pay cannot be a credit against claimant's entitlement because the sick pay is based upon past performance rather than the injury. 2 Workman's Compensation Law, 10-164.14 to 10-164.13, §57.46.

Whatever the reasons for or against credit of sick pay toward the total owed, the Cherry case did not open the door to a violation of the principle of weekly payments; it simply defined which weekly payments could count toward the total owed. No credit of sick pay will be allowed toward fulfillment of the award.

The hearing deputy's findings of fact and conclusions of law will be followed as they were written.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDING 1. On April 24, 1981 claimant received an injury while working for defendant.

CONCLUSION A. Defendant has filed a memorandum of agreement thereby admitting clamant's injury arose out of and in the course of his employment.

FINDING 2. As a result of his injury, claimant has a functional impairment of ten (10) percent of the body.

FINDING 3. Claimant is 35 years old.

FINDING 4. Claimant has worked as a grocery store stock boy, as an apprentice pattern maker and as a farmer.

FINDING 5. Claimant has worked for over 15 years as an electrician.

FINDING 6. At the time of his injury, claimant had been working for defendant for approximately six months as an electrical mechanic.

FINDING 7. Since his injury claimant has returned to his former position.

FINDING 8. Claimant has been able to handle all tasks assigned to him since returning to work.

FINDING 9. Claimant is not expected to have any further recovery other than cosmetic in nature.

FINDING 10. Claimant has failed to show a reduction in his actual earnings.

FINDING 11. Claimant has shown that he does have a reduction in his earning capacity.

FINDING 12. Claimant's burns were very severe.

FINDING 13. As a result of the burns to his hands, claimant has a reduction in grip strength in his left hand.

FINDING 14. Claimant's present job requires him to use his hands, and any other job claimant would be qualified to do would require the use of his hands.

FINDING 15. Claimant will have additional problems and discomfort with high or low environmental temperatures.

FINDING 16. One of the requirements of claimant's job is working outside.

FINDING 17. The areas where claimant was burned are more susceptible to reinjury, and cut and abrase more easily.

FINDING 18. Claimant's facial disfigurement will work against him if he has to look for other employment.

CONCLUSION B. As a result of his injury, claimant has an industrial disability of thirty-five (35) percent.

THEREFORE, defendant is to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at a rate of two hundred seventy-five and 25/100 dollars ($277.25) a week. Claimant's permanent partial disability is to have begun on March 24, 1982.

Defendant is to be given credit for benefits previously paid, but no credit is allowed for the weekly difference between the workers' compensation and the sick pay.

Accrued benefits are to made in a lump sum together with statutory interest at the rate of ten (10) percent per year pursuant to Section 85.30, Code of Iowa, as amended.

Costs are taxed against defendant.

Defendant shall file a final report upon completion of payment of this award.

Signed and filed at Des Moines, Iowa this 27th day of Janaury, 1983.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WANDA BELLNAP, As Surviving Spouse of VIRGIL BELLNAP, Claimant, vs. ROBERT J. ELLIOTT, INC./ VITALIS TRUCK LINE, Employer, and THE FARMERS INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 623035 A P P E A L D E C I S I O N

By order of the industrial commissioner filed November 30, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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; defendants' exhibits A, B, C and E; and claimant's exhibits 1 through 19 inclusive (exhibit E is the deposition of John D. Woodbury, M.D.; exhibit 14 is the deposition of Don Shoeman; exhibit 16 is the deposition of Charles H. Gutenkauf, M.D.; exhibit 17 is the deposition of Ronald K. Grooters, M.D.; and exhibit 18 is the deposition of Paul From, M.D.), all of which evidence was considered in reaching the final agency decision.

The result of this final agency decision will be the same as that reached by the hearing deputy and will adopt that decision in all its points. However, the appeal points raised by defendants need considerable discussion.

SUMMARY

The hearing deputy wrote a comprehensive review of the evidence; however, a brief summary of the events would be helpful.

The employee, a man of 53, was a truck driver and had a history of cardiac problems. There was evidence that he was unwell the day before his fatal heart attack. On December 4, 1979 he arose early, about 1:30 or 1:45 a.m. He left his home in Mountain Home, Arkansas and before 6:00 a.m. that morning was found dead in the cab of his loaded semi-tractor trailer, partly on a service road parallel to Route 60 in Missouri. (Defendants do not deny the jurisdiction under the Iowa Workers' Compensation Act.)

ISSUES

The hearing deputy found that the employee felt unwell as he was driving along Route 60 and that the exertion required to bring his semi-tractor trailer to a stop (going off the highway and onto the ground) accelerated a coronary event and caused his death.

Defendants state the issues on appeal:

(1) There is absolutely no evidence to support the following conclusion found at the bottom of page 31 of the Deputy Industrial Commissioner's Decision:

> "That Virgil Bellnap's continued exertion of driving his vehicle after the onset of symptoms aggravated his condition to the point of causing his death." Emphasis added.

(2) No reasonable interpretation of the testimony of Dr. From and Dr. Gutenkauf could support the Deputy Industrial Commissioner's conclusion that what Mr. Bellnap did after the onset of the symptoms caused or brought about his death.

(3) The Deputy Industrial Commissioner erred when he concluded the following at page 29 of the Decision:

> "However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact."

APPLICABLE LAW

The main legal point concerns requirements which the evidence must establish in order to support recovery. In a case of heart attack, "compensation is allowed when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a pre-existing diseased condition, [which] results in a heart injury." Sondag v. Ferris Hardware, 220 N.W.2d 905 (Iowa 1974). In the same vein, at page 906, the court says "that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable."

See also Sumner v. Varied Enterprises, Inc., et al., Appeal Decision by the Iowa Industrial Commissioner, December 30, 1982.

ANALYSIS

Defendants' issues rightfully are concerned with the question of causation.

(1) Some evidence of continued exertion is found in the testimony of Edward B. Spears, a Missouri Highway Patrol Tooper. Trooper Spears' deposition establishes that the truck traveled some 757 feet after leaving the main traveled portion of the road. (Spears dep. p. 21, ll. 2-6) The photographic evidence in that deposition (dep. exhibits 2-13) shows that after leaving the highway, the truck followed along the shoulder, then at about a 45° angle crossed a ditch and ended up parallel to the highway again, partially resting on a service road. (See Spears dep. exhibit 8) The hearing deputy placed considerable weight, as does the undersigned, on the opinion of Trooper Spears that the truck had to be steered over this terrain. (Spears dep. pp. 18-19, ll. 16-25 and 1-2)

Defendants believe, no doubt, that such evidence does not show the required "continued exertions" as outlined in Sondag. However, one must be allowed to make some inferences from the circumstances. See Pace v. Appanoose County, 184 Iowa 498, 168 N.W. 916 (1918) at p. 504 of the Iowa Report:

> "'... It [an injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It needs not to have been foreseen or expected, but after the event, it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.'" (Quoting McNicol v. Patterson Wild & Co., 215 Mass. 497, 102 N.E. 697.)

From Trooper Spears' testimony, then, one infers that the employee needed to use considerable effort to control his vehicle over ground, which, while not rough, was certainly not meant to be driven over with a semi-tractor trailer.

Further, one notes from the evidence that the highway is a super highway, one which has a shoulder sufficient for truck parking. Given that the employee had some acute distress before he guided the truck off the highway, he clearly was unable to hold the machine to that shoulder. Yet, he was, by dint of effort, able to bring the truck to a stop without upsetting it. The employee's actions amounted to a continued exertion after the onset of distress. The other evidence of exertion is medical in nature.

(2) Defendants' second point is that the medical evidence of Drs. From and Gutenkauf did not support the hearing deputy's conclusion. It is necessary, however, to look at all the evidence by these as well as other physicians. For example, Paul From, M.D., a qualified internist, testified: "I think that continuing activity such as driving his truck after the initiation of an ischemic cornonary event could only further aggravate that ischemic event." (From dep. p. 20, ll. 16-18) Charles H. Gutenkauf, M.D., a qualified internist, testified:

> Q. Were you aware that the vehicle had traveled a considerable distance off the highway, across an unsurfaced ground, and pulled up next to a frontage road running parallel to the highway?
>
> A. I think that's correct, yes.
>
> Q. If that [a cardiac eposide] occurred while driving, would continuing to drive be a good idea, or would it be contraindicated?
>
> A. It would be contraindicated.
>
> Q. He should stop?
>
> A. Yes. (Gutenkauf dep., p. 32, ll. 4-8 and 20-24)

Such testimony establishes a causal relationship.

Of course, the value of such medical opinions often rises and falls on the accuracy of the assumptions held by the opinion staters. In this regard, a further review of Dr. Gutenkauf's evidence would be helpful:

> A. Yes. Apparently the truck just-- You know, apparently he turned the switch off before the truck stopped, and it just kind of rolled along and came to a stop all by itself. It doesn't suggest that he tried to turn the truck to try to get back up onto the road, or-- There is nothing about this story here that suggests to me he was doing anything very vigorous with his hands or anything else in the last minute or two.
>
> Q. If in fact the physical evidence would indicate that he did steer the truck off a considerable distance, would it change your opinion?
>
> A. I think not, the reason being he was driving down the road, just--you know, his hand resting lightly on the wheel, probably with one finger, you know, when the thing happened to him.

Q. You are making some wild assumptions.

A. I know, but it doesn't take a lot of strength to drive the car down the road. I would think that this occurred--that the event that caused his death occurred while he was driving the truck down the road and was not exerting himself, and that is what initiated-- His vessel closed off at that time. It could have closed off the night before while he was at home, but it happened to close off while he was driving the truck and not exerting himself particularly, and then what happened after that--the event was already under way, and nothing he could do was going to alter that, you know--

Q. Even the extent--

A. --nothing that he did do, I should say, after that, altered the extent of it. I don't see-- It would appear to me, from what evidence I have at my disposal, that he just--that he turned the wheel slightly so the car--truck went off the road, and he turned the ignition off, neither one of which would require much physical exertion. (Gutenkauf dep., pp. 37-38, ll. 11-25 and 1-19)

This opinion testimony is contrary to the inference taken that the employee did have to use considerable effort to bring the truck to a rest. For that reason, the evidence is rejected as being based on an incorrect assumption.

With respect to the other medical evidence, that of John D. Woodbury, M.D., who specializes in gastroenterology and internal medicine, is at best self-contradictory:

Q. Doctor, do you have an opinion with reasonable medical certainty as to whether or not once a myocardial infarction or heart attack started, continuing to drive a semi truck would accelerate, aggravate, hasten that heart attack?

A. Have no opinion.

Q. Doctor, in your report of August 5th, you say, "Certainly, if he were having anginal attacks, it would have been exacerbated by his continued occupation."

A. That is correct.

Q. Is that still your opinion today?

A. That is correct. (Woodbury dep., pp. 32-33, ll. 16-25 and 1-2)

This evidence on cross-examination shows that Dr. Woodbury first refuses to tie the work to an injury and then he reverses himself, which is not a maneuver calculated to inspire confidence in his opinion.

Finally there is the evidence of Ronald K. Grooters, M.D., a cardiac surgeon. He testified:

Q. ... If you were driving his truck in his normal routine and began to experience a coronary event -- cardiac event, would continuing to drive the truck have any effect on the extent -- the severity of that event?

A. In a major cardiac event, Frank, that's already in process, a few moments of activity doesn't change a thing. They are going to die or have their major insult to that heart no matter what.

Q. If it's not a major event, can it become one by continuing to do this?

A. Not for just a few seconds or few minutes. This is all based on recent forms of treatment in cardiac disease now called streptokinase effusion where we know that the artery clots at that particular time, and they come in the hospital within an hour or two, and we take them down to the cath lab now, put a catheter in that blocked artery and can open it up, and then later on, of course, they bypass it later on. So the event is due to a blood clot on that stenosed artery, and it's just one of those events that happens very suddenly. (Grooters' dep., p. 13, ll. 1-22)

The assumption upon which Dr. Grooters thus testifies is that a major cardiac event occurred and claimant's exertions made no difference to the outcome; such an assumption is contrary to that of Drs. From and Gutenkauf and contrary to one's understanding of medical evidence in these cases. That is, Dr. Grooters assumes that a heart attack cannot be exacerbated by exertion, a theory one finds unacceptable.

On the whole, the medical evidence establishes a probability that the employee had some cardiac distress while he was driving and that the exertions thereafter in bringing the truck to a stop on the grass was a sufficient aggravation to result in his death.

(3) The whole text of defendants' final point needs to be stated:

The Deputy Industrial Commissioner erred when he concluded the following at page 29 of the Decision:

"However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact."

The Deputy Industrial Commissioner at page 29 drew a legal conclusion that expert opinion may be accepted or rejected in whole or in part by the trier of fact. The case of Sondag v. Ferris Hardware, supra. was cited. However, the Court also went on to say the following along that subject matter:

"But a study of our cases indicates greater deference is ordinarily accorded such testimony where the opinion necessarily rests on medical expertise."

The case of Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa 1979) also held that the testimony of experts should not be arbitrarily rejected.

In the case at hand the Deputy Industrial Commissioner arbitrarily rejected the opinions of Dr. Gutenkauf and Dr. Grooters. Both of those doctors clearly indicated that nothing that Virgil Bellnap did following the onset of symptoms would have altered the fact of his death. This affirmative testimony apparently was ignored and rejected. On the other hand there is an absolute lacking of any testimony that the acts and conduct of Virgil Bellnap would have or could have altered the event. Dr. From was never asked. In all of the testimony of Dr. From and all of his reports he never once drew this conclusion. The only conclusion ever drawn is that continued driving could aggravate the event. This is so vague and ambiguous a decision of this magnitude should not be predicated on it. Especially when the evidence in this case clearly establishes that there was absolutely no "continued driving". Virgil Bellnap stopped what he was doing and sought rest. (Defendants' brief pp. 13-14)

One does not believe that the hearing deputy was arbitrary in his handling of the medical testimony. At any rate, the above analysis should give sufficient explanation of the reasons for adopting certain portions of the medical evidence while rejecting others.

FINDINGS OF FACT

That on December 4, 1979 Virgil Bellnap was an employee of Robert J. Elliott, Inc.

That on December 4, 1979 Wanda Bellnap was Virgil Bellnap's spouse.

That on December 4, 1979 Virgil Bellnap was 53 years old.

That Virgil Bellnap was an over-the-road truck driver operating primarily between the midwest and New York City and New Jersey.

That Virgil Bellnap had been an over-the-road truck driver for 20 years.

That on December 4, 1979 Virgil Bellnap was operating a semitrailer truck owned or leased by Vitalis Truck Lines and was at a place called for by his employment.

That on December 4, 1979 Virgil Bellnap had preexisting coronary artery disease.

That on December 4, 1979, as Virgil Bellnap was operating a semi truck and trailer for his employer, he felt the onset of a coronary event, maneuvered his vehicle off the traveled portion of the road and physically steered and guided the vehicle approximately 700 feet over a rough, uneven and unpaved terrain, eventually bringing it to rest partially on and partially off a parallel service road.

That Virgil Bellnap then turned the vehicle off.

That Virgil Bellnap then died as the result of an acute myocardial infarction.

That continuing to operate the semitrailer truck over the rough, uneven and unpaved terrain after the onset of coronary symptoms aggravated the coronary event to such an extent as to cause his death.

That on December 4, 1979 Virgil Bellnap was not under any stress associated with his employment.

CONCLUSION OF LAW

That claimant sustained her burden of proof and established that on December 4, 1979 Virgil Bellnap was an employee of Robert J. Elliott, Inc. and that on the aforementioned date sustained an acute myocardial infarction which both arose out of and in the course of his employment.

That claimant has further sustained her burden of proof and established that there exists a causal relationship between the acute myocardial infarction and the claimant's death.

ORDER

THEREFORE IT IS ORDERED:

That defendant Robert J. Elliott, Inc. pay unto claimant benefits at the stipulated rate of two hundred sixty and 79/100 dollars ($260.79) from December 4, 1979 for the life of Wanda Bellnap or until she remarries.

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

That interest at the rate of ten (10) percent per year from the date of the death of the employee shall be paid by defendant.
s

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 charges:

Hamilton Funeral Home $1,000.00

That defendants shall contribute to the Second Injury Fund pursuant to Iowa Code section 85.65.

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

Signed and filed at Des Moines, Iowa this 27th day of January, 1983.

Appealed to District Court;
Settled

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. BERRY,	:	
	:	File No. 700302
Claimant,	:	
	:	RULING ON MOTION
vs.	:	
	:	FOR
J. I. CASE COMPANY,	:	
	:	SUMMARY JUDGMENT
Employer,	:	
Self-Insured.	:	

Defendant's motion for summary judgment and claimant's resistance thereto came on for hearing before the undersigned at the Henry County Courthouse in Mount Pleasant, Iowa on October 11, 1982. The matter was considered fully submitted on that date.

Pursuant to Industrial Commissioner's Rule 500-4.35, the rules of civil procedure govern contested case proceedings before this agency unless in conflict with workers' compensation law, administrative law or agency rules. There being no conflict between the rules of civil procedure pertaining to a summary judgment and the law and rules applying to this agency, the present matter is properly before the undersigned.

Iowa Rule 237(b) of Civil Procedure indicates 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."

In order to be entitled to a summary judgment, defendants must show there is no genuine issue of material fact involved in the case and that summary judgment should be entered in their favor as a matter of law. Iowa Dept. of Transp. v. Read, 262 N.W.2d 533 (Iowa 1978); Schulte v. Mauer, 219 N.W.2d 496 (Iowa 1974). In determining whether a genuine issue of material fact exists which would preclude granting the motion for summary judgment the court must view all material before it in a light most favorable to the opposing party. Steinbach v. Continental Western Insuance Co., 237 N.W.2d 780 (Iowa 1976); Schulte 219 N.W.2d 496. In resistance to a motion for summary judgment, the resisting party must set forth specific facts showing there is a genuine issue for trial. Graham v. Kuker, 246 N.W.2d 290 (Iowa 1976); Iowa Civil Rights Commission v. Massey-Ferguson Inc., 207 N.W.2d 5 (Iowa 1973). A party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of a genuine issue of material fact Prior v. Rathjen, 199 N.W.2d 327 (Iowa 1972). Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of trial. Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

At the time of the hearing, the parties agreed on the following facts: that claimant was hired by defendant in Racine, Wisconsin; that claimant was domiciled in Iowa at the time of the injury; that claimant was injured at work on December 22, 1977 in Burlington, Iowa; that Wisconsin and Iowa have concurrent jurisdiction; and that claimant received seven weeks of benefits under the Wisconsin workers' compensation law.

Defendant argued that claimant's petition in arbitration should be construed as a petition in review-reopening because benefits had been paid, albeit under the Wisconsin law, and, accordingly, the action should be barred by operation of Code section 85.26(2) because the petition was filed more than three years after the date of last payment of compensation. (The industrial commissioner's file reflects that the petition was filed on April 22, 1982. Exhibit 1-C, attached to defendant's motion, and excerpts from claimant's deposition indicate the last payment was received on or about January 31, 1978.)

At the time of the hearing the undersigned ruled that the present case was an original proceeding governed by Code section 85.26(1) since no memorandum of agreement had been filed under Iowa law nor had a prior award been filed in Iowa with regard to the December 12, 1977 injury.

Defendant reasoned that if claimant's action were construed as an arbitration, he was barred by operation of Code section 85.26(1) because he was aware he had a compensable claim--he had received benefits under the Wisconsin law--and had failed to file an action in Iowa within two years of the occurrence of the injury. Defendant again emphasized that had the claim been processed under Iowa law and had a memorandum been filed, the action would have been barred. Defendant appeared to argue that allowing the claimant to utilize a discovery rule approach in an original action in Iowa at this time was contra public policy in that it would seemingly require employers to file appropriate documents in all states where a claimant may have a possible right to bring an action for workers' compensation benefits.

In resisting the motion for summary judgment, claimant contends he was confused as to the compensable nature of his claim and was not advised by a medical expert until sometime in 1981 that his problems were related to the work injury. Hence, it is claimant's position that the discovery rule analysis set forth in Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980) applies to his case. Claimant stresses that at the very least a summary judgment is premature because there is a material question of fact as to when the claimant knew or, through the exercise of reasonable diligence, should have recognized the nature, seriousness and probable compensable character of his injury.

In determining whether there is a question of fact regarding when claimant knew or should have known he had a possible cause of action, the following excerpts from the portions of claimant's deposition that were attached to the motion and resistance are of importance:

> Q. So between January of 1978, specifically January 31, 1978, when you received your last workmen's compensation or worker's [sic] compensation payment, and April of 1982, you made no other demand of J. I. Case regarding workmen's compensation?
>
> A. I asked--and who is ever ahead of insurance--he made the decision of which way it would go, which way he wanted it to go.
>
> Q. You are saying worker's comp versus disability payments?
>
> A. Yes.
>
> Q. And you have in fact been receiving Metropolitan Life disability insurance payments?
>
> A. Yes.
>
> Q. All along?
>
> A. Yes.
>
> Q. And you have been submitting claims to the Metropolitan Life Insurance Company, have you not, for your hospitalization?
>
> A. Yes.
>
> Q. And your doctor's treatment?
>
> A. Yes.
>
> Q. I have seen many, if not most, of those compensation Metropolitan Life Insurance forms. On none of them do I find the box checked which says Was this or Is this treatment or expense work-related.
>
> Is that correct? Do you know?
>
> A. I don't know.
>
> Q. Did you fill those forms out, Mr. Berry? I realize a portion of them has to be filled out by the physician and a portion by the employer, but did either you or your wife fill out the pertinent part that pertained to you?
>
> A. Yes, and it was-- If it was filled out by me, it was work-related 'cuz we would have mentioned that.

(Claimant's deposition, pp. 51-52.)

. . .

Q. Would you describe for the Industrial Commissioner how you feel right now?

A. I'm nervous; have pain through my ribs, and inside I'm all upset.

Q. By "inside you are all upset," what do you mean?

A. My ribs start hurting, and everything starts hurting.

Q. Okay. What part of your ribs hurt?

A. This area here. Right down where it always hurt.

Q. All right. Now, you are indicating on your left side underneath your left armpit around to approximately the front of your body to the left side?

A. Yes. My ribs, yes.

Q. What kind of a pain is that? Dull aching pain, or a sharp pain, or what?

A. It's-- Sometimes, it's sharper than others; but it's a constant pain. It's not-- It's not as if to stick you with a pin, you know, but it's constant. It hurts all the time.

Q. How long has it hurt like that?

A. Well, it hurts like that until the pain pills dull it, but it really never stops.

Q. Perhaps you didn't understand my question or I didn't make it clear.

How long have your ribs hurt like that? Did you have that pain that you just described prior to December 12th, 1977?

A. No.

Q. Okay. So when did that pain first start?

A. Since my injury.

Q. Did it occur on the day of the injury or the day after or what?

A. Started as soon as I hurt myself. I hurt all over then. I mean, it hurt bad.

(Claimant's deposition, pp. 67-68.)

...

Q. All right. Mr. Berry, when was the first time after January of 1978 that any doctor related your present problems, told you that he related some of your present problems or any of your present problems to your injury in December of 1977?

A. Well, I don't remember the date but it was Dr. Anderson.

Q. What did he tell you, if you can recall?

A. Well, I can't recall very clearly, but this was to do with the teeth and everything, that they would help--they wouldn't eliminate my problems, you know, pain, my ribs, anything they could do to relieve some pain or complications that might be causing why; but otherwise--

Q. All right. Mr. Berry, excuse me. Let me clarify that question.

Did Dr. Anderson discuss with you your rib pain?

A. Yes.

Q. And when was that?

A. I can't recall what date.

Q. Can you recall the year?

A. It wasn't this year, was it? I'm not certain.

Q. Could it have been last year?

A. Yes.

Q. Did Dr. Anderson-- In other words, did Dr. Anderson relate any of the pain you are now having in your ribs to the original injury in December of '77 when you fell at Case?

A. He-- I don't remember whether he mentioned this specifically or not, but there was-- We did talk of it, and I'm sorry but I can't remember more.

Q. That's all right.

Mr. Berry, since January of '78, has the rib pain ever stopped?

A. Yes.

Q. When?

A. When I had the nerve-block shot.

Q. All right. When did you have this nerve-block shot? What doctor performed that?

A. Dr. Calderon.

Q. And When did he do that?

MRS. BERRY: It was in April of this year.

A. Yes, April.

Q. (By Mr. Crowley) Of what year?

A. Of this year.

Q. 1982?

A. Yes.

Q. So I take it Dr. Calderon did more for you than just the acupuncture to try to relieve your smoking?

A. Yes. He give me this nerve block.

Q. Did you discuss with Dr. Calderon your injury in Decemer of '77?

A. Yes.

Q. Did he discuss that with you in terms of your rib pain?

A. That's the reason that he said-- I asked him if there was anything that he could do for the pain, and he said there would be no guarantees; but we could try this method, this--I don't remember names of the medication that he was going to use. It's--

Q. Okay.

A. But he did perform it.

Q. Prior to Dr. Calderon discussing your rib pain with you, had any other doctor told you why you were having the pain in your ribs?

A. Well, they tell me-- Well, I mean just like Dr. Todd told me, I had a spot on my pancreas and scared the daylights out of me; and then they talk about my emphysema or respiratory problems or bowel problems. I didn't know. I was just-- I was confused. I wanted to get well.

Q. You are talking about Dr. Todd diagnosing you as having this spot on your pancreas?

A. Yes.

Q. That was back in 1978, wasn't it?

A. Yes.

Q. All right. Continue.

A. And it just-- It's confusing. They are the medical doctor, and I'm the truck driver; and took their word and hoped that they'd find something. It created doubts. I was confused, you know. I mean, I was ready to try anything. That's the reason that I've seen so many doctors.

(Claimant's deposition, pp. 71-74.)

. . .

Q. Now, Mr. Berry, let's back up. In January of '79, Dr. Todd told you that you had a spot on your pancreas; is that correct?

A. Yes.

Q. And he referred you to Dr. Zike in Iowa City?

A. Yes.

Q. Did Dr. Todd tell you that the problems that-- that any of the problems you were having then were related to your accident at J. I. Case?

A. No. I'd mention this and seems like that they would look for something else.

Q. All right. Throughout the doctors that you have been to see in the last four years, did you always tell them or give them the history of the injury at J. I. Case?

A. I always told them about the injury and, of course, I was hoping that they-- They're the doctor, you know, if they suggest something, I'd have to go along with it becaue I didn't know. They'd done so many things to me, I couldn't tell you all they've done to me.

Q. All right.

A. It's confusing.

Q. Were you relying on the doctors' diagnoses on

what was wrong with you and what was keeping you from working at that time?

A. I had to. I had to take their word for it. I felt they were the doctors and they should know what they were talking about although you wonder when, you know, in case of the pancreas and everything that--

Q. Had Dr. Kivlahan ever treated you for the pain in your ribs? Had he tried to do anything to reduce that pain other than give you this medication?

A. Just medication.

Q. Did Dr. Kivlahan refer you to Dr. Calderon?

A. No.

Q. Who did that?

A. Dr. Anderson.

Q. When was the first time you saw Dr. Anderson again?

MRS. BERRY: March of '81.

A. March, '81.

Q. (By Mr. Crowley) After January, 1979, when you again quit J. I. Case after you'd tried to go back, since that time, when was the first time that you felt like you were on the road to recovery and that you might be able to go back and work?

A. Not until I had that shot, when I actually honestly had plans, I thought that this nerve block, I really thought that in my own mind that this was it, that I would improve and get better and be able to return, hopefully, to work.

Q. All right.

A. Which has been my-- That's-- All along, that's all I've wanted.

Q. The nerve block then, which Dr. Calderon performed this year, was the first time that you felt relief from the pain in your ribs?

A. Yes.

Q. Is that the same-- Well, when did that pain in your ribs first start?

A. When I was injured.

Q. At J. I Case?

A. Yes.

(Claimant's deposition, pp. 84-86.)

In the opinion of the undersigned the foregoing testimony indicates that there is a genuine issue of material fact regarding when claimant became aware of the compensable nature of his claim. The fact that he received benefits under the Wisonsin Workers' Compensation Law does not, under the facts of this case, establish that claimant was aware of the compensable nature of his claim. That claimant allegedly was left with the impresson that the medical experts thought his problem was related to some cause other than the work injury and that his workers' compensation payments were changed to long term disability benefits casts doubt on when he acquired a work-injury consciousness. Additionally, it is noted that exhibit 1-D attached to the motion indicates that the Wisconsin file was destroyed in the stage of "noncompensable" case--a "claim not prosecuted by claimant". It should be noted that this ruling is not to be construed as allowing a claimant who has received workers' compensation benefits in one state and is aware of the fact that he had a compensable producing injury to pursue what is really a change of condition in another state, by applying the discovery rule to what is actually a new development in the resultant injury, thereby escaping the ramifications of Whitmer v. International Paper Co, etc. 314 N.W.2d 411 (Iowa 1982). Hence, a hearing on the merits of the application of the discovery rule to this case is necessary.

WHEREFORE, defendant has failed to establish that there is no genuine issue of material fact entitling them to summary judgment in their favor as a matter of law.

THEREFORE, defendant's motion for summary judgment is hereby denied.

Signed and filed this 29th day of October, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GAROLD K. BERTRAND, Claimant, vs. AMF LAWN & GARDEN DIVISION, Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 660914 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Garold K. Bertrand, the claimant, against his employer, AMF Lawn and Garden Division, and the insurance carrier, Insurance Company of North America, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on September 4, 1979. This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on January 18, 1982. The record was considered fully submitted on March 9, 1982.

No first report of injury has been filed in this matter.

The record consists of the testimony of the claimant; the testimony of Don Mullin; the testimony of Kenneth Purdy; claimant's exhibit 1, records from the Veterans Administration; claimant's exhibit 2, records from Mercy Hospital; claimant's exhibit 3, a May 12, 1981 letter from Robert C. Jones, M.D.; claimant's exhibit 4, AMF records regarding the claimant; defendants' exhibit A, records from Mercy Hospital (includes claimant's exhibit 2); defendants' exhibit C, AMF record regarding claimant's illnesses (includes duplication of claimant's exhibit 4, page 11.); the deposition of Dr. Jones; the deposition of Thomas A. Carlstrom, M.D. (including one exhibit [exhibit 2, claimant's work history, was not offered]); and a copy of the 1979 Model and Loading Instructions, claimant's work record from August 8, 1972 to September 12, 1980 and a unit traceability shipping record filed March 9, 1982.

ISSUES

According to the pre-hearing order the issues to be determined are whether the claimant received an injury in the course of and arising out of his employment with defendant employer; whether there is a causal relationship between the alleged injury and the disability; the nature and extent of such disability; and whether claimant is entitled to benefits pursuant to Code section 85.27.

RECITATION OF THE EVIDENCE

Claimant testified that he experienced chest pains on his way to work on September 4, 1979. He had been on vacation (fishing) on the prior day. Claimant advised his supervisor, Don Mullin, of his problem and returned home. Claimant subsequently was taken to the hospital by his wife.

Mercy Hospital records for claimant's September 4 through September 19, 1979 hospitalization contain the following history:

> The patient was in good health until four months prior to admission when he began to experience retrosternal chest pain on exercise. He described the pain as occurring almost always during exercise and rarely at rest. He described this as a kind of pressure type chest pain radiating to the left arm and to the jaw. The chest pain usually lasts for 10-15 minutes and is generally relieved by rest. However, for the past 2-3 weeks he experienced more frequent chest pain. He has had chest pain 3-4 times over the last week. A week ago he had chest pain that lasted for one hr. Today, when he was driving to work again he experienced severe retrosternal chest pain radiating to the jaws, left shoulder and left arm. It was pressure type chest pain and lasted for 1-1/2 hrs. Subsequently he was brought to the ER.
>
> The patient smoked two packs of cigarettes per day for at least the past 40 years. He has had chronic productive cough for 10 years, with exertional shortness of breath. He also had an accident on the right foot and underwent surgery. Since then he has had intermittent back pains. (Claimant's exhibit 2, page 2; defendants' exhibit A, page 3.)

Since claimant's history was compatible with possible coronary disease, diagnostic studies including chest x-ray, EKG and blood analyses were conducted. Nothing significant or indicative of coronary disease was found.

However, claimant also underwent x-rays of the cervical spine which revealed "evidence of narrowing of the intervertebral disc at the level of C-5, C-6 and C-6, C-7 and C-7, T-1 with anterior and posterior bony spur formation which has caused narrowing of the neural foramina at the level of C-5, C-6." (Claimant's exhibit 2, page 6; defendants' exhibit A, page 12.) X-ray of the lumbosacral spine yielded normal findings.

Robert C. Jones, M.D., specializing in neurological surgery, testified that he first examined the claimant on Septeber 11, 1979 at Mercy Hopsital at the request of Roger Lui, M.D., claimant's treating physician during the September 1979 hopitalization. Dr. Jones recalled that claimant complained of pain in the back of the neck, of pain with numbness and tingling across the upper chest, of progessive weakness in the left arm and of numbness and tingling in the left hand. Upon examination he found decreased left hand grip, weakness in the left shoulder muscles and biceps and decreased sensation in the entire left hand.

A cervical myelogram, performed on September 14, 1979, demonstrated:

> Myelogram with amipaque: Examination initially revealed contrast to be held up at the C-7, T-1 interspace but eventually contrast did fill the upper cervical spine with marked extradural defects noted at the C-2,3 and C-3,4 levels. There were associated spondylotic changes, particularly at C-7, T-1 but not at the upper defects and the possibility of disc protrusions would also have to be considered. Two views of the lumbar spine were obtained with suggestion of slight general narrowing of the canal at the lumbosacral disc space. (Claimant's exhibit 2, page 10; defendants' exhibit A, page 10.)

Electrodiagnostic studies of the upper limbs and neck indicated no evidence of nerve root compromise. Likewise, an EMG study of the upper limbs and related paraspinal muscles was normal.

Dr. Jones recommended both at the time of claimant's hospitalization and during follow-up visits that the claimant undergo an anterior cervical fusion at C-7, T-1 and probably at C-4-5 and C-5-6. However, the claimant preferred to rely on the transcutaneous electrical stimulator.

Records from the Veterans Administration reveal that claimant was examined in February of 1980 by A.P. Neptune, M.D., who set forth his findings and impression in a report dated February 11, 1980:

> This is a 59 year old male patient complaining of pain in the lower cervical dorsal region radiating upward to the occipital area and associated with headaches. Also has some pain in the left hip at times, particularly on long standing and ambulation. Veteran does not appear to be in any distress today when seen. He is an obese male who is ambulating satisfactorily. Neck range of motion was normal on lateral rotation to the right. He claimed to experience some discomfort on rotation to the left in the left neck also. There was no spasticity of the paraspinous muscles. Shoulder motion was normal. There was some pain on pounding of the left hip. Motor function is normal and there is no sensory deficit. He also had a pain in the lumbo-sacral area at time.
>
> IMPRESSION: Degenerative disease of the cervical and lumbo-sacral region, associated with some hip degeneration, probably.
>
> RX: Physical Therapy to be treated as an outpatient three times weekly with Ultrasound 1 1/2 watt for 6-8 minutes over the left hip and lumbo-sacral area and neck, to be alternated with hot packs. Massage of the neck muscles with Benalg and range of motion to the upper limbs. To be reviewed in tow [sic] weeks. (Claimant's exhibit 1, page 5.)

Physical therapy was discontinued as of April 17, 1980 and claimant's condition was labeled "chronic". (Claimant's exhibit 1, page 8.)

(Claimant had been hospitalized from January 18 to January 26, 1971 at Veteran's Hospital for complaints of severe headaches, night sweats, gas and abdominal distress and pain in the left chest. One of several diagnoses made at that time was that of "[d]iscongenic disease and degenerative arthritis of the cervical spine." No treatment was prescribed. [Claimant's exhibit 1, page 3.])

Dr. Jones last saw the claimant on December 19, 1980 at which time claimant's cervical disc disease was virtually unchanged. (Dr. Jones noted that the claimant also complained of pain in the right hip and leg which was not referrable to the cervical condition.) In a subsequent letter to defendant carrier, Dr. Jones acknowledged that the claimant had had long standing degenerative changes in the neck but opined that heavy work materially aggravated the condition. (Claimant's exhibit 3.) During his deposition, Dr. Jones recalled that the claimant gave a history of performing "a fair amount of reasonably heavy work at AMF over many years, at work as a warehouseman." (Jones deposition, page 8.) He described the pre-existing cervical spondylosis and explained how heavy work could aggravate such condition:

> I like to think of it [cervical spondylosis] as a crowding of the structures of the neck, particularly the spinal cord, the nerves as they come out of the spine, where the disks are, bulging of the disk, also wear and tear changes, bone encroachment of the nerves as they come out of the spine, they go down the arm, and thickening of the ligaments in the area. It gives you a sort of the napkin ring-like constriction of the spinal canal, compressing all of the elements of the spinal canal, including the spinal cord and the exiting of the nerve roots.
>
> * * *
>
> Well, due to the vigorous use of the neck and head turning, and other vigorous uses associated with heavy work, it has been my experience, it does in many, and has done in many other industrial cases, aggravated pre-existing spondylosis, I think it did here. (Jones deposition, pages 11 and 12.)

Although Dr. Jones first learned at the time of his deposition that the claimant sustained a head injury in 1977 and engaged in non-occupational activities such as camping and fishing, he indicated such factors would not change his opinion regarding causal connection.

Dr. Jones further testified that it was his opinion based upon the symptoms claimant demonstrated on December 19, 1980 that the aggravation of the pre-existing condition was permanent, not temporary. (He acknowledged that claimant reported having had such symptoms for several years and that the pre-existing condition was responsible for the x-ray findings and existed at multiple levels throughout the cervical spine.) Dr. Jones stated that he would not disagree if someone gave the claimant a 15 to 20% permanent impairment rating.

Thomas A. Carlstrom, M.D., specializing in neurosurgery, testified that he examined the claimant on November 24, 1981 and on December 10, 1981 at the request of defense counsel. Dr. Carlstrom's summarization of claimant's history and complaints was essentially consistent with the record. Dr. Carlstrom's testimony regarding his examination findings and conclusions substantially mirrored his December 15, 1981 report:

> . . .He has no cervical bruits and range of motion of his neck is diminished in all planes. Particularly left lateral rotation results in a good deal of upper extremity and left second and third finger pain and numbness. This represents a positive Spurling's sign. . . Neurologically, I found fasciculations in his left deltoid. Strength examination revealed slight weakness of the left deltoid, the left biceps, and moderate weakness of the left grip. . . Sensory examination revealed significant diminution in sensation to all modalities in the left C6 and C7 distribution, and lesser diminution in the left C8 distribution. . .
>
> Cervical spine x-rays were obtained which showed significant cervical spondylosis, particularly at C3-4, C5-6, C6-7 and C7-T1. I did obtain an EMG. There was no evidence of any radiculopathy but he did have some evidence of an old C5 and C6 radiculopathy on the left, and a carpal tunnel syndrome bilaterally.
>
> It is my opinion that Mr. Bertrand's neck, shoulder, chest and left upper extremity pain are caused by his cervical spondylosis. I again offer him a surgical prodedure as I am fairly certain many of his symptoms would be improved. But again he prefers not to undergo surgical therapy at the present time.
>
> Mr. Bertrand's problem is definitely chronic, and not related to any one particular traumatic incident. Cervical spondylosis is definitely job related on most occasions, with job injuries being an aggravation rather than a directly causal factor. I would not expect significant improvement in his symptomatology in the future, without surgical therapy, although improvement could occur. Using the AMA guide lines [sic], he rates approximately a 5-8% permanent physical impairment of the body as a whole. (Carlstrom deposition exhibit 1. At the time of his deposition Dr. Carlstrom indicated claimant's impairment rating was between 5-10%.)

Dr. Carlstrom testified that cervical spondylosis is a generalized, gradual disease in the bones of the neck and occurs in everyone. He explained that "[d]ay-to-day mild traumatic injuries to the bones and the ligaments holding the neck together cause inflammation which results in scar tissue formation, calcium buildup in the scar tissue; and the bones and joints then have abnormal scar tissue, basically." (Carlstrom deposition, page 10.) Although Dr. Carlstrom testified that heavy work does not always accelerate cervical spondylosis, that he was unable to get a history of discrete injuries that might have caused claimant's condition and that the chances were high that claimant would be in the same condition today regardless of the work he performed for defendant employer, he also stated that claimant's symptoms had not been particularly severe until 1979, that cervical spondylosis will probably accelerate at a greater rate if a person performs a great deal of heavy work and that the work claimant performed for defendant (as he understood it from the claimant's work history) probably aggravated the underlying condition to the extent of slightly less than half of the impairment rating. (He indicated the carpal tunnel syndrome findings were not related to the cervical spondylosis.)

Dr. Carlstrom recommended that the claimant avoid jobs requiring a lot of heavy pushing, lifting and shoving. He would limit lifting to between 20 and 30 pounds.

Claimant testified that he began working for defendant employer in 1972. During most of the first five years of such employment he drove a semi truck in town, transporting items such as lawnmowers from the factory to the warehouses. According

to the claimant he did no loading or unloading of the trailers but was required to perform minor maintenance on the semi, including crawling under the rig to loosen frozen brakes. Claimant also worked as an assembler for a few months at a time during those years and drove a towmotor off and on beginning in July of 1976. Claimant received one verbal warning for misuse of company property on March 2, 1976.

Claimant recalled that he bid into truck load scheduling when there was a cutback on semi-truck drivers. (According to the work record provided by defendants, such reclassification occurred on February 23, 1978.) Claimant testified that from that date and until September 4, 1979, he drove a towmotor 50% of the time. (Claimant's work record indicates he was reclassified as a towmotor driver from November 13, 1978 to August 13, 1979.) Claimant indicated he was required to drive the towmotor backwards 90% of the time because forward vision was blocked by items to be loaded into the trailers. He found turning his neck to look over his shoulder more bothersome than a lot of other motions. Although the scheduling job basically entailed checking that orders were filled, claimant also helped load small items by hand. The towmotors (and some hand pushing) were used to load the larger items. Since the towmotors could not raise to the top of the trailer, small items were lifted and packed into the uppermost spaces by hand. Claimant estimated that the items moved manually ranged in weight from 35 to 75 pounds and those moved by the towmotor weighed up to 600 pounds. (Records provided by defendant employer for 1979 reveal that the weight of items ranged from 4 pounds to 604 pounds.)

Claimant testified that he began experiencing pain in his wrist and arm sometime during 1978-1979. He was treated with ligament, wrap and aspirin by the company nurse. He also found himself dropping boxes upon lifting. Defendant employer's records indicate claimant complained of a stiff neck on January of 1976, a sore left wrist in October and November of 1976, a sore shoulder in November of 1976, chest pains in December of 1976 and in August of 1977 and bilateral wrist pain in May of 1977. (Claimant's exhibit 4, page 11; defendants' exhibit C, page 1. Such injuries appear under the heading of "non-occupational illness.) Claimant's numerous complaints of occupational injuries to various parts of his body began in February of 1973. Mention is made of a head injury in February of 1977 and of a fall upon the left wrist in January of 1978. (Defendants' exhibit C, pages 2 and 3.) Claimant recalled only the former incident.

Claimant has not returned to work since September 4, 1979. Claimant testified that when he visited the personnel office after his sick leave pay ended, he was advised that a doctor had indicated he could not work and was instructed to turn in his medical card. (Three such references appear in the company's records. Claimant's exhibit 4, pages 10, 12 and 15.) He does some minor craft or carpentry work, such as constructing wind chimes and putting together a three-tiered table. Claimant drives a pickup but has put his camper up for sale because he has been unable to fish and to travel as much as he did before he was injured. Claimant denied that he is selling firewood but acknowledged that he has experimented with a log splitter and has a chainsaw. Claimant felt his condition had not improved since September 4, 1979. He thought his left arm was now 50% weaker than his right. (Claimant is right-handed.) Claimant testified that he has not sought medical care during the six months preceding the hearing because he cannot afford it. He no longer uses the TENS unit for the same reason. Claimant generally demonstrated a distrust of doctors in explaining why he did not seek treatment between 1971 and 1979 and why he did not wish to pursue the surgery recommended by Dr. Jones and Dr. Carlstrom.

Claimant is 62 years old. He quit school sometime during the eleventh grade. He attended arc welding classess at Des Moines Technical School and is certified in such trade by Iowa and Illinois. Claimant worked on the family farm until joining the army wherein he served as a tank, truck and jeep driver and as a maintenance man. After leaving the army and before going to work with defendant employer, claimant performed a number of jobs including operating a bandberry machine at Firestone, driving seim-trucks both in town and over the road, working in packing houses, welding, drilling, and doing maintenance work. He receives $569 per month in Social Security disability benefits. (Benefits he was receiving from the Veterans Administration ceased when the social security disability began.)

Don Mullin, shipping supervisor for defendant employer for 20 years, testified that he was claimant's supervisor both when the claimant was a semi-driver and when the claimant was a scheduler. He verified that semi drivers do no loading or unloading. He received no complaints from the claimant about such job. Mr. Mullin testified that each scheduler had a towmotor operator who would load 90% of the trailer. Then the scheduler and operator would fill the small voids and top with items weighing 12 to 60 pounds. He described the scheduler's job as requiring heavy work 20 to 30% of the time. He did not recall observing the claimant having any difficulty doing the required lifting. Regarding the date of injury, Mr. Mullin recalled that the claimant advised him at the start of the working day that he was having stomach pain.

Kennith Purdy, defendant employer's manager of material distribution and control since 1970, testified that the towmotor position entailed no lifting by hand and that the towmotor was operated in a forward motion 85 to 90% of the time. He agreed that it would be possible to load the towmotor in such a fashion that one would not be able to see forward. However, Mr. Purdy commented that operating the towmotor backwards would be illogical because it would be in an unsafe manner. Mr. Purdy further testified that 10 to 15% of the scheduler's job entailed lifting items weighing between 10 and 60 pounds. He noted that according to contract provisions a scheduler cannot operate a towmotor.

Mr. Purdy recalled that after the claimant damaged one of defendant employer's vehicles, claimant reported having had two prior accidents including rolling a cement truck. He knew no specifics regarding such incidents. Mr. Purdy also stated that when he purchased a motor from the claimant in late 1979 or early 1980, claimant was making a log splitter and claimant stated he was chopping wood for added income.

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).

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.

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 ommitted.] 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 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., 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 September 4, 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 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. Perris 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).

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).

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 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 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.

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

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. McSpadden v. Big Ben Coal Co., supra.

ANALYSIS

The record viewed as a whole supports finding that claimant sustained a personal injury arising out of and in the course of his employment. While it is true that claimant's underlying condition was documented as early as 1971 and would naturally progress with normal wear and tear, both Dr. Jones and Dr. Carlstrom were in agreement that heavy work aggravated the pre-existing condition to some extent. The lay testimony revealed that both the scheduler's job and the towmotor position entailed some percentage of lifting items weighing up to 60 or 75 pounds to varying heights. (Mr. Purdy's comment that the towmotor position entailed no lifting by hand was discounted insofar as it was contradicted by both the claimant and the claimant's supervisor.) By contrast semi driving did not entail such activity. Furthermore, towmotor operation apparently required more backward driving, even if the actual percentage amount is in dispute. Claimant first noticed neck and arm pain in 1978 and 1979 which is the period of time he was alternately assigned to scheduling and towmotor driving. Hence such work performed in 1978 and 1979 is found to be more than a slight aggravation resulting in changes beyond the normal general processes of nature. Such aggravation amounted to a personel injury arising out of and in the course of employment. It should be noted that references to other accidents, injuries and recreational activities did not have any impact on the "arising out of" or "causal connection" issues due to a lack of medical evidence supporting such lines of defense.

Dr. Jones indicated he would not disagree with someone who rated claimant's impairment at 15 to 20%. However, Dr. Carlstrom specified that less than half of his 5 to 10% rating was based on the work aggravation. Yet, based on claimant's present cervical condition, Dr. Carlstrom recommeded the claimant avoid heavy pushing, lifting over 20 to 30 pounds and shoving, which suggests that claimant would not be able to perform some of his former job duties. Both doctors believe surgery would improve claimant's condition.

Claimant did not return to work with defendant employer apparently because of medical information received by defendant employer in connection with claimant being declared permanently and totally disabled by Dr. Liu and by the Veterans Administration. (The record was not clear regarding what occurred at that time. That is, whether defendant employer refused to give claimant any sort of work because of the work aggravation has not been established.) There is no evidence that claimant has attempted to seek other gainful employment. Rather the record reveals that he has curtailed his recreational activities because of discomfort and has supplemented his Social Security disability benefits in a minor fashion with his handiwork. (Whether claimant also sells firewood is disputed; however, it is noted that he did not deny use of the log splitter or chainsaw.) The record also contains subjective complaints referrable to objective findings of degenerative disease in the lumbo-sacral and hip regions and of carpal tunnel syndrome, neither one of which is related to the aggravation of the cervical spondylosis (nor to the underlying cervical condition). Accordingly, claimant's loss of earning capacity resulting from the work related aggravation of his underlying cervical condition is deemed to be 20%.

Neither party explored the question of healing period with Dr. Jones or Dr. Carlstrom. The record as a whole suggests that no significant improvement was anticipated or achieved once the claimant became disabled from working on September 4, 1979. Therapy claimant was receiving at Veterans Hospital in early 1980 was discontinued and his condition labeled chronic. Range of neck motion decreased between the time of Dr. Jones' last examination and the time Dr. Carlstrom evaluated the claimant. (Whether subjective factors influenced the objective findings on the latter occasion was not investigated.) Finally, claimant felt his condition had not improved since September 4, 1979. Accordingly, no healing period benefits shall be awarded.

The only medical expenses submitted were those for treatment received at the Veteran's Hospital. The attached medical records indicate that claimant obtained treatment for the lumbo-sacral and left hip problems as well as for the cervical condition. Defendants are responsible only for the latter portion.

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 conclusion of law:

Finding 1. Claimant was diagnosed as having discogenic disease and degenerative arthritis of the cervical spine in 1971. No treatment was rendered.

Finding 2. Claimant worked for defendant employer as a semi-driver and occassionally as an assembly worker or towmotor operator during the years 1972 through 1977. He worked as a truck load scheduler and as a towmotor driver during 1978 and until September 4, 1979. The latter period of employment entailed an increased amount of lifting items weighing up to 60-75 pounds to varying heights and of twisting neck motion.

Finding 3. Claimant began to notice neck and arm pain during 1978 and 1979 and chest pain for four months prior to September 4, 1979.

Finding 4. Claimant experienced severe chest pain on his way to work on September 4, 1979. He was hospitalized on that date and until September 19, 1979. Diagnostic studies revealed no evidence of coronary disease. X-ray of the cervical spine indicated there was narrowing of the intervertebral disc at C-5, C-6 and at C-6, C-7 and at C-7, T-1 with posterior bony spur formation causing narrowing of the neural foramina at C-5, C-6. Cervical myelogram also revealed defects at C-2,3 and C-3,4.

Finding 5. The medical experts agree that claimant sustained a material aggravation of the underlying cervical spondylosis as a result of the heavy work he performed for defendant employer.

Conclusion A. Claimant sustained a material aggravation of a pre-existing condition in the course of and arising out of the work he performed for defendant employer in 1978 and 1979.

Finding 6. Claimant's functional impairment as a result of the work related aggravation was assessed at slightly less than 5% of the body as a whole. (One of the medical experts would not have disagreed with a rating of 15 to 20%, if it had been given by someone else.)

Finding 7. Claimant should avoid a lot of heavy pushing, lifting and shoving. Lifting should be limited to 20 to 30 pounds.

Finding 8. Claimant does not wish to pursue surgery recommended by the treating and evaluating doctors.

Finding 9. Claimant has not returned to work.

Finding 10. Claimant has not attempted to return to work.

Finding 11. Claimant received benefits from the Veteran's Administration sometime after September 4, 1979 and until his Social Security disability benefits commenced.

Finding 12. Claimant has curtailed his recreational activities due to pain and occasionally does some minor craft work.

Finding 13. Claimant is 62 years old.

Finding 14. Claimant quit school before completing the eleventh grade. He received training in arc welding and is a licensed welder in Iowa and Illinois.

Finding 15. Claimant's employment history includes farming, factory and packing house work, welding, truck driving, drilling, and maintenance work.

Finding 16. Claimant has subjective complaints referable to objective findings of degenerative disease in the lumbo-sacral and hip regions and to findings of carpal tunnel syndrome. Neither condition is causally related to the work related aggravation.

Conclusion B. Claimant has sustained 20% industrial disability as a result of the work related injury.

Finding 17. The medical record indicates no significant improvement was anticipated as of or after September 4, 1979.

Conclusion C. Claimant is not entitled to healing period benefits comtemplated by Code section 85.34(1).

ORDER

THEREFORE, it is ordered that the defendants pay the claimant one hundred (100) weeks of permanent partial disability at the stipulated rate of one hundred ninety-four and 33/100 dollars ($194.33) per week. Permanent partial disability benefits shall begin as of September 4, 1979.

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

Defendants are further ordered to pay unto the claimant (upon submission of an itemized bill) that portion of the Veteran's Administration statement that reflects treatment rendered for the cervical condition.

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. A first report shall be filed immediately.

Signed and filed this 20th day of August, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SIDNEY BITTEL,
Claimant,
vs.
L. E. Myers Co.,
Employer,
and
AMERICAN INTERNATIONAL ADJUSTMENT CO., INC.,
Insurance Carrier,
Defendants.

File No. 649368

A R B I T R A T I O N

D E C I S I O N

This is a proceeding in arbitration brought by Sidney Bittel, the claimant, against his employer, L.E. Myers Co., and the insurance carrier, American International Adjustment Co., Inc., to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on September 24, 1980. This matter came on for hearing before the undersigned at the Linn County Juvenile Court Facility in Cedar Rapids, Iowa on June 21, 1982. The record was considered fully submitted on that date.

On October 10, 1980 defendants filed a First Report of Injury concerning the September 24, 1980 injury.

The record consists of the testimony of the claimant and of Ed Rusho; claimant's exhibit 1, a stipulation of fact; and defendants' exhibit A, an investigating officer's report of motor vehicle accident with cover letter from the Coralville Police Department. Both parties filed briefs.

ISSUE

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

RECITATION OF THE EVIDENCE

Claimant, a lineman for defendant employer for over two years, testified that on September 24, 1980 he arrived at Jerry's Standard Station in Coralville, Iowa at 7:45 a.m. Claimant explained that it was customary for the crew to which he was assigned to meet every morning at the Coralville location prior to leaving for that day's particular job site. He acknowledged that the formal working day (and pay) began at 8:00 a.m., but noted it was his understanding that the crew members were to arrive earlier for instructions and so that they could depart promptly from Coralville at 8:00 a.m.

Claimant recalled that upon arrival at Coralville the morning of September 24, 1980 he searched for his sunglasses in the truck and in the "show up" without success. He told Ed Rusho, his foreman, that he was going to purchase another pair. Since there were no sunglasses available at the Standard Station, claimant crossed Highway 6 to the '76 Station on the other side. After purchasing the sunglasses, claimant crossed the highway to return to the meeting site. As he approached the last of the six lanes, the eastbound right turn lane, at a time when the eastbound traffic was stopped at the intersection, a pickup truck moved from an eastbound through lane into the right turn lane knocking the claimant into Jerry's flower garden. (Claimant indicated he deliberately crossed the intersection about 120 feet back from the intersection to avoid trampling the flowers.) According to the investigating officer's report accident occurred around 7:58 a.m. as claimant crossed the highway 175 feet from the intersection, and claimant was struck as described, thrown 10 feet east, got up and walked into Jerry's Standard where he fell into the bushes. Claimant was taken to the University of Iowa Hospitals and Clinics for treatment of a broken hip and bruises. Claimant indicated he was off work recuperating from his injury until November 11, 1980.

Claimant testified that he wears sunglasses on the job for safety reasons. Apparently, the claimant had experienced electrical sparks fly in his face on prior occasions. In general, he felt the sunglasses aided his vision in working outside in the sun. He recalled that three other crew members on the date of injury wore sunglasses while working. He acknowledged that defendant employer did not require the crew members to wear sunglasses, as it did require the employees to wear long pants and a shirt, and that he did not consider himself to be in the course of employment when purchasing the latter items. He conceded that defendant employer does not provide sunglasses as they do hard hats.

Ed Rusho, presently employed by defendant employer and foreman at Coralville on the date of injury, testified that although starting time was 8:00 a.m. he told his crew members that he liked to see their faces before 8:00 a.m. so that he knew who was available for each day's work. He did not recall whether he talked to the claimant that morning before the accident because he was busy with paper work. He did remember that he was advised by another crew member that everyone had arrived. He did not witness the accident.

Mr. Rusho verified that sunglasses, unlike hardhats, are neither required nor provided by the defendant employer. He himself had no requirement that his crew members wear eye protection except when welding and doing metal chipping which were not involved in the work being done at the time of the injury. Mr. Rusho could not recall how many of the September 24, 1980 crew wore sunglasses, but generally commented that the linemen are the ones who wear the sunglasses. He testified that he does not wear sunglasses but explained that as foreman he does not perform the same tasks as the linemen. (The undersigned observed that Mr. Rusho does wear glasses.)

The parties stipulated that if claimant's injury arose out of and in the course of employment, claimant's rate of compensation is $256.48 per week, claimant has no permanent partial disability related to his injury, claimant was temporarily totally disabled from September 24, 1980 through November 10, 1980, inclusive, and claimant is entitled to $938.17 in medical expenses.

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). Code section 85.3(1).

Code section 85.61(6) states:

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

In Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979), the Iowa Supreme Court explained the meaning behind and distinction between "in the course of" and "arising out of":

> ..."in the course of" his employment. This element refers to the 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 the employee may reasonably be, and while he is doing his work or something incidental to it. McClure v. Union, et al. Counties, 188 N.W.2d 283, 287 (Iowa 1971).
>
> ...arose "out of" his employment. This element refers to the cause and origin of an injury. Id. The injury must be a natural incident of the work. This means it must be a rational consequence of a hazard connected with the employment. Musselman vs. Central Telephone Co., 261 Iowa 352, 355, 154 N.W.2d 128, 130 (1967); Burt v. John Deere Tractor Works, 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1956).

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

"[C]ases involving an injury from a highway accident suffered while enroute to or from work require a determination whether the employee was engaged in his employer's business at the time..." Pribyl v. Standard Electric Co., 246 Iowa 333, 339, 64 N.W.2d 438 (1965). The Iowa Supreme Court elaborated upon such principle in Farmers, supra at 177:

> When faced on prior occasions with the argument that an injured employee's presence at the scene of an accident was not "required," this court has adopted a liberal interpretation of the "course of employment" criterion. We have thus said that
>
> > [a]n injury occurs in the course of the employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.
>
> Bushing v. Iowa Railway & Light Co., 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929) (citations omitted, emphasis added).

Whenever an employee leaves the line of duty, compensation coverage ceases. Walker v. Speeder Machine Corp., 213 Iowa 1134, 240 N.W. 725 (1932). However, to disqualify the employee from compensation coverage, the departure from the usual place of employment must amount to an abandonment of the employment or be an act wholly foreign to the usual work. Crowe v. DeSoto Cons. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). After a deviation from the employment, if the employee returns to the course of the employment, and is then injured, such an injury is compensable. Crees v. Sheldahl Telephone Co., 258 Iowa 292, 139 N.W.2d 190 (1965).

ANALYSIS

Defendants argue that the present case fits squarely within the going and coming rule and none of the well known exceptions

to such rule apply. Somewhat in the alternative, they argue that claimant's presence on defendant employer's premises before the accident is insignificant because claimant's unpaid excursion for a personal reason would come within the parameters of the going and coming rule.

Defendants' emphasis on the going and coming rule is not persuasive. The fact that the claimant arrived early at the "show up" in accordance with his understanding that the foreman wanted the crew members to arrive prior to 8:00 a.m. and the defense witness' testimony corroborating such routine are significant. Claimant's testimony that he did arrive at the "show up" at 7:45 a.m. on September 24, 1980 is believed. That Mr. Rusho did not actually remember claimant checking in is not crucial insofar as he acknowledged that another employee advised him that all crew members were present. Furthermore, claimant did not arrive unreasonably early. See Griffith v. Cole Bros., 183 Iowa 415, 165 N.W. 577 (1918). Hence, the facts of this case do not lend themselves to analysis under the basic going and coming doctrine.

Rather, claimant's action in leaving the "show up" to secure a pair of sunglasses appears to be in the nature of an off premises break and in preparation for the work day. After noting that the claimant did not bring himself within an exception of the rule that off premises meals on employee's time are not compensable, the Iowa Supreme Court in Halstead v. Johnson's Texaco, 264 N.W.2d 757 (Iowa 1978) declined to state whether Iowa recognized an exception to the coffee break and lunch break situations where the employee proves the break was on company time. General review of 1 Larson, Workmen's Compensation Law, §§ 15.50 and of 1A, §§ 21.00 et seq., suggests that when the injury occurs off the defendant employer's premises during a break, the circumstances or work-relatedness of the activity must be scrutinized. However, work connected activity is not exclusive of some ministration to the personal comfort and needs of the employee. Bushing, supra; Walker, supra. Likewise, the duration or other circumstances that restrict or limit the employee's freedom of movement during a break are to be taken into consideration in assessing the issue at hand. Halstead, supra.

The fact that defendant employer neither required nor provided sunglasses for the linemen does not obviate finding that claimant's attempt to secure sunglasses for what he deemed to be his health and safety in carrying out his employment duties was incidental to his employment. Claimant did not venture away from defendant employer's premises longer or farther than was necessary and essentially was available to leave from the "show up" for that day's assignment upon the foreman's command. That is, claimant did not abandon his employment.

Clearly, even if claimant's action was viewed as a deviation for a personal errand, the fact that he was returning to the "show up" at the time of the injury would require a similar finding of compensability. For decisions discussing deviation see Loren Achenbach v. Iowa Department of Public Safety and State of Iowa, Vol 1, Iowa Industrial Commissioner's Report, p. 1 and Darrell A. Boettcher v. The Garst Company and Employers Mutual Casualty Co., 34th Biennial Report of the Iowa Commissioner, p.47.

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 arrived at defendant employer's "show up" at 7:45 on September 24, 1980 in accordance with his foreman's request that crew members be present prior to 8:00 a.m., the actual start of the working day, so he would know how many employees were available for assignment.

FINDING 2. Claimant discovered he had misplaced his sunglasses, which he used for purposes of safety in his work as a lineman, and crossed the highway to purchase a pair at a gas station. Defendant employer did not require nor provide sunglasses.

FINDING 3. Claimant was struck by a pickup truck as he crossed the highway to return to the "show up" after purchasing the sunglasses.

FINDING 4. Based on the above findings, claimant completed arrival at a time and place specified by defendant employer and did not subsequently abandon his employment by crossing the highway to purchase glasses he deemed necessary to the safe performance of his work.

CONCLUSION Claimant sustained an injury in the course of and arising out of his employment on September 24, 1980.

ORDER

THEREFORE, it is ordered that the defendants pay the claimant six and six-sevenths (6 6/7) weeks of temporary total disability at the rate of two hundred fifty-six and 48/100 dollars ($256.48) per week.

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:

Mach Ambulance Service	$ 80.00
Marshalltown Area Community Hospital	$ 47.50
Johnson County Emergency Ambulance	$ 74.75
University of Iowa Hospitals	$637.92
Medical Services (University of Iowa Hospitals)	$ 98.00

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 27th day of July, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLARENCE A. BLEVINS, Claimant,	:	File No. 510678
vs.	:	A P P E A L
WILSON FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a ruling on rehearing filed November 24, 1982 wherein the deputy determined claimant should be permitted to pursue a review-reopening with regard to a July 5, 1978 injury to his left knee only to the extent that there has been a change of condition subsequent to March 27, 1981. Claimant's notice of appeal was filed December 15, 1982.

The record in this matter consists of Industrial Commissioner File No. 510678 and all briefs and filing therein. Due to the subject matter of the ruling from which this appeal is taken, it is also necessary to review Industrial Commissioner File No. 654196. The latter file outlines an arbitration between the identical parties as are involved in this appeal, and is currently pending final adjudication in the Supreme Court of Iowa.

ISSUE

Whether principles of res judicata and claim preclusion prohibit claimant from maintaining an action in review-reopening concerning a July 5, 1978 injury other than to merely show a change of condition subsequent to March 27, 1981.

REVIEW OF THE RECORD

Claimant suffered an injury to his left leg and knee on July 5, 1978 while unloading packages of meat from a truck with a two-wheel cart. Claimant's heel caught as he was taking a two foot step from the truck down to the ground, resulting in a sprained knee and twisted leg. Workers' compensation benefits totaling $863.63 were paid to claimant over a period of three weeks and five days, the final payment being made on August 10, 1978.

On November 25, 1980 claimant filed an arbitration action for an occupational disease of the back and both legs. The petition asserted severe pain and limitation of motion in the back and legs, and the date of injury was stated to be August 4, 1980. A hearing was completed on March 27, 1981 and claimant was denied benefits as the alleged occupational disease was found not to have arisen out of and in the course of employment. Appeals to both the industrial commissioner and the district court ended in the same result. Judicial appeal is currently pending in the Supreme Court of Iowa.

On May 21, 1981 claimant filed a new petition in review-reopening regarding the injury to his left leg and knee on July 5, 1978.

On July 30, 1982 defendant filed a motion to adjudicate law points and a motion for summary judgment. Defendant asserted that claimant had previously filed a petition in arbitration which sought compensation for injuries sustained during his employment at Wilson Foods, including those to the left lower extremity. Defendant prayed for a ruling that claimant be entitled to only one action, and thus that claimant be barred from bringing an action in review-reopening.

In analyzing defendant's motions to adjudicate law points and for summary judgment, the deputy examined the doctrine of "issue preclusion." The deputy's ruling stated "this deputy... cannot find as a matter of law that claimant is not entitled to bring a proceeding in review-reopening relating to his left lower extremity." Defendant's motion for summary judgment was overruled.

On September 15, 1982 defendant filed a petition for rehearing stating that the deputy had erroneously applied "issue preclusion" rather than "claim preclusion" in her prior ruling. Oral arguments were heard, and in a November 24, 1982 ruling the deputy found that the elements of claim preclusion were met. Defendant's motion for summary judgment was again overruled, but claimant's review-reopening regarding the July 5, 1978 injury to the left knee and leg was limited to showing a change of condition subsequent to March 27, 1981. (The arbitration hearing from which claimant was previously denied benefits for an alleged occupational disease was completed on March 27, 1981.)

Claimant appeals this latest ruling by the deputy on the bases that his right to bring an action in review-reopening has been violated without due process of law and that the doctrine of claim preclusion was improperly applied.

APPLICABLE LAW

The Supreme Court of Iowa addressed the issue of claim preclusion in B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279 (Iowa 1976). At 286 the court cites the Restatement of Judgments for the following:

> Where a judgment on the merits is rendered in favor of the defendant, the plaintiff is precluded from subsequently maintaining an action on the same cause of action although he presents a ground for the relief asked other than those presented in the original action, except where the defendant's fraud or misrepresentation prevented the plaintiff from presenting such other ground in the original action.

In a more recent case, Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982), the Supreme Court of Iowa stated:

> Res judicata, in the sense of claim preclusion, applies only if the cause of action in the 1969 litigation was the same as the present action. A cause of action is the same when the asserted invasion of rights is the same. A plaintiff is not entitled to a second day in court simply by alleging a new ground of recovery for the same wrong. In order to determine whether the cause of action is the same, we examine the protected right, the alleged wrong, and the relevant evidence.

Section 85.26(2), Code of Iowa, 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 or the Iowa occupational hearing loss Act [chapter 85B] 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.

Section 86.14(2), Code of Iowa, states: "In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

ANALYSIS

The sole issue to be decided on this appeal is whether the doctrine of claim preclusion should be applied to limit the scope of review-reopening concerning a July 5, 1978 leg and knee injury. Claimant previously brought an arbitration action against defendant alleging that he had suffered from an occupational disease in his back and both legs. The date of injury stated in the petition for arbitration was August 4, 1980. Claimant later sought to bring a review-reopening action against defendant with regard to an injury which did, in fact, occur on July 5, 1978. The date of injury stated in the petition for review-reopening was July 5, 1978. In order for the doctrine of claim preclusion to limit the scope of claimant's review-reopening to change of condition subsequent to the arbitration hearing, the review-reopening must be nothing more than a new grounds for recovery for the same claim or wrong. The issues of whether claimant suffered from an occupational disease on August 4, 1980 and whether claimant has had a change in the condition of a sprained knee which resulted from a July 5, 1978 accident appear to be separate and unique.

The simple fact that no occupational disease was found to exist in claimant's left leg on August 4, 1980 should in no way preclude him from presenting a case concerning the ultimate outcome of an injury which did occur in July 1978. While much of the evidence that claimant might wish to present at a review-reopening hearing may parallel that which was presented at the earlier arbitration hearing, the fact remains that the two claims are separate and distinct in time and form. The record indicates, and defendant in no way refutes, that claimant did suffer an industrial injury in July 1978 for which temporary workers' compensation benefits were paid. As only the August 4, 1980 occupational disease claim was litigated in the earlier arbitration, claimant must be permitted to pursue a review-reopening in its broadest sense and show whether the condition of the employee as a result of the July 1978 injury warrants an increase of compensation previously paid pursuant to the memorandum of agreement filed in conjunction with the July 1978 injury.

FINDINGS OF FACT

1. Claimant suffered a work-related injury to his left leg and knee on July 5, 1978.

2. That defendants filed a memorandum of agreement and paid three weeks and five days of temporary total disability benefits.

3. On November 25, 1980 claimant filed an arbitration petition which alleged an occupational disease of the back and legs as of August 4, 1980.

4. An arbitration hearing was completed on March 27, 1981, and claimant was subsequently denied benefits in that matter.

5. On May 25, 1981 claimant filed a review-reopening petition concerning the July 5, 1978 injury to his left leg and knee.

6. In an August 30, 1982 ruling, the deputy ruled that claim was "permitted as a matter of law to bring a proceeding in review-reopening relating to his left lower extremity."

7. On September 15, 1982 defendant filed for rehearing on the grounds that the deputy had failed to apply "claim preclusion" against claimant's request for review-reopening.

8. In a November 24, 1982 ruling the deputy found that claimant's review-reopening should be limited in scope under the doctrine of claim preclusion, and would only consider change of condition subsequent to the conclusion of the arbitration hearing.

9. That the arbitration claim, although alleging disability which in part included the area affected by the July 1978 injury, was for a separate insult to the area distinct from the July 1978 injury.

CONCLUSIONS OF LAW

That claimant's review-reopening proceeding to show a change of condition which may warrant an increase in the compensation previously paid as a result of an injury received on July 5, 1978 is not precluded by any matters adjudicated in the arbitration proceeding alleging occupational disease on August 4, 1980.

THEREFORE, it is ordered:

That claimant be allowed to pursue a review-reopening regarding any change of condition from that previously compensated to his left leg and knee as a result of an injury on July 5, 1978.

Signed and filed this 30th day of March, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOUIS BOECKEMEIER,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	
ARMSTRONG TIRE,	:	
	:	File No. 691919
Employer,	:	
	:	A P P E A L
and	:	
	:	D E C I S I O N
TRAVELERS INSURANCE COMPANY,	:	
	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed December 29, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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 transcripts of hearing which took place on August 24 and August 30, 1982; claimant's exhibits 1, 2, 3, 4, 5, 6, 7 and 8; and defendants' exhibit A, all of which evidence was considered in reaching this final agency decision.

This decision will differ from that of the hearing deputy in that an award will be made.

SUMMARY

The arbitration decision contains a good summary of the facts. Basically, claimant's work at the employer's plant consisted of 12 hour days from November of 1981 until January 5, 1982. During that time, he noticed some swelling in his groin and went to the plant nurse. The record was clear that the pain in claimant's groin was worse after a coughing spell. The plant nurse's testimony shows that it was her impression that the coughing had caused or aggravated the problem, which was diagnosed as a hernia by William P. Wellington, M.D.

Claimant testified that the long hours of work, some of which involved lifting up to 80 pounds, also strained his groin. Claimant included his work as a part of the history given to Dr. Wellington. Dr. Wellington's opinion will be discussed below.

ISSUE

The issue presented is whether claimant sustained an injury which arose out of and in the course of the employment.

APPLICABLE LAW

The hearing deputy's decision contains a statement of the applicable law, which statement is adopted herein and will not be repeated. (See hearing deputy's decision.)

Another principle of law is applicable here, however. In Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), the Iowa Supreme Court states at page 354 that "A cause is proximate if it is a substantial factor in bringing about the result....It only needs to be one cause; it does not have to be the only cause." The court then refers the reader to Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d at 670 (Iowa 1971).

ANALYSIS

The case is close, and it is understandable that the hearing deputy might not view the evidence in the same light as the undersigned deputy industrial commissioner. It is clear that the non-work connected coughing incident played a part in the acute symptoms of the hernia. This is brought out in both the evidence of the claimant and the employer's nurse, Nancy Wray.

There is considerable evidence, also, that claimant's work from November 1981 until January 5, 1982 was a contributing factor. For example the transcript contains the following: "Q. That's my question. When you would pick up a heavy item, the eighty-pound item, would that make you feel as bad as the coughing spell had made it feel? A. I would say, yes." (Hearing transcript, August 24, 1982, ll. 14-18, p. 27) That testimony, along with claimant's description of his work, shows that the work contributed to the acute symptoms.

In a report of August 16, 1982, Dr. Wellington states: "These signs and symptoms [tender bulging mass in the right inguinal area] appear to be aggravated doing his work, that consists of some moderate lifting, pushing and tugging."

The transcript contains the following:

> Q. Dr. Wellington, we lawyers like to find smoking guns. It makes our work easier. I guess what I'm asking you is that is it more likely than not that someone who had been involved in that continuous kind of strain and stress like Mr. Boeckemeier -- and I want reasonable certainty not absolute certainly (sic) -- is it more likely that the strain and the stress of the work would cause or bring about the disabling hernia condition than one coughing spell?
>
> A. I'm talking about the averages. You will say that a man does work. That implies repeated effort. The chances of having it occur in secondary to repeated effort are higher than the chances of having it consecutive to severe coughing. (Hearing transcript, August 30, 1982, ll. 10-24, p. 14)

This testimony certainly points to the work being a factor in the hernia.

Claimant had surgery to repair the condition which had arisen. That condition, a hernia, is congenital or developmental and is predisposed to aggravation by such trauma as coughing or lifting. Considering all the testimony in the case, the evidence is legally sufficient to support an award, and the evidence is convincing that claimant's work was a substantial factor, one cause of his condition.

FINDINGS OF FACT

1. Between November 7, 1981 and January 5, 1982, claimant worked some 12 hour days, which work involved some lifting of 80 pounds in his duties as a rubber cutter, utility man and tuber operating.

2. In December 1981 claimant had a cold and cough, said cough, causing him pain in the groin.

3. Claimant's work between November 7, 1981 and January 5, 1982 also caused claimant pain in the area of his groin.

4. Claimant had surgery for a hernia on January 21, 1982 and returned to work without permanent impairment on March 5, 1982.

The parties stipulated that claimant was off work from January 5, 1982 until March 4, 1982 and that defendants were entitled to a credit for all payments made under the accident and sickness policy (Transcript, August 24, 1982, p. 4).

CONCLUSION OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on December 10, 1981 which resulted in temporary total disability only between January 5, 1982 and March 5, 1982.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from January 5, 1982 through March 4, 1982, a period of eight (8) weeks, three (3) days, at the stipulated rate of two hundred fifty-one and 17/100 dollars ($251.17), accrued payments to be made in a lump sum together with statutory interest at the rate of ten (10) percent per year.

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 28th day of February, 1983.

Appealed to District Court:
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

REPORT OF THE IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

REGINA MARIE BOUGHTON,

Claimant,

vs.

ROBIN RAWLINGS, d/b/a THE BARN,

Employer,
Uninsured,
Defendant.

File No. 705515

A R B I T R A T I O N

D E C I S I O N

This is a proceeding in arbitration brought by Regina Marie Boughton, the claimant, against Robin Rawlings, d/b/a The Barn, her employer, who is found to be in violation of Section 87.1, Code of Iowa, to recover benefits under the Iowa Workers' Compensation Act by virtue of an industrial injury which occurred on Junr 3, 1982.

Defendant employer was found to be in default by virtue of an agency order entered October 27, 1982.

This matter came on for hearing on December 16, 1982 in Mount Pleasant, Iowa, and considered as fully submitted at the conclusion of the hearing.

No court reporter was present at the hearing.

Based upon the undersigned's notes of the proceeding, the following findings of fact are made:

1. That the claimant herein became an employee of the defendant employer on February 2, 1982, as a waitress, for which labor she received $90 per week in cash plus $15 in tips per a forty hour week.

2. That on June 3, 1982, while the claimant was engaged in her normal duties for the defendant employer, claimant sustained an injury to her right leg when the defendant employer playfully pushed her.

3. That claimant's injury arose out of and in the course of her employment duties.

4. That claimant was able to return to work on July 7, 1982.

5. That claimant sustained a five week period of temporary total disability.

6. That during this five week period, claimant was unable to perform her normal duties at a second place of employment, to wit, "Chumleys Deli," for which labor she received $70 per week.

7. That this single person with no dependents had a gross weekly wage of $175 per week.

8. That claimant's resulting weekly entitlement is found to be $107.38.

9. That claimant's weekly entitlement has been wrongfully withheld.

10. That pursuant to Section 86.13, Code of Iowa, claimant as found to be entitled to an award of fifty percent of those weekly entitlements wrongfully denied her since July 1, 1982, or $53.69.

11. That claimant has, as of the date of the hearing, suffered no permanent impairment as a result of the industrial injury in question. (Claimant's exhibits 2 and 3.)

12. That claimant's medical expenses incurred as necessary to treat the injury remain unpaid.

THEREFORE, IT IS ORDERED that defendant pay the claimant five (5) weeks of temporary total disability at the weekly rate of one hundred seven and 38/100 dollars ($107.38) or five hundred thirty-six and 90/100 dollars ($536.90) plus fifty-three and 69/100 dollars ($53.69) as penalty together with statutory interest. Accrued benefits are payable in a lump sum.

Defendant is further ordered to pay the claimant the sum of ninety-five dollars ($95) in payment of her incurred medical expenses.

There being no costs, none are assessed.

Signed and filed this 7th day of January, 1983.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY L. BROWN,

Claimant,

vs.

WILSON FOODS CORPORATION,

Employer,
Self-Insured
Defendant.

File No. 696308

R E V I E W

R E O P E N I N G

D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Gary L. Brown, claimant, against Wilson Foods Corporation, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on February 18, 1982. It came on for hearing on March 14, 1983 at the Buena Vista County Courthouse in Storm Lake, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received March 3, 1982. A memorandum of agreement was filed on March 12, 1982. A final report shows the payment of 19 weeks and 6 days of temporary total disability and of medical and travel expenses.

At the time of hearing the parties stipulated to a rate of $288.62.

The record in this matter consists of the testimony of claimant and of Keith Garner, M.D., and claimant's exhibit 1, three return to work slips and the office notes of Dr. Garner.

ISSUES

The sole issue in this matter is claimant's entitlement to temporary total disability for the period from April 19, 1982 to May 3, 1982.

STATEMENT OF THE CASE

Thirty-eight year old claimant who has been employed by the defendant for nearly 18 years testified that his usual job is tending casing machines.

He recalled the circumstances surrounding his injury on February 18, 1982 thusly: He was carrying a vat of leaf lard to be dumped. He slipped and pulled something in his left shoulder. He was sent to Dr. Garner's office and he stayed off work. He was treated with physical therapy and pain pills.

Claimant stated that under the union contract he was entitled to four weeks of vacation in 1982 two of which he scheduled from April 19 to May 3. He was married on April 17 and took a Caribbean honeymoon cruise. He said that he returned from the trip for a scheduled appointment with Dr. Garner.

Claimant remembered that he went for physical therapy on Tuesday, April 27 and Thursday, April 29. On Friday, April 30, Dr. Garner provided him with a return to work slip for May 3.

Claimant testified that he went to pick up his compensation check on May 3 and was told he got no check because he had been released by Dr. Garner. Claimant denied that he had been told by Dr. Garner that he was released when he was seen on April 13, that he had been given a release slip or that he had seen the release slip dated April 13.

Claimant reported that he tried to return to work on May 3. After laboring a half hour he went back to the doctor because his shoulder was bothering him. Dr. Garner subsequently arranged for him to be seen in Omaha. Claimant remained off work until August 9, 1982.

Apparently an attempt was made to give claimant more vacation which he did not want because he had been off work with his injury. Claimant indicated he received full pay for the two weeks vacation period and weekly compensation for his other time off. Claimant denied any shoulder injury on his honeymoon or seeking medical attention during that time.

Keith Garner, M.D., who practices medicine in Cherokee and who serves as company doctor for defendant testified that claimant was seen on April 13 for a check on his shoulder. The physician interpreted his notes as showing that he discussed with claimant claimant's return to work and gave a slip with the April 19, 1982 date on it to the claimant. He agreed that claimant was back on April 27 and was sent to physical therapy and that when he was seen on April 30 he was given a slip for a return on May 3, 1982.

In explaining why two slips had been given, Dr. Garner said that he had discussed with claimant claimant's impending marriage and that as the marriage had no bearing on the return to work, claimant ordinarily would have gone back on April 19. However, when claimant felt he was unable to return to work when he was seen on April 27, he was given more physical therapy and a new slip for May 3.

Dr. Garner agreed that claimant's shoulder was not in good shape in April.

Offered in evidence were three return to work slips, one dated April 13, 1982, for return on April 19, 1982; one dated April 30 for return on May 3, 1982 and one dated June 11, 1982 for return June 14, 1982.

Medical records show claimant was seen in Dr. Garner's office on March 10, 1982 following an injury to his left shoulder three weeks before.

Notes from April 13, 1982 indicate a return. On April 27, 1982 claimant complained of being too sore to work. On April 30, 1982 the return was set for May 3, 1982. On that date claimant reported his inability to work and he was referred to another physician.

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is claimant's entitlement to temporary total disability for the time from April 19, 1982 through May 2, 1982.

Iowa Code section 85.33(1) provides:

> Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32 until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever comes first.

Much has been made in this matter over what the doctor and the claimant discussed and whether or not claimant was told he could return to work on April 19 or was given a return to work slip at the time of his visit on April 13. The testimony is in conflict and this deputy industrial commissioner does not believe a resolution of that conflict is necessary to the decision in this matter. See Ward v. Iowa Department of Transportation, 304 N.W.2d 236 (Iowa 1981). The bottom line herein is that claimant was unable to work during that time period. Dr. Garner's notes indicate claimant was seen from March 10 to April 13 on a regular basis. Dr. Garner's testimony was that claimant's shoulder was not in good shape during the month of April. No evidence was presented as to any intervening incidents. When claimant attempted to return to work on May 3, 1982 he was unable to do so. With the benefit of hind sight it is perfectly clear that the claimant did not return to work on April 19 and in light of ensuing events was not medically capable of returning to employment substantially similar to his employment at that time.

Claimant's vacation pay is a separate entity from his workers' compensation payment. He has earned his vacation pay through his service to his employer. Receipt of one does not exclude the other.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That on February 18, 1982 claimant injured his left shoulder while he was working on defendant's premises carrying a vat of leaf lard.

That as a result of his injury claimant was treated by Keith Garner, M.D., with physical therapy and pain pills.

That Dr. Garner signed a return to work slip on April 13, 1982 indicating claimant could return to work on April 19, 1982.

That claimant was on vacation from April 19, 1982 through May 2, 1982 and received vacation pay.

That the condition of claimant's shoulder in April of 1982 was not good.

That claimant was treated on a continuing basis in March and April of 1982.

That claimant saw Dr. Garner on April 27 at which time more physical therapy was prescribed.

That on April 30, 1982 Dr. Garner provided claimant with a return to work slip for May 3, 1982.

That claimant attempted to return to work on May 3, 1982, but he was unable to do so.

That on May 3 claimant was referred to another physician.

That claimant remained off work until August of 1982.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant was entitled to temporary total disability benefits for the period from April 19, 1982 through May 2, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant two (2) weeks of temporary total disability benefits for the period from April 19, 1982 through May 2, 1982 at a rate of two hundred eighty-eight and 62/100 dollars ($288.62).

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay costs of these proceedings as set out in Industrial Commissioner Rule 500-4.33.

That defendant file a final report in thirty (30) days.

Signed and filed this 17th day of March, 1983.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD BURGETT,	:	
Claimant,	:	
vs.	:	
MAN AN SO CORP.,	:	
Employer,	:	File No. 503945
and	:	A P P E A L
NEW HAMPSHIRE INSURANCE CO.,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed June 30, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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 hearing; claimant's exhibits 1 through 59; defendants' exhibits A, B, C and D, all of which evidence was considered as a part of reaching this final agency decision. (The deposition of Dr. A. Ivan Pakiam was claimant's exhibit 37; the deposition of claimant was claimant's exhibit 40.)

The result of this final agency decision will be the same as that reached by the hearing deputy.

SUMMARY

On July 18, 1978, while driving a truck for the employer on Highway 30 in Nebraska, claimant lost control of the vehicle and it overturned. As a result of the accident, claimant received very serious injuries:

1. Crush wounds, lower extremities and left flank.
2. Third degree burns, skin, knees, bilateral.
3. Devitalized soft tissue, knees, bilateral.
4. Possible rupture, left suprapatellar tendon.

(Claimant's exhibit 8)

Claimant's exhibit 59 lists his surgeries:

7-28-78----Extensive Debridement of tissue with attempted closure of knee joint.

8-4-78-----Further debridement of wounds with trimming of bone and delay of thigh flaps.

8-25-78----Debridement of groin area and of granulating areas over knees, and cover of split-skin graft taken from the legs.

3-9-79-----Delay of flap on left leg.

3-22-79----Further delay of flap on left leg.

3-30-79----Transfer of flap on left leg to cover knee joint, Debridement of knee joint and trimming of bones, Split-skin graft to exposed muscle over lateral part of knee joint, and pigskin to donor sites on thigh.

4-10-79----Debridement and removal of sutures and of remaining bad areas, and immobilization fo (sic) knee and ankle in long-leg cast.

7-20-79----Delay of right flap on back of calf.

8-9-79-----Debridement of right knee, transfer of flap, grafting of lateral part of the flap, harvesting of split-skin grafts from the right thigh, and setting up of irrigation apparatus for right knee.

3-17-80----Advancement flap to right knee.

9-23-80----Adjustment of local flaps on both knees.

Likewise as a result of the injuries, claimant was hospitalized a total of eight times and treated by nine different physicians.

Both G. Charles Roland, M.D., a qualified orthopedic surgeon, and Thomas B. Summers, M.D., a qualified neurosurgeon, believe claimant to be unable to work ever again.

Dr. Roland states such to be the case because claimant has a problem with lymphedema in his legs while sitting and that claimant cannot work while standing "for obvious reasons." (Claimant's exhibit 35) Dr. Summers believes claimant cannot work again because of the "post traumatic residuals afflicting him." (Claimant's exhibit 7) Dr. Summers' report summarizes claimant's condition:

> There is severe atrophy involving both thighs and due to massive and extensive loss of soft tissue. In this regard, the deformity and atrophy is much more severe on the left side. The skin of the thighs and legs is dry and scaling. The lower legs are edematous and the left more so than the right. There is extensive scar formation involving both thighs and both calves.
>
> ....
>
> X-ray examination of the knees was carried out and with the following interpretation of the radiographic films submitted:
>
> "RIGHT KNEE: The right patella is absent. The medial aspect of the joint space is slightly narrowed and early degenerative arthritic changes are present.
>
> LEFT KNEE: The left patella is absent. There is considerable deformity of the articular surfaces of both the femur and the tibia. This apparently is related to post operative change in which the medial condyle of the femur was partially removed."
>
> CLINICAL IMPRESSION: Post traumatic deformity and motor weakness involving both lower extremities of severe degree as narrated above.

A. Ivan Pakiam, M.D., a qualified reconstructive plastic surgeon, rates claimant's permanent partial impairment at 60% of the body as a whole plus an extra 15% for possible future complications. (Claimant's exhibit 37, deposition of A. Ivan Pakiam, pp. 11 and 23; claimant's exhibit 24, a report of Dr. Pakiam)

Claimant's disability is severe but confined to his legs. It is important to consider Dr. Pakiam's testimony in this regard:

> Yes. I think the most important thing to consider with regards to Mr. Burgett now is that he is in the knee braces. And the whole idea of this -- it should immobilize those knee joints, because they have been badly damaged and he is in danger certainly of developing osteoarthritis in that joint if it's moved. Quite apart from the fact that both knee joints are completely unstable. There are no ligaments holding them. It's only my skin flap preventing that from going on to infection and possibly amputation. So, he would have to wear those braces all the time. And the other problem that Mr. Burgett has developed now is lymphadema. This being a condition where the leg is swollen, particularly at the end of the day, and it really doesn't take very much before the leg swelling occurs. In fact, I've been real worried about him and sent him to see a dermatologist with regards to this. He has developed some skin changes that could possibly go into recurrent skin infection or cellulitis if this problem--and we have experienced with other patients a chronic lymphadema. This could land Mr. Burgett in the hospital for a week every month or even more often. So, that would be the thing I'd worry about in this particular patient. (Pakiam dep. pp. 13-14)

Dr. Pakiam testified further that if claimant had a desk job, he would have to put his feet up every hour for about 10 or 15 minutes. (Claimant's exhibit 37, p. 14)

Claimant's background shows that he is a high school graduate and a veteran of military service, which included attending a clerk typist school in the Army. At the time of the hearing, he was age 39. His most extensive employment was at Delavan in Des Moines from 1963 to 1977 where he was a machinist. He had worked for the employer Man An So Corp. for only some three months when the accident happened.

There was extensive testimony in the file by Deanna Hardin, a rehabilitation specialist, as to whether claimant could perform certain jobs. Among those listed in defendants' exhibit 3 and discussed in the transcript, pp. 162 and following, were accountant and bookkeeper, proofreader, accountant and billing clerk, telephone operator, watchguard, production assembler, packager, insurance rater, and a credit clerk.

ISSUES

The hearing deputy held that claimant was permanently and totally disabled and that he should draw weekly compensation benefits for the period of his disability.

On appeal defendants argue that claimant's maximum entitlement, in any case, is 500 weeks under the applicable code section, §85.34(2)(s). Defendants argue further that the hearing deputy erroneously included considerations of the depressed economy in determining whether or not claimant was employable. Finally, defendants argue that the facts do not show claimant to be permanently and totally disabled.

On appeal claimant argues that defendants should not be allowed to argue the exclusiveness of the 500 weeks schedule of §85.34(2)(s) because that issue was not in question at the time of the hearing. Claimant further argues that the loss of two members may entitle claimant to permanent and total disability, and the claimant argues, finally, that the facts show his disability is permanent and total.

APPLICABLE LAW

Before §85.34(2)(s) was amended by the 65th General Assembly it 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." (1973 Code of Iowa) Section 85.34(2)(s) now reads:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal 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 3. (1981 Code of Iowa)

The last unnumbered paragraph of §85.34(2) allows for permanent partial disability to be paid.

Section 85.34(3), The Code, states that compensation for an injury causing permanent total disability is payable during the period of that disability.

Claimant has the burden to prove the extent of his disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

Industrial disability is 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. Id. at 1112 and Martin v. Skelly Oil Co., 252 Iowa 128, 106 N.W.2d 95 (1960). Also see Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) and McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). In Webb v. Lovejoy Construction Co., a decision by the industrial commissioner dated October 20, 1981, he held that a local economic situation which lowered employment opportunities should not entitle claimant to additional compensation for industrial purposes.

Rating of permanent losses of such scheduled members of the body is determined by loss of function not earning capacity. Function is the normal or characteristic action of the member. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321, 324 (1959); 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); Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935).

ANALYSIS

Claimant argues that defendants should not be allowed to bring up the issue of claimant being restricted to the 500 weeks schedule of §85.34(2)(s). However, as defendants point out the question from the beginning has been the extent of claimant's disability, and, since that is the overall question, any issue of statutory interpretation pertaining thereto would be arguable.

Defendants argue, ably, that since 1974, recovery under §85.34(2)(s) has been restricted to 500 weeks. Defendants go on to cite certain propositions of statutory construction. Prior to 1973, a claimant could receive partial industrial disability by combining the contents of subsection (s) with that of the last unnumbered paragraph of §85.34(2) which allowed permanent partial disability to be paid. The effect of amending subsection (s) was to remove the possibility of receiving partial industrial disability and to remove the absolute mandate that total loss of two major members would result in permanent total disability. The amendment did not change the wording of subsection (s) to show that only full loss of both members could entitle claimant to benefits for permanent and total disability.

Therefore, claimant's severe but partial disability to his legs may entitle him to benefits for permanent and total disability but only if he can show a complete loss of earning capacity. The next question is one of fact, namely whether or not the evidence supports an award of permanent total disability.

The cause of claimant's disability, of course, is the very serious and disabling injury which occurred on July 18, 1978. The above summary should give a good idea of the sheer severity of the injury and subsequent functional impairment. The photographic exhibits, claimant's exhibits 41-57, reinforce the doctors' descriptions of claimant's impairment.

It is perhaps true that Drs. Summers and Roland invade the province of the industrial commissioner when they state that claimant is unable to work. Nevertheless, their other evidence is descriptive and not phrased in terms of an opinion. That evidence shows claimant can walk only with extreme difficulty and cannot sit for extended periods of time without relief.

Dr. Pakiam, the plastic surgeon, reinforces the problem of claimant's having a sit-down job. Dr. Pakiam's estimate of functional impairment is taken to be 60% because the extra 15% is for the future and therefore speculative. Whether the impairment is viewed as to the clinical descriptions of the three doctors or arithmetically as 60%, it is extremely serious.

That impairment was suffered by a man who appears to be of average intelligence and education. There is evidence that he could perform certain basically sedentary activities. But, realistically, such an eventuality does not seem feasible.

The hearing deputy's decision, which was dated April 20, 1982, referred to a currently depressed job market. It would appear, considering the industrial commissioner's ruling in Webb v. Lovejoy, current economic conditions should not form a part of industrial disability. Therefore, such conditions were not taken into consideration in the making of this final agency decision. Taking account of the various elements of industrial disability, therefore, it is found that claimant is entitled to benefits under §85.34(3) so long as his disability shall last.

FINDINGS OF FACT

On July 18, 1978, claimant was driving a truck for the employer on Highway 30 in Nebraska and sustained admitted industrial injuries when the truck overturned.

Those injuries were crush wounds, lower extremities and left flank; third degree burns, skin, knees, bilateral; devitalized soft tissue, knees, bilateral and, possible rupture, left suprapatellar tendon.

As a result of the injuries, claimant underwent multiple surgeries and hospitalizations.

Also as a result of the injuries claimant has a very severe functional impairment.

Claimant's functional impairment is restricted to his legs.

Claimant's adult work has been mostly as a machinist (14 years) and as a truck driver for about three months.

Claimant is a high school graduate and went to clerk typist school in the Army.

He was 39 years old at the time of the hearing.

CONCLUSION OF LAW

On July 18, 1978, claimant sustained injuries which arose out of and in the course of his employment and which resulted in permanent and total disability and entitles claimant to benefits under sections 85.34(2)(s) and 85.34(3).

ORDER

Defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of one hundred thirty-six and 34/100 dollars ($136.34) per week commencing on July 18, 1978 for the period of his disability, accrued payments to be made in a lump sum together with statutory interest.

Defendants are to receive credit for compensation previously paid.

Costs of this action are taxed against defendants.

Signed and filed at Des Moines, Iowa this 30th day of November, 1982.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOIS CAMPOLO, Surviving Spouse of Charles Campolo, and dependent minor children,	:	
Claimants,	:	
vs.	:	File No. 669181
BRIAR CLIFF COLLEGE,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
UNITED STATES FIDELITY & GUARANTY CO.,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed decision in arbitration wherein claimants (the surviving spouse and dependent children of Charles Campolo) were awarded weekly death benefits, emergency room treatment costs, and a burial benefit. Defendants' notice of appeal was filed December 3, 1982.

The record on appeal consists of the hearing transcript which contains the testimony of Lois Axline Campolo, Barbara Ann Redmond, James Patrick Redmond, Ward Tom Wells, Paul Weber, James Madsen, Timothy Weiler, Louis Agnese, Jr., Eugene N. Herbek, M.D., Sharon L. Bradshaw, Charles J. Bensman, and Sister Margaret Wick; claimants' exhibits 1 through 3, 6 through 12, 14 through 33 and 36 (claimants' exhibits 14, 15, 17, 18, 19, 20, 22, 24, and 36 were received subject to defendants' objections); defendants' exhibits A through L and O; the depositions of Dr. Paul From, Liberato A. Iannone, M.D., and Ronald A. Draur, M.D., in their entirety; the partial depositions of Charles Bensman, Bruce Weise, and Ward Tom Wells as specified in claimants' designation of certain evidentiary matters offered at hearing; defendants' answers and supplemental answers to claimants' interrogatories as specified in claimants' designation of certain evidentiary matters offered at hearing; and the briefs and filings of all parties on appeal. On June 1, 1982 defendants filed an objection to claimants' designation of certain evidentiary matters offered at hearing which was overruled in the deputy's November 18, 1982 arbitration decision.

ISSUES

Defendants' stated issues on appeal are as follows:

1. That the November 18, 1982 arbitration decision is in error as a matter of law for the reason that the deputy's findings of fact are not supported by substantial evidence in the record.

2. That the November 18, 1982 arbitration decision is in error for the reason that the findings of fact are irrelevant and immaterial to any issues of the case.

3. That the November 18, 1982 arbitration decision is in error as a matter of law for the reason that claimants failed to carry the burden of proof.

4. That the deputy's November 18, 1982 decision is in error for failing to find that the deceased's preexisting heart condition was the sole and proximate cause of his death.

5. That the deputy's November 18, 1982 decision is in error for failing to make a finding of fact or finding of law that an injury was sustained which caused death.

6. That the November 18, 1982 arbitration decision is in error as a matter of law in the admission and consideration of testimony which would be inadmissable as being irrelevant, immaterial, and with no proper and sufficient foundation to the extreme prejudice of the defendants.

REVIEW OF THE EVIDENCE

The record establishes that at the time of the arbitration hearing the parties stipulated that the funeral and hospital bills were fair and reasonable (Transcript, p. 3).

Claimants in this action are Lois Axline Campolo who was 40 years old at the time of the hearing, and her three minor children (Andrea, age 14; Charles, age 13; and Damon, age 11). When reference to claimant in the singular it shall refer to Lois. Lois Campolo met Charles Campolo, decedent, at Western Michigan University in 1964 and they were married August 7, 1965. They moved to Sioux City, Iowa in 1966 where decedent worked as director of counseling services at Briar Cliff College during the following three years. The Campolo family moved to Ohio in 1969, where decedent was in business with his brother for approximately one year. Decedent then worked at a variety of jobs including substitute teaching and driving a truck until returning to Sioux City in 1972. Decedent began teaching in the Briar Cliff department of psychology, where he remained employed

until his death in March 1981. Lois Campolo was also employed at Briar Cliff College in March 1981, her title being director of counseling and career development. (Tr., pp. 53-59)

Claimant testified that decedent's working hours at Briar Cliff would often vary depending upon whether he was teaching weekend continuing education classes, handling seasonal coaching duties, or was involved in various campus activities. She testified that classes generally began at 8:00 a.m., and that night classes were often held at Briar Cliff. In addition to his class room duties and responsibilities, claimant testified that decedent served on various faculty committees and had been named faculty chairman twice. He also participated in lecture-concert events, oral presentations, counseling with students, student meetings, recreational activities, and seminars. Claimant testified that decedent seemed to be involved in "everything and anything that would involve students and the college." (Tr., pp. 59-64)

Claimant noted that the Briar Cliff faculty was encouraged by the administration to become involved in student life activities In particular she recalled an address by Charles Bensman, President of Briar Cliff College, to the faculty body encouraging its members to participate in as many activites as possible, and to get involved with the students and their activities on the campus outside of the teaching and classroom situation. (Tr., pp. 67-68)

Claimant recalled the events of March 26, 1981 as follows: Decedent had gone to work at approximately 9:00 a.m. Claimant did not know whether decedent had returned home for lunch, but noted that he was home for dinner at 5:00. Decedent had commented that he was tired, but left for the campus at 7:00 or 7:15 that evening to participate in an intramural basketball game between the faculty team and a student team. Decedent had been encouraged to play in the 7:30 game by other faculty members on the team. Claimant was contacted between 8:00 and 9:00 that evening with the news that decedent was choking. Decedent was transferred to St. Luke's Hospital where he died later that evening. (Tr., pp. 70-74, 92-95)

Claimant recalled that decedent had been diagnosed in 1973 as having a heart murmur, and also that he had suffered from rheumatic fever as a child. She testified that decedent was not on any medication at the time of his death. (Tr., pp. 80-82)

Claimant testified that the physician decedent regularly saw was Paul A. Fee, M.D. Records from Dr. Fee show that he first saw decedent on February 26, 1968 at which time aortic stenosis was found. Decedent was next seen by Dr. Fee in November of 1972 after complaining of dizziness. At that time decedent was referred to A. Clark Hyden, M.D. (Claimant's Exhibit 29)

In a letter dated February 13, 1973 Dr. Hyden reported the findings of his examination of decedent to Dr. Fee:

> Historically, the interesting thing is that this young man developed rheumatic fever at the age of nine. A murmur was heard at that time. He was diagnosed as having aortic stenosis and apparently later was having mitral valvular lesions. His activity level is quite good although he has had several spells in which he has become lightheaded for a short period of time. He has no evidence of failure at all. On examining his heart I did not hear the mitral valvular murmurs either. I do hear a Grade III aortic systolic murmur, heard loudest at the base and transmitted to the upper chest and neck vessels. I can hear no decrescendo diastolic murmurs nor apical diastolic murmurs. There is a systolic murmur at the apex but I think it is transmitted from the base. There is an apical systolic click also. He has no heaves or thrills. The peripheral pulsations are within the range of normal although his blood pressure, upper extremities, is 100/60. I question that this man has rheumatic heart disease. Aortic valvular lesions at age nine would be extremely unusual. It is more likely that he has a congenital aortic valvular lesion. (Cl. Ex. 29)

Dr. Hyden arranged for further evaluation of decedent at the Mayo Clinic from March 21 to March 23, 1973. In a March 28, 1973 letter M. C. Cody, M.D., reported the findings of the evaluation at the Mayo Clinic:

> Physical examination revealed a pleasant, slightly tense man with a blood pressure of 110/75, a weight of 159 pounds, and a height of 67.1 inches. The jugular venous pressure was normal. The carotids were rather deeply imbeded in his neck, but the upstroke felt normal. The apex was in the fifth intercostal space in the mid clavicular line and felt normal. First and second heart sounds were normal. There was a grade 3/6 systolic ejection murmur at the right upper sternal border heard down into the apex and also into the carotids. There was an ejection click heard closer to the apex. I could hear no diastolic murmurs. The murmur was reduced by the valsalva maneuver, and there was no apical murmur of mitral valve disease after either exercise or amyl nitrite.
>
> An ecocardiogram was performed which demonstrated normal mitral valve motion. A chest x-ray and fluoroscopy were entirely within normal limits as was an electrocardiogram.
>
> ....
>
> The patient was also seen in consultation by Dr. J. A. Callahan of the Department of Cardiovascular Diseases who felt that the murmur reflected a benign aortic outflow murmur without significant stenosis. It was suggested that he be followed on a routine yearly basis, and that he use subacute bacterial endocarditis prophylaxis should he undergo any dental procedures or minor surgical procedures. There were no restrictions placed upon his physical activities, and no medications appear to be necessary. (Cl. Ex. 29)

Dr. Holdiman, who received the referral of claimant from the St. Luke's Hospital emergency room on March 26, 1981 recorded a history of decedent as having had rheumatic heart disease for a long period of time, multiple murmurs, and according to his wife some chest tightness and numbness in his left arm. Dr. Holdiman's impression was:

> 1. Cardiac arrest secondary to rheumatic heart disease with electrical mechanical dissociation.
>
> 2. History of rheumatic heart disease.
> (Cl. Ex. 29)

An autopsy performed on the morning of March 27, 1981 produced the following diagnoses and summary:

> GROSS AUTOPSY DIAGNOSES:
>
> 1) Clinical history of rheumatic heart disease.
> 2) Calcific stenosis of aortic valve, marked.
> 3) Marked pulmonary congestion and edema.
> 4) Fractured sternum and ribs (2-5 bilaterally).
> 5) Hemopericardium, mild (iatrogenic).
> 6) Visceral congestion.
>
> MICROSCOPIC DIAGNOSES:
>
> 1) Calcific stenosis of aortic valve, marked.
> 2) Focal intimal proliferation and degeneration of ascending aorta (jet lesions).
> 3) Marked pulmonary congestion with intra-alveolar hemorrhage.
> 4) Marked pulmonary edema.
> 5) Chronic passive congestion of visceral organs.
>
> SUMMARY: The death in this 40-year-old white male is related to the marked calcific aortic valvular stenosis, which is clinically secondary to rheumatic heart disease. A cardiac arrhythmia is the most likely cause of death secondary to the aortic valvular stenosis, which resulted in compromised coronary perfusion. (Cl. Ex. 26, Defendants Ex. B)

The autopsy on decedent was performed by Eugene N. Herbek, M.D., who testified that he obtained a history of decedent from the outpatient record. He testified that the most striking abnormality revealed by the autopsy was a calcified aortic valve, and that calcific stenosis of the aortic valve had been present for a duration of months to years. He explained that the aortic valve is located at the base of the heart and origin of the aorta, and its purpose is to stop the back flow of blood into the heart. Dr. Herbek found decedent's aortic valve to be markedly thickened, a condition which would allow the back flow of blood from the aorta into the ventricular chamber of the heart. This would in turn cause increased work load on the left side of the heart and increased pressure within the left ventricle due to the increased amount of blood in the left ventricle. Dr. Herbek elaborated:

> [i]t's been shown...that severe calcific aortic stenosis, due to the fact that the aortic valve was responsible for profusing coronary arteries, providing the heart with oxygen -- the aortic valve is very necessary in its function -- to provide this function, obviously. When we have severe involvement with aortic stenosis, for whatever cause, the coronary arteries are not profused as they normally should be, due to the fact that the valves are not as pliable as they need to be. They are not functioning normally.
>
> Also, when the aortic valve gets hard and thick and immobile, it cannot stop the flow of blood back into the left ventricle; and this increases the work load on the left side of the heart.
>
> So you've got several factors involved. Number one, you've got an aortic valve that's not functioning properly, not profusing the aortic arteries, which in turn are not providing the adequate amount of oxygen to the heart muscle.
>
> Now, this is in face of a left ventricle, a heart pump, which is working against an increased work load, because heart -- the blood that is -- the aortic valve usually stops blood flow back into the left ventricle; and in this case being hard and cyanotic and constantly being held open, blood is allowed to flow back into the left ventricle, causing increased pressure within the left ventricle and increased work. So you've got a heart muscle that needs more oxygen.
>
> You've got a valve that's not functioning properly, so the vessels are not getting the amount of blood that they need and, therefore, are not providing adequate amounts of oxygen to the heart muscle itself. And these are the kind of conditions that hypoxia or decreased amounts of oxygen are what trigger arrhythmias. (Tr., pp. 265-267)

Dr. Herbek explained a cardiac arrhythmia as a type of heart beat that is irregular. He stated that in forensic pathology, sudden death is often associated with ventricular fibrillation, which is an abnormal rhythm or arrhythmia. (Tr., p. 263) At one point the following exchange occurred between Dr. Herbek and claimant's counsel:

Q. Doctor, do I understand correctly that it was a cardiac arrhythmia that you believe occurred in respect to Mr. Campolo's heart?

A. I believe that was the -- it is the likely end result in this man's heart, yes.

Q. And isn't it true that there is a good deal of uncertainty as to what causes cardiac arrhythmia?

A. Not in hearts that have calcific aortic valvular stenosis.

Q. Excuse me. What was your answer?

A. Not in hearts that have a specific cardiac lesion.

Q. There isn't any confusion?

A. In this particular situation there isn't any confusion, I guess, as far as I am concerned.

Q. Do you believe that the cardiac -- excuse me. Do you believe that there was a cardiac arrhythmia?

A. I believe that is the most likely result, yes. I believe that there was a cardiac arrhythmia, most likely. There is no way to prove that.

Q. But do you know what precipitated that cardiac arrhythmia?

A. I believe that the case of the aortic stenosis precipitated that cardiac arrhythmia.
(Tr., pp. 264-265)

Dr. Herbek was later questioned:

Q. Would the insufficiency of oxygen within the blood or the insufficiency of oxygenated blood to certain parts of the body create stress on a heart?

A. It would -- as far as decreased oxygenated to any part of the body?

Q. Yes.

A. The normal heart response would be to increase blood flow.

Q. And when it increases blood flow, it increases it in its work, doesn't it?

A. That's true.

Q. Do increased physical demands in one's activity increase the oxygen demands from the blood?

A. Yes.

Q. And does it have an increased relationship if you will, to the amount of blood that is necessary to be moved through the heart?

A. Yes.
(Tr., p. 279)

He was further questioned:

Q. But so that we can understand, would it be that you indicate the cardiac arrhythmia to be the likely cause of death and that it was secondary to the valvular stenosis; is that correct?

A. That's correct.

Q. And when you say secondary to the valvular stenosis, if this man had been engaged in a sedentary occupation and not engaged in heavy physical activity, isn't it quite possible that there would not have been a cardiac arrhythmia occur in March of 1981?

(objections -- overruled)

THE WITNESS: I believe that this event could have happened with any activity, sedentary or active.

Q. Why do you say that?

A. Because the poor -- the poor oxygenation on a chronic basis of any -- of any activities, where they would be running -- anyone would be running or walking or sleeping, there is still oxygen demands upon the heart. Without a properly functional valve, and this man was so severely involved, blood flow could be diminished for a variety of reasons.

Slowing down and oxygen -- the oxygen levels to the heart, to the SA nodes, the EV nodes, which trigger the electrical system which coordinate our heart beat, may have occurred at any time because of the oxygen -- the potential for decreased oxygenation at any time.

Q. That potential for decreased oxygenation would manifest itself, if you will, with increased physical activity, wouldn't it?

A. As you are increasing work load, you are increasing demand. That's true.

Q. And isn't it true that the probability that this arrhythmia could have occurred increased proportionately with increased physical activity?

A. I would have to agree with that.
(Tr., pp. 283-285)

Dr. Herbek was also specifically questioned as to the effect playing basketball would have on decedent's heart:

Q. Would being engaged in basketball on a full court play with students 18 or 20 years of age, at 20-minute halftimes, for at least a period that would encompass nearly three-quarters of a game, would that be a circumstance that would result in a coronary insufficiency?

A. Yes.

Q. Is it something that would very likely result in a cardiac arrhythmia?

A. It could.
(Tr., p. 283)

Paul From, M.D., practices at the Mercy Medical Plaza in Des Moines, specializing in cardiovascular pulmonary disease. (From Deposition, pp. 4-5) In a letter to claimants' counsel dated July 31, 1981 Dr. From made the following observations after reviewing the autopsy report of decedent and the previously noted correspondence of Dr. Fee, Dr. Hyden, and Dr. Cody:

> The activity of engaging in a full basketball game, even though no limitations had been placed on his physical activities about eight years before, would not be consistent with the history here of calcific aortic stenosis. Especially, if he had not been feeling well in the immediate period prior to the participation in this game, he was already having some compromise of his coronary circulation and this could only have been aggravated by his participation in the intramural basketball game. Activity of this sort (participation in a basketball game) was unusual for a person engaged in a sedentary occupation, especially if he was not used to excess physical activity of this sort. In addition, because of his pre-existing [sic] rheumatic heart disease, and because he had not recently been feeling well and was having some symptoms suggestive of coronary insufficiency, the participation in this game could only have aggravated and hastened his entire disease process.
>
> There does appear to me to be a very definite cause and effect relationship between the activities of Mr. Campolo on the evening of his death, and his death. These activities undoubtedly aggravated his underlying cardiac condition, and aggravated the coronary insufficiency which was already being manifest and which ended in a fatal arrhythmia from which he could not be successfully resuscitated.

Dr. From also testified by deposition. He gave the following summary of decedent's medical history:

Q. And tell me what your findings were in respect to his adolescent health.

A. He had a history of having rheumatic fever when he was nine years of age, and he was told at that time that he had a heart murmur, and medical evidence in the records indicated that it was thought that that was an aortic valve murmur. Later, other physicians thought that there might be a second valve involved, the mitral valve, but eventually when he got to the Mayo Clinic in 1973, it was pretty well pinned down that basically it was the aortic valve. At least that was their impression; that it was a rheumatic valvular defect; that he should follow what we call subacute endocarditis precautions. That is basically with skin, dental or genital-urinary infections or manipulations, he should be covered with antibiotics which were being developed in those days to prevent infection on the valve, and at that time he seemed to be relatively asymptomatic; that is, he had only the murmur, so they placed no restrictions on his activity in 1973.

Q. Was the information in respect to his adolescent health and the condition of his health as of 1973, as contained within the Mayo Clinic report -- were those opinions and diagnoses consistent with the findings in the autopsy report that was performed subject to Mr. Campolo's death?

A. Yes, sir, exactly.

Q. And you had indicated, I think, in layman's terms, in any event, that it is clear that Mr. Campolo had a heart defect?

A. Yes, sir, that's correct, an abnormality of his heart; in this case, valve.
(Tr., pp. 17-18)

Dr. From testified that after reviewing decedent's medical records and the autopsy report, he believed decedent died as a result of a cardiac arrhythmia. He indicated that the effect of strenuous physical activity on a calcified stenotic valve would be to increase the demand upon the heart to move blood through the calcified valve to get oxygen to the tissues and to get rid of metabolic waste. Dr. From listed advance symptoms of a fatal

cardiac arrhythmia as shortness of breath, cough, weakness or fatigue, feeling of faintness, syncope, chest pain, slowing down, sweating, loss of thinking ability, and change in functioning of abdominal organs. (From Dep., pp. 23-28) Dr. From explained the effect that the faulty aortic valve had upon decedent's heart:

> A. It was aggravated by it. Because of the way the valve was, it could not work well. It had lost its pliablity [sic]. It was calcific. It was hard. Calcium was in the bone. It simply was not pliable. It did not bend, and so forth, move back and forth. It did not allow the blood to get out of the heart as it should.
>
> The heart was attempting to get more blood out to the muscles, which were demanding oxygen. It was going faster. It was trying to push harder. It was raising its pressures within the heart to try and blow it through this small hole in the valve, this stenotic opening; and not only that, the valve, in its thickening, was laying over the openings of the coronary arteries, so what little blood could get out, also couldn't get into the coronary arteries as it should. Therefore, there wasn't the blood that passed through the coronaries to the heart muscle, and the heart then acted as if it were having, if you will, a heart attack in the respect that it wasn't getting oxygen; but, you see, it wasn't really from the coronary vessel that you are thinking is directed to the heart attack. It was because of the valve in the very first place, and in fact that activity was making it so that the valve became even more insufficient to the total body than it was -- not insufficient to the valve. That's-- An aortic insufficiency is another disease process, but it was not allowing the blood to pass properly.
> (From Dep., pp 34-35)

When questioned as to whether decedent's fatal cardiac arrhythmia was causally connected to his participation in the student faculty basketball game, Dr. From first noted the strenuous activity required by participants in any basketball game. He stated that the heart rate would be increased in that type of activity, and that that was the exact opposite of what decedent's heart could take. He believed it to be an inescapable conclusion that the activity of participating in a basketball game hastened the problems which decedent was having with his heart. (Tr., pp. 36-39)

Ronald A. Draur, M.D., a specialist in the field of cardiology, testified by deposition. Dr. Draur initially discussed the functions of the heart and aortic valve, and then the manner in which they are affected by calcific aortic stenosis. (Draur Dep., pp. 3-12) He also discussed the symptoms which might accompany calcific aortic stenosis:

> A. The symptoms of calcific aortic stenosis will, of course, vary on the severity of the narrowing. The most ominous symptoms are those seen towards the end of the natural history of this disease. Those are episodes of syncope, episodes of congestive heart failure and episodes of angina, the discomfort that a person feels in his chest when performing significant physical exertion which goes away with rest generally. When aortic valve disease becomes particular severe a person does not always have to perform significant physical activity.
> (Draur dep., pp. 13-14)

Dr. Draur indicated that the restrictions on the day-to-day activities of a person suffering from aortic stenosis would depend upon the severity of the disease. He also indicated that restriction of a person who had rheumatic fever would be variable depending upon the degree to which the heart was affected by the rheumatic process and the degree of valvular damage which had been caused and existed at that particular time in the patient's life. (Draur Dep., pp. 14-15) The doctor stated that had he personally examined a patient who had a history of rheumatic fever and became satisfied that there was no evidence of significant heart disease, no restrictions would be placed upon the patient. (Draur Dep., pp. 24-25) He indicated, however, that it would be prudent to restrict the physical activities of a person if a rheumatic disease process has caused a moderately severe calcific aortic stenosis. The questioning went as follows:

> Q. Why do you recommend that one avoid strenuous physical activity when the disease process advances itself?
>
> A. To avoid the condition of ischemia primarily and to avoid the sudden onset of acute left ventricular failure which is called acute pulmonary edema.
>
> Q. And those restrictions and advice that you would give to a patient with moderately severe calcific aortic stenosis, would I be correct in understanding that if for some reason surgical intervention was not indicated or undertaken that in a person who had severe calcific aortic stenosis he would provide the same recommendations only on a more stringent or more restrictive basis?
>
> A. That's true.
>
> Q. Would that be because the risk of ischemia and left ventricular failure and heart failure becomes much greater if you place a person with severe calcific aortic stenosis in a situation where they encounter strenuous physical exercise?
>
> A. Yes.
>
> Q. Are you able to state within a reasonable degree of medical certainty whether or not strenuous physical activity can hasten or aggravate, trigger, if you will, heart failure in a person that has severe calcific aortic stenosis?
>
> A. Yes, it can.
>
> Q. Do you believe that's what happened this Mr. Campolo's case?
>
> A. Certainly appears that way to me.
> (Draur Dep., pp. 38-39)

Dr. Draur refused, however, to conclude that decedent's aortic stenosis was the result of rheumatic fever. He said:

> A. Because of many of the things that we've talked about earlier I think it is nearly impossible to tell from the autopsy material whether or not this was a rheumatic valve. It is apparently documented that he did, indeed, have acute rheumatic fever at the age of nine. There were no comments that I recall in the materials you mentioned about recurrences of rheumatic fever through the rest of his life and it is a continuing problem at the autopsy table to try to decide when looking at an abnormal aortic valve that is heavily calcified, whether this, in fact, represents the end results of the rheumatic process or whether there was a congenital aortic valve. The valve is markedly deformed by the presence of the calcification and the heavy fibrosis in both circumstances.
>
> ....
>
> A. It appears to me from the description of the autopsy material that the probability is that this was a congenitally abnormal valve although, as I just mentioned, it is impossible to prove one way or the other the exact etiology of the end stage severely deformed valve that was seen at autopsy.
> (Draur Dep., pp. 22-23)

Liberato A. Iannone, M.D., another specialist in the field of cardiology, also testified by deposition. Prior to being deposed, Dr. Iannone had reviewed the hearing testimony of Dr. Herbek and trial exhibits 26 through 30. (Iannone Dep., pp. 3-6)

Dr. Iannone stated that a person suffering from aortic stenosis may remain symptom-free for his entire life depending on the severity of the disease. He noted that the most common symptoms of aortic stenosis are fainting spells, chest pain, or heart failure. He also indicated that once the aortic valve becomes critically narrowed and the first symptoms are seen, there is usually associated a high death rate. Dr. Iannone stated that had the decedent had critical stenosis in 1973 he more than likely should have been dead long before 1981.

(Iannone Dep., pp. 9-13)

Dr. Iannone classified aortic stenosis as mild, moderate or severe. He stated that if the patient had only a "mild" disease few restrictions would be needed. He stated:

> A. I would follow him closely, and would get him to perform that treadmill to give me objective data to say, "You went so many miles per hour at so much of a grade, and nothing happened. I have a cath that says your valve area is mildly diseased, and statistically you will do well," and I would go further in that and say, "As the degrees and stenosis become worse, the restrictions would become more and more severe." (Iannone Dep., p. 38)

Moderate aortic stenosis would require the following types of restrictions:

> I would restrict the patient from any heavy physical exertion, and strenuous sports, such as tennis, basketball. He might be able to play golf, using a cart.
>
> I would not have him walking up hills carrying heavy objects. I would not have him mow the yard. He might be able to ride on a lawn mower, but I would tell him not to do it during the heated part of the day; and I would probably restrict him to 30 to 40 pounds maximum weight lifting at any one time, and not to do series of repetitions of this weight.
> (Iannone Dep., p. 39)

Dr. Iannone stated that a patient with a severe aortic stenosis would be restricted from most physical activity if surgery was not possible. He stated that such a patient would be restricted to walking in his home, walking to the dinner table, walking to work, sitting at a desk. (Iannone Dep., pp. 39-40)

At one point during the deposition, claimants' counsel posed a hypothetical question to Dr. Iannone, which outlined the activities of decedent on March 26, 1981 and asked him to give a medical opinion as to whether playing basketball on that date was a substantial factor in bringing about decedent's death. Dr. Iannone was also asked to consider the testimony of Dr. Herbek, the autopsy report, the emergency room records of St. Luke's Hospital for March 26, 1981, correspondence from the Mayo Clinic dating back to 1973, correspondence from Dr. Pee, and a sworn statement by James P. Redmond (Exhibits 26-30) in formulating his opinion:

A. I feel that if I, as his treating physician -- if I were his treating physician, and knew that he had this disease process, would absolutely have restricted him from that form of activity, because I feel that that would play a material part in leading to his death.

I feel in this particular instance that it is the only reasonable explanation one could come to.

Q. (By Mr. Patterson) Further assuming the facts that we have related in this record, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not his engaging in basketball play, as I have described, for Briar Cliff College, would have, quote, aggravated, hastened or accelerated his condition and resulted in his death?

A. Yes.

Q. What is that opinion?
(objections)

MR. PATTERSON: You can answer subject to his objection.

A. I feel that in the situation as you have outlined, that the physical activity -- that playing basketball may have hastened his demise.
(Iannone Dep., pp. 20-21)

Responsibilities of Briar Cliff faculty members are enumerated in the Briar Cliff College Faculty Handbook.

1. Teaching - The ordinary teaching load ranges from 24 - 27 semester hours per academic year. This usually represents responsibility each term for two or three term courses, a mini-course, and Independent Research at the junior-senior level if the department offers a major. Faculty overloads are determined by joint consultation of the department chairperson and the Academic Dean.

2. Advising - All full-time faculty members are expected to assist in the academic advising program by serving as advisors for majors in the department or for freshmen. The department chairperson assigns majors to faculty members as advisees; the Director of Advising assigns students to faculty members who are members of the freshman advising team.

3. Office Hours - Faculty members are required to keep regular office hours. A class schedule, with office hours indicated, should be posted on the faculty members' office doors. A copy of this schedule should be sent to the Academic Dean's office and to the information office in Heelan Hall.

4. Committee Assignments - Ordinarily, faculty members are expected to serve on one committee of the college's governance structure.

5. Attendance at College Functions - Faculty members are to be present for:

   (a) regularly scheduled faculty meetings
   (b) convocations
   (c) faculty institute
   (d) graduation exercises

Faculty members and their families are encouraged to participate in various college functions, such as lecture-concert programs, plays, and athletic events.
(Cl. Ex. 3; Def. Ex. I)

Charles J. Bensman, president of Briar Cliff College since 1977, testified at the hearing and through deposition. Dr. Bensman distinguished Briar Cliff from large state universities because of the caring nature of the smaller institution and its ability to provide more personalized attention for the individual student. He noted that the student to faculty ratio at Briar Cliff was 17 to 1, and that the individualized attention stems from the faculty being able to spend time with students before and after class. (Tr., pp. 27-29) While Dr. Bensman insisted that faculty members were paid only for services rendered in the classroom, he admitted that participation in student activities and student life was encouraged. (Tr., pp. 34-35) The following was elecited from Dr. Bensman during his deposition, and was later incorporated into the transcript:

Q. All right. And how do you convey this encouragement to them?

A. When any faculty member is interviewed, they meet with the dean as well as the committee of faculty and students and also an interview with myself. And in coming to the Cliff, I think during those interview periods that encouragement is shown.

Q. How would it be shown?

A. I think mainly that we are a caring institution, as our literature would indicate, and as a private liberal arts institution, that we do encourage you to be involved with the institution in some way.

....

Q. All right. And just so we can carry it one step further, if you had someone equally well qualified but would Oake [sic] the commitment to the Briar Cliff student life and community as we have described this afternoon, who would you hire?

A. That's difficult to say without having the people, I realize, but undoubtedly, because of the smallness of the institution, would probably go for the person that is going to be involved in as many activities as possible.
(Tr., pp. 34-35)

Dr. Bensman testified that the intramural program had existed for a number of years, and that faculty members were encouraged to participate on a faculty basketball team. The faculty team was not charged a fee for participating in the program, and all costs of the intramural program were borne by Briar Cliff College. While Dr. Bensman did not solicit participation on the faculty team himself, he did indicate that Tom Wells, chairperson of the department of health, physical education and recreation, as well as being intramural director, annually inquired among faculty members as to their interest in participating in intramurals. (Tr., pp. 40-49) There was no written policy concerning faculty participation in intramural activities at the time of decedent's death. (Tr., p. 314)

With regard to decedent's performance as a member of the faculty, Dr. Bensman had the following exchange with claimants' counsel:

Q. All right. Now, what kind of a professor was Charles Campola [sic]?

A. Explain what you mean.

Q. How did he perform in his duties as a professor?

A. As I think you will find from Sister Marge's evaluation and anybody else's, he was an excellent professor.

Q. Did he enjoy a close and good faculty or professor-student relationship with his students?

A. No question.

Q. Was he a caring professor?

A. Very much so.

Q. Did he, as you indicated quite early -- did he elect to give the extra attention or the extra concern to his students in respect to any problems they may have?

A. Yes, he would.

Q. Was he one of the faculty members -- one of several up there that really made a special effort to strive to reach the goals of a good catholic educational community that you have described?

A. Yes.

Q. Did he do this not only in the classroom but outside the classroom?

A. To the best of my knowledge.

Q. All right. And was he the type of professor that if you had asked him or simply encouraged him to take up a task or assist the college -- would he have done it?

A. Yes.

Q. Would he do things that were good for the college and good for the students that would promote your interest whether or not he had been asked or not?

A. Yes.

Q. Would that include, for example, coming down and playing in a faculty-student basketball game at seven thirty in the evening?

A. Undoubtedly.
(Tr., pp. 49-50)

Ward Tom Wells, chairman of Briar Cliff's health, physical education, and recreation department, testified at the hearing and by deposition. In addition to his administrative and teaching duties, he also held the position of intramural director in March of 1981. Wells noted the growth of the Briar Cliff intramural program since he had become affiliated with the college in 1978. He stated that the faculty team had been in existence prior to his joining the staff, and that announcements concerning intramural games were posted on bulletin boards throughout the campus as well as in the faculty lounge. The witness related that he personally encouraged faculty members to participate in the intramural program, and believed that the students received educational as well as physical benefit from the program. In particular, Wells believed that the faculty who participated were seen as role models with emotions and fallibilities which are seldom displayed in the classrooms. (Tr., pp. 179-188)

Wells recalled that the faculty roster consisted of all faculty members except two persons not directly associated -- one being the husband of a woman on the staff and the other

being a part-time basketball coach. (Wells Dep., p. 30) He recalled that the game on March 26, 1981 began at 7:30 p.m. and consisted of twenty-minute halves during which the clock didn't stop unless there was a time out, except for the last two minutes of the second half when the clock was stopped. There was a five-minute break between halves. (Tr., pp. 196-197) Wells discussed what happened on March 26, 1981:

> A. What we always did in a faculty game and invariably, we take the number of players we had and divide up the game evenly, no matter what skill level anybody was at. And so we -- if we had two people left over, those two people we figure out before the game -- okay -- we are going to sit out the first five minutes and then two other people came out and sat out the next. So, everybody sat out the first -- so, you can take five-sevenths of the first half and determine approximately how much he played.
>
> ....
>
> A. After the fact we -- and I say we -- I noticed -- I guess I should just speak for myself -- I noticed that Chuck was rather slow to -- he played guard -- to bring the ball up court when we were behind and that's the usual opposite to the way Chuck would do it or anybody being competitive. And I remember some people on the team urging him to hurry up and get the ball down the court because of the fact that we were behind. But, instead, he was moving rather sluggishly, especially during the second half. (Wells Dep., pp. 36-37)

Paul L. Weber is a member of the Briar Cliff faculty and participated on the faculty team. He testified that the faculty participation in the intramural program was beneficial in terms of student-teacher relationships. He felt that the faculty was encouraged to become involved in student life and with student activities, and noted that the administration had circulated questionnaires concerning faculty interests.

Barbara Redmond is employed by Briar Cliff as a faculty member in the business administration and accounting departments. She stated that as a faculty member she is expected to participate in various college events, and that her family is also encouraged to participate. It was her opinion that faculty involvement in student life and student activities promotes an atmosphere for the development and maturing process of students. The witness believed that such an atmosphere would not prevail without the close involvement of the faculty in student life activities. (Tr., pp. 106-119)

James Patrick Redmond, professor and chairperson of the English department at Briar Cliff College, testified at the hearing and through a sworn statement. He reported as follows with regard to questions concerning his participation on the faculty team:

> MR. PATTERSON: Did you have any particular feeling in respect to your involvement with the faculty extramural [sic] game?
>
> THE WITNESS: Yes. I felt that involvement was important for me as a faculty member, as a chairperson.
>
> Q. Did you as a faculty member perceive any benefit to the students?
>
> A. Yes. Some benefits would include being able to show the faculty another side of the student. I think that in the classroom you observe people in one way, and when you observe them in a gymnasium setting, in a game setting, you recognize the other skills and talents they might have. It was an opportunity to maintain contact with students. If students were having problems, had concerns, they would -- this would be another point at which students might bring that up.
>
> Q. Did you as a faculty member receive any encouragement from the college to become involved in this activity?
>
> A. Yes.
>
> Q. What kind of encouragement did you receive?
>
> A. The faculty has been described as a caring faculty, and at faculty institute at the beginning of the year we were addressed and again encouraged to participate. Our mailboxes have notices of various activities. We were encouraged by whoever was assigned to direct that activity to attend, participate.
>
> Q. Did you consider this to be a part of your duties as a faculty member?
>
> A. Yes.
> (Tr., pp. 158-159)

Louis Agnese, Ph.D., vice-president of the Briar Cliff student development department, testified at the hearing. His responsibilities are primarily in the areas of counseling, placement, health, food service, housing activities, parking, security, and retention. Although the student development department first became staffed after decedent's death, Dr. Agnese described his work as a continuation of many policies handled by separate departments in the past, along with the implementation of a student retention office. (Tr., pp. 230-235) Dr. Agnese was responsible for preparing the Briar Cliff Guide to Programming 1981 - 1982 manual which suggests methods by which faculty and administration can become more involved in the student development process. The manual contains a letter to the faculty, staff, and administration dated August 20, 1981 which reads:

> In the interest of further developing the educational aspect of Student Life, the Student Development Office will begin programming efforts during the upcoming school year.
>
> Students have expressed an interest in all types of faculty-student involvement, and I would like to invite you to become a participant in our many programs. In this way, you may become more acquainted with our program and our students, spending an evening (or two!) with our students in an informal setting.
>
> I would like to ask you to complete the following questionaire, and return it to the Office of Student Development by September 1, 1981. In this way, we may further extend our student-faculty programs, and perhaps, provide you with an opportunity to actively participate in our Student Life here at Briar Cliff.

The introduction of the manual states:

> It is our hope that this Guide to Programming will provide you with a foundation on which to build exciting activities for the upcoming academic year. Let us develop programs that will stimulate an informal and meaningful contact between students, administrators, faculty, and staff members. By encouraging members of the Briar Cliff Community to become involved in Student Life we will be producing an environment that encourages and supports the academic and social growth of Briar Cliff Students.

Prior to suggesting specific areas of programming, the manual defines what a program is: "an activity or event that involves the interaction of individuals or group of individuals and results in the sharing of ideas, feelings, perceptions, and perhaps, just plain good times. Hopefully, this interaction will lead to a satisfying and positive learning experience for the students involved."

Under the heading "Recreational," the manual reads:

> RECREATIONAL: Taking into consideration the scholastic schedule and demands of a college student, it is safe to assume that students may often need an outlet for "letting off steam". Giving students an opportunity to release stored energy involves recreational activities. Recreational Programs should be provided to allow for productive release, rather than destructive release of energy. Some ideas:
>
> * inter-floor/inter-dormitory athletic competitions
> * student-faculty, staff, administrator competitions
> * Superstar Contests
> * a trip to a professional sports event
> * taking a group of students hiking, bowling, skiing, etc.
> * etc. (be creative -- there are hundreds!)
>
> (Cl. Ex. 36)

Sister Margaret Wick has been academic dean at Briar Cliff College since 1972. She testified that while decedent's primary duties were in the classroom setting, all faculty members are encouraged to participate in extracurricular activities. Although she indicated that there was no specific policy on faculty participation in the intramural program, she later testified as follows:

> Q. You indicate that you encourage a good number of activities by faculty, including participation in extramural [sic] sports activities; isn't that correct?
>
> A. When you say "you," do you mean mean [sic] personally or the college collect?
>
> Q. Excuse me. The college collectively.
>
> A. The college encourages participation, right.
>
> Q. What is the reason that the college encourages that kind of participation?
>
> A. I think that we like to see as much involvement as possible by all people on the college campus. One of the assets is that people get to know each other more and the events -- people feel more welcome at the various events.
>
> ....
>
> Q. A good faculty member at Briar Cliff College, would they do certain things or volunteer to do certain things that they weren't required to do under their contract?
>
> A. Certainly.
>
> Q. Did Charles Campolo volunteer and do certain things that he wasn't required to do under his contract?
>
> A. Oh, yes, I'm sure.
>
> Q. And the things that he would volunteer to do or that he would do for the college, would that be for

the benefit of the students and college?

A. I'm sure it would be beneficial, yes.
(Tr., pp. 349-350)

James Madsen, a Briar Cliff College sophomore at the time of the hearing, testified as to his participation in the intramural program in both his freshman and sophomore years. He related that being able to meet teachers outside of the classroom makes it easier to approach them later about problems. (Tr., pp. 214-218) Tim Weiler, another sophomore who participates in intramurals, echoed the sentiments that getting to know the faculty during intramurals breaks down tensions between students and faculty. (Tr., pp. 220-227)

APPLICABLE LAW

Iowa Code section 85.3(1) provides: "Every employer...shall provide, secure, and pay compensation...for any and all personal injuries sustained by an employee arising out of and in the course of the employment...."

Iowa Code section 85.31(1) provides:

> 1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of eighty percent per week of the employee's average weekly spendable earnings, commencing from the date of his death as follows:
>
> a. To the widow or widower for life or until remarriage, provided that upon remarriage two years' benefits shall be paid to the widow or widower in a lump sum, if there are no children entitled to benefits.
>
> b. To any child of the deceased until the child shall reach the age of eighteen, provided that a child beyond eighteen years of age shall receive benefits to the age of twenty-five if actually dependent, and the fact that a child is under twenty-five years of age and is enrolled as a full-time student in any accredited educational institution shall be a prima facie showing of actual dependency.

Iowa Code section 85.61(6) provides:

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

"It is well settled that the words 'arising out of' and the words 'in the course of' are used conjunctively, and so both conditions must exist to bring the case within the statute." Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

A determination that an injury "arising out of" the employment contemplates a causal connection between the conditions under which the work was performed and the resulting injury; i.e., the injury followed as a natural incident of the work. Musselman v. Central Tel. Co., 261 Iowa 352, 154 N.W.2d 128 (1967); Reddick v. Grand Union Tea Co., 230 Iowa 108; 296 N.W. 800 (1941).

It was stated in McClure v. Union, et al., Counties, 188 N.W.2d 283 (Iowa 1971) that, "'in the course of' the employment refers to time, place and circumstances of the injury....An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto."

In Bushing v. Iowa R. & L. Co., 208 Iowa 1010 (1929), it was stated that:

> 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. [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.

Professor Larson in his treatise on workmen's compensation law 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.
> Volume 1A, Larson Workmen's Compensation Law, section 22 at 5-71.

The Iowa Supreme Court considered "employer benefit" in Linderman v. Cownie Furs, 234 Iowa 708, 13 N.W.2d 677 (1944) citing Smith v. Seamless Rubber Co., 111 Conn. 365, 368, 150 A. 110, 111 for the proposition:

> "Where an employer merely permits an employee to perform a particular act, without direction or compulsion of any kind, the purpose and nature of the act becomes of great, often controlling significance in determining whether an injury suffered while performing it is compensable. If the act is one for the benefit of the employer or for the mutual benefit of both an injury arising out of it will usually be compensable; on the other hand, if the act being performed is for the exclusive benefit of the employee so that it is a personal privilege or is one which the employer permits the employee to undertake for the benefit of some other person or for some cause apart from his own interests, an injury arising out of it will not be compensable."

With regard to whether or not an employee was "required" to act in a particular manner, the court in Linderman said at 710: "'Required,' as used in the statute, does not mean only an act in response to a command. It is sufficient if the act is in response to the company's bidding or in any manner dictated by the course of employment to further the employer's business."

The Iowa Supreme Court, in Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955), recognized the peculiar nature of a public school teacher's job. The court stated:

> "It is clear that the job of teaching school is not one where a time clock is punched, and much has been said about the duties and responsibilities of a schoolteacher not only to the children, their education, their health, their welfare, but responsibilities to become a part of and take part in the activities of the community where they are employed."
>
> Good teachers are concerned over the welfare of their students. They are second only to the parent in concern over the child's welfare, and communities expect nothing less. They often, as was planned here, stay at or return to the schoolhouse at night for plays, games and other school activities, rendering many other services to the students and the community beyond that of mere classroom instruction. It is expected, if not actually required of such teachers, by most employer school districts.
>
> ....
>
> It seems unnecessary to include herein the statement that the workmen's compensation statute is to be liberally construed so as to get within the spirit rather than only within the letter of the law. Bidwell Coal Co. v. Davidson, 187 Iowa 809, 174 N.W. 592, 8 A. L. R. 1058, and cases cited therein. This law is remedial and is to be given a broad and liberal construction. The rule is universal and applies in all jurisdictions. See Rish v. Iowa Portland Cement Co., 186 Iowa 443, 170 N.W. 532, and cases cited therein. No further comment is needed except to say here that to restrict compensability for teachers to the duties called for in their contracts only, or in classroom teaching or supervising during school hours only, would be to exclude them from coverage in many well-known incidental activities and would be unconscionably and unreasonably restrictive. Such construction would not be a liberal construction as contemplated by the legislature in the passage of this Act.

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 claimants have the burden of proving by a preponderance of the evidence that the injury of March 26, 1981 is causally related to the disability on which they now base their 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 (1955). 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 Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974) the Iowa Supreme Court identified the circumstances under which workers' compensation can be awarded in cases involving a preexisting heart condition. The opinion stated:

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

> In the first situation the work ordinarily requires heavy exertions which, superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in compensable injury.... Claimant in such a case is aided by our liberal rule permitting compensation for personal injury even though it does not arise out of an "accident" or "special incident" or "unusual occurrence."
>
> ....
>
> In the second situation compensation is allowed when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a pre-existing diseased condition, results in a heart injury.

The court in Sondag cited with apparent approval 1A Larson Workmen's Compensation Law, §38.83 at 7-172 which states:

> "But when the employee contributes some personal element of risk--e.g., by having * * * a personal disease--we have seen that the employment must contribute something substantial to increase the risk. * * *
>
> "In heart cases, the effect of applying this distinction would be forthright:
>
> "If there is some personal causal contribution in the form of a previously weakened or diseased heart, the employment contribution must take the form of an exertion greater than that of nonemployment life. * * * Note that the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person."

ANALYSIS

The first issue on appeal is whether the findings of fact as set forth in the deputy's decision are supported by substantial evidence in the record. Defendants specifically assail six of the deputy's proposed findings and argue, in effect, that the interpretation of the evidence found in the record was improper. A review of the record supports the conclusion that only the deputy's finding of fact number 4 (that in addition to teaching classes in psychology, decedent coached the golf team) is not supported by the evidence contained in the record. The remainder of the deputy's findings are held to be reasonable and sound based upon the testimony and exhibits presented at the arbitration hearing. Furthermore, it is held that the fact that decedent had not coached the golf team prior to his death is of no significance in the disposition of this matter.

The second issue on appeal is nothing more than an attack upon the form, rather than the substance, of the deputy's decision by asserting that several findings of fact were irrelevant and immaterial. Reversal or modification of the arbitration decision is not merited by the inclusion in the findings of fact that the claimants in this action are the spouse and children of decedent, that decedent was employed by the defendant employer, and that decedent's injury occurred on the employer's premises. These findings are not only supported by the record, but are also essential elements in the determination that an award was proper.

The third issue on appeal is a broad assertion by defendants that the claimants have failed to carry their burden of proof as to the existence of a personal injury, as to an act arising out of employment, and as to an act arising in the course of employment. The burden of proof in this case is a preponderance. Preponderance of the evidence means the greater weight of the evidence; i.e., the evidence of superior influence. The evidence in this case clearly indicates that decedent had a preexisting heart condition -- aortic stenosis. While there appeared to be some question as to whether decedent's heart defect was congenital or was the result of rheumatic fever, there was no divergence in any of the medical opinions in the record that decedent's aotic valve was calcified prior to 1981. The expert medical testimony presented linked decedent's heart failure on March 21, 1981 to the preexisting aortic stenosis and decedent's participation in an intramural basketball game. Dr. Herbek, who performed an autopsy on decedent, testified that death was most likely attributable to cardiac arrhythmia which was the result of a condition of aortic valvular stenosis. It was Dr. Herbek's belief that while cardiac arrhythmia could have occurred during a sedentary activity, the probability of its occurrence increased proportionally with increased physical activity. Dr. From also testified that decedent most likely died as a result of arrhythmia. He indicated that the effect of strenuous physical activity on a calcified stenotic valve would be to increase the demand upon the heart to pump blood, and opined that decedent's participation in a basketball game would have aggravated and hastened the disease process. Dr. Draur and Dr. Iannone echoed the opinions that strenuous physical activity could aggravate, hasten, or trigger heart failure in a person suffering from aortic stenosis, and believed that playing basketball may have hastened the demise of decedent. Because we find playing basketball to be an unusually strenuous exertion within the meaning of the tests set forth in Sondag, 220 N.W.2d 903, concerning cases in which workers' compensation may be awarded in cases involving preexisting heart conditions, and the record contains nothing to rebut the medical evidence that decedent's heart disease was aggravated or hastened by his participation in a basketball game on March 26, 1981, we find that claimants have carried the burden of proving the existence of a personal injury. The testimony of four doctors indicated that decedent's death was incidental to his physical activity. Because the medical opinions relate a causal connection between the heart failure of decedent and his participation in the basketball game, it cannot be denied that the injury arose out of that activity.

The remaining question, then, is whether the activity of playing basketball was in the course of decedent's employment. While it is clear that Briar Cliff faculty members were not required to participate on intramural sport teams, the evidence indicates that they were expected to become involved in student activities and student life outside of the classroom setting. Charles Bensman, president of the college, testified that the need to become involved in student activities was conveyed to faculty members when they interviewed for a position, and that he would preferably hire individuals who would become involved in as many activities as possible. Sister Wick, the academic dean, testified that a "good" faculty would volunteer to do things for the college which were not required under their employment contract. Ward Tom Wells, chairman of the Briar Cliff health, physical education, and recreation department, annually inquired among faculty members and administrators as to their interest in participating in intramural basketball. Finally, the Briar Cliff Guide to Programming 1981-1982 manual, although published after decedent's death, illustrates the types of activities in which the college encouraged the faculty to engage. The manual specifically lists student-faculty recreational activity as a means of stimulating informal and meaningful contact between students and faculty members. It appears that Briar Cliff College has impliedly required faculty participation in student activities, and in as much as those activities have not been specified or assigned, participation in intramural basketball reasonably fits into that category of student activities.

Much of the testimony also focused upon the benefit Briar Cliff College received by faculty members being involved in student activities, and specifically in intramural basketball. Briar Cliff College was dipicted throughout the hearing as a "caring community" in which the low student/faculty ratio permitted a more personal learning and maturing experience for the student. Virtually every witness who was associated with the college admitted that participation of the faculty in the intramural basketball league contributed to breaking down barriers between the faculty and the students. Two students who played intramural basketball testified that by getting to know faculty members during basketball games, it became easier to approach them in the classroom about problems. If the employee's activity is one for the benefit of the employer or the mutual benefit of both, it will be deemed as being in the course of employment. In view of the total circumstances of this case, Briar Cliff College received substantial benefit from the faculty participation in intramural basketball. While this activity alone is not responsible for the development of a caring community consisting of students, faculty, and staff, taken with the aggregate of other activities in which both students and faculty are involved, it appears to be a contributing factor.

The fourth issue on appeal states that the deputy's decision is in error for failing to find that the decedent's preexisting heart condition was the sole and proximate cause of his death. The medical evidence, as discussed supra, indicates that aortic stenosis was not the sole cause of decedent's death. The testimony heard from all medical witnesses indicated that death was most likely the result of the preexisting aortic stenosis being precipitated by unusually strenuous activity -- playing basketball. As such, decedent's death was the proximate result of a combination of his preexisting heart condition and the strenuous activity of playing basketball which has been found to precipitate the injury resulting in death arising out of and in the course of employment.

The fifth issue on appeal states that the deputy's opinion is in error for failing to make a finding of fact that an injury was sustained which caused death. We believe the defendants' point has merit, and the oversight of the deputy shall be rectified in the findings of fact set forth in this decision.

The final issue on appeal is an assertion that the arbitration decision is in error in the admission and consideration of testimony which would be inadmissible as being irrelevant, immaterial, and with no proper and sufficient foundation to the extreme prejudice of defendants. Review of the hearing transcript, with special regard being given to the sections which defendants claim to be inadmissible, reveal that the testimony was indeed material and relevant to the disposition of this matter. Unfavorable testimony against a party to an action is not legitimate grounds upon which an objection to testimony may be sustained. We find no error in the deputy's consideration of testimony offered at the arbitration hearing.

FINDINGS OF FACT

1. That Lois Campolo is the surviving spouse of decedent, Charles Campolo.

2. That Andrea, Charles, and Damon Campolo are the children of decedent.

3. That decedent was employed as an assistant professor of psychology at Briar Cliff College.

4. That decedent was contracted to teach specified courses and attend specified events.

5. That Briar Cliff College faculty members were encouraged by administrators to participate in student life activities which took place outside of ordinary classes.

6. That the consideration for hiring faculty members was to a significant degree based upon the willingness of an individual to engage in college activities not specified in the employment contract.

7. That on March 26, 1981, decedent was participating on an intramural basketball team composed of college faculty, staff, and a staff member's spouse.

8. That the faculty basketball team regularly competed against student teams.

9. That Briar Cliff College benefited from faculty members participating in the intramural basketball program insomuch as tensions between students and faculty were broken down.

10. That decedent had a preexisting heart condition -- aortic stenosis -- prior to March 26, 1981.

11. That the history of decedent's heart condition was long standing.

12. That decedent's participation in an intramural basketball game on March 26, 1981 aggravated or hastened the process of the heart disease.

13. That decedent collapsed of a cardiac arrythmia while playing basketball on March 26, 1981 at the Briar Cliff gym.

14. That decedent died on March 26, 1981.

15. That the injury which was the cause of decedent's death was the effect of the strenuous physical activity of playing basketball upon his preexisting heart defect resulting in the inability of the heart to pump sufficient quantities of blood throughout the blood stream, resulting in cardiac arrhythmia.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

That claimants have sustained the burden of proving that the death of Charles Campolo on March 26, 1981 arose out of and in the course of his employment.

THEREFORE, IT IS ORDERED:

That defendants pay unto the surviving spouse and dependent children of Charles Campolo weekly death benefits.

That defendants pay unto claimant charges for decedent's emergency room treatment at St. Luke's Medical Center totalling eight hundred sixteen and 40/100 dollars ($816.40).

That defendants pay unto claimant a burial benefit of one thousand dollars ($1,000).

That defendants pay one thousand dollars ($1,000) to the treasurer of state for the second injury fund.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay amounts due and owing in a lump sum.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33 including the following:

Cost of service of the original notice and petition	$ 3.74
Cost of service of witness subpoenas	$ 53.90
Witness fees for James Redmond and Barbara Redmond	$ 20.00
Witness fees for Ward Tom Wells, Paul Webber, Tim Wieler, Jim Madsen, Louis Agnese	$ 25.00
Mileage fees for each of the above witnesses	$ 12.32
Witness fees for Drs. Iannone and From	$300.00
The cost of a report from Dr. From	$200.00

Transcription costs for the following depositions:

Dr. From	$236.90
Ward Tom Wells	$206.85
Charles Bensman	$245.20
Bruce Weise	$226.40
Dr. Herbek	$ 24.05
Dr. Iannone	$233.39

Signed and filed this 29th day of April, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN D. CARTER,	:	
Claimant,	:	File No. 676376
vs.	:	R E V I E W -
FOOTE MINERAL COMPANY,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Steven D. Carter, the claimant, against his employer, Foote Mineral Company, and the insurance carrier, Liberty Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on July 17, 1981. This matter came on for hearing before the undersigned at the Henry County Courthouse in Mount Pleasant, Iowa on October 15, 1982. The record was considered fully submitted on November 2, 1982.

On July 28, 1981 defendants filed a first report of injury concerning the July 17, 1981 injury. On December 18, 1981 defendants filed a memorandum of agreement (Form 2A) indicating that the weekly rate for compensation benefits was $188.57. On October 6, 1982 defendants filed a final report indicating that 9.857 weeks of temporary total disability/healing period benefits (July 20, 1981 through September 26, 1981) had been paid pursuant to the memorandum of agreement.

The record consists of the testimony of the claimant; claimant's exhibit 1, varied medical reports; and the deposition testimony of Robert E. Cram, M.D. Defendants' objections to portions of Dr. Cram's deposition were noted. (See Analysis.)

ISSUES

According to the pre-hearing order the issues to be determined include whether there is a causal relationship between the alleged injury and the disability and whether claimant is entitled to benefits for permanent partial disability. At the time of the hearing, the parties indicated that only the extent of permanent partial disability remained in issue.

REVIEW OF THE RECORD

Claimant testified that on July 17, 1981 he fell into a vat of hot water up to his knees when a paddle, supported by a steel cable and upon which he was sitting to do his assigned work, broke. Claimant was taken by ambulance to the Keokuk Area Hospital where he remained until August 13, 1981 for treatment of second and third degree burns of his legs and feet. He underwent daily debridement of the burned areas and one extensive debridement under general anesthesia on July 28, 1981. The discharge summary indicated that 95 percent of claimant's burn wounds were healed. Prognosis was guarded and it was noted that there was "a possibility that he (the claimant) may develop some scar tissue at some areas of the feet disturbing the functions." (Claimant's exhibit 1, p. 4.)

Claimant recalled that he continued to receive outpatient treatment on a daily basis for three or four weeks. As of August 17, 1981, David Siroospour, M.D., claimant's treating physician, observed that claimant had no infected areas and anticipated no major complications in the future. He indicated that claimant could return to work at the end of September 1981 and planned on evaluating the claimant in four months for any permanent partial disability rating. (Claimant's exhibit 1, p. 2; no permanent partial disability rating from Dr. Siroospour is found in the record.) In what appear to be office notes of Dr. Siroospour but are labeled hospital records by the claimant, the following entry for September 23, 1981 is made:

> The area healed well, both legs and feet. There is not that much of scar tissue. Stillhaving [sic] some problems moving the toes of the right foot. I think he is able to go back to work next Monday and if he has any problems wearing those heavy boots or gets any skin ulceration, should be rechecked againhere [sic].

Although claimant testified that he did not see another doctor from the time he was released to work until July 28, 1982 when he was evaluated by Albert E. Cram, M.D., at the Burn Center at the University of Iowa Hospitals, he apparently complained of itching legs and sought a work excuse on November 3, 1981. (Claimant's exhibit 1, p. 3. Claimant testified that he has continued to work since the healing period ended except when laid off.)

In a report dated July 31, 1982 and addressed to the defendant carrier, Dr. Cram, board-certified general surgeon specializing in burns and trauma, related the history he had received from the claimant (which was essentially consistent with the rest of the record) and the following findings and conclusions:

> At the present time Mr. Carter has complaints of a drawing up of his toes bilaterally, pruritus and tingling while standing. He also notes dryness in the dorsum of his feet and rather sensitive plantar surfaces. He does note some discomfort on exposure to the cold and states that his feet feel quite cold to him under most circumstances.
>
> On physical examination he has excellent pulses. The burn wounds are healed and retain some pliability although there is a slight tightness across the dorsum of the feet. Although his toes are held in a slightly dorsiflexed position, they can be extended to full extension, both passively and actively. They do not appear to be limited significantly by any skin contracture. There is a dry scaly appearance to the skin and it is mildly atrophic as is often the case following a burn injury.
>
> In regard to any permanency of the changes, the appearance and viability of the skin that is presently obvious is likely to be the condition of his skin for the remainder of his life in the burned area. He does have some dryness which we have recommended he treat with moisturizers and we have given him a steroid cream to see if this will help relieve some of the dryness and some of his itching symptoms. His feet will never be fully normal and probably will also have some degree of sensitivity to cold. Based on this, the sensitivity to cold and the mild discomfort that he will probably have on a permanent basis whenever he has to stand for any long period of time, I would estimate his disability at 5% permanent disability of the whole man.... (Claimant's exhibit 1, pp. 7-8.)

Although Dr. Cram agreed that claimant's impairment was confined to the feet, he indicated an inability to rate the scheduled losses because he felt claimant's disability was due to the persistent symptoms of itching and tingling in the feet which, in his view, had an effect on the whole man. He knew of no method whereby he could trace back from 5 percent of the body as a whole to percentage ratings for each foot. Dr. Cram commented that claimant would continue to experience more sensitivity to the heat and cold than a person who had not suffered such a burn. He acknowledged that pain, discomfort or itching were subjective factors he could not measure and that thickening of the skin, dryness and scaliness of the feet and color change, loss of skin elasticity and skin thinning of the toes were the only objective factors. He did not disagree that his diagnosis was based principally on the subjective complaints.

In response to a question seeking clarification regarding claimant's loss of motion of the toes, Dr. Cram testified:

> [W]e can have what we call passive motions where we move the toes for him and we could obtain a full range of motion when we did that with this patient. He is able by effort to obtain a full range of motion in active exercise, but he doe so with obvious tightening of the skin and some evidence that this might cause some discomfort. (Cram deposition, p. 13; at the time of the hearing, claimant disputed full range of motion upon active exam.)

Claimant testified that his present complaints with regard to his feet and toes include sensitivity to heat and cold, trouble balancing, and skin irritation from exposure to chlorinated water or to synthetic material and from rubbing too hard with a wash cloth. Claimant noted that he wears raw spots on his feet from walking and he wears boots only occasionally whereas he used to wear them all the time. He put special lining in his work boots. He observed that when he does not have enough seniority for the switchman position, he is assigned to work as a tapper near the furnace which work bothers his legs. Claimant added that he formerly spray painted cars on the side for profit but had to quit doing such work after the injury because the spray paint also bothers his legs. Claimant demonstrated that the second toes are "crooked in" and that he can extend the toes upward somewhat but cannot flex them too far.

APPLICABLE LAW

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).

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).

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 totally 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. (To date, agency decisions following such interpretation have converted the losses of both members to body as a whole impairment ratings which are then combined, using an appropriate guideline for a final functional body as a whole rating that, in turn, is multiplied by the 500 week schedule. Current agency thinking is that the average of the functional losses to the members should be multiplied by the 500 week schedule.)

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 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).

ANALYSIS

Claimant sustained some degree of permanent impairment to both feet as a result of the July 17, 1981 work injury, and therefore, he is entitled to compensation pursuant to Code section 85.34(2)(s). As indicated above the industrial commissioner awards compensation based on functional loss, not industrial disability. Insofar as Dr. Cram's remarks seemingly entitle claimant to an assessment of industrial disability because they are based upon a body as a whole rating, defense counsel's objections are proper. However, upon closer scrutiny, Dr. Cram's comments concern functional loss. The dilemma noted above with regard to assessing the losses of both members in a manner consistent with the statute appears to be the converse of Dr. Cram's difficulty in determining the loss of use of both feet. Claimant's testimony and demonstration essentially mirrored the record of complaints and examination findings of Dr. Cram. (Claimant's contention that he did not have full range of motion upon active examination is not found to be significantly different from Dr. Cram's statement that claimant can obtain full range of motion with effort and possible discomfort.) Hence, upon the present record and in light of the case law cited above, claimant is entitled to 25 weeks of compensation based on 5 percent functional loss of use to the body as a whole based, in turn, on some loss of use to both feet.

Although the parties stated that healing period was not in issue, the evidence indicates that claimant was disabled immediately and therefore is entitled to healing period benefits from the date of injury as specified in Code section 85.34(1).

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 July 17, 1981 claimant fell into a vat of hot water up to his knees in the course of performing repair work for his employer.

FINDING 2. Claimant was hospitalized on July 17, 1981 and until August 13, 1981 for treatment of second and third degree burns of his legs and feet.

FINDING 3. Claimant's impairment is limited to both feet. Objective findings include thickening of the skin, dryness and scaliness of the feet and color change, loss of skin elasticity and skin thinning of the toes. Claimant is able to fully flex and extend his toes with effort and some discomfort. His feet are sensitive to cold and heat and are at time irritated upon walking. Claimant no longer wears boots except with a special lining.

FINDING 4. Claimant has sustained five percent (5%) functional loss to the body as a whole.

CONCLUSION A. Pursuant to Code section 85.34(2)(s) claimant is entitled to twenty-five (25) weeks of permanent partial disability.

ORDER

THEREFORE, it is ordered that the defendants pay the claimant twenty-five (25) weeks of permanent partial disability at the rate of one hundred eighty-eight and 57/100 dollars ($188.57) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of September 27, 1981.

Defendants are ordered to pay the claimant additional healing period benefits from the date of injury to July 20, 1981 at the rate of one hundred eighty-eight and 57/100 dollars ($188.57) per week.

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

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 as amended by SF 539.

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

Signed and filed this 24th day of November, 1982.

No Appeal

LEE W. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE F. CHAPMAN, Claimant, vs. MAX BOYD COMPANY, Employer, and IOWA KEMPER INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 709447 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Wayne F. Chapman, claimant, against Max Boyd Company, employer, and Iowa Kemper Insurance Company, 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 27, 1982. It came on for a hearing on February 25, 1983 at the Cerro Gordo county courthouse in Mason City, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file contains a first report of injury received on August 4, 1982.

At the time of hearing the parties stipulated to the fairness of the medical expenses. They also stipulated to a rate of $146.10 per week. They agreed that claimant's time off work was from August 2, 1982 through October 11, 1982. Claimant returned to work on October 12, 1982 and worked part time for eight weeks. The parties provided these figures for calculation of the temporary partial disability: normal wages $1,712; wages paid $647.25.

The record in this case consists of the testimony of claimant, Frank Davenport, Jeffrey Roath, and Mary Ann Chapman; claimant's exhibit 1, medical records and notes from Wayne E. Janda, M.D.; claimant's exhibit 2, a letter from Dr. Janda dated December 1, 1982; claimant's exhibit 3, a report from John R. Walker, M.D., dated January 21, 1983; claimant's exhibit 4, an additional note and a return to work slip from Dr. Janda; claimant's exhibit 5, materials relating to claimant's workers' compensation claim in Minnesota; claimant's exhibit 6, medical reports relating to claimant's Minnesota claim; claimant's exhibit 7, a bill from North Iowa Medical Center; claimant's exhibit 8, a bill from Radiologists of Mason City, P.C.; claimant's exhibit 9, itemized charges of Dr. Janda; claimant's exhibit 10, charges from St. Joseph Mercy Hospital; claimant's exhibit 11, charges from Forest Park Pharmacy, P.C.; claimant's exhibit 12, mileage expenses; claimant's exhibit 13, charges of Dr. Walker; and claimant's exhibit 14, medical report expenses. Claimant filed a brief.

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 disability; whether or not claimant is entitled to temporary partial disability, healing period or permanent partial disability benefits; whether or not claimant is entitled to benefits under Iowa Code section 85.39; whether or not claimant is entitled to benefits under Iowa Code section 85.27; and whether or not the provisions of Iowa Code section 86.13 should be invoked.

STATEMENT OF THE CASE

The six foot 250 pound 32 year old married claimant, who has a GED, two typewriter repair courses and additional work in trouble shooting electronics, went to work for the defendant employer in June of 1979. Immediately prior to that he had a job with a farmer in Minnesota in a hog feeding operation. Earlier work was performed for a canning company.

He recalled the events of July 27, 1982 thusly: It was between 10 and 11 o'clock. Davenport, Day, and he were delivering a 600 pound fire file. He was controlling the handles on a five foot cart which was a little shorter than the file. The file was being moved to a van. He was inside the van crouched down tugging on the cart's handles and pulling "pretty hard." Davenport and Day were on the ground. The file was placed on its back in the back of the van. When the three got to the laundry he pushed the file out and it was wheeled in on the cart. He had no pain loading or unloading the file or on his way back to the store.

In the afternoon his hip began to ache with a sharp pain and his leg had a dull ache. He started to limp. He mentioned his discomfort to Day and Roath. He did not think there was a serious problem; and whatever it was, it did not interfere with his work. He finished out the day and a few minutes overtime.

He drove home.

His pain was stronger and he continued to limp. He took it easy. He went to bed earlier than usual as he hoped lying down would make him feel better. But he was unable to get comfortable.

He was up at six. He felt worse. His pain had increased. He decided to go to the doctor. His spouse called defendant employer.

Claimant testified to prior back problems commencing in 1975 while he was working in Minnesota for a canning company and doing heavy lifting. He said that he pulled a muscle in his back and was off for several weeks. In late 1976 he had another incident which resulted in his being off a few months. He tried to return to work, but eventually there was no work for him. He reported a fusion in 1978 which alleviated some of the problems he was having so that by July of 1982 his low back was feeling "pretty good" and comfortable and would not bother him on a normal day. Claimant recalled that in early 1982 he had back pain ocassionally depending on what he had done perhaps once or twice a month or every week or two. He acknowledged that his back trouble has been confined to the same spots.

Claimant filed a claim for workers' compensation in Minnesota and recovered against the canning company.

Claimant asserted that the comfortable feeling he was beginning to have prior to July 27, 1982 is no longer with him. Claimant claimed that he now is unable to do some of the things he did in July such as sports, splitting wood, moving furniture and shoveling snow as pain comes on with steady lifting or with bending over. He expressed fear of taking on larger mechanical tasks. His pain has dulled and comes and goes in relation to his activity. In an average week he would have pain during most of the week. The pain routinely does not preclude his work doing typewriter repair as he usually would not bend to pick up the machines. He related some of his restlessness at night to back pain and his inability to get comfortable.

Claimant admitted discussing the effect of his weight on his back with Dr. Janda and reported losing a "a few" pounds.

Claimant has returned to the job that he had prior to his injury -- a job he is able to do.

Claimant's spouse of 10 years, Mary Ann Chapman, recalled the events of July 27, 1982 as follows: Claimant was limping badly when he came home. She asked about the limp, and she was told about the fire file. She thought that his primary pain was in his leg and that his back was not bothering him too badly. She noted that claimant went to bed early and had trouble sleeping. The next morning he had low back and leg pain and was limping. She called Davenport to say claimant would not be in.

The witness testified that she is familar with claimant's back problems beginning in 1975. She thought his physical condition was getting back to normal in late 1979 and by 1982 he was getting along "pretty good" in that he was able to do things that he could not do before surgery and in that his pain was ocassional. She reported that claimant is no longer able to shovel snow or move furniture. She observed that claimant has back pain, rubs his leg and has to get up and move around.

Frank Davenport, sales and service representative of defendant employer, testified regarding delivery of the fire file on July 27, 1982: A 600 pound four drawer fire file made of insulated materials so that it would not burn was sold to a laundry. It

was removed from the showroom floor by Day, claimant and him on a two wheel hand cart with claimant on the handles of the cart and without aid of mechanical devices. It was taken to a van where it was tipped for loading. Claimant was stooped inside the van pulling on the handles. He and Day pushed. The file was laid on its back in the van. It was taken to the laundry where it was unloaded with claimant pushing it out. It was moved to a corner.

Davenport learned the following day that claimant had hurt his back and would not be in to work. He recalled no complaints of pain by claimant at any time during the delivery process nor did he observe anything indicating claimant had been injured that day.

It was the opinion of the witness that the job was not difficult for three men although he agreed there was substantial lifting and pulling involved. He asserted that it is hard to have more than three persons working around a file cabinet.

Jeffrey Roath, who started work for the defendant employer on January 18, 1982 as a service technician and who sometimes assists with deliveries, testified that he was originally scheduled to help with delivery of the fire file. He was at the store when the group returned and he talked to claimant who told him he thought he had pulled a muscle in his back. While the witness did not know what caused the pull, Roath said they were talking about the delivery. He observed no difference in claimant's work activity and heard no further references to an injury that day.

It was Roath's impression that someone other than claimant was to do heavy lifting as claimant had a previous back injury. He had not noticed claimant favoring his back prior to July 27, 1982.

Claimant was seen by Wayne E. Janda, M.D., on August 9, 1982. Claimant gave a history of an injury on July 27, 1982 and complained of tingling in his left foot and back and leg pain. Dr. Janda measured claimant's height as five feet nine and a half inches and his weight at 257 pounds. On examination claimant's back motion was moderately restricted with a list to the right. There was tenderness over the lumbar spine, spinous processes in the left paravertebral muscles and in the left buttock over the sciatic nerve. Straight leg raising was 75 degrees on the right and 60 degrees on the left with slight back pain. There was mild give-way weakness in the left foot and leg. Dr. Janda's impression was back sprain with radiculitis into the left leg. Tylenol #3 was prescribed for severe pain.

The physician believed the x-rays showed a Grade I spondylolisthesis of L5 on the sacrum.

Claimant returned on August 23, 1982 and was found to be improved. Claimant was encouraged to exercise. Motrin 600 mg. was continued.

On September 7, 1982 claimant's weight had climbed to 262 pounds. He continued to have back and left leg pain. A lumbar support was prescribed. Claimant was to continue his exercise. The back strain was classified as resolving the following week. Claimant's height was recorded at five feet eleven inches. Two weeks of physiotherapy were ordered.

Claimant was seen by Dr. Janda on December 30, 1982 at which time he was released to resume full time work activity.

Dr. Janda assessed a twenty-five percent functional impairment of the whole person which he related entirely to claimant's preexisting condition.

John R. Walker, M.D., evaluated claimant on January 21, 1983 at which time claimant complained of neck pain and stiffness; sharp pains in the mid-dorsal spine; dull, intermittent pain in the low back; tingling in the great and second toes of the left foot; occasional aching in the left anterior thigh down to the knee; and pain in the left sciatic notch and sacroiliac area.

On examination Dr. Walker found claimant 40 pounds overweight. He elicited some pain in the cervical spine at the extremes of motion, mild tenderness at C7, and tenderness at L4, L5 and over the left sacroiliac area. The fusion was pronounced good. The right leg is one half inch short. A 3/8 inch atrophy was found in the left calf. Pelvic torsion and straight-leg raising produced pain in the low lumbar and left sacroiliac areas.

X-rays showed the fusion, but nothing else out of the ordinary. Dr. Walker's diagnoses were: "[s]prain of the lumbar spine, soft tissues mostly; [s]tretch of the nerve roots or the cauda in new bone and scar formation giving him a little sciatica on the left; and [a] chronic sacroiliac sprain, post-traumatic."

The orthopedist related the diagnoses to claimant's moving the file. He suggested physical therapy and possibly a lumbosacral support, medication, or Cortisone injection. Dr. Walker added a five percent permanent partial impairment due to claimant's injury in July. He believed claimant's condition might improve. As to restrictions the physician proposed no heavy lifting and avoidance of bending, stooping and lifting from the floor to a table.

A number of reports were offered from a claim made by claimant for a back injury in Minnesota.

A. J. Floersch, M.D., supplied a summary of claimant's back related complaints which commenced on November 9, 1975 when claimant was lifting cases at work and had pain in the middle back, posterior neck, and anterior and lateral upper chest on the left. Back motion was restricted. Claimant was treated during that month with a prescription for Indocin.

Claimant was seen in January of 1977 with complaints of back pain in the left lower lumbar and supraclavicular area which developed as claimant stacked boxes. Straight-leg raising and reflexes were normal. An x-ray of claimant's lumbar spine on January 14, 1977 showed normal appearing vertebral bodies with the exception of L4 which was slightly displaced to the right on L5 in one view. There was a slight anterior spondylolysis of L5 on S1. L4-5 and L5-S1 were slightly narrowed.

On February 18, 1977 Dr. Floersch wrote that claimant was capable of working and that any residual disability was due to obesity. In a subsequent letter he suggested claimant would do better if the work would not involve lifting away from his body.

Claimant apparently saw R. W. Stioke, D.C., who treated him for a lumbosacral strain and returned him to work on March 7, 1977.

In April of 1977 claimant was placed on exercises by P. M. Arnesen, M.D. Later in the month claimant had tenderness in his lumbar area. Straight-leg raising was negative with no evidence of sciatic nerve irritation or compression. Claimant was to return to work and to continue exercises.

In October of 1977 Dr. Arnesen wrote that claimant would have permanent partial disability. He also proposed that a spinal fusion might be necessary. The next month claimant had tenderness at L5. The remainder of the examination was essentially normal. Claimant was wearing a back brace for strenuous work.

A letter from Dr. Arnesen dated January 6, 1978 explains that claimant's spondylolisthesis is a congenital defect. He expressed the opinion that "the relatively stable spondylolithesis was made unstable by ... work." He went on to say that claimant's symptoms were increased by applying stress.

A fusion was performed on May 3, 1978.

On June 14, 1978 claimant complained of left hip pain particularly in the morning. In the late summer claimant continued to complain of early morning pain and aching. The doctor continued to restrict claimant's physical activities.

Claimant returned to Dr. Arnesen on February 12, 1979. He complained of occasional pain in the low back, soreness in the left hip, and pain in the right leg. Grade II tenderness was localized over L3. Claimant was to undertake a two month conditioning program. At the end of two months claimant had no positive findings on examination. He was to return to work on May 1, 1979.

On September 26, 1979, claimant reported sorness with long periods of sitting and tiredness in his legs. Tenderness remained at L3 and was present over the posterior superior iliac spine on the left. There was full range of motion in the lumbar spine. On x-ray no pseudarthrosis was present. Dr. Arnesen assessed claimant's permanent partial disability at fifteen percent of the spine.

Elmer R. Salovich, M.D., saw claimant on September 1, 1978. Thirty percent limitation of motion secondary to discomfort was found. Dr. Salovich was of the opinion that claimant could not return to heavy or medium heavy employment. He recommended a twenty-five pound weight restriction from the floor and avoidance of repeated bending and twisting.

Claimant saw Dr. Salovich slightly more than a year later. The doctor's findings showed little change from his previous examination. A permanent partial disability rating of thirty to thirty-five percent of the spine was assigned.

David R. Johnson, M.D., neurological surgeon, evaluated claimant on August 28, 1979. His neurological was normal. There was moderate restriction in the back. Dr. Johnson rated claimant's permanent partial disability at twenty-five percent of the spine.

Records from the Minnesota Workmen's Compensation Commission were also offered into evidence. A settlement was approved on November 14, 1977. The parties to the settlement agreed that claimant sustained a low back injury arising out of and in the course of his employment and that claimant should be paid twenty weeks of temporary total disability. Medical expenses were to be paid by the defendant. A hearing was held on October 19, 1979. Among the findings of the compensation judge were these: That claimant's injury was an aggravation of the preexisting spondylolisthesis in his low back, that claimant had been paid a five percent permanent partial disability of the back and that as a result of his injury claimant has a twenty-five percent permanent partial disability of his back.

The initial decision was appealed to the Workers' Compensation Court of Appeals which affirmed.

APPLICABLE LAW AND ANALYSIS

The first issue to be considered is whether or not claimant had an injury arising out of and in the course of his employment.

In order to receive compensation for an injury an employee must establish his injury arose out of and in the course of his employment. Both conditions must exist. Crowe v. DeSoto Consolidated School District, 246 Iowa 402, 68 N.W.2d 63 (1955).

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 a 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, 286 (Iowa 1971).

In addition to establishing that an injury occurred in the course of employment, 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 was 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).

If claimant had an injury on July 27, 1982 as he delivered a fire file, that injury was clearly in the course of his employment. The major problem in this case is whether or not claimant's injury arose out of his employment.

An award of benefits cannot stand on a showing of a mere possibility of a causal connection between the injury and 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, 21 N.W.2d 584 (1946). Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodisit Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). Expert medical evidence must be considered with all other evidence introduced bearing on a causal connection. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956).

Claimant testified that he felt pain in his back subsequent to moving a fire file on July 27, 1982. His spouse verified his testimony. Jeffrey Roath, claimant's coemployee, also testified that claimant told him on July 27, 1982 that he had pulled a muscle in his back.

Although claimant acknowledged he felt no pain during either the loading or the unloading process or on his way back to the store, he consistently has related the pain he experienced later in the day to the incident. He gave a history to both doctors Janda and Walker of an injury on July 27, 1982. Claimant said that the condition of his back before that date was good. Notes from the Independent Medical Surgical Group, P.C., beginning almost a year before contained no back complaints.

Dr. Janda relates claimant's functional impairment to his preexisting condition, but he does not make a causation statement as to the initial injury. Dr. Walker's diagnosis is a sprain as was Dr. Janda's. Dr. Walker relates the sprain to claimant's injury in July 1982.

The record viewed as a whole is sufficient to sustain claimant's burden of proving an injury arising out of and in the course of his employment.

The second issue to be considered is whether or not claimant has established a causal relationship between his injury and his present disability. The claimant has the burden of proving by a preponderance of the evidence that injury of July 27, 1982 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1956); LIndahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). Claimant has a history of back trouble. Concerning the matter of causation it is important to keep in mind that the search is not for the only cause. The Iowa Supreme Court in Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667, 670 (Iowa 1971) held that requiring the claimant to show an accident was the sole proximate cause placed on him a greater burden than law imposed. More recently in Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) at 354 the court reiterated: "A cause is proximate if it is a substantital factor in bringing about the results....It only needs to be one cause; it does not have to be the only cause."

Again, the record viewed as a whole carries claimant's burden. Dr. Walker clearly relates an additional five percent permanent partial impairment to the claimant's injury in July of 1982. Dr. Janda attributes all of claimant's present impairment to his preexisting condition; however, his twenty-five percent impairment to the body as a whole exceeds the rating to the spine in the Minnesota action. The claimant's own testimony which was corroborated by his spouse indicates that he was having only occasional pain prior to July of 1982. Although he saw the doctor for other reasons, he was not complaining of his back. His testimony at the time of hearing was to a deterioration in his condition.

The next issue to be considered is claimant's entitlement to healing period, temporary partial disability and permanent partial disability.

While claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at time of the 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, the claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962).

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 claimed 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).

The industrial commissioner has stated on many occasions:

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 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.

Dr. Janda relates all of claimant's 25% functional impairment to his preexisting condition. As noted above, Dr. Janda's impairment rating exceeds that assigned by claimant's Minnesota doctors. Dr. Walker assesses an additional five percent permanent partial impairment attributable to claimant's injury of July 27, 1982. There is no reason to disregard Dr. Walker's opinion. He like Dr. Janda is an orthopedic surgeon. His evaluation is thorough. Claimant is a young person who after a previous back injury improved his lot by increasing his education and skills. He is precluded from heavy lifting, but apparently his present job conditions are such that heavy lifting is not needed. Claimant has been fortunate to have an employer who is willing to work with him. Claimant continues to work for that employer at this time and seems motivated to continue to do so. It is important to keep in mind that we are concerned with loss of earning capacity rather than loss of actual earnings in dealing with industrial disability. Claimant had a preexisting condition in his back. He had some prior restrictions. Claimant has been encouraged to lose weight but his weight remains in excess of what it should be and undoubtedly places a burden on his back. This deputy industrial commissioner finds claimant's industrial disability at the present to be minimal and believes the claimant is entitled to 25 weeks of permanent partial disability.

Claimant has suffered a permanent impairment. The benefits to be paid to him for his time off work therefore are healing period benefits.

Iowa Code section 85.34(1) provides:

> Healing Period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

At the time of hearing the parties stipulated that claimant was off work from August 2, 1982 through October 11, 1982. That time is determined to be claimant's healing period.

Temporary partial disability is discussed in Iowa Code section 85.33. Subsection 3 of that section provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Claimant was able to return to work on October 12, 1982. He by stipulation of the parties, worked part-time for eight weeks. The parties agreed that claimant's normal wages would have been $1,712. As a result of his work he was paid $647.25. Applying the formula in Iowa Code section 85.33(4) results in a finding that claimant is entitled to $709.92 in temporary partial disability benefits.

The parties are to be complimented on the manner in which claimant was eased back into his job. This is an excellent example of how the workers' compensation system should work.

The fourth issue to be considered is whether or not claimant is entitled to benefits under Iowa Code section 85.27 which 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 and supplies there of and shall allow reasonably necessary transportation expenses incurred for such services." That section is supplemented by industrial commissioner rule 500-8.1.

At the time of hearing claimant submitted a number of medical expenses. As claimant has been found to have an injury arising out of and in the course of his employment, he is entitled to the payment of medical expenses and those expenses will be ordered.

The fifth issue to be considered is claimant's right to examination under Iowa Code section 85.39. That section provides in pertinent part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Dr. Janda assessed no permanent impairment to claimant's injury of July 27, 1982. A rating of no impairment is considered a rating of impairment for purposes of Iowa Code section 85.39. Coble v. MetroMedia, Inc., 34 Iowa Industrial Commissioner Report 71 (1979). Claimant has shown entitlement to examination under Iowa Code section 85.39. Industrial Commissioner Rule 500-8.1 contemplates the payment of mileage and meal expenses. Those will be ordered as well.

The remaining issue is whether or not the provisions of Iowa Code section 86.13 are triggered. A portion of that section states:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The undersigned has concluded that the provisions of 86.13 are applicable in this matter. Claimant complained to a coemployee on the date of his injury. Claimant called his employer the day following his injury to tell of his back problems. Claimant reported the injury to Dr. Janda. Dr. Janda had no record of back complaints in the year's time prior to claimant's injury. Defendants are found lacking only in their failure to pay weekly benefits in the time from claimant's injury until his return to part-time work. In light of the newness of temporary partial disability benefits and the complexity of the formula involved no addition will be made to the award of those benefits. Likewise no addition will be made to the permanent partial disability benefits in that Dr. Janda's report attributing no impairment to claimant's injury of July 27, 1982 is unequivocal. Defendants' waiting for a determination of industrial disability was not unreasonable. Claimant will be allowed an additional $300.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 32 years of age.

That claimant is approximately six feet tall and weighs about 250 pounds.

That claimant has a GED.

That claimant has additional training in business machines.

That claimant's work experience before beginning work for defendant has been in a canning company and in a hog feeding operation.

That claimant had an incident with his back on July 27, 1982 as he delivered a 600 pound fire file.

That claimant spoke of this incident with a coemployee.

That claimant had injured his back before in 1975 and in 1977.

That claimant had a spinal fusion in 1978.

That claimant made claim for workers' compensation in Minnesota and was awarded benefits including permanent partial disability to his back of 25%.

That claimant had a good recovery from surgery with only occasional pain.

That since the incident of July 27, 1982 claimant has increased pain and an inability to carry out some of his activities.

That claimant was working for defendant employer at the time of his Minnesota claim and continues to work for defendant employer.

That claimant was off work from August 2, 1982 through October 11, 1982.

That claimant returned to work on October 12, 1982 and worked part-time for the next eight weeks.

That claimant has some permanent impairment resulting from his injury of July 27, 1982.

CONLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant sustained an injury to his back arising out of and in the course of his employment on July 27, 1982.

That claimant has established a causal relationship between his injury of July 27, 1982 and his present disability.

That claimant has shown entitlement to healing period benefits from August 2, 1982 through October 11, 1982 at a rate of one hundred forty-six and 10/100 dollars ($146.10).

That claimant has proved entitlement to temporary partial disability benefits totalling seven hundred nine and 82/100 dollars ($709.82) for the period from October 12, 1982 until December 6, 1982.

That claimant has demonstrated entitlement to twenty-five (25) weeks of permanent partial disability at one hundred forty-six and 10/100 dollars ($146.10) per week.

That claimant has established entitlement to medical and mileage expenses under Iowa Code section 85.27.

That claimant has shown entitlement to examination under Iowa Code section 85.39.

The defendant insurance carrier delayed in commencement of weekly benefits without reasonable or probable cause or excuse from August 2, 1982 through October 11, 1982 entitling claimant to an additional three hundred dollars ($300).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay healing period benefits from August 2, 1982 through October 11, 1982 at a rate of one hundred forty-six and 10/100 dollars ($146.10).

That defendants pay claimant an additional three hundred dollars ($300) pusuant to Iowa Code section 86.13.

That defendants pay temporary partial disability totalling seven hundred nine and 92/100 ($709.92).

That defendants pay permanent partial disability benefits for twenty-five (25) weeks at a rate of one hundred forty-six and 10/100 dollars ($146.10) per week commencing on December 7, 1982.

That defendants pay all amounts accrued in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay mileage totalling one hundred ninety-six and 80/100 dollars ($196.80).

That defendants pay the following expenses under Iowa Code section 85.27:

Forest Park Pharmacy, P.C.	$ 39.70
St. Joseph Mercy Hospital	1,447.50
North Iowa Medical Center	38.20
Radiologist of Mason City, P.C.	107.00
Independent Medical Surgical Group, P.C.	262.00

That defendants pay costs of an examination by Dr. Walker and expenses incidental thereto totalling three hundred twenty-six and 03/100 ($326.03) pursuant to Iowa Code section 85.39.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33 including the charges for medical reports from Dr. Janda and Dr. Walker totalling one hundred five dollars ($105).

Signed and filed this 25th day of March, 1983.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVE COTTRELL, Claimant,	:	File No. 603182
vs.	:	R E V I E W -
MIDWEST CARBIDE CORPORATION, Employer,	:	R E O P E N I N G
and	:	D E C I S I O N
FIDELITY & CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

Mr. James P. Hoffman
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P.O. Box 1066
Keokuk, IA 52632 — For Claimant

Mr. Dennis L. Hanssen
Ms. Carol Ann Nix
Attorneys at Law
1040 Fifth Avenue
Des Moines, IA 50314 — For Defendants

INTRODUCTION

This is a proceeding in review-reopening brought by David Cottrell, the claimant, against his employer Midwest Carbide Corporation, and the insurance carrier, Fidelity & Casualty Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on October 4, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Henry County Courthouse in Mount Pleasant, Iowa on February 3, 1982. The record was considered fully submitted on March 31, 1982.

An examination of the industrial commissioner's file reflects that on October 25, 1979 a memorandum of agreement was filed with respect to this case. On October 10, 1979 a first report of injury was filed by the employer. A supplemental form 2A was filed March 15, 1982 indicating that permanent partial disability payments were continuing to be paid to the claimant.

The record in this case consists of the testimony of the claimant, Jesse Heriford and Dan Smith; the deposition of Jerry L. Jochims, M.D.; the deposition of William A. Vance, Jr., D.C.; the deposition of Frank Koranda, M.D.; the deposition of Marc Joseph Williams, D.C.; the deposition of Albert Cram, M.D.; claimant's exhibits 1 through 9 inclusive; and defendants' exhibits A through K inclusive.

ISSUES

The issues to be determined in this litigation are the causal relationship between the work injury of October 4, 1979 and the claimant's present back complaints as well as the extent of disability. It should be noted that as a consequence of the October 4 incident, claimant sustained extensive burns over his body. There is no issue of causation concerning those burns.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $163.18. The parties further agreed that there was no issue of time off work and that all medical bills have been paid.

Claimant, David Cottrell, testified that he is 27 years old. He was single on the date of injury and remains unmarried as of the date of hearing. He completed the eleventh grade and has not received a GED.

His prior work experience includes working for the Gardner Denver Company for five and one-half years in a general unskilled labor position. He then worked for the Quincy Soybean Company unloading soybeans and functioning as a general laborer for two months. He has also had experience working for Sheller-Globe Company, again in a general labor position, for a six month period. The claimant does not have any specialized training in any particular field.

The claimant acknowledged that on the date of injury of October 4, 1979, he was an employee of the defendant. He had been working for Midwest Carbide for approximately one and one-half years prior to the date of injury. His position was that of "head fireman" for the defendant on the date of injury.

On October 4 the claimant was working near a carbide furnace when that piece of equipment started to make loud noises. Claimant notified Merle Hamilton, a coworker, that there was a problem with the furnace. They tried to shut down the furnace when it exploded. The claimant was struck by a large metal portion of the furnace which he estimated to weigh 500 pounds. The claimant indicated that he was struck in the middle of the back by this metal which then slammed and pinned him against a brick wall. The claimant also received extensive burns as a result of the explosion on his arms, legs, back and neck.

After the explosion Mr. Cottrell immediately went to the first aid station where he remained 30 to 40 minutes. He was then transferred to the Keokuk Area Hospital and subsequently flown by helicopter to University Hospitals in Iowa City.

The claimant lost consciousness during this period of time and woke up three or four days later in the intensive care unit at Iowa City Hospitals. He indicated he was burned over 35 percent of his body as a result of the explosion. He testified that to the best of his recollection he spent five weeks at University Hospitals for treatment and skin grafting procedures on his arms, stomach and thighs. He was under continuous pain medication during this time.

Since being discharged from the hospitial the claimant indicated that he has made numerous trips to University Hospitals and has been under the continuing care of Dr. Albert Cram of that institution.

By the time of hearing the claimant had returned to work for the defendant and had been actively working one and one-half weeks. He is not working at the same job he had prior to the date of injury.

Claimant indicated that he is now restricted in what he can do physically. Specifically, he must avoid exposure to the sun for any length of time and he has an inability to lift as much as he could prior to the date of injury. Claimant testified to the extensive scarring on his body which is evidenced by photographs and other evidence in this case. He testified that he is unable to manipulate his arms as he did before and does not have the strength that he had prior to the date of injury. He indicated that in cold weather he chills faster than he did prior to the date of injury.

Mr. Cottrell testified about an embarrassment he experiences as a result of his skin situation; hence, he continues to leave his shirt on in the summertime. The claimant testified that the extensive scarring makes him feel as though people are looking at him and consequently he stays at home quite often.

As previously noted, claimant returned to work, initially was assigned to an outside job and got along satisfactorily. However, he noted that he chilled rapidly and was required to go inside and warm up. Due to the facial burns, specifically the burns on the right ear, he has lost the sensation in that portion of his body and cannot feel the cold there.

Claimant is paid $7.91 per hour and his seniority was restored when he returned to work. The claimant is afraid of the furnace where the accident occurred. He indicated that the mere lighting of a cutting torch or a popping noise causes him to flinch and be nervous. Whenever he is around an exposed flame of any type, he is very cautious. The claimant testified that he has a quick temper now which he did not have prior to the injury. He also testified to a nervous stomach which he did not have prior to the date of injury. Claimant has an inability to walk as far or work as fast as he once did.

Mr. Cottrell was in good physical condition prior to the injury and not affected by any of these problems.

In connection with the furnace blast, claimant injured his back. He received some chiropractic adjustments prior to the date of injury, but the back situation has become progressively worse since the date of injury. Part of his lifting restriction is due to the back injury.

Claimant confirmed that in 1970 he sustained a neck injury while in high school and in 1971 a subsequent low back injury, both of which were treated by Dr. Vance. Claimant's present complaints include pain in the thoracic and lumbar portions of his back.

Jesse Heriford, claimant's mother, testified on his behalf. She has had occasion to observe the claimant both prior to and after the October 4 incident. She confirmed the claimant's testimony regarding his present physical status and complaints. In addition, she noted the claimant was in good health prior to the date of injury.

Dan Smith testified on behalf of the defendants. He is the personnel and safety director for Midwest Carbide Corp. He confirmed that the claimant was an employee of defendant on October 4. He described the claimant as a good employee prior to the date of injury. He confirmed the claimant was making $7.00 per hour prior to the date of injury and that he is presently receiving $7.91 per hour.

Albert Cram, M.D., testified by deposition that he is the director of the burn unit at University of Iowa Hospitals in Iowa City and held that position since 1969. He confirmed that he treated the claimant commencing October 4, 1979. The claimant, according to Dr. Cram, was burned over 35 percent of the total body surface due to the explosion. A history was secured by Dr. Cram from the claimant which is consistent with the facts as the claimant recites them. He confirmed that the claimant underwent a variety of surgical procedures including skin grafts and testified that he reached maximum medical recuperation on June 16, 1981. With respect to the scarring and its effect on the claimant, Dr. Cram testified:

> Q. With respect to the rest of his body, however, what shape is that in other than what I can see looking at it?
>
> A. Well, he has the obvious scars that can be seen by anyone who observes him and, obviously, there are some areas of his body that were burned that are not seen when he's normally clothed that are also burned. His primary residual effects are these scars and their affect on his ability to control his body temperature both by sweating and by dilating or constricting the vessels in the skin, and the inelasticity of this tissue when compared to normal unburned tissue probably constitute the major residual affects other than the obvious appearance changes that one can see.

Q. With the burns that he has, that is the scarring, what is the difference between skin that is scarred as it is here and skin that is what I would consider normal, that isn't scarred like that?

A. Well, the normal unburned tissue and that tissue that was very lightly like a first degree burn generally heals back to a fairly normal stage. And that tissue has a large amount of elastin which is a material that allows skin to stretch and be mobile. That skin has normal hair follicles, normal sweat glands, and normal sebaceous glands. Now, the sebaceous glands secrete oils which keep our skin from drying out.

Areas that were burned for deep partial thickness are areas which the sweat glands have been lost, areas which the sebaceous glands are no longer present. And certainly the blood supply to that area of skin is not normal blood supply in the sense that it's under the control of the body to help adjust body temperature. So patients who have either grafts or very deep second degree burns have areas of skin that are not as elastic as normal skin. They may have altered sensation, that is they may have areas of discomfort where nerve endings have not grown back in a completely normal fashion. They have a lack of lubricating or moisturizing cells in many areas so they may have to apply creams on a daily basis to keep their skin from drying out. And they have difficulty in protecting themselves from extremely cold weather, for instance, they may be susceptible to frostbite at temperatures where unburned skin would not be at great hazard. And they may have a great deal of difficulty tolerating extremely hot temperatures because they can't dissipate their body heat as rapidly as normal.

Q. So if he can't sweat in an area that's burnt to an area of third degree burn, what problem is that for him, the fact that it doesn't sweat?

A. Well, depending on the amount of body burned, if one was burned in all the sweat bearing areas, one wold have a tremendous difficulty in controlling their body temperature.

In David's case, there are obviously areas of the body with sweat glands which are not affected. And in all probability, as long as he's maintained in some reasonable degree of temperature extremes, he can control his body temperature. I would think that at temperatures of, say, above seventy-five that he would become uncomfortable. And those areas that still have sweat glands would sweat in excess in order to help maintain his body temperature, at least many of the burn patients do have this problem where areas that were unburned that have sweat gland bearing areas do sweat excessively in order to sort of make up, if you will, for the loss of sweat glands in other parts of the body.

Q. The fact that it doesn't self lubricate, what kind of a problem is that for a person?

A. Well, primarily the skin gets dry and flaky and irritated, is more easily infected then as it becomes irritated and inflamed. And basically just for personal comfort, they usually feel better if they apply some kind of mild lubricating cream. Some people have to do that once a day, some people have to do it several times a day. And it seems to vary a great deal from one individual to the next.

Q. If a person works in a foundry or a place that is dirty, are they more susceptible to getting infection because of that?

A. Well, certainly the skin that was grafted in those areas that were deep second degree burned that have healed would be more susceptible to injury from a physical standpoint because they're not as elastic, they can't stretch as much. So a bump that might, in an area of normal unburned skin, that might not cause an open break in the skin would be likely or at least possibly could do so in the other area. So from that standpoint, there's a little bit of increased risk.

Q. Whereabouts is most of the area that has the type of problem on Mr. Cottrell?

A. Well, I think the area that was most severely burned is the area we had to graft on the right arm and on the areas on his abdomen. He did have a fair amount of fairly deep second degree burn which healed with some hypertrophic scarring on the shoulder and on a portion of his back and in scattered areas on his neck and face.

With respect to other injuries that the claimant sustained, Dr. Cram stated:

A. Yes, he had rib fractures. He, as I said, he did have a bit of collapse in the lung. And eventually when he was in the intensive care unit, we did have to place a chest tube on that side. And that was in place for a period of fourteen days or somewhere in that neighborhood.

The chest tube was removed, he did recollect some fluid on that side as a result of the injuries that he received and we did have to tap that once by placing a needle into the chest cavity and withdrawing it. But recently his pulmonary function has appeared to be adequate. We've not tested it to any great extent but clincially it appears adequate.

. . .

Q. Does that have to do then with his possibly breathing in some kind of carbonic material then?

A. Yes, there's no doubt from the findings when he came into the hospital that he inhaled some materials during the explosion which were injurious to the lining of his pulmonary tree or his trachea and the bronchi and his lungs. The residual -- We never, unless we could measure the gases that were present at the time, we never know with certainty which ones. Most likely they were some calcium byproduct. And these create a chemical injury to the lung which, depending on its severity, may be completely or partially reversible. And as I've said, I feel at least clinically we don't have a measurable residual injury as a result of that.

With respect to the extent of permanent disability, Dr. Cram testified:

A. Well, based on the change of an irreversible nature in the skin and the difficulties associated with those, it would be my feeling that his partial permanent disability is 15 percent.

Q. And that is of the body as a whole; is that correct?

A. Yes.

Q. And Doctor, within a reasonable medical certainty, would you tell me whether or not the injuries that he suffered are consistent as far as causal connection with the type of injuries that was related to you in your medical history?

A. Yes, his injuries are consistent with the history that he related.

On cross-examination this physician indicated that the claimant's injuries would not prevent him from returning to gainful employment. The claimant did not complain of neck or low back problems while under Dr. Cram's treatment. This physician is of the opinion that claimant could still engage in employment that required heavy lifting, but a restriction has been placed on the claimant in terms of the temperature of the area in which he works. This must range in the area of 35 degrees to 75 degrees.

Frank C. Koranda, Assistant Professor of Dermatology at the University Hospitals in Iowa City, testified that he had occasion to examine and treat the claimant in December 1980. The treatment was for hypertrophic scarring secondary to his calcium carbide thermal burns. Claimant continues under the care of Dr. Koranda. This witness indicated that the claimant had a revision of the hypertrophic scar on the right lateral neck. This scar has required additional treatment since that operation. With respect to the limitations that this scarring presently causes, Dr. Koranda testified:

A. Well, first of all, there would be a restriction of motion because it was a linear band that constricts down. And when you get a hypertrophic scar or any scar, the scar then constricts and shortens so it can impede motion, and chronic irritation from clothing rubbing there, and finally just the appearance.

With respect to residual difficulties claimant will experience, Dr. Koranda testified:

Q. In what way do burns of this nature and the scarring affect a person? What can he reasonably expect in the future over his lifetime as to any effects of that?

A. Well, burns are sometimes -- the skin doesn't have its same strength and it can be subject to breakdown. You know, the skin can break down. You could develop ulcers there or something like that. It's a potential, it's not necessarily going to happen.

On cross-examination this physician indicated that the claimant did not complain of any neck or back problems during his treatment. He indicated that the claimant is, in his opinion, able to work.

Marc Joseph Williams, D.C., testified on behalf of the claimant. He initially examined the claimant on November 3, 1981 for complaints of back and neck pain. Chiropractic treatments were commenced. This practitioner expressed the opinion that the claimant has a 40 total permanent impairment based upon the AMA Guides to the Evaluation of Permanent Disabilities. He is also of the opinion that his disability is causally related to the injury of October 4, 1979. The cross-examination of this witness was considered in the final disposition of this case.

Willam A. Vance, Jr., D.C., testified that he initially examined the claimant on December 7, 1979. At that examination, the claimant's chief complaints were stiff neck, cervical pain, severe headaches, pain and tingling in both upper extremities, severe low back pain radiating into both lower extremities. Subsequently, treatments were undertaken during the period December 7, 1979 through July 1, 1980. This practitioner expressed the opinion that the injuries were causally related to the explosion at the Midwest Carbide plant. He is of the opinion that the residual disability is ten percent.

On cross-examination with respect to causation, this physician testified:

Q. Doctor, since Mr. Cottrell has had problems in his cervical and lumbar areas since November of 1970 for the cervical problem and November of '71 for the lumbar problem, you can't say, within a reasonable degree of medical certainty, that the cervical and lumbar problems that you found in his December, '79 X-rays were caused by the furnace blast at Midwest Carbide in October of '79, can you?

A. I can say they were certainly aggravated by it, yes, Ma'am.

This physician further testified:

Q. (By Mr. Hoffman) As a result of taking the medical history, can you then tell within a reasonable medical certainty--not an absolute certainty, but within a reasonable medical certainty--as to when that change occurred or what caused it? Just yes or no.

A. Yes.

Q. Now, isn't it true that at the time that you saw Mr. Cottrell on December 7th, that his complaints about his problems there were different in many respects as compared to anything he had ever seen you for before that time?

A. Yes.

Q. For instance, I believe you mentioned something about pain tingling down both the lower extremities as well as tingling sensation or pain down the extremities of the arms. Was that different than ever before?

A. Yes.

This practitioner is also of the opinion that any problems he may have treated the claimant for prior to October 4, 1979 resolved themselves as of that date. Any prior back complaints were only temporary in nature.

Jerry L. Jochims, M.D., an orthopedic specialist, testified on behalf of the defense. He examined Mr. Cottrell at the request of the defendant on February 1, 1982. He has also had an opportunity to examine the multitude of reports and depositions contained in this file. In substance, this physician testified:

Q. Doctor, given that as a possible cause, can you say within a reasonable degree of medical certainty that the furnace explosion caused Mr. Cottrell's compression fracture?

A. Given no other significiant traumatic episodes, I believe that that causal corelation [sic] can be made.

With respect to the extent of permanent impairment, he testified:

Q. Doctor, do you have an opinion on how much of Mr. Cottrell's present permanent physical impairment can be attributed to the furnace explosion to a reasonable degree of medical certainty?

A. Yes.

Q. What is that opinion?

A. Ten percent.

Q. And what is that based on?

A. The finding of a compression wedged deformity at T12.

The cross-examination of this witness has been considered in the final disposition of this case.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 4, 1979 is the cause of the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. 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).

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. U. S. Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, ___ (1961).

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 299 (1961); 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, 252 Iowa 613, 620, 106 N.W.2d 591 (1961), and cases cited.

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 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.

In Floyd Enstrom v. Iowa Public Service, Appeal Decision filed August 5, 1981, the industrial commissioner stated:

> 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.

ANALYSIS

The claimant, David Cottrell, as the record reflects, received a very severe burn injury. The medical testimony indicates that the burns covered approximately 35 percent of his body. Photographs contained in this record are a graphic illustration of the extent of this injury. A back injury was also sustained as a result of the carbide furnace explosion in October 1979.

The medical testimony as to the extent of disability varies according to the speciality of the medical witness. After examining the entire record and all medical testimony, the greater weight will be given to the opinions of Dr. Jochims because of his specialized expertise and background in the area of orthopedics; Dr. Koranda, because of his specialized expertise and background in the area of dermatology; and Dr. Cram, because of his specialty and intimate involvement in the treatment of claimant's burns. Dr. Cram is of the opinion that claimant has sustained a 15 percent permanent functional impairment as a result of the burns. Dr. Jochims is of the opinion that claimant has sustained a ten percent permanent partial disability to the body as a whole as a result of the back injury sustained at the time of the furnace explosion.

Dr. Koranda does not testify in terms of numerical disability, but his testimony is very helpful in illustrating the residual difficulties Mr. Cottrell will experience.

Some dispute has arisen regarding the causal relationship between the back injury and the furnace explosion. Dr. Jochims, the defendants' examining physician, bridges any gap that may have existed when he indicated that in his opinion there is a causal relationship.

The undersigned deputy had an opportunity to observe the

claimant during trial and finds him to be totally credible. In the opinion of the undersigned deputy, a severe burn injury of the type experienced in this case is one of the most severe and disfiguring injuries an individual can receive. Claimant has testified to a multitude of residual problems he experiences as a result of the burns in question including psychological and nervous impairment.

Although it is true that claimant has returned to work, this only occurred a very short time prior to hearing. At best, the situation is tenuous from the claimant's standpoint.

After examining all the contents of the record and based on the substantial functional impairment sustained by claimant, the undersigned is of the opinion that claimant has sustained a permanent partial disability for industrial purposes of 50 percent. In the opinion of the undersigned, if the claimant was not working in some fashion for the defendant employer, the extent of disability would be substantially greater than the 50 percent awarded herein. The basis for this is the specific type of injury sustained (i.e., burn).

FINDINGS OF FACT

That on October 4, 1979 the claimant sustained an injury to his back which is causally related to the carbide furnace explosion occurring on that date.

That the disability claimant has to his back is causally related to the work injury.

That the claimant has a permanent impairment of ten percent to the body as a whole as a result of the back injury sustained on October 4,1979.

That as a result of the work injury, claimant must avoid prolonged exposure to the sun, has difficulty lifting and has loss of strength in his arms, is susceptible to chilling, has portions of his body which are susceptible to freezing without his knowledge due to a lack of sensation, is self-conscious and feels people are looking at him as a result of the burns, experiences nervousness around popping sounds or open flames, has a quick temper post injury and will have continuing difficulty with his skin.

That claimant received some chiropractic adjustments prior to the date of injury, but has not been physically restricted as a result.

That claimant is credible in his testimony.

That claimant returned to work for defendant employer a short time prior to the date of hearing.

CONCLUSIONS OF LAW

That claimant sustained his burden of proof and established a causal connection between the back injury and the resulting disability.

That claimant sustained his burden of proof and established a causal connection between the burns he sustained and his resulting disability.

That claimant has sustained a permanent partial disability for industrial purposes of fifty (50) percent of the body as a whole.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the stipulated rate of one hundred sixty-three and 18/100 dollars ($163.18).

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

That defendants are given credit for benefits previously paid.

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 20 day of July, 1982.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES V. COWELL, Claimant,	:	
vs.	:	
INSULATION SERVICES, INC., Employer,	:	File No. 518327
	:	A P P E A L
and	:	
UNITED STATES FIDELITY & GUARANTY, Insurance Carrier, Defendants.	:	D E C I S I O N

By order of the industrial commissioner filed September 9, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, to issue the final agency decision on appeal in this matter. Defendants appeal from a review-reopening decision in which claimant was awarded a running healing period.

The record on appeal consists of the transcript; claimant's exhibits A and B; defendants' exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 (exhibit 7 was not received into the record); and the deposition of Robert C. Larimer, M.D., all of which evidence was considered as a part of reaching this final agency decision.

The result of this final agency decision will modify that of the hearing deputy.

SUMMARY

The hearing deputy's decision contains a good summary of the record, but a somewhat brief summary will be helpful. Claimant hurt his low back in a fall at a construction site on November 14, 1978. He has not worked since.

His medical history shows a great deal of back trouble which included hospitalizations in January of 1978, June of 1979, and October of 1979. The principal treating physician was Dr. Larimer, a qualified internist, other physicians have examined claimant and consulted. Although a myelogram in 1979 was negative, claimant continued to exhibit objective as well as subjective symptoms of a severe low back disorder. Then, on September 2, 1981, a CAT scan showed a herniated disc at L5-S1.

It was claimant's understanding that Dr. Larimer favored surgery. However, Alexander Kleider, M.D., a neurosurgeon, "strongly advised against surgery." (Claimant's exhibit A, Kleider report, October 9, 1981) Morris P. Margules, M.D., a neurosurgeon, stated that no surgical procedure should be performed until further testing is completed. (Claimant's exhibit A, Margules report, February 19, 1980)

ISSUES

The hearing deputy awarded a running healing period from the date of the injury onward. The issues on appeal stated by defendants:

> The issues presented by the parties at the time of the hearing are whether a running healing award is proper. Whether the Deputy Industrial Commissioner was in error for not determining that the claimant has reached maximum recuperation and failed to determine the amount of Industrial disability. Whether the Deputy Industrial Commissioner is in error for the reason that as a matter of law there is insufficient evidence to warrant the decision that claimant had recovered from the effects of a non industrial fall at his residence which occurred in December of 1977 and January of 1978. Whether the Deputy Industrial Commissioner is in error for the reason that as a matter of law, there is insufficient evidence to warrant the conclusion that claimant apparently is suffering from a bulging disc at the level of L5-S1 on the left and that an additional myelogram apparently needs to be done when the record shows a prior myelogram of October, 1979, with a normal finding. (Emphasis in original)

From the foregoing, the issues are taken to be that of the question of causal relationship between the injury and the disability and, if a causal relationship is established, the extent of the disability attributable to the injury.

APPLICABLE LAW

Claimant must show both that the health impairment was probably caused by his work and the nature and the extent of his disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955); Ford v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949); Almquist v. Shenandoah Nurseries,

Inc., 218 Iowa 724, 254 N.W. 35 (1934). A preexisting disease or condition which is aggravated at work is compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961) and cases cited.

Section 85.34(1), Code of Iowa, 1977, stated:

> 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.

Industrial Commissioner's Rule 500-8.3, I.A.C., stated:

> 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.

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).

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, 255 Iowa 1112, 125 N.W.2d 251; Martin v. Skelly Oil Co., 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).

Reasons for industrial disability may not always be related to functional impairment. (1)Claimant may have an award of industrial disability if the employer refuses to give him any sort of work after the injury. (2)"[a] claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted." Id., at 192.

ANALYSIS

The record amply shows that claimant had a preexisting low back condition, but it likewise shows that claimant sustained a real trauma on November 14, 1978. He was working on a construction project some 90 feet above the ground. He stated:

> As I come back from dinner, we took the elevator up, climbed up the roof, got onto the scaffold and walked onto my position where we was supposed to start welding. And the scaffold would be -- would be -- This particular scaffold was level except down towards the end they made a -- a step up in the scaffolding, and then it went on for another two or three lengths of the scaffolding, and then that was it. That was the drop from there on down. And I walked along the scaffolding coming back, and when I got to the step, I just stepped up on the board. And when I stepped up on the board, the board come up, and I fell down between the two pieces of scaffolding. (Tr., p. 32)

In so doing, claimant twisted his low back.

His condition did not improve and he was admitted to the hospital for six days beginning December 4, 1978. Claimant continued to experience low back symptoms and has, in fact, never returned to work. A myelogram in 1979 was negative; however, a CAT scan later revealed a lumbar disc as stated above.

Of course, neither the myelogram nor the CAT scan is a perfect diagnostic instrument. Often times, a real diagnosis can be made only upon surgery, and then even could remain in doubt. The diagnosis of a herniated lumbar disc is consistent with claimant's complaints and is found to be the correct diagnosis.

Further, both Dr. Larimer, the principal treating physician, and Dr. Margules tied the injury to claimant's present condition. (Larimer dep., pp. 12-13, and claimant's exhibit A, Margules report, February 19, 1980) John J. Dougherty, M.D., a qualified orthopedic surgeon, who also treated claimant, was less moved with claimant's problems ("I am just not too impressed with this guy"), but did not rule out a causal relationship. (Claimant's exhibit A, Dougherty office call note, October 9, 1979) Likewise, Dr. Kleider stated that his examination "failed to reveal any evidence at all of any objective findings of disability." Yet, his diagnosis was "residual back pain following industrial accident." (Claimant's exhibit A, Kleider report, October 9, 1981) Thus, although Dr. Kleider does not necessarily find any disability, he does not rule out a causal relationship between the injury and a supposed disability.

All the physicians who treated or examined claimant are highly qualified. The opinions of Drs. Larimer and Margules are accepted principally because Dr. Larimer is the physician who treated claimant the most.

Claimant was injured on November 14, 1978, and the hearing was May 18, 1982, some three and one-half years later. Under the above definition of healing period, claimant should have reached a recuperation or maximum improvement in that amount of time. That is, by the time of the hearing, he should have reached a point where no further improvement would be anticipated. (Of course, further treatment might cause a resumption of a healing period.) Dr. Larimer's testimony shows that as of November 23, 1981, he had had no change in his condition for some time. That date is taken to be the final day of recuperation.

In connection with the extent of claimant's disability, defendants complain that Drs. Larimer and Margules usurp the commissioner's province by stating that claimant cannot work. Such may in fact be the case; however, their testimony is taken to be medical in nature and not meant to cover claimant's career possibilities.

With respect to claimant's industrial disability, one sees that claimant was age 53 at the time of the hearing and had an education through the eighth grade. He was in the military service from 1946 to 1948, and his work background was mainly labor, including some truck driving and hotel managing. He also operated a bait shop on his own. Claimant is a large man, his height being listed in the record variously between six feet even and six feet, six inches. His weight was a problem in his back condition and one of the main therapies for his low back condition was weight loss. The record shows that claimant weight dropped from 262 pounds in February 1979 to 220 pounds in October 1979. Thus, he has made some effort to help himself in that regard.

His functional impairment is somewhat severe, although the doctors are reluctant to give ratings before claimant decides upon surgery. Dr. Larimer estimates that claimant could have as high as 30% permanent partial impairment. (Claimant's exhibit A, Larimer report, December 5, 1979)

Donald Vander Vegt, an employment counselor, lists certain jobs that claimant could perform, particularly if he were self-employed. Among these are light welding, sedentary jobs and machine tenders. The witness states that eliminating the heavy jobs would eliminate only about 10% of the job titles in the economy. (Tr., 78-79) Of course, one realizes claimant would not automatically be able to perform the other 90% of the jobs in the economy.

Considering the various factors of industrial disability, the claimant's rating is found to be 30%.

FINDINGS OF FACT

1. Claimant injured himself at work on November 14, 1978 when a fall aggravated a preexisting back condition.

2. As a result of the fall, claimant sustained a herniated disc at L5-S1.

3. Claimant was age 53 at the time of the hearing, with an eighth grade education and military service 1946-1948. His work history included labor, truck driving, hotel managing, and self-employment operating a bait shop.

4. Claimant reached maximum improvement from his injury of November 14, 1978 on November 23, 1981.

5. Claimant's functional disability is not determinable.

CONCLUSION OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on November 14, 1978 which resulted in industrial disability of thirty percent (30%). Claimant is entitled to a healing period of one hundred fifty-eight (158) weeks and permanent partial disability of one hundred fifty (150) weeks.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of two hundred sixty-five dollars ($265) per week from November 14, 1978 through November 23, 1981, a period of one hundred fifty-eight (158) weeks, for the healing period, and further to pay claimant a period of one hundred fifty (150) weeks at the rate of two hundred forty-four dollars ($244) per week commencing November 24, 1981, for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest at the rate of ten percent (10%) per year.

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 30th day of November, 1982.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARILYN CROSS,
Claimant,
vs.
MONTGOMERY WARD,
Employer,
Self-Insured,
Defendant.

File No. 649133

R E V I E W -

R E O P E N I N G

D E C I S I O N

INTRODUCTION

This matter came on for hearing at the offices of the Industrial Commissioner in Des Moines on November 24, 1982, at which time the case was fully submitted.

A review of the commissioner's file reveals that an employer's first report of injury was filed on October 3, 1980; and a memorandum of agreement was filed on October 10, 1980, calling for the payment of $99.12 in weekly compensation. A total of three weeks of compensation has been paid.

The record consists of the testimony of the claimant, Carol Still, Trudy Volz, and Karen Morehouse; claimant's exhibits A, B, C, D, E and F; and defendant's exhibits 1 - 30.

ISSUES

The issues for resolution are whether claimant's condition is causally connected to the injury and the nature and extent of disability.

STATEMENT OF EVIDENCE

Claimant, presently age 48, was employed by Montgomery Ward at the Southridge Mall in Des Moines on September 24, 1980. Claimant was employed as a sales clerk and fell over a box of merchandise. Claimant missed about three weeks of work and was treated by Ronald E. Alley, D.O., on September 25, 1980. He diagnosed claimant's condition as cervical myositis with cervical and left shoulder muscle spasm (Defendant's Exhibit 16). Claimant returned to work about October 15, 1980 and testified that she felt "pretty good." By Christmas, 1980, claimant had resumed her regular activities.

Claimant testified that in June 1981, she left work early because of back pains. She went to see Dr. Alley and he prescribed physical therapy which did not improve claimant's condition. Claimant was admitted to the Mercy Hospital Medical Center from July 31, 1981 through August 14, 1981. Her treating physician at this time was John T. Bakody, M.D., a neurosurgeon (he has treated claimant for years for a very large arteriovenous malformation of the left frontoparietal area of the brain). On August 14, 1981, claimant was examined by Joshua Kimelman, M.D., a Des Moines orthopedist. X-rays showed a hemisacralization of L5 on the left side. A myelogram showed prominence at L3-4. His impression was that claimant had a mechanical backache with predisposing hemisacralization.

Dr. Bakody expressed the opinion that the back problems were caused by the September 1980 injury. His report (Def. Ex. 14) indicates that as claimant's neck symptoms subsided, her lower back symptoms increased.

Defendant's exhibit 10 is a physical therapy progress record from Mercy Hospital. The entry for August 1, 1981 indicates that claimant related "that she had vacuumed entire 7- room house day of back pain onset." The testimony of Trudy Volz indicates that claimant related that she hurt her back cleaning at home. She also testified that claimant has altered her gait somewhat to indicate pain upon seeing that she (the claimant) was being observed by the witness. The answers upon written interrogatories submitted to Ross Nicholas Rutledge supports the testimony of Volz that claimant indicated that she hurt her back at home.

Other evidence at the hearing concerned the completion of health insurance forms and the completion of the section indicating whether the form was completed by claimant or office personnel. A finding in this regard is unnecessary.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon this agency in workers' compensation cases.

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

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of September 24, 1980 is causally related to 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 (1955). 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).

4. When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

ANALYSIS

Although the evidence in the form of Dr. Bakody's opinion gives us the necessary connection, other medical evidence does not, and Dr. Bakody's report does not show the home activity which preceded the hospitalization. The finding of fact must also be made that claimant's lower back problem started at home. The testimony of two witnesses plus the bolstering statement in the physical therapist's records indicate that claimant should take nothing further from these proceedings.

FINDINGS OF FACT

1. Defendant filed a memorandum of agreement on October 10, 1980.

2. Claimant has not proven by a preponderance of the evidence that her back problems are related to the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant sustained an injury arising out of and in the course of her employment.

3. Claimant has failed to prove that her back problems are causally related to that injury.

4. Claimant is not entitled to further compensation.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing further from these proceedings.

Costs are taxed to claimant.

Signed and filed this 25th day of January, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT C. CROUSHORE,	:	
	:	File No. 480301
Claimant,	:	
	:	A R B I T R A T I O N A N D
vs.	:	
	:	R E V I E W -
JOHN DEERE DES MOINES WORKS,	:	
	:	R E O P E N I N G
Employer,	:	
Self-Insured,	:	D E C I S I O N
Defendant.	:	

INTRODUCTION

This is a combined proceeding brought by Robert C. Croushore, the claimant, against his self-insured employer, John Deere Des Moines Works, to recover additional benefits under the Iowa Workers' Compensation Act on account of injuries he sustained on August 22, 1977 and January 19, 1978. This matter came on for hearing before the undersigned at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on September 30, 1981. The record was considered fully submitted on March 26, 1982.

On August 28, 1977 defendants filed a first report of injury concerning the August 22, 1977 injury. On August 30, 1977 defendants filed a memorandom of agreement indicating that the weekly rate for compensation benefits was $179.33. On January 8, 1979 defendants filed a final report indicating that 11 3/7 weeks of temporary total disability (8-23-77 through 10-16-77 and 1-19-78 through 2-12-78) had been paid pursuant to the memorandum of agreement.

The record consists of the transcribed testimony of the claimant, of Dean Stump and of Alton Lee Kornegay; claimant's exhibit 1, claimant's answers to interrogatories; claimant's exhibit 2, RESB reports; claimant's exhibit 3, Mercy Hospital records for April 1, 1975 admission; claimant's exhibit 4, Mercy Hospital records for August 22, 1977 admission; claimant's exhibit 5, Mercy Hospital records for January 19, 1978 admission; claimant's exhibit 6, the deposition of Jerome G. Bashara, M.D., including 5 exhibits; claimant's exhibit 7, medical statements; claimant's exhibit 8, portion of defendant's records regarding the claimant; claimant's exhibit 9, defendant's medical records regarding the claimant; claimant's exhibit 10, copy of claimant's job card; defendant's exhibit A, Mercy Hospital records for May 4, 1978 admission; defendant's exhibit B, emergency room report dated May 4, 1978; defendant's exhibit C, claimant's earnings record from January 1974 to March 1979; defendant's exhibit D, final report of benefits paid; defendant's exhibit E, referral slip dated March 18, 1975 and March 17 notation; the deposition of Marvin H. Dubansky, M.D., including 8 exhibits; and the deposition of John Long. Claimant filed a post-hearing brief. Claimant's objection to defendant's exhibit E was overruled at the time of the hearing. Claimant's objection to Dubansky deposition exhibit 2 is sustained. With regard to Bashara deposition exhibit 5, defendant was willing to stipulate that $155.00 was for the 85.39 examination but contended that the remainder of the bill was for treatment that was not authorized and was not fair and reasonable. Claimant contended that the 85.39 examination included the myelographic examination conducted by Dr. Bashara. Resolution of the medical expenses is discussed below.

ISSUES

The issues to be determined include whether claimant received a separate injury in 1978 arising out of and in the course of employment; whether there is a causal relationship between the alleged injuries and the disability; the nature and extent of the disability; whether the statute of limitations applies if the January 19, 1978 incident is found to be a separate injury; and whether Dr. Bashara's treatment was fair, reasonable and authorized. The parties agreed that $179.33 was the applicable rate for both injury dates and that any additional time loss benefits would commence as of March 8, 1981, the date claimant was hospitalized by Dr. Bashara.

REVIEW OF THE EVIDENCE

36 year old claimant began working for defendant in January of 1974 as a saw, drill and threader operator. Claimant testified that he was paid on an incentive basis and that his work entailed bending, twisting, stooping, standing and lifting up to 77 pounds. Claimant recalled that he began experiencing occasional back soreness in January of 1975. (Claimant denied prior back problems. He acknowledged being hit on the head with a piece of steel in 1968, pulling muscles in his left shoulder in 1973, straining muscles in his left shoulder in February of 1974, hurting his right knee and ankle in March of 1974, and suffering hernias in April and October of 1974. Claimant indicated he lost some time off work for all but the February 1974 injury yet experienced no lasting difficulty from any of the episodes.)

Claimant testified that on March 12, 1975 he experienced a sharp stabbing pain in his low back as he was bending to pick up parts to run on the radial drill. He recalled that the company nurse referred him to Dr. Wellington the company doctor who suggested he see an orthopedic surgeon. Claimant reported that defendant initially authorized Dr. Flapan but later agreed to claimant seeing D. C. Wirtz, M.D., because an earlier appointment could be obtained from Dr. Wirtz. Claimant was admitted to the hospital on April 1, 1975. Dr. Wirtz recorded the following history and physical findings:

> History: This patient states that he works at John Deere running a drill press and he states that his back started giving him trouble while picking up parts and examination of the back revealed the patient had localized pain over the lumbar area of the back. Localized to the sacrolumbar junction. Hyper-extension increased the discomfort. Motion of both the left and right also increased the discomfort. Percussion of the back revealed the discomfort to be of the sacralumbar junction. Straight leg raising tests negative for sciatic pain. Found no tenderness over the sciatic nerves. Knee reflexes and tendon Achilles reflexes were tested and they were found to be normal. I found no sensory changes as far as concerned.
>
> X-rays taken at Mercy Hospital revealed the patient to have spina bifida defect involving the pars and the articular joint on the left side of the 5th lumbar vertebra with the sacrum. Oblique views in my office also revealed the defect of the lamina and the posterior articular facette on the left side compared with the right side of the 5th lumbar vertebrae.
>
> (Claimant's exhibit 3.)

Dr. Wirtz' diagnosis was "unstable back" for which he performed the following operation upon the claimant:

> Under general anesthesia, a J-shaped incision was made over the lower lumbar area of the back extending out over the right ileum. The posterior spinous processes and the laminae of the 4th and 5th lumbar vertebra and the sacrum were cleaned up and repaired with a gouge for placement of a bone graft. Graft material was obtained from the right ileum. The cortical bone as well as cancellus bone was obtained with a curved rongeur. This material was placed laterally along the posterior spinous processes over the dorsal aspect of the posterior spinous processes and down over the upper portion of the sacrum. The muscle fascia were then closed with chromic. A Hemo-Vac was inserted and the subcutaneous tissue was sutured with plain. The skin was closed with silk. A sterile dressing was applied. Post-operative condition of the patient good. (Claimant's exhibit 3.)

Claimant returned to work at his same job on the radial drill on January 12, 1976 but with a 50 pound weight limit. Apparently, the claimant received weekly indemnity benefits, not workers' compensation payments, for the period of time he was off work. Dean Stump, defendant's supervisor of employee benefits then and now, related that claimant had given the defendant the impression that work was responsible for a muscle strain but not for an underlying congenital problem for which surgery was performed. (Defendant's exhibit E; See also claimant's exhibit 9, entries for 3-11-75, 3-13-75 and 1-12-76.)

Claimant testified that he still had back pain and soreness when he returned to work in January of 1976. He voiced such complaints to the company nurse on January 13, 1976, January 19, 1976, January 20, 1976 and February 2, 1976. (Claimant's exhibit 9.) Claimant testified that on February 5, 1976 he experienced a sharp pain in the same area of his back upon moving skid rings at work. He was again hospitalized and treated by Dr. Wirtz. According to defendant's medical records, February 5, 1976 x-ray finding indicated a normal lumbar spine. (Claimant's exhibit 9; see also Bashara deposition exhibit 4.) Mr. Stump testified that this episode was treated as a work injury and therefore benefits and medical expenses were paid under the defendant's workers' compensation program.

Claimant returned to work on April 5, 1976 with the 50 pound restriction still in effect. After one week he transferred from radial drill to rake tooth operation, a job he had not previously performed and one entailing pulling 20-25 pound teeth out of quenching oil, setting them on a screen and sliding the screen to the heat furnace. Claimant testified that he was able to perform the job but had some problems from prolonged standing. As of May 31, 1976 claimant was assigned to the position of single spindle drill operator which involved bending and picking up parts off of skids and placing them on a table to be drilled. Claimant indicated this was a piecework position.

Claimant testified he sustaind an injury to his right knee in July of 1976 when he was struck by a car traveling through his yard. He was off work until September 7, 1976, at which point he returned to the position of radial drill operator. Claimant apparently also lost some time off work following recurrence of a hernia upon heavy lifting at work in December of 1976.

On August 22, 1977 claimant was assigned temporarily to shovel parts from a skid on the floor to a skid on the washer conveyer line. Claimant testified that he had not previously performed that job. He experienced a sharp pain in the "lower midregion" of his back, above and below his belt, as he was lifting a shovelful of parts. (Tr., pp. 93-94.) Claimant reported the matter to the company nurse and was subsequently hospitalized under the care of S. Robinow, M.D., from the date of injury to September 1, 1977. Dr. Robinow related the history he received from the claimant, examination findings and his impression and plan in the hospital history and physical:

> History of present illness: This man developed severe lower back pain today while shoveling parts at the John Deere Factory. He had the history of having had a spinal fusion in April 1975 by Dr. D.C. Wirtz and returned to work at John Deere February 1976. He ordinarily has does not [sic] heavy lifting but for some reason the machine broke down that he usually uses, he was put on a heavy shoveling. The patient was brought ot [sic] Emergency Room where it was ascertained he was in extreme distress and he was admitted at this time for treatment.

Examination - well developed, well nourished, obese male, appearing in acute distress. Examined only on table because of acute distress. ....

Back and extremities: Percussion tenderness thoracolumbar junction region. Positive straight leg raising bilaterally at about 60 degrees with pain produced in the low back. No apparent neurological deficits.

....

IMPRESSION: Acute Low back, myofascitis, etiology not clear. Post spinal fusion, April 1975.

Plan: Conservative therapy, consisting of pelvic traction, and physical therapy. (Claimant's exhibit 4.)

X-rays taken on August 22, 1977 revealed:

THORACIC SPINE: Examination of the thoracic spine reveals some osteophytic lipping anteriorly in the mid thoracic spine. No fractures are identified.

LUMBAR SPINE: Examination of the lumbar spine reveals some narrowing of the lumbosacral joint space. There is a bone mass posteriorly in the apophyseal joint and spinous process area (illegible) fusion which is old and apparently stable. There is irregularity in the region of the right sacroiliac; this might be the site of the origin of the fusion mass. (Claimant's exhibit 4.)

Claimant improved after bedrest and physical therapy. Principal diagnosis upon discharge was acute low back myofascitis and strain.

Claimant emphasized that he was able to perform his various work assignments between April 1976 and August 22, 1977 without significant back problems and that he did not seek treatment for his back from any doctor or the company nurse during that period of time. (Defendant's medical records appear to corroborate the latter statement. [Claimant's exhibit 9.]) Upon questioning by defense counsel as to why he reported to Dr. Dubansky on August 22, 1977 that he had "had trouble with his back ever since the surgery and not much different than he did before he had surgery and most of his life before that," claimant explained that he merely experienced back soreness between April 1976 and August 22, 1977. He could not recall making the statement read by defense counsel. (Tr. pp. 100-101. It is noted that in reality defense counsel quoted from the history taken during the January 19, 1978 hospitalization, not during the August 22, 1977 hospitalization. Dr. Dubansky did not treat the claimant on the earlier occasion.)

Claimant returned to work on October 17, 1977 with a 20-25 pound limitation. (Mr. Stump testified that claimant was paid workers' compensation benefits for the period of time he was off work. [Defendant's exhibit D.]) Although claimant's work history indicates he returned to work as a radial drill operator (claimant's exhibit 10), claimant clarified that he was assigned to labeling parts, a light duty job compatible with his physical limitations. Claimant indicated that such work entailed standing, some stooping, running labels and affixing them to parts and transferring parts from racks to pallet boxes. He was able to perform that job as long as he could take breaks from standing. Claimant testified that he continued to experience low back pain and also began to notice pain down his hips and into the top part of his legs. (Claimant's exhibit 9 indicates that claimant complained of hip pain following his return to work in April of 1976. The exhibit does not reflect any complaints of hip or leg pain being made after his return to work in October of 1977.) At some point thereafter (claimant's exhibit 1 suggests December 12, 1977 and January 13, 1978) claimant was transferred to the position of parts or material handler in the paint department. According to the claimant, that job consisted of pulling racks back onto the paint line, entailed standing, bending, pulling and stretching and generally caused his back to hurt. (In response to defense counsel's inquiry based on Dr. Robinow's December 22, 1977 notation [that claimant offered no complaints at that time], claimant stated that his back pain did not completely resolve itself during that period of time even though he voiced no particular complaints. [Tr. pp 97-98.] From the record it appears that claimant was doing lighter work on December 22, 1977.)

Claimant testified that on January 18, 1978 he worked the entire day despite noticeable back pain. The following day he experienced a particularly sharp pain upon pulling one of the racks and subsequently transferred to labeling until break time. He was unable to stand up after break and was taken by plant ambulance to the company nurse who gave him a shot of Talmin and sent him to the hospital. Claimant did not recall if he reported the foregoing description to Dr. Dubansky at the time of admission. In the history and physical report obtained at the time of admission on January 19, 1978, Dr. Dubansky stated in part:

> PRESENT ILLNESS: This patient has had a long history of back problems. He had a spinal fusion in 4/75 by Dr. Wirtz. He had not had previous back surgery. The patient states that he has had trouble with his back ever sine his surgery, and not much different that [sic] he did before he had surgery, and most of his life before that.
>
> The patient was hospitalized at Mercy Hospital from 8/22/77 until 9/1/77. He did return to work, after having last seeing Dr. Robinow in the office on 12/22/77. He was on a 20 lb. weight limitation. When he returned to work on 1/3/78 he said that he was doing heavier work than that. He was moving parts that came on a conveyor line, and then go off to a branch line. He was lifting parts weighing 40-70 lbs. He does have a hoist to help.
>
> He said that on 1/18/78 he noted some pain in his back. He went to work on 1/19/78, and was having increasing pain in the back and the back of the left leg, but not below the knee. He sat down on a stool, and after break he tried to get up, and it felt as though his back was not connected, and he could not move, and was sent to Mercy Hospital Emergency Room.
>
> At this time, the patient complains of pain in the lower back, and pain in the back of the left leg to the knee.
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> ....
>
> PHYSICAL EXAMINATION: The patient is a well developed, obese, white male in acute distress. He could only be examined horizontally and just turning him to his side caused severe pain.
>
> ....
>
> Musculo-Skeletal: The knee and ankle reflexes are 2+. The strength on dorsiflexion, plantar flexion, flexion extension of the knees is good. Straight leg raising to 30° with either leg causes severe pain. On trying to flex the hips and knees, I could get up to about 45°, but had to stop because of pain. There was diminished sensation to pinprick from the toes anteriorly over both legs up to the level of the umbilicus on both sides. Posteriorly there was intact sensation all of the way.
>
> Review of his x-rays from 1975 until current films taken on 1/19/78 shows spina bifida occulta, a fusion of L5 and S1 with some of the fusion mass going up to the spinous process. On the films on 1/19/78, it appears that there is separation of the spinous process of L4 from the fusion mass. There also appears on the oblique film to be a defect in the pars interarticularis at L4, L5, which would be pretty much above the fusion mass as it appears now. No previous oblique films could be found, so I am not certain what the status of the pars interarticularis was before, namely, were they intact, or did they have a defect, or did this come on after surgery.
>
> IMPRESSION: Acute myofascial strain, post-spinal fusion 4/75.
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> Will try to get him back into condition so we can move him, and perhaps consider the possibility of a diskogram, not so much for the dye patterns but to determine reaction of pain in various disc levels to determine whether or not we have degeneration at L4, L5 which is giving trouble. I believe also, that careful study should be made on the status of L4, 5. I have also tried to get the records from 4/75 so that we will have the surgery note available at that time.

The radiologist reports regarding the x-rays taken on January 19, January 25 and January 26, 1978 read as follows:

> LUMBOSACRAL SPINE: There has been no interval change from an examination of 7-19-76 which showed a fracture at the pars interarticularis of L-4 and an old injury involving the posterior portion of L-5. There is mild disc space narrowing at L-5, S-1. No radiographic evidence of any acut e [sic] traumatic process is seen at this time. (1-19-78)
>
> FLEXION AND EXTENSION OF THE L4-L5 AREA. Alignment of L4 and L5 is normal. There is slight anterior subluxation of L5 on S1, but this is probably within normal limits considering the stresses at the L5-S1 region. Again, the break in the pars interarticularis at L4 and evidence of old injury at L5 is seen. (1-25-78)
>
> LUMBAR SPINE WITH FILMS TAKEN IN FLEXION AND EXTENSION AND RAPID SEQUENCE 105 FILMS OBTAINED - shows the joint spaces of the lumbosacral junction to be intact. We see very little motion. We do not identify evidence of forward or backward motion at the lumbosacral junction. Its appearance on fluoroscopy and at 105 appears not to show any significant change in position of L-5 to S-1. A fusion mass is noted in the posterior processes of L-5 or L-4, S-1. At least the transitional body shows a fusion mass to the sacrum. On study of previous oblique films the vertebral body above and the laminal aroa [sic] shows suggestion of either a fracture or defectwith some bony reaction about it. (1-26-78) (Defendant's exhibit A. Dr. Dubansky testified that he was unable to locate the July 19, 1976 films referred to in the radiologist's report and otherwise did not see evidence of a fracture at the pars interarticularis of L-4 when he reviewed the above x-rays.)

In the discharge summary dated February 6, 1978, Dr. Dubansky indicated that the final diagnosis was postoperative spinal fusion with defect in the pars inter-articularis L4-5 and made the following observations regarding claimant's course of treatment:

> He had severe pains and required hypo's almost every 3-4 hours. Gradually substituted sterile saline for the Demerol and the patient got relief for an hour or two from the hypo's. He did not get any relief particularly from the physical therapy. He had an MMPI which revealed that the patient psychologically tended toward hypochondriasis or psychologically some exaggeration of his pain and

> the type of an individual that would commonly have musculoskeletal type of disorders. It was felt that with his response to the sterile saline and the long history of troubles that probably we had very little to offer him in the hospital. Will notify the Comp carrier and employer and it is a problem that they will have to work out with the patient. (Claimant's exhibit 5.)

Claimant returned to work on February 13, 1978 with a 20-25 pound restriction. (Mr. Stump testified that defendant paid claimant workers' compensation from January 19, 1978 through February 12, 1978 but considered the episode a flareup of the August 22, 1977 injury and not a separate incident.) According to defendant's medical record, claimant indicated his back was doing well and expressed interest in increasing his weight limit as of March 31, 1978. Dr. Robinow refused to increase the weight restriction after examining the claimant on April 12, 1978. (According to Dr. Dubansky's testimony upon reviewing Dr. Robinow's notes, claimant's clinical examination was normal but his history of back problems dictated a continuation of the weight restriction.) Claimant explained that his back was not bothering him much upon his return to work because he was assigned to light duty parts handling which included unloading parts into pallet boxes and labeling. Claimant added that he requested his weight restriction be lifted because he wanted to look for other work in general and anticipated potential employers would respond negatively to a weight limitation.

Claimant was next hospitalized from May 4, 1978 to May 18, 1978 following a six to seven foot fall from the roof of his home as he was attempting to descend a ladder. The emergency room report indicates that claimant's injury was localized in the upper spine:

> He complains severely of a headache with contusions and ecchymosis and a small abrasion on his forehead and severe cervical and shoulder pain....
>
> Upon arrival the patient was moving all extremities spontaneously. He was sandbagged with a cervical collar in place. The patient could recall the names of his children and their ages and his address. He was fairly lucid with only occasional intervals of lack of orientation with some slight memory lapse, such as he could not remember what day it was on one occasion. The pupils were equal and reacted to light and accommodation. He did experience some photophobia. Extraocular movements were normal. There was pain along the cervical spine. A Spaulding's maneuver was positive with pain at the cervical spine. I did not observe any otorrhea or rhinorrhea at this time. There was no hypermobile teeth. The chest was symmetrical with good respiratory excursions. The lungs were clear. The heart revealed a regular rate and rhythm. The patient was not cyanotic. His skin was warm and dry. The abdomen was obese and soft and non-tender. There was no Lloyd's sign. There was no localizing pain. There were adequate bowel sounds. There were good femoral pulses palpable bilaterally. Deep tendon reflexes in the upper extremities were normal. The grips were equal but somewhat weak bilaterally in the upper extremities. The lower extremities showed adequate reflexes with no pathologic sign at this time.
>
> ....
>
> Initially, lateral cross table cervical spine was taken and I can see no abnormality that would rule out the taking of further cervical spines. The patient underwent a full cervical spinal series and a skull x-ray, and at this time I cannot see any gross or obvious fracture. (Defendant's exhibit A.)
>
> The x-rays mentioned above revealed:
>
> SKULL: X-ray studies of the skull show both tables to be of normal density. No abnormal areas of rarefaction or calcification are seen. The sella turcica is well outlined and appears normal. No fractures are seen.
> IMPRESSION: Normal skull.
>
> CERVICAL SPINE: Three views of the cervical spine were obtained. It appears that the patient had severe neck pain and was unable to perform oblique and flexion and extension views. No definite abnormalities were identified on the three films that were present. It should be noted that the C7 vertebral body was not seen on the lateral view. (5-5-78) (Defendant's exhibit A.)

An x-ray of the thoracic spine taken on May 9, 1978 indicated: The alignment of the thoracic spine is good in all projections. No evidence of recent injury or other bone pathology is seen." (Defendant's exhibit A.) Principal diagnosis at the time of discharge included cerebral concussion and cervical strain. Claimant indicated he has no present complaints referrable to his head or cervical spine.

Claimant apparently returned to work as a parts handler on May 30, 1978. (Claimant's exhibit 9 and 10.) Claimant testified that on September 4, 1978 he was transferred to the position of materials handler which required pulling racks from the side areas, where parts were put on the racks, and back onto the paint line. He indicated that such assignment entailed the same pulling, bending and stretching as pulling racks off the line--the position he held when injured in January of 1978. After one week he switched to poly bagger assembly which consisted of filling bags with small washers, nuts and bolts. (Claimant's exhibit 9 indicates that he noticed pain in the right inguinal area while pulling racks on September 6, 1978.) Claimant was assigned to another assembly job on December 11, 1978, but ended up doing sweeping and forklift driving when the foreman learned of his 20 pound restriction. Claimant testified that being on his feet and bending to do the sweeping work and the bouncing involved in forklift driving bothered his back. (Alton Kornegay, claimant's supervisor from December 11, 1979 to January 22, 1979 portrayed the claimant as a chronic complainer but did not recall the claimant specifically mentioning his back condition. He explained that his reason for not wanting claimant back in his department was the weight restriction.) In late January of 1979 claimant became a straightening press operator. Claimant testified such assignment involved bending, stooping, twisting, reaching, and lifting 0-30 pounds. He experienced back pain from standing, stooping and operating the hand truck. (Claimant's exhibit 9 reveals that claimant went to defendant's medical department on numerous occasions after February 13, 1978 but not for back complaints.)

Claimant testified that he voluntarily terminated his employment with defendant on March 2, 1979 because his family doctor had recommended sedentary employment and he had located a sales position in Denver, Colorado. Claimant testified that the work he performed for Colorado State Tire consisted of contacting people by phone. Claimant quit such work after six weeks because he did not like conning people, not because of any physical problem in performing the work.

Claimant next worked as a stockroom clerk for Ragsdale Brothers for six months. Claimant testified that he quit such employment because he was unable to do the job fully--he had trouble standing, bending and reaching. While claimant acknowledged that he injured his right knee in July 1979 when he was forced to jump off his motorcycle in an effort to avoid a collision and that he was hospitalized for two weeks and off work six (or eight) weeks, he denied that his back complaints were affected by the incident. Claimant insisted that he was unable to do the stockroom job before the knee injury. On cross-examination, claimant agreed that he had been planning a move back to Des Moines, Iowa anyway. Claimant testified that his right knee has not significantly bothered him since the July 1979 injury.

Claimant reported that in late October of 1979 he made inquiry about returning to work for defendant. He thought he would be able to do labeling and order filing. Instead claimant went to work as a serviceman for Walsh Equipment. Claimant quit such job after a week because he experienced back discomfort from climbing ladders and using heavy drills and air guns. In November of 1979 he sought vocational rehabilitation and subsequently underwent 3-4 weeks of testing at Des Moines Area Community College. He ruled out pursuing a drafting course because he found bending over a drafting table to be difficult on his back. Instead he enrolled in a two year accounting specialist program. About the same time claimant worked full time for eight weeks as a dispatcher for Capitol City Cab. At the time of the hearing, claimant had completed one year of the accountant program and was a full time student attending classes five days a week for six hours a day and studying 4-7 hours a day. He had a 3.364 grade point average.

Claimant returned to Dr. Robinow is September of 1980 at the request of his attorney. Upon cross-examination, claimant conceded that the visit was primarily for evaluation of his knee and that he had not sought treatment nor had any checkup of his back condition since his April 1978 visit to Dr. Robinow. Claimant explained that his back condition remained essentially constant between the visits except that he began to experience pain radiation into his legs from the amount of walking he did at school. Claimant also noted back pain from sitting through 50 minute classes.

Jerome G. Bashara, M.D., board-certified orthopedic surgeon, examined the claimant on December 11, 1980 at the request of claimant's attorney. Claimant returned to Dr. Bashara on January 23, 1981 for treatment. (Dr. Robinow had passed away sometime after claimant's last visit with him. Claimant testified to his knowledge no one had requested authorization of Dr. Bashara's care from the defendant on his behalf. Mr. Stump testified that defendant had authorized care by Drs. Robinow and Dubansky and added that neither the claimant nor any representative of the claimant had requested authorization by any other doctors.) Dr. Bashara reported the following history, physical examination findings and diagnosis when he hospitalized the claimant on March 8, 1981:

> HISTORY: This is a 35 year old white male who was referred through Mr. Arthur C. Hepburg [sic] for an evaluation of his back in December of 1980. He brought in medical records and x-rays and a letter dated December 10, 1980 by Mr. Hepburg [sic] to the office. This patient injured his lower back in March of 1975 when lifting some heavy parts working for John Deere. In April of 1975, he underwent a lumbar fusion L-5 through S-1 by Dr. D. C. Wertz [sic]. He was apparently released to work in January of 1976 with a 50 pound lifting restriction. He worked from April 26 to approximately August of 1977. August 22, 1977, he was shoveling some parts when he reinjured his back. Since that time, he has been followed by Dr. Robinow and Dr. Dubansky. He has had repeated x-rays of the spine, has had admissions for traction, physical therapy, has not had a repeat myelogram, actually does not recall having an initial myelogram. He has also been seen in consultation by Dr. Silverman [sic] for MPI. He continues at this time to have pain in his lower back and both hips which is aggravated by prolonged standing, lifting, bending, and twisting. There is no pain irradiating into his extremities. Some mild sneeze aggravation. No bowel or bladder symptoms.
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> PAST MEDICAL HISTORY: Operations, hernial repair x 3, hemorrhoidectomy, T&A, right knee surgery, appendectomy and procedures as described above.

Medications, none. Drug allergies, none. His family doctor is Dr. Lester Beachy.

FAMILY & SOCIAL HISTORY: He is married and has four children. He is presently a student at the Des Moines Area Community College as an accounting specialist.

PHYSICAL EXAM: On physical exam, he is a large muscular white male mildly to moderately obese. He has moderate lumbar paraspinous muscle spasm, tenderness over both paraspinal regions at the L3, L4, and S1 level. Flexion to the spine to approximately 60 degrees extension 10 degrees with pain. Lateral bending is approximately 0 degrees in each direction. Straight leg raising procedures some tight hamstrings at 60 degrees bilaterally. Neurological exam of the lower extremities is normal. His general health is good. X-rays taken in December 1980 at the lumbosacral spine with oblique showed a Grade 1 spondylolisthesis of L3 on L4 well demonstrated in the oblique views. Flexion and extension views showed that there is a movement at L4 and L5 vertebra. No movement between L5 and the sacrum. In January 1981, the patient was bowling when he had a sudden exacerbation of pain when he started the second game and since that time has had a marked amount of pain in his lower back, right hip, and buttocks with the marked tenderness at the L3 L4 and L4 L5 interspaces posteriorly. Motion is markedly decreased. Straight leg raising produces pain in his back bilaterally at 50 degrees. Neurological exam of the lower extremities is normal. It was decided to treat him with a lumbosacral course at a peak control. He was started on Robaxin, Tylenol #3 for pain. It was discussed at that time with him the possibility of having a lumbar fusion bilaterally. In February 26, 1981, he was again seen. The acute episode had somewhat improved. His primary difficulty is back pain which is brought on aggravated by any walking in excess of 1-2 blocks, any twisting or bending activity. On exam at this particular date, he still has some moderate lumbar paraspinous muscle spasm. Motion of the lumbar spine is restricted to about 50 percent of normal. Neurologic exam of the lower extremities is normal.

DIAGNOSIS: 1. Grade 1 spondylolisthesis of L3 and L4
2. Postoperative status fusion of the L5 S1 level
3. Pseudoarthrosis at the L4 L5 level

He is being admitted to Iowa Methodist Medical Center at this time for an EMG and nerve conduction velosity of the back and both lower extremities. Second, a amipeg lumbar myelogram of L3 to S1 and a possible lumbar fusion L3 to the sacrum possibly combined with a Gill procedure. (Dubansky deposition exhibit 1. Claimant testified that he did attempt to bowl in January of 1981 but quit after experiencing pain in the first frame of the first game.)

In a discharge summary dated March 25, 1981, Dr. Bashara described claimant's hospital course:

> The patient is admitted to Methodist Medical Center at this time for an EMG and nerve conduction velocity to back and bower [sic] lower extremities. An amopaque lumbar myelogram of L-3 through S-1 and possible lumbar fusion of L-3 can possibly be combined with the Gill procedure. The EMG showed a very mild right L-4 radiculopathy. His amopaque lumbar myelogram showd [sic] a small disc protrusion, no other significant findings. This was at the L-3 level. The patient was taken to surgery on 03-12-81. A laminotomy at the 1-3,[sic] 4 level on the right, lumbar fusion L-3, 4, L-4, 5, L-5, S-1 using tibial bone graft. Left tibia repair of pseudoarthrosis at the L-4, 5 level was performed. He tolerated the procedure fairly well. His postoperative course was without complications. His left leg was incased in a short leg walking cast with a walking heel attached to the cast. His right shoe was brought up to level so that his gait would be more even. He was also placed in a lumbosacral corset with AP control. No problems whatsoever. The patient is discharged at this time to his home for some bedrest and gradual increase of ambulation. He should see Dr. Bashara in the office in five weeks. Sutures have been removed. (Dubansky deposition exhibit 1. Claimant testified that he returned to school on June 22, 1981.)

Dr. Bashara elaborated upon the surgery he performed:

> A....We go in and we re-explore the discs to make sure they are okay and his were. I found a pseudarthrosis at the L-4 and L-5 level about a quarter of an inch wide and kind of a loose vertebra at the L-3 and L-4 level, and the fusion mass at the L-5 and S-1 level, the very lowest level, appeared to be solid, so then I performed a fusion from L-3 to L-4 and from L-4 to L-5 and from L-5 to S-1 just to reinforce the last level.
>
> Q. Now, how did you go about fusing that, Doctor?
>
> A. We just take a bone graft in his case because of the distance it had to be expanded from his tibia or leg and then wired it in place into his lower back between those three levels, actually wired it down to the bones at those three levels. (Bashara deposition. p. 12.)

Dr. Bashara described pseudarthrosis as a false joint either where there had previously been a solid bone or in an area where a fusion was disrupted by another injury or was unsuccessful initially. Dr. Bashara was of the opinion that the August 22, 1977 injury was the probable cause of claimant's pseudarthrosis and that the January 1978 episode "just aggravated the condition." (Bashara deposition, p. 23.) He cited Dr. Dubansky's January 19, 1978 review of x-rays as support for this conclusion:

> A. In somewhat support of that is Doctor Dubansky's examination on January 19th of 1978.
>
> Q. That is shown on Exhibit 2, is that right?
>
> A. Yeah, he says his review of x-rays from 1975 until the current films, which were taken on the date that Doctor Dubansky examined him on 1-19-78 shows spina bifida occulta, a fusion of L-5 and S-1, with some fusion mask going up to the spinous process. On the films on 1-19-78 it appears that there is a separation of the spinous process of L-4 from the fusion mass. That's between L-4 and L-5, and then he goes on.
>
> Q. So you are saying that what he observed then was what you later observed when you examined him, is that right?
>
> A. Yes, I think that's consistent with what we found later on.
>
> Q. It is also consistent with your opinion of the matter, I take it?
>
> A. Yes. (Bashara deposition, p. 24.)

Dr. Bashara testified that his diagnosis and surgical intervention were directly related to the August 1977 injury and possibly to the March 1975 injury. (Although he testified on direct examination to a January 1976 injury, and on re-cross agreed that he probably meant January 1978, the context on direct suggests he was referring to the injury triggering the need for the first fusion. [Bashara deposition, pp. 20-21.]) He was uncertain about the January 1978 aggravation:

> Well, I think basically you have a man that injured his back while working in '75. He subsequently had an operation. He then went back to work and reinjured it, and then as I can see things he was seen by a variety of physicians who were placing fairly strict restrictions on his work ability and he went back to work and possibly reinjured it again in January of 1978 and subsequently had to undergo more surgery.

(Bashara deposition, p. 22. Defendant's objections on pages 18, 19 and 22 are overruled. Bashara deposition exhibits 1-4 essentially mirrored the record as a whole. Dr. Bashara did not find it significant that while the claimant apparently left the impression at the time of his January 19, 1978 hospitalization that he had had trouble with his back all his life and that the April 1975 surgery did not significantly improve his condition, he stated at the time of his deposition and in giving a history to Dr. Bashara that he had no problems between the time his weight restriction was lifted and the time of the August 1977 injury. Dr. Bashara placed importance on the fact that claimant returned to work in January of 1976 with a 50 pound restriction. He noted that the history he received from the claimant did not reflect that claimant specifically reported no symptomatic problems during such period of time. He stressed the importance of viewing the claimant's actual record over time than the history claimant gave on particular dates. Other discrepancies between the history Dr. Bashara received and the record viewed as a whole would be that claimant reported occasional back pain commenced three months after he began working for defendant and that the January 1978 episode occurred all on one day. Although claimant suggested the 50 pound restriction after the first fusion was lifted after three months, the medical records presented to Dr. Bashara indicated otherwise. Also, Dr. Wirtz' notes indicate some post April 1975 surgery aggravations prior to claimant's return to work in January 1976.)

Dr. Bashara testified that as of June 23, 1981, the last time he saw the claimant prior to his September 18, 1981 deposition, he considered the claimant to have a 45 percent permanent impairment to the body as a whole, of which 15 percent was attributable to the preexisting August 1977 condition. He based such opinion on his history, physical exam, and the manual for orthopedic surgeons. Dr. Bashara elaborated:

> A. Well, as I said before, fifteen percent is related to an injury to a lumbar disc with subsequent surgery and a fusion, and I relate that to his 1975 injury. The other thirty percent is related to a subsequent injury to his back, to a pseudarthrosis, which I think was traumatic in his case, with subsequent fusion of that level, and to a spondylolisthesis, which may or may not have been traumatic. (Bashara deposition, pp. 29-30.)

He explained that he could not determine whether the spondylolisthesis, a falso joint between a different area of the vertebrae and a cause of instability, was traumatically induced or congenital because there were no previous oblique (side view) x-rays. However, it was Dr. Bashara's belief that, statistically speaking, spondylolisthesis is more likely to be from some form of trauma. He thought this was particularly true in the claimant's case:

> A. Well, it's my opinion specifically with regards to Mr. Croushore that since I believe that spondylolisthesis is, in fact, traumatic in origin, and since he had fusions at the L-4 and L-5 and L-5 and S-1 level, which then immobilized those two levels and leaves then, as we know, much increased stress on the next

mobile vertebra level, which in him would have been L-3, L-4, so, yes, in my opinion, his spondylolisthesis at L-3, L-4 was directly related to previous injury and possibly related to the very first incident in that he had to have a fusion, which then put more stress on the level above.

Q. So the theory that would be the most likely explanation of this, and I guess the one to which you are testifying, as I understand it, to a reasonable degree of medical certainty, is that the fusion of two levels resulted in increased stress being placed on the next nearest level, and that then led to the spondylolisthesis. Do I understand it --

A. That's not quite the way I believe that it happened, okay?

Q. Go ahead.

A. Yeah, he had an injury to his lower back and had to have subsequent surgery, which included a fusion. He continued mechanical stress to his lower back and then developed a pseudarthrosis, which I think was traumatic from an injury. He had already increased stress at the level above, L-3, L-4, and the combination of the previous fusion and repeated injury, or two injuries, then produced the spondylolisthesis. (Bashara deposition pp. 37-39. Claimant's objection on p. 37 is overruled.)

Dr. Bashara testified that claimant's intermittent back pain and discomfort since surgery was part of the normal healing process. He estimated that further medical improvement in claimant's case would not be expected after mid October of 1981, 6-8 months after surgery. With regard to claimant's physical limitations per se, Dr. Bashara testified:

> A. Well, he's going to have supremely limited low back motion. He'll only have two mobile vertebrae, actually, in his lower back or interspaces, and the stress on those is going to be increased, and I would say all activities that involve heavy lifting, say, much over, well, it's difficult to put a pound limit on it. It depends on how a patient lifts as to how much they can lift, but, as we say, in an unfavorable attitude where he's having to bend forward and lift he shouldn't lift much over ten pounds. In a favorable attitude where he bends his knees down and can go straight down and lift something up he can lift more than that without probably injuring his back, and so that's why we ask patients that have that much disability permanently to avoid any prolonged bending or twisting or lifting, stooping, which involves bending, riding on tractors, which we think is hard on the back, any heavy equipment, heavy equipment operating. Any running activity would probably be eliminated. I could probably think of more if we had more time, but I mean there are lots of limitations on someone that's had that amount of disability in his lower back.
>
> Q. Apparently before this last problem and surgery you assessed his disability of fifteen percent. What limitations might you expect a person to have with that degree of disability such as Mr. Croushore?
>
> A. Oh, well, he has the same restrictions but to much less degree. He can lift heavier weights in an unfavorable attitude. He can maybe go up to thirty, maybe fifty pounds. That's, I think, a little heavy for even an L-4, L-5, L-5, S-1 fusion, and I would place a caution on prolonged bending or twisting or stooping because I do think that it can aggravate the spine. (Bashara deposition, pp. 55-57.)

Dr. Dubansky testified that claimant was only temporarily disabled as a result of the January 19, 1978 incident. Based on his treatment of the claimant at the time of the January 1978 hospitalization and on Dr. Robinow's followup office notes, Dr. Dubansky believed claimant recovered to pre January 19, 1978 status, which result was consistent with his diagnosis of acute myofascial strain. (Claimant's counsel's objections on pages 11 and 12 are overruled.) Dr. Dubansky had reviewed records regarding claimant's March 1981 hospitalization in addition to the deposition of Dr. Bashara and was of the opinion that there was no causal relationship between the January 1978 incident and the condition for which claimant was treated in March of 1981. Specifically, he observed that there was no evidence of pseudarthrosis at L-4, 5 on flexion and extensive x-ray studies of the lumbosacral spine taken on January 25, 1978.

With regard to particular review of the August 1977 hospitalization records, the March 1981 hospitalization records, his office notes and defendant's nurses' notes, Dr. Dubansky testified that he could find no causal connection between the August 1977 injury and the condition for which claimant underwent surgery in March of 1981. (Claimant's counsel's objection on pp. 24-25 is overruled. According to earlier questioning, Dr. Dubansky had reviewed Dr. Bashara's deposition.) He noted that claimant's complaints in August 1977 were in the dorsal or thoracic area and that the 1975 surgery entailed the lower lumbar spine. He similarly testified the medical records for 1981 indicated involvement of the lower back and both hips, not the dorsal spine.

Dr. Dubansky testified on cross-examination that he accepted Dr. Bashara's diagnosis of pseudarthrosis at L-4, 5 noting that Dr. Bashara had the opportunity to view the area during surgery. Dr. Dubansky emphasized that in light of his studies showing no motion between L-4, 5 and S-1 and claimant's return to previous activities, he felt justified in not operating to explore the area in 1978. He likewise agreed with Dr. Bashara's diagnosis of a defect in the pars interarticularis at L-3, 4 and commented that he made a similar finding in 1978. Dr. Dubansky subsequently clarified that his review of the January 19, 1978 x-rays, set forth in the history and physical report in the 1978 hospitalization records, was incorrect insofar as the location of the defect in the pars interarticularis was stated as being at L-4, 5 instead of at L-3, 4. In response to defense counsel's inquiry regarding whether the defect in the pars interarticularis was the basis of claimant's complaints in January of 1978, Dr. Dubans stated:

> No. I think it was just part of his overall back problem that he had and had had. As I say, many times people can have this defect all their life and never have symptoms. Many people have it. In fact, studies have been done in which they have found a patient with this, and they would check all their relatives and many other people and may find a higher than normal incidence of this defect in those relatives, many of whom have never had symptoms.
>
> Sometimes this has been found as an incidental finding in other X rays, and the patient has never had any complaints so that sometimes it's extremely difficult to try and determine what relationship this particular defect has to the patient's present symptoms. (Dubansky deposition, p. 53.)

When asked by the cross-examiner whether the fact that Dr. Wirtz concluded from x-rays taken in February of 1976 that claimant had a myositis condition and no evidence of injury to the spinal fusion meant that something occurred between February 1976 and the time Dr. Dubansky noted a separation in January of 1978, Dr. Dubansky emphasized that the defect he was talking about was not in the area of the fusion. (The somewhat confusing testimony might be attributable to the use of "defect" to describe the separation of L-4 from the fusion mass [noted on the January 19, 1978 x-rays] and the condition in the pars interarticularis at L-3, 4. Dr. Dubansky earlier testified that the motion present at L-3, 4 was normal.) Dr. Dubansky agreed if Dr. Wirtz' findings in February of 1976 and Dr. Bashara's findings in March of 1981 were accepted as true, the "defect" in the L-4, L-5 fusion was not present in 1976 but was present in 1981. Dr. Dubansky acknowledged that he at least considered further investigation of the lumbar area in January of 1978 because he was concerned about the status of the 1975 fusion. However, based on the claimant's response to the saline solution and on other studies such as the January 25, 1978 x-rays, the contemplation of doing a diskogram was abandoned.

Dr. Dubansky further acknowledged during cross-examination that both the 1977 injury (as described by the claimant to Dr. Robinow) and the heavier work claimant reported he was doing in January of 1978 (Dr. Dubansky did not recall the claimant reporting a specific incident) could have aggravated the low back condition. However, based on claimant's subsequent history, Dr. Dubansky did not believe either incident resulted in additional permanent impairment. He similarly explained that he concurred in Dr. Robinow's decision to continue claimant's lifting limitations in April 1978 because of claimant's history of repeated back problems, not because of any belief that every repeated back trauma or strain would materially aggravate claimant's condition so as to result in additional permanency. (After noting that claimant had been getting along quite satisfactorily at work and that he could find nothing unusual in claimant's clinical examination on April 12, 1978, Dr. Robinow stated:

> [but] I think it would [sic] folly to remove him from the weight restrictions inasmuch as he has a past history indicating he has a vulnerable back and he has a past spinal fusion. I think it would be in this mans [sic] best interest to continue on the weight restriction. [Bashara deposition, exhibit 1.])

Since, as is indicated in the analysis, the matter of the causal connection between the two injuries in issue and the alleged disability is resolved in defendant's favor, the record regarding industrial disability will not be reviewed.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 19, 1978 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 injuries of August 22, 1977 and January 19, 1978 are causally related to 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, 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, 247 Iowa 691, 73 N.W2d 732 (1956). In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. Sondag, 220 N.W.2d 903 (Iowa 1974).

While a claimant is not entitled to compensation for the esults of a preexisting injury or disease, the mere existence t the time of a subsequent injury is not a defense. Rose v. ohn Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 1956). If the claimant had a preexisting condition or disabil-ty that is aggravated, accelerated, worsened or lighted up so hat it results in disability, claimant is entitled to recover. icks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 1962).

When a worker sustains an injury, later sustains another njury, and subsequently seeks to reopen an award predicated on he first injury, he or she must prove one of two things: (a) hat the disability for which he or she seeks additional com-ensation was proximately caused by the first injury, or (b) hat the second injury (and ensuing disability) was proximately aused by the first injury. DeShaw v. Energy Manufacturing ompany, 192 N.W.2d 777, 780 (Iowa 1971).

Preponderence of the evidence means the greater weight of vidence, the evidence of superior influence or efficacy. auer v. Reavell 219 Iowa 1212, 260 N.W. 39 (1935). A decision o award compensation may not be predicated upon conjecture, peculation or mere surmise. Burt v. John Deere Waterloo Tractor orks, 247 Iowa 691, 73 N.W.2d 732 (1956).

ANALYSIS

As is suggested by the above cited case law, claimant must stablish by a preponderence of the evidence that the disability pon which he bases his present claim is traceable to the August 2, 1977 injury, or to both the August 22, 1977 injury and to he January 19, 1978 injury (with the latter relating back to he former under a De Shaw analysis), or to both of the injuries o a separate degree or, finally, to only the latter injury (in hich latter two approaches, a finding that the discovery rule pplies to the January 1978 injury must be made in order to ircumvent the ramifications of the two-year statute of limitations). laimant has failed to carry his burden of proof under any of hese analyses.

Dr. Bashara boldly testified that claimant's surgery in arch of 1981 and 30 percent of claimant's present 45 percent isability were probably attributable to the August 22, 1977 njury--that the pseudarthrosis he found at L-4, L-5 upon urgery was related to such incident. He minimized any con-ribution by the January 19, 1978 episode yet emphasized the -ray findings on such date. (Indeed the nebulous and more ften inaccurate medical evidence with respect to the objective istory of treatment and x-ray findings made assessment of the ausation issue in the present case extremely difficult.) If Dr. ashara related the pseudarthrosis to the August 22, 1977 njury, should he not have based his opinion on supportive x-ray indings made on such date? Yet, Dr. Robinow reported, upon eview of x-ray taken at the time of the August 22, 1977 incident, hat the old fusion appeared stable. In light of various eferences to Dr. Wirtz' 1975 fusion entailing L5, S1 without ention of L4, L5, the undersigned questioned whether Dr. obinow, like Dr. Dubansky, had misread the levels of fusion. owever, in Dr. Robinow's office notes for August 22, 1977 he entions the fusion site as L4, L5. (It must be noted that on eptember 10, 1980, Dr. Robinow does refer to the fusion site as 5, S1. However, this is at a remote point in time and after he January 1978 history and physical reported by Dr. Dubansky--herein reference is made to a 1975 fusion of L5, S1. Even Dr. ashara, who matter-of-factly testified to two levels of fusion n 1975, recorded such fusion as entailing only the L5, S1 in he history taken at the time of the March 1981 hospitalization.) hus, Dr. Bashara's conclusion regarding the results of the ugust 22, 1977 injury do not appear to be justified by the edical record upon which he relies nor upon the record viewed s a whole as will be discussed below.

It must next be determined if the January 19, 1978 incident esulted in the pseudarthrosis at L-4, L-5. At this juncture, r. Bashara's reference to Dr. Dubansky's comment that the anuary 19, 1978 x-ray appears to demonstrate "separation of the pinous process of L4 from the fusion mass" seemingly takes on ome significance--that is, until Dr. Dubansky explains that he nd the radiologist misread the fusion depicted on such x-ray, eaning that what is described at the time as L-4, L-5 is upon ater study L-3, L-4. Dr. Dubansky's explanation with regard to he misread x-rays is corroborated by the reference in the anuary 1978 admission history to a 1975 fusion of L5, S1. urthermore, Dr. Dubansky's recent review of the January 15, 978 lumbar extension and flexion views indicated no detectable otion between L-4, L-5 and S-1. He considered the evident otion present at L-3, 4 in January of 1978 to have been normal. hat Dr. Bashara considered the vertebra at such level to be ose in March of 1981 and so fused such level does not satisfy he causal connection issue in favor of the claimant in light of he passage of time which included both additional injuries and rdinary wear and tear. Parenthetically, it is noted that the nconclusive evidence regarding a possible fracture of the pars nterarticularis of L-4 in July of 1976 is given no weight. If ccepted it only would have cast further doubt on claimant's ase.

While it was Dr. Bashara's belief that the spondylolisthesis t L-3, L-4 was traumatic in origin and while he focused on the ffect of the August 22, 1977 and January 19, 1978 incidents on he L-3, L4 level in light of the previously immobilized L-4, -5 and L-5, S-1 levels, he conceded that he had no prior blique views to verify his opinion and acknowledged that some edical experts consider the condition to be congenital. Dr. ubansky clearly did not contribute claimant's complaints in anuary of 1978 to any such condition, nor did Dr. Robinow nclude any L-3, L-4 instability in his diagnosis in August 1977. Dr. Bashara's comments about recent speculation in the medical ommunity over the contribution stress or fatigue fractures of he foot, tibia or hip play in the development of such a back ondition was not explored by the parties despite claimant's istory of lower extremity injuries.)

That Dr. Dubansky was willing to admit that the August 22, 1977 shoveling and the January 19, 1978 rack pulling could have aggravated claimant's low back condition does not cure the evidentiary problems set forth above and is not in conflict with his testimony that claimant did not suffer any additional permanent impairment as a result of the August 1977 and January 1978 injuries. His concession that Dr. Wirtz found no injury to the spinal fusion as a result of the February 1976 injury but Dr. Bashara found pseudarth sis at L-4, L-5 in March of 1981 likewise is of no assistance to claimant's case.

Upon first review of the record, one is tempted to conclude that claimant must have sustained some material aggravation of his preexisting condition in August of 1977 because (aside from complaints of routine soreness) he sought no back treatment between his return to work in April 1976 and the first injury in issue, because he had returned to essentially the same job he was doing in March of 1975, because he was required to do a different job on August 22, 1977 and because his weight limitation was further reduced after the August 1977 injury. With regard to the January 19, 1981 injury, one considers the latter episode to be a flareup of the August 22, 1977 disabling condition in that it occurred only some three months after the claimant had returned to work after the August injury, claimant was off work less than four weeks for the January injury and he returned to work with the same weight limitation as after the August injury. However, upon deciphering what turned out to be an irreconcilable medical record, scrutiny of the record as a whole to establish the causal connection between the injuries and claimant's present disability was pursued, but in vain. At the time of the first injury in issue, claimant clearly had a preexiting back condition for which he had been given a 50 pound restriction on lifting when he returned to work after the March 1975 incident and April 1975 fusion. (Claimant's testimony that the restriction had been lifted does not appear to be corroborated by Dr. Robinow's records. Furthermore, Dr. Bashara indicated he would place a 30-35 pound limitation on a two level fusion.) The continuing instability of claimant's back was indicated by his suffering a flareup in February of 1976 after having returned to work for only a matter of weeks. After being off work, claimant returned to somewhat lighter duties in April of 1976 and eventually resumed the job he was doing when injured in March of 1975. Claimant may have had some back soreness during this time but not of such a nature or degree that he sought medical care for such condition. Then upon performing a different task on August 22, 1977, claimant experiences lumbar thoracic pain. (Dr. Dubansky's separation of the areas of discomfort and treatment was not supported by the rest of the record.) He is treated conservatively and returns to work in less than two months with a 20-25 pound restriction. However, during the next three months he works from light duty into heavier duty assignments and experiences another bout of back pain. He is treated conservatively again and returns to work in less than a month and with the same 20-25 pound limitation. Regardless of claimant's motive for seeking an increase in his limitation a month and a half later, Dr. Robinow's observations about the normal clinical findings on April 12, 1978 and the decision to leave claimant's restriction at 20-25 pounds because of his history of back problems destroys any impression that claimant suffered a material aggravation as a result of either or both injuries in issue. (The record does appear to support finding that the January 19, 1978 injury related back to the August 22, 1977 incident as a further flareup of the already temporarily aggravated preexisting condition.) Further supporting the conclusion that the August 22, 1977 and January 19, 1978 episodes were merely short-lived expressions of claimant's underlying unstable back condition is the fact that claimant did not seek further medical treatment for his back until after the January 1981 bowling incident--the September 1980 examination by Dr. Robinow and the December 1980 examination by Dr. Bashara were clearly for purposes of evaluation and at claimant's counsel's request. Furthermore, while claimant would have the record indicate that he had continued back problems which caused him to finally leave work for defendant, his own exhibits reveal that he did not complain of back problems or such back treatment after his return to work in February of 1978. Claimant's implication that he was unable to perform the rack pulling job in September of 1978 for more than a week because of his back condition is not persuasive in light of the medical record indicating his complaints at the time were referrable to an alleged hernia. Finally, claimant's history of falling from his roof and injuring his knee in jumping off a motorcycle (even though he voiced no complaints of back pain and the records in evidence do not document any back problems at those times) must at least be noted in that claimant was able to engage in such activities and was injured in so doing (It may be that with respect to all the injuries in question the expertise of a biomechanical engineer may have clarified the record--to whose advantage is another matter.)

Hence, the record supports finding that claimant was only temporarily disabled as a result of the August 22, 1977 and January 19, 1978 injuries.and that the latter was really a continuation of the former. Defendant has paid the claimant for the period of time he was off work, so no further weekly benefits are due and owing. Concomitant with such finding is that the treatment rendered by Dr. Bashara was not for a condition causally related to the August 22, 1977 and January 19, 1978 injuries. Even if such treatment had been so related, the record appeared to be without dispute that such care had not been authorized by the defendant. Claimant is entitled to reimbursement for the December 11, 1980 evaluation by Dr. Bashara. Contrary to Dr. Bashara's testimony that his charge for such evaluation was $35.00, Bashara deposition exhibit 5 reveals that $155.00 is the proper amount. The myelographic examination appears to have been part of the treatment rendered by Dr. Bashara and not part of the December 11, 1980 evaluation.

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 preexisting condition: Claimant, who started working for defendant as a saw, drill and threader operator in January of 1974, began experiencing occasional back soreness in January of 1975; on March 12, 1975 he felt a sharp stabbing pain in his low back upon bending to pick up some parts at work; claimant was hospitalized in April of 1975--x-rays revealed a spina bifida defect involving the pars and the articular joint at L5, S1 left and a defect of the lamina and the posterior articular facette at L5 left; claimant underwent a fusion of L-4, L-5 and L-5, S-1; claimant returned to work on January 12, 1976 with a 50 pound weight limit; on February 5, 1976 claimant experienced a sharp pain in his low back upon moving skid rings at work; claimant was hospitalized--x-rays revealed no injury to the fusion; claimant returned to work on April 5, 1976 with a 50 pound weight limit; claimant did not seek further treatment for his back until August 22, 1977.

FINDING 2. The first injury upon which claimant bases his present claim: on August 22, 1977 claimant experienced sharp pain in the lower midregion of his back, above and below his belt, as he was lifting a shovelful of parts in the course of carrying out a temporary assignment which he had not previously performed; claimant was hospitalized for conservative treatment--x-ray of the thoracic spine revealed some osteophytic lipping anteriorly in the mid-thoracic area and x-ray of the lumbar spine revealed some narrowing of the lumbosacral joint space, an apparently old and stable fusion and irregularity in the region of the right sacroiliac; claimant was discharged from the hospital on September 1, 1977 with the diagnosis of acute low back myofascitis and strain; claimant returned to work on October 17, 1977 with a 20-25 pound limititation (claimant received workers' compensation benefits for the time he was off work); claimant performed light duty labeling until sometime around the end of the year when he was assigned to work that entailed pulling racks.

FINDING 3. The second injury upon which claimant bases his present claim: on January 19, 1978 claimant experienced a sharp back pain upon pulling a rack and, after a subsequent break period, was unable to stand up; claimant was hospitalized--x-rays allegedly revealed a separation of the spinous process of L4 from the fusion mass and a defect in the pars interarticularis at L4, L5 (the treating physician during such hospitalization later testified that the x-rays were misread by one lumbar level); claimant was discharged on February 6, 1978 with the diagnosis of postoperative spinal fusion with defect in the pars intra-articularis L4-5 (L3-L4); claimant returned to work on February 13, 1978 with a 20-25 pound limitation (claimant received workers' compensation benefits for the period of time he was off work); clinical examination on April 12, 1978 was essentially normal but the treating physician left the weight restriction at 20-25 pounds because of claimant's history of back problems.

FINDING 4. Subsequent injuries: claimant sustained a cerebral concussion and cervical strain in May of 1978 when he fell 6-7 feet from the roof of his home and was hospitalized for two weeks--x-rays of the thoracic spine revealed no evidence of recent injury or other bone pathology (no lumbar x-rays were taken); claimant complained of pain in the right inguinal area upon pulling racks at work on September 6, 1978 (he was transfered to poly bagger assembly); claimant injured his right knee in July of 1979 when forced to jump off his motorcycle to avoid a collision.

FINDING 5. Subsequent evaluation and treatment of the back: claimant did not seek treatment for his back between April 1978 and September 1980; on the latter occasion he pursued only an evaluation of his back and knee condition, at his attorney's request, from the physician previously authorized by defendant: on December 11, 1980 claimant sought an independent evaluation from another physican at his attorney's request; x-rays taken at that time revealed Grade 1 spondylolisthesis of L4 on L5, movement at L4 and L5 and no movement at L5 and the sacrum; on January 23, 1981 claimant returned to such doctor for treatment, sometime after noticing an exacerbation of pain after bowling one frame; (the treating physician had died in the interim; however, both the claimant and defendant's supervisor of employee benefits were in agreement that claimant did not seek authorization for treatment from the evaluating physician [the assoicate of the late physician had treated the claimant during the January 1978 hospitalization]); in February of 1981 claimant complained of back pain upon walking more than 1-2 blocks, twisting or bending; claimant was hospitalized from March 8, 1981 to March 25, 1981--the admitting diagnosis included Grade I spondylolisthesis of L3 and L4, postoperative status fusion of the L5, S1 level and the pseudarthrosis at the L4, L5 level and the evaluating physician performed a fusion of L-3, 4, L-4, 5 and L-5, S-1; claimant's permanent partial disability was rated at 45 percent of the body as a whole, 15 percent of which was attributable to the earlier fusion.

FINDING 6. Preponderance of the evidence: the weight of the medical evidence indicates that the August 22, 1977 and January 19, 1978 injuries amounted to a temporary aggravation of the preexisting back condition; the record viewed as a whole corroborates such evidence and supports finding that the latter injury was merely a flareup of the already temporarily aggravated underlying condition.

CONCLUSION A. Claimant sustained injuries in the course of and arising out of his employment on August 22, 1977 and January 19, 1978; however, the latter injury and ensuing disability were related to the former injury.

CONCLUSION B. Claimant proved by a preponderance of the evidence that he was temporarily disabled following both dates of injury; claimant failed to prove by a preponderance of the evidence that he suffered any permanent disability as a result of the August 22, 1977 and January 19, 1978 injuries

CONCLUSION C. Claimant failed to prove by a preponderance of the evidence that the March 1981 surgery and healing period were related to the August 22, 1977 or January 19, 1978 injuries; claimant failed to prove that the treatment provided by the evaluating physician was authorized as contemplated by Code Section 85.27.

ORDER

THEREFORE, it is hereby ordered that the claimant take nothing in weekly benefits from the present proceeding.

It is further ordered that defendant pay the claimant the following 85.39 expense:

Dr. Bashara. $155.00

Costs of the proceeding, including $75.00 for Dr. Robinow's reports, are taxed to the defendant. See Industrial Commissioner Rule 500-4.33.

Signed and filed this 29th day of November, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

D & G TRUCKING and EMPLOYERS INSURANCE OF WAUSAU, Petitioners,	:	
vs.	:	File No. 660535
JUDY D. GENUNG, SHARON J. GENUNG, Next Friend of TRAVIS D. GENUNG, KATHY COUSINS, Next Friend of AARON COUSINS, and JUDY D. GENUNG, Next Friend of MELISSA A. DILLIE and CHRISTOPHER W. DILLIE, Respondents.	:	O R D E R O F E Q U I T A B L E A P P O R T I O N M E N T

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Mr. John Aitken
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INTRODUCTION

This is a proceeding brought by D & G Trucking, employer, and Employers Insurance of Wausau, insurance carrier, petitioners, against Judy D. Genung, Sharon J. Genung, next friend of Travis D. Genung, Kathy Cousins, next friend of Aaron Cousins, and Judy D. Genung, next friend of Melissa A. Dillie and Christopher Dillie seeking apportionment of benefits under the Iowa Workers' Compensation Act accruing from the death of James Dean Genung on February 2, 1981. It came on for hearing on July 28, 1982 at the Bicentennial Building in Davenport, Iowa and was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received February 4, 1981. The parties entered into stipulations and covenants which were filed with the industrial commissioner on November 16, 1981.

The record in this matter consists of the testimony of Connie Clark, Judy Genung, Sharon Genung, and Kathy Cousins;

Dillie Exhibit A, expenses from September 1980 to January 1981; Dillie Exhibit B, a record of child support payments made by William Dillie; Dillie Exhibit C, a government pamphlet showing the estimated cost of raising a child; Dillie Exhibit D, the 1980 tax returns of James D. and Judy D. Genung; Dillie Exhibit E, the 1979 W-2 forms for Judith D. Dillie; Dillie Exhibit F, a copy of the 1979 tax returns for James D. and Judith D. Genung; Genung Exhibit 1, a marraiage certificate for James D. Genung and Sharon J. Ballard; Genung Exhibit 2, a birth certificate for Travis Dean Genung; and Cousins Exhibit 1, a birth certificate for Aaron R. Cousins.

ISSUES

The issue in this matter is how the benefits resulting from the death of James Genung should be apportioned.

STATEMENT OF THE CASE

Thirty-four year old Judith Genung, wife of decedent James Genung and mother of twelve year old Melissa and ten year old Christopher Dillie, testified that she married James in December of 1979 after they had cohabited from June through September 1979. Prior to marrying James, she was divorced from William Dillie by an Illinois decree entered in September 1976. Under the terms of that decree Dillie was to provide child support in the amount of $30.00 per week per child, to claim the children as tax exemptions and to carry health insurance on the children. Medical expenses not covered by insurance were to be split between the parties. She stated that she had never attempted modification of the decree.

Judith reported that she and James opened a joint checking account in which they deposited their earnings and child support checks. She denied any other monies coming into the home. She claimed that her marriage to decedent had raised the family standard of living in that she was able to buy better quality clothing for the children and to provide a larger variety of food. The family grew to rely on James for maintenance of this life style. She attributed the family's large phone bill to business calls made by James and to his calling in when he was on the road. She reported that some expenditures were not reflected by Exhibit A as the family paid cash for some items.

During the early months of the couple's marriage Judith worked. Her earnings in 1979 were $12,192.41. Her income for 1980 was $6,610.00. James's was $11,156.00. In August of 1980 she stopped working so that she could attend Scott Community College. When James was unable to watch the Dillie children, Judith's sister was paid $35.00 per week to do so. Judith's plans are to obtain her associate degree there and then undertake studies at Palmer College. Judith testified that James intended to adopt her children as their natural father did not see them and only provided monetary support.

While she described her ex-spouse as consistent in making child support payments, she acknowledged that James was not regular in his payments. He did not claim either son on his taxes.

Records of support payments from William O. Dillie to Judith Genung show a good and current record for the period covered by the exhibit.

Connie Clark, a self-employed bookkeeper with two years of college and ten years of experience, testified to having examined the bank statements and checks of Judith Genung. She prepared an exhibit showing family expenditures from September 1980 to January 1981. She computed child support payments from Dillie which she said totaled $2,820.00 in 1979 and $2,760.00 in 1980 and $1,080.00 in the period from September 1980 to January 1981. She used a government pamphlet regarding the estimated cost of raising a child to determine the expense of raising an eight and a ten year old at a moderate income level at $318.00 each per month and at a low level at $230.00 per month per child. The witness did not know what standards were used to prepare the government document.

Offered into evidence was the marriage certificate of James D. Genung and Sharon J. Ballard which showed that the couple were married on December 17, 1971. Travis Dean Genung was born on May 26, 1972. Sharon Genung testified that she recently started a job. In the past she had collected unemployment and drawn ADC. She stated that decedent who was to provide $35.00 per week and to pay medical expenses had not made many payments.

Aaron Ray Cousins was born on February 9, 1977. An order was entered in the District Court of Iowa by a Judge of the Seventh Judicial District, granting a motion for summary judgment filed by Kathy Cousins, mother of Aaron, finding James Genung to be the father of Aaron. A ruling by a deputy industrial commissoner filed March 22, 1982 found "[t]hat Aaron Cousins' paternity having been established in the decedent, James Genung, Aaron Cousins is under Section 85.42(2), The Code, conclusively presumed to be a dependent of the decedent."

Kathy Cousins testified that the decedent had provided neither support nor services for his child. She admitted that she was not relying on decedent prior to his death.

APPLICABLE LAW

Applicable Code sections are as follows:

Iowa Code Section 85.43:

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

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

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

Iowa Code section 85.42:

The following shall be conclusively presumed to be wholly dependent upon the deceased employee:

1. The surviving spouse, with the following exceptions:
   a. When it is shown that at the time of the injury the surviving spouse had willfully deserted deceased without fault of the deceased, then such survivor shall not be considered as dependent in any degree.

   b. When the surviving spouse was not married to the deceased at the time of the injury.
2. A child or children under eighteen years of age, and over said age if physically or mentally incapacitated from earning, whether actually dependent for support or not upon the parent at the time of his or her death. An adopted child or children shall be regarded the same as issue of the body. A child or children, as used herein, shall also include any child or children conceived but not born at the time of the employee's injury, and any compensation payable on account of any such child or children shall be paid from the date of their birth. A stepchild or stepchildren shall be regarded the same as issue of the body only when the stepparent has actually provided the principal support for such child or children.

Iowa Code section 85.31:

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

   a. To the widow or widower for life or until remarriage, provided that upon remarriage two years' benefits shall be paid to the widow or widower in a lump sum, if there are no children entitled to benefits.

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

Iowa Code section 85.44:

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

Iowa Code section 85.49:

When a minor or mentally incompetent dependent is entitled to weekly benefits under this chapter or chapter 85A, payment shall be made to the clerk of the district court for the county in which the injury occurred, who shall act as trustee, and the money coming into his hands shall be expended for the use and benefit of the person entitled thereto under the direction and orders of a judge of the district court, in which such county is located. The clerk of the district court, as such trustee, shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may best. The cost of such bond shall be paid by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county. If the domicile or residence of such minor or mentally incompetent dependent be within the state but in a county other than that in which the injury to the employee occurred the industrial commissioner may order and direct that weekly benefits to such minors or incompetents be paid to the clerk of the district court of the county wherein they shall be domiciled or reside.

If the domicile or residence of such minor or mentally incompetent dependent be outside the state of Iowa the industrial commmissioner may order and direct that benefits to such minors or incompetents be paid to a guardian, conservator, or legal representative duly qualified under the laws of the jurisdiction wherein the minors or incompetents shall be domiciled or reside. Proof of the identity and qualification of such guardian, conservator, or other legal representative shall be furnished to the industrial commissioner.

Iowa Code section 85.61(10):

"Payroll taxes" means the following:

a. 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
b. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, 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
c. An amount equal to the amount required on July 1 preceding the injury by the Social Security Act of 1935 as amended to July 1, 1976, to be deducted or withheld from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which he was injured.

ANALYSIS

The first determination to be made is which parties are entitled to benefits. Under Iowa Code section 85.42 the surviving spouse and children under eighteen whether actually dependent for support or not are conclusively presumed dependents. That provision covers Judith Genung, Travis Genung and Aaron Cousins.

The more difficult question arises as to the Dillie children. It is noted that under the commissioner's decision in Ostwinkle v. M. P. Kluck & Sons, 33 Biennial Report of the Industrial Commissioner 12 (1977), the Dillie children would not be entitled to benefits as long as there are other dependents receiving benefits unless they, too, fit within section 85.42.

This deputy industrial commissioner is prepared to find that the Dillie children fall within section 85.42. The time frame to focus on is the situation at the time of decedent's death as the Iowa Supreme Court pointed out in Kramer v. Tone Brothers, 198 Iowa 1140, 199 N.W. 985 (1924).

The Dillie children can be conclusively dependent under 85.42(2) "only when the stepparent has actually provided the principal support . . . ." Judith Genung stopped working in the fall of 1980. She provided no support for her children at the time of decedent's death. William Dillie provided an average of $108.00 per child per month during this time. The family's average monthly expenses were in excess of $723.00 per month. The government pamphlet offered in evidence shows that Dillie's support would be not quite sufficient for one child at a low income level. Thus the unrebutted evidence as to income figure for the family show that decedent was providing principal support for the Dillie children at the time of his death. The parties, therefore, eligible for benefits are Judith Genung, Travis Genung, Aaron Cousins and Christopher and Melissa Dillie.

The apportionment of benefits will be considered next. Judith Genung is the surviving spouse. She was dependent on decedent at the time of his death for her support as she was not working. Her ambition to better herself and her family is admirable. She will be awarded forty percent of the weekly benefits. That amount is not to change until such such time as only one child is receiving benefits at which time she will be entitled to a fifty percent share with the remaining child.

The children will be considered as family units -- Genung, Cousins and Dillie. It is unfortunate that James Genung's untimely death was the means by which his natural children are at last receiving his support. Each family unit will receive a twenty percent share. The Dillie children are being considered together because they are receiving some support from their biological father. In the event a child is no longer eligible for benefits that child's share is to be divided between or among the remaining family units.

The final matter to be considered is the rate. The parties were unable to agree on a rate of compensation. There is no dispute as to claimant's gross weekly wage which was reported by defendent's counsel as $614.00 per week nor to decedent's marital status which is married. The question arises as to the number of exemptions which should be applied. It is important to separate this issue of rate from that of dependency which has been resolved above and to remember that dependency does not dictate exemption status nor vice versa.

Decedent's tax records from 1979-1980 claim two exemptions, himself and his spouse. Decedent could not claim the Dillie children because under Judith's dissolution decree, their biological father was to take them as exemptions. At the time of decedent's death, the applicable time, the paternity of Aaron Cousins had not been determined; therefore, no exemption could be claimed for him. See, Snook v. Hermanson, 161 N.W.2d 185 (1968); Kramer v. Tone Brothers, 199 N.W. 985 (1924). The remaining possible exemption is one for decedent's biological child Travis.

The industrial commissioner addressed a problem similar to that presented herein in Biggs v. Charles Donner, Appeal Decision filed April 22, 1982. In Biggs claimant was living with his second wife and her two children. He had three biological children from a previous marriage whom he was under court order to support although he was not doing so. The commissioner found claimant could claim his natural children as exemptions for rate purposes. With Biggs as a precedent, benefits will be awarded at a rate computed on a marital status of married with three exemptions.

WHEREFORE, IT IS FOUND:

That Judith Genung was married to decedent James Genung at the time of his death.

That Judith Genung was married to William Dillie prior to her marriage to James Genung.

That Judith Genung has two children, Melissa and Christopher Dillie from her marriage to William Dillie.

That under the terms of the decree of dissolution of marriage between Judith Dillie Genung and William Dillie, he is to provide $30.00 per week per child, to take the exemptions for tax purposes and to carry health insurance on the children.

That James and Judith Genung and the Dillie children had expenses of at least $3,616.70 during the period from September 1980 to January 1981.

That during the period from September 1980 to January 1981 child support payments in the amount of $1,080.00 were made by William Dillie.

That during the period from September 1980 to January 1981 Judith Genung was not working.

That prior to his marriage to Judith decedent was married to and divorced from Sharon J. Ballard.

That the issue of the marriage between decedent and Sharon Ballard is Travis Genung.

That decedent's support of Travis Genung was erratic.

That decedent was the father of Aaron Ray Cousins.

That decedent had not provided support for Aaron Cousins.

That decedent had gross weekly wages of $614.00 per week.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That Judith D. Genung, Travis D. Genung, Aaron Cousins, Melissa Dillie and Christopher W. Dillie are conclusively presumed to be dependents of decedent under Iowa Code section 85.42.

That the proper rate of compensation in this matter is $337.24.

ORDER

THEREFORE, IT IS ORDERED:

That petitioner pay onto Judith D. Genung weekly benefits in the amount of one hundred thirty-four and 92/100 dollars ($134.92) per week for as long as she is eligible to receive benefits with no change in that percentage to occur until such time as only one child is receiving benefits.

That petitioner pay unto the Clerk of the District Court for Scott County, acting trustee, for Travis D. Genung weekly benefits in the amount of sixty-seven and 44/100 dollars ($67.44) per week until such time as he is no longer eligible to receive benefits.

That petitioner pay unto the Clerk of the District Court for Scott County, acting trustee, for Aaron R. Cousins weekly benefits in the amount of sixty-seven and 44/100 dollars ($67.44) per week until such time as he is no longer eligible to receive benefits.

That petitioner pay unto the Clerk of The District Court for Scott County, acting trustee, for Melissa and Christopher Dillie benefits in the amount of sixty-seven and 44/100 dollars ($67.44) per week until such time as they are no longer eligible to receive benefits.

That should Judith Genung remarry or should a child no longer be eligible for benefits Judith's share or that of the child be equally divided among the remaining family units.

That petitioner pay cost.

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

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LUELLA DART, SURVIVING SPOUSE OF BERNARD DART,	:	
Claimant,	:	File No. 694749
vs.	:	A P P E A L
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

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Mr. Harry W. Dahl
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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 the 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 compen-

sation 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.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS DESY, Claimant,	:	
vs.	:	File Nos. 686224/686225
UNITED PACKING OF IOWA, Employer,	:	O R D E R
and	:	O N
NORTHWESTERN NATIONAL, Insurance Carrier, Defendants.	:	A P P E A L

Claimant appeals from the deputy's order filed June 18, 1982 denying claimant's motion to reinstate.

The circumstances of this matter are set forth in the deputy's order as follows:

> On June 7, 1982 claimant filed a motion to reinstate petition in the above entitled proceeding. Claimant alleges that he complied with the undersigned's May 6, 1982 order dismissing claimant's action for failure to respond to the April 2, 1982 order to show cause by filing the Analysis of Status/Certificate of Readiness on May 6, 1982. Defendants filed a resistance to claimant's motion on June 16, 1982, citing authority applicable to timely filing of an appeal from a proposed decision.
>
> Filing an Analysis of Status/Certificate of Readiness within twenty days of the filing of an order to show cause minimally satisfies such order; however, since more than twenty days pass before sanction orders are filed, good cause for lifting a sanction order is not established by the mere filing of the Analysis/Certificate within twenty days of the filing of the order to show cause.
>
> The party upon whom sanctions are imposed must establish that delay in timely responding to the order to show cause within the twenty day period was due to some excusable neglect, error or ommission [sic].
>
> WHEREFORE, it is hereby found that claimant has not established wherein his failure to respond timely to the order to show cause was due to excusable neglect, error or ommission [sic].

Claimant's notice of appeal was filed July 2, 1982. On August 4, 1982 an order was issued directing claimant appellant to submit brief and exceptions by August 24, 1982. On August 24 claimant appellant requested an extension of time. As no cause was submitted, the extension was denied.

The claimant has failed to file a timely brief in support of his position or provide any excuse for repeated missed deadlines. Claimant's obligations to make timely filings are clear under the rules of this agency as are the sanctions provided under Iowa Industrial Commissioner Rule 500-4.36 for failure to make timely those filings. Insofar as there is no error by the deputy or reason to set aside the findings, claimant's appeal is found to lack merit.

WHEREFORE, the findings in the deputy's order filed June 18, 1982 are proper.

THEREFORE, claimant's motion to reinstate petition is denied.

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

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAYMOND M. DILLEY, Claimant,	:	
vs.	:	File No. 654920
METRO AREA TRANSIT, Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs on May 18, 1982 and was fully submitted on June 1, 1982.

No filings were made prior to the filing of the Original Notice and Petition. The record consists of the testimony of the claimant and Robert D. Lager; exhibits one through seventeen; the report of Clifford M. Danneel, M.D., dated May 20, 1982; and the stipulation of counsel.

ISSUES

The issues for resolution are:

1. Whether this agency has jurisdiction.

2. Whether there is a causal relationship between the injury and the disability, and

3. The nature and extent of disability.

Because the conclusion is made that this agency does not have jurisdiction, the remaining issues will not be discussed.

REVIEW OF THE EVIDENCE

Claimant, age 37, was domiciled in Iowa at all times material hereto. He became employed by defendant, Metro Area Transit, in 1977. At the time he was hired, he lived in Council Bluffs, Iowa and later moved to Crescent, Iowa. At all times, claimant reported to work at Metro Area Transit's Omaha facility on

Cumming Street. On May 1, 1980, he sustained a back injury arising out of and in the course of his employment while driving his route. The injury occurred in Omaha, Nebraska. Claimant was paid compensation pursuant to the Nebraska Workers' Compensation Act. As a result of the injury claimant missed 20 2/7 weeks of work.

Claimant testified that the Metro Area Transit system serves both Omaha, Nebraska and Council Bluffs, Iowa. Claimant testified that his contract of hire was made in Nebraska and that his chief duties were in Nebraska. Claimant testified further that there were two separate unions representing Omaha drivers (AFL-CIO) and Council Bluffs drivers (Teamsters). Claimant also testified that he drove in Council Bluffs about twice a month. When an Omaha driver was asked to drive in Council Bluffs, he was paid at one-and-a-half time his normal Omaha wage. Robert D. Lager, employee relations manager for Metro Area Transit testified that two different unions represent Omaha and Council Bluffs drivers. He testified that information gleaned from payroll records indicated that prior to May 1, 1980, claimant had only driven in Iowa three times prior to his injury (August 8, October 12, and November 22, 1977). Since the injury he has driven in Iowa twice in 1980 and six times in 1981.

APPLICABLE LAW

1. Section 85.71, Code of Iowa stated:

Employment outside of state. If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by the chapter, provided that at the time of such injury:

1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or

2. He is working under a contract of hire made in this state in employment not principally localized in any state, or

3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or

4. He is working under a contract of hire made in this state for employment outside the United States.

In Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981) the court stated that the enacting clause of sub-paragraph (1) of Section 85.71 was to provide benefits for an employee whose employment is principally localized in this state 312 N.W.2d at 533. The court goes on to define "principally localized" citing Dahl's Drake Law Review article:

A person's employment is principally localized in this or another state when (1) his employer has a place of business in this or such other state and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

ANALYSIS

Considering the evidence presented, it is clear that claimant's employment was not principally located within this state. Although the employer had "Iowa employees", claimant was not such an employee nor was he regularly employed in Iowa. His contract of hire was made in Nebraska. He was recovered by and paid pursuant to Nebraska workers' compensation. Since claimant's situation does not come within the above quoted code section, he cannot recover under the extraterritorial provisions of the Iowa law.

FINDINGS OF FACT

1. Claimant became employed by defendant-employer in 1977.

2. Claimant, at all relevent times, was domiciled in Iowa.

3. On May 1, 1980, claimant sustained an injury arising out of and in the course of his employment in Nebraska.

4. Although claimant occasionally worked in Iowa for this employer, he was not regularly employed in Iowa.

5. Defendant-employer regularly does business in Iowa.

6. Claimant's employment was principally localized in Nebraska.

7. Claimant was not under a contract of hire made in this state for employment outside the United States.

CONCLUSION OF LAW

This agency does not have jurisdiction over the subject matter.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Signed and filed this 29th day of July, 1982.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA A. DORMAN,	:	
Claimant,	:	
vs.	:	File No. 501246/16721
CARROLL COUNTY, IOWA,	:	
Employer,	:	C O M M U T A T I O N
and	:	D E C I S I O N
MARYLAND CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Carroll County Courthouse in Carroll on September 1, 1982 at which time the case was fully submitted.

The record in the instant proceeding consists of the testimony of Linda (Dorman) Heater, Linda Frank and Robert Feldman.

ISSUE

The issue for resolution is whether claimant should be granted a full or partial commutation of future benefits.

STATEMENT OF THE CASE

Claimant's decedent, Walter Dorman, died as a result of an injury arising out of and in the course of his employment on June 25, 1978. He was survived by his wife and three minor children: Michael, born April 15, 1968; Linn, born June 7, 1971; and Amy, born June 16, 1975. Since decedent's death, Linda has remarried and is presently separated from her husband. Linda has recently taken the test for certification as a registered nurse. Inasmuch as the accrued amounts were paid in a lump sum, the funds were only received in April 1982. Linda was paid through the time of her remarriage, with interest. This amount totalled slightly more than $20,000. An amount slightly in excess of $10,000 was paid to the Carroll County Clerk of Court as trustee of the minor children. This amount represented the amount due the minor children since Linda's remarriage. The assistant clerk of court in charge of workers' compensation testified that this money, along with the periodic payments received since April, have been placed in an account bearing 5 1/4 percent. No withdrawals have been made.

Linda desires to have the children's share of the commutation for investment in time certificates. She does not plan to use either the principal or interest and proposes to pass the funds to the children when they achieve their majority. A conservator-ship will be set up, if necessary.

Robert A. Feldman is a certified public accountant who concentrates on tax and financial planning. He testified that if the weekly checks were deposited in savings, they would only yield about 5 1/4 interest. The small periodic amounts could not be invested in higher yielding securities. The inference is, therefore, that a commutation would benefit claimant because a larger amount would yield more interest than weekly passbook savings.

APPLICABLE LAW

1. Sections 85.3 and 85.30, Code of Iowa, provide for jurisdiction by this agency over workers' compensation matters.

2. Section 85.45, Code of Iowa, allows for the commutation of all payments due a claimant. Section 85.48, Code of Iowa, provides for the payment of a portion of a potential claim. The Code was amended as of July 1, 1982 to increase the discount rate to ten percent in commutations.

3. 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 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.

4. Section 85.49, Code of Iowa, states:

> When a minor or mentally incompetent dependent is entitled to weekly benefits under this chapter, chapter 85A or chapter 85B, payment shall be made to the clerk of the district court for the county in which the injury occurred, who shall act as trustee, and the money coming into the clerk's hands shall be expended for the use and benefit of the person entitled thereto under the direction and orders of a judge of the district court, in which such county is located. The clerk of the district court, as such trustee, shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. The cost of such bond shall be paid by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county. If the domicile or residence of such minor or mentally incompetent dependent be within the state but in a county other than that in which the injury to the employee occurred the industrial commissioner may order and direct that weekly benefits to such minors or incompetents be paid to the clerk of the district court of the county wherein they shall be domiciled or reside.
>
> If the domicile or residence of such minor or mentally incompetent dependent be outside the state of Iowa the industrial commissioner may order and direct that benefits to such minors or incompetents be paid to a guardian, conservator, or legal representative duly qualified under the laws of the jurisdiction wherein the minors or incompetents shall be domiciled or reside. Proof of the identity and qualification of such guardian, conservator, or other legal representative shall be furnished to the industrial commissioner.

ANALYSIS

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 deputy 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.

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.)

Accordingly, in light of the Diamond rationale, a commutation will be ordered in this case since investment at a higher rate of interest will allow the corpus of the estate to increase. Presumably, the reinvestment of the interest will increase the corpus significantly.

The payment will be made to the Carroll County Clerk of Court pursuant to the dictates of Section 85.45. Presumably, a judge will order a higher yielding security with sufficient flexability for liquidation.

A full commutation will not be ordered, however. The undersigned is concerned that the children may seek further education which may necessitate resumption of weekly commutation payments upon the youngest child's eighteenth birthday. Therefore, a partial commutation will be ordered through June 15, 1993. At this time, payments may resume. The period from October 5, 1982 through June 15, 1993 is 554 weeks.

FINDINGS OF FACT

1. Claimant's decedent was employed by Carroll County on June 25, 1978.

2. An award for compensation was entered by the district court and the Iowa Court of Appeals, holding that decedent died of injuries arising out of and in the course of employment.

3. The period during which payments are definitely determinable is five hundred fifty-four (554) weeks.

4. The granting of a commutation would be in the beneficiary's best interests.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the subject matter and the parties.

2. A partial commutation should be granted.

3. The five hundred fifty-four (554) weeks of payment due will be discounted at the rate of ten (10) percent, giving a discounted figure of three hundred seventy-six point nine thousand sixty-eight (376.9068) weeks. By multiplying this figure by the rate of weekly compensation, which is one hundred fifty-seven and 49/100 dollars ($157.49), a partial commutation in the amount of fifty-nine thousand three hundred fifty-nine and 05/100 dollars ($59,359.05) will be awarded.

ORDER

IT IS THEREFORE ORDERED that defendants pay fifty-nine thousand three hundred fifty-nine and 05/100 dollars ($59,359.05) unto the Carroll County Clerk of Court in partial commutation of this case.

IT IS FURTHER ORDERED that defendants resume weekly compensation if any of the minor children are eligible for benefits on June 16, 1993.

Costs are taxed to defendants.

Defendants are to file an interim final report.

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

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRORAH DOTSON, Widow of STEVEN DOTSON, and as Administrator of the Estate of STEVEN DOTSON,

Claimant,

vs.

MORTON BUILDINGS, INC.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 678415

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed January 26, 1983 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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; claimant's exhibits 1 through 8; and defendants' exhibits A and B, all of which evidence was considered in reaching this final agency decision.

The outcome of this final agency decision will be the same as that of the hearing deputy. The findings of fact will be changed somewhat from those of the hearing deputy.

SUMMARY

Steven Dotson, a man of 24 years, collapsed at work and died some two hours later at the Spencer Municipal Hospital. Deborah Dotson, the surving spouse brought this action for workers' compensation benefits alleging that the deceased's work on August 12, 1981 was the cause of his death.

The employee worked for Morton Buildings, Inc., and on the day in question was helping put up a metal machine shed on a farm. At about 4:15 p.m., when the temperature was 85 to 87 degrees and the humidity was 55 percent, the employee complained of feeling dizzy and collapsed. He fell in an awkward position with his head somewhat twisted underneath him. Steve Riley, a co-worker immediately straightened him out.

The employee's other co-workers and the farm owner tried to revive the employee but were unsuccessful. An ambulance arrived, and within about 30 minutes from the time of his collapse, he was taken to Spencer.

The medical opinions are discussed below.

ISSUE

Based on the evidence taken at the hearing, the hearing deputy found that there was no causal relationship between the work and the employee's death. The claimant appealed, stating that the issue is whether or not the employee's death arose out of and in the course of the employment.

APPLICABLE LAW

The hearing deputy's decision states the correct law to apply in this case.

ANALYSIS

The employee was, of course, in the course of his employment when he collapsed. The question is one of causation. Evidence of five physicians, all medical doctors, is a part of the record: (1) J. X. Tamisiea, a qualified pathologist; (2) Harold A. Van Hofwegen, whose subspecialty is cardiology; (3) Ruth Langstraat, an internist; (4) Paul From, a qualified internist; and (5) Alexander Ervanian, M.D., a qualified pathologist. All of these doctors testified by deposition except Dr. Langstraat who testified in person at the hearing.

Dr. Tamisiea testified that the employee died of acute cardiorespiratory failure (which is conceded to be the actual reason for his death). He testified that the exact cause of the cardiorespiratory failure was not identifiable "either grossly or microscopically." (Depo., p. 4) He later testified, however, that the death was caused by a "heat syncope" which caused claimant to fall in an abnormal position and have difficulty breathing. (p. 8) However, Tamisiea deposition exhibit 1, an autopsy protocol, which was taken before the actual deposition, stated that the cause of the cardiorespiratory failure was not identifiable and that there was no evidence of heat stroke.

Dr. Van Hofwegen testified that he treated the employee, attempting to revive him. He testified further (Dep., p. 9) that the death was caused by heat exhaustion and that claimant probably fell and had his airway obstructed, thus cutting off the oxygen to the brain. (p. 10).

Dr. Langstraat testified that there was a very real probability that the employee suffered a heat related collapse. (Trans., p. 39).

Both Dr. From and Dr. Ervanian testified that there was no indication of the reason for the cardiorespiratory failure. Dr. Ervanian went on to say (p. 10) that any statement as to causation would be conjecture.

The hearing deputy reasoned that the employee died shortly after his collapse. Claimant argues with good reason that the employee showed signs of life for some two hours after he collapsed. Since the employee was alive for those two hours after his collapse, the theory that claimant fell in an unnatural position and had his air supply cut off for some time must be dealt with. The most serious problem with that theory is that there is no evidence that he was in such a position for more than a few seconds and, further, no evidence that those few seconds would have been the basis of a continued lack of supply of air. Dr. Tamisiea conceded that it would be difficult to determine whether or not claimant's head was in "an effective position without seeing something physical demonstrated." (p. 14)

One realizes that medical opinions need not be couched in definite, positive or unequivocal language. (Sondag v. Ferris Hardware, 220 N.W.2d 903 [Iowa 1974].) Yet some explanation of why such a possible cause of death, which amounts to suffocation, is incumbent on claimant.

Tamisiea deposition exhibit 1, the first page, shows that the trachea, "is in the midline of the neck." Such a finding is neither stated as normal nor abnormal, making it impossible to infer whether the employee had damage to his windpipe. Thus, it is the lack of foundation for the opinions of Dr. Tamisiea and Dr. Van Hofwegen which damages their testimony. (Dr. Langstraat gave no opinion on the particular question of claimant's air supply being cut off)

The most convincing evidence was from the two pathologists whose whose profession deals with causation (as opposed to treatment) and whose evidence is a part of the record. The prevailing portion of Dr. Tamisiea's evidence is his initial impression contained in the autopsy protocol which stated that there was no evidence of heat stroke, a finding confirmed by Dr. Ervanian. The evidence of these two physicians is controlling here.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Finding 1. On August 12, 1981 the employee collapsed while working for defendant and died almost immediately.

Finding 2. The employee was given mouth-to-mouth resuscitation in a proper manner shortly after his collapse.

Finding 3. The employee was given CPR by Kevin Franker prior to the rescue unit's arrival.

Finding 4. The cause of the employee's death was cardiorespiratory failure, the origin of which was not shown in the evidence.

Finding 5. Claimant failed to prove decedent's death was in any way caused by his work.

Conclusion A. Claimant failed to prove decedent's death arose out of his employment.

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

The parties will pay the costs of producing their own witnesses and evidence.

Defendants will pay the costs of the court reporter at the hearing and for the transcript of the hearing.

Signed and filed at Des Moines, Iowa this 27th day of April, 1983.

Appealed to District Court;
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM E. DRIEMAN, Claimant, vs. IOWA STATE MEN'S REFORMATORY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	FILE NO. 675202 D E C I S I O N O N P A R T I A L C O M M U T A T I O N

INTRODUCTION

This matter is presented on a stipulated record. It was considered fully submitted with the filings of claimant's brief on June 17, 1983.

A first report of injury was received on July 20, 1981. An agreement for settlement was approved on November 24, 1982.

ISSUES

The sole issue in this matter is whether or not claimant should be granted a partial commutation to pay his attorneys' fees.

STATEMENT OF THE CASE

Claimant injured his right hand as he worked with a punch press at the Iowa State Men's Reformatory where he was incarcerated. The parties stipulated that the injury arose out of and in the course of his employment. An agreement for settlement approved on November 24, 1982 provided for the payment of $5,407.00 representing a 50 percent disability to the long finger, 45 percent to the ring finger and 45 percent to the little finger for a total of 35.25 weeks at a rate of $153.39. The agreement leaves open claimant's right to file a review-reopening or to seek further benefits under Iowa Code section 85.27.

On January 3, 1983 claimant filed for partial commutation to pay attorneys' fees. That application has been resisted by defendants.

APPLICABLE LAW AND ANALYSIS

Iowa Code sections 85.45 and 85.48 deal with commutations and provide in pertinent part:

> Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:
>
> When the period during which compensation is payable can be definitely determined.
>
> 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.
>
> ....
>
> Future payments of compensation shall not be commuted to a present worth lump sum payment when the employee is an inmate as set forth in section 85.59.
>
> ....
>
> 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 at the rate provided in section 535.3 for court judgments and decrees, with provisions for the payment of weekly compensation not included in the commutation, subject to the law applicable to such unpaid weekly payments; all remainingpayments, if any, to be paid at the same time as though the commutation had not been made.

Iowa Code section 85.59 also has relevancy:

> For the purposes of this section, the term "inmate" includes a person confined in a reformatory, state penitentiary, release center, or other state penal or correctional institution while that person works in connection with the maintenance of the institution or in an industry maintained therein or while on detail to perform services on a public works project.
>
> ....
>
> Weekly compensation benefits under this section may be determined prior to the inmate's release from the institution, but payment of benefits to an inmate shall commence as of the time of the inmate's release from the institution either upon parole or final discharge.
>
> If an inmate is receiving benefits under the provisions of this section and is recommitted to an institution covered by this section, the benefits shall immediately cease. If benefits cease because of the inmate's recommitment, the benefits shall resume upon subsequent release from the institution.
>
> ....
>
> Payment under this section shall be made promptly out of appropriations which have been made for that purpose, if any. An amount or part thereof which cannot be paid promptly from the appropriation shall be paid promptly out of money in the state treasury not otherwise appropriated.
>
> ....
>
> If a dispute arises as to the extent of disability when a memorandum of agreement is on file or when an award determining liability has been made, an action to determine the extent of disability must be commenced within one year of the time of the release of the inmate from the institution. This shall not bar the right to reopen the claim as provided by section 86.34*.
>
> Responsibility for the filings required by chapter 86 for injuries resulting in permanent disability or death and as modified by this section shall be made in the same manner as for other employees of the institution.

Claimant argues that a portion of Iowa Code section 85.60 is applicable. That portion states:

> ...However, the industrial commissioner may, if the industrial commissioner finds that dependents of the person awarded weekly compensation pursuant to section 85.33 or section 85.34, subsections 1 and
>
> 2, would require welfare aid as a result of terminating the compensation, order such weekly compensation to be paid to a responsible person for the use of dependents.

Claimant asserts that the same rationale for allowing dependents to receive payment of an inmate's benefits should be applied to the matter sub judice "not so that he might benefit, [but] so that those who undertook to assist him in pursuit of his claim will not be injured, but will be compensated for their diligence."

Defendants cite many rules for statutory construction. Regarding the workers' compensation act, the Iowa Supreme Court has said, "It is essential that simple words be simply construed, and that definite terms be not opened up to indefinite construction. The statute is always subject to amendment by the legislature. It is important that it not be amended by judicial construction." Brugioni v. Saylor Coal Co., 198 Iowa 135, 138 197 N.W. 470, ___(1924). Judicial engrafting also is frowned upon. Hawk v. Jim Hawk Chevrolet-Buick Inc., 282 N.W.2d 84, 91 (Iowa 1979). "Chapter 85, the Workmen's Compensation Act, is a creation of statute and, subject to constitutional limitations, may contain such provision and limitations as legislature may prescribe." Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, ___(1961).

Additionally defendants point out there really is no need for statutory construction. The statute could not be more clear or specific than saying that "[f]uture payment of compensation shall not be commuted to a present worth lump sum payment when the employee is an inmate...."

Section 85.60 cited by claimant is not applicable for two reasons. First it refers to dependents which the attorneys in this case are not; and, secondly, it relates to termination of benefits. There has been no termination in this case as benefits were never commenced.

At the time his petition was filed, claimant was an inmate. It is presumed that those who undertook to represent him knew the law and the difficulty they would encounter in attempting to obtain a fee as long as claimant is incarcerated. The undersigned does not find Iowa Code section 85.60 applicable in this case and she knows of no way around the provision in Iowa Code section 85.45. The intent of the legislature cannot be questioned.

Because denial of this partial commutation is being based on Iowa Code section 85.45(4), it is unnecessary to determine whether or not a partial commutation to pay his attorneys' fees is in the best interest of this claimant.

FINDINGS OF FACT

WHEREFORE, it is found:

That claimant filed an application in arbitration on July 17, 1981.

That claimant was represented by attorneys.

That claimant has incurred attorneys' fees in this matter.

That claimant's petition in arbitration resulted in an agreement for settlement approved November 24, 1982.

That as a result of an agreement for settlement claimant is to be paid thirty-five and one-quarter (35.25) weeks of compensation at a rate of one hundred fifty-three and 39/100 dollars ($153.39).

That claimant is an inmate at the Iowa State Men's Reformatory.

That no weekly benefits have been paid as a result of this injury.

That a partial commutation is personal to the injured employee.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant, an inmate, cannot receive a partial commutation to pay attorneys' fees.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That each party bear any cost incurred.

Signed and filed this 30th day of June, 1983.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD DYE, Claimant, vs. SAFWAY STEEL SCAFFOLDS COMPANY, Employer, and ST. PAUL COMPANIES, Insurance Carrier, Defendants.	File No. 704612 O R D E R

Be it remembered that on June 3, 1983 claimant filed an application to determine medical care. Defendants resisted on June 13, 1983.

A hearing was held before the undersigned on June 14, 1983 at the Industrial Commissioner's Office in Des Moines, Iowa.

The record consists of the testimony of the claimant; claimant's exhibit 1; and defendants' exhibit A.

The issue for resolution is whether the care by Kent Patrick, M.D., should be allowed.

Claimant testified that he sustained an injury at work on June 2, 1982. He was treated by a chiropractor, Dr. Jeffrey Meyers, for about a month and then treated conservatively until May 1983 by Kent Patrick, M.D., an orthopedic surgeon. Dr. Patrick discovered a rupture of the L4, L5 disc with bulging at the L3, L4 level in May 1983. Dr. Patrick considered that claimant was a candidate for surgery or chymopapain injection. On May 11, 1983 Dr. Patrick sent a letter to the insurer informing them of this development. Dr. Patrick informed the insurer that he planned to admit claimant to the hospital on May 1, 1983 for a myelogram, to see if the CT Scan which had been taken was confirmed. Both the injection and the disc surgery were discussed with claimant. Dr. Patrick was the authorized physician.

At this point, the defendants applied for, and claimant was ordered to see William Boulden, M.D., also an orthopedist, for examination pursuant to section 85.39, Code of Iowa. Dr. Boulden proposed and the insurer approved and authorized that he (Dr. Boulden) perform the injection, and defendants informed claimant that Dr. Boulden was the authorized physician. Dr. Patrick proposes to refer claimant to another physician for the injection while remaining the treating physician. Claimant wishes to remain with Dr. Patrick, objecting to Dr. Boulden's "bedside manner."

Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon the industrial commissioner in workers' compensation cases.

Section 85.27, Code of Iowa, states in pertinent part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care 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 situation in this case involves the removal of authorization from a physician previously selected (Dr. Patrick) and placing that authorization to another (Dr. Boulden). Under the strict interpretation of the Code, defendants have the right to do this. The Code, however, allows claimant an "out." He may apply to the commissioner for relief. He has. I have observed the claimant and read the proofs. Claimant needs treatment. I cannot say which alternative proposed is better. Both physicians are competent. Although Dr. Boulden is qualified to inject, Dr. Patrick proposes referral for the injection and continued treatment. This seems reasonable and a relationship between Dr. Patrick and claimant (formerly authorized by defendants) has been established. I am reluctant to sever a relationship which has been established by defendants. An order will be issued allowing care by Dr. Patrick.

IT IS THEREFORE ORDERED that the care proposed by Dr. Patrick be allowed.

Costs of this proceeding are taxed against defendants.

Signed and filed this 14th day of June, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRIAN ECCLES,	:	
Claimant,	:	File No. 510767
vs.	:	A P P E A L
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,	:	D E C I S I O N
Employer, Defendant.	:	

This matter was previously before this tribunal at which time it was found that claimant was covered by the Federal Employers' Liability Act (FELA) and therefore this tribunal was without jurisdiction over the subject matter. On judicial review the district court remanded to take evidence "on the question of whether the claimant's work duties included work in: (A) Interstate commerce and (B) Intrastate commerce."

REVIEW OF THE EVIDENCE

A deputy industrial commissioner conducted an evidentiary hearing and concluded that claimant's duties remained in interstate commerce. No recitation of his duties was included in the findings other than a job classification of machinist. The statement of facts contains references to the claimant as a "set up" man, advanced helper and working journeyman machinists jobs.

The record contains testimony that claimant's duties included "honing cylinders with cylinder oil and solvent and pressure testing...cylinder heads...for locomotive diesel engines." (Transcript, p. 5, l. 25 - p. 6, l. 7) "There may have been an occasional--say my job, if there wasn't any parts to run with my particular job, they would have me do something else...but it would be right in that area." (Tr., p. 11, l. 23 - p. 12, l. 1) The duties would have been very similar to a machinist. (Tr., p. 12) A machinist's duties in the Oelwein shop in general were "the repair and rebuilding of diesel locomotives and engines and engine rebuilding, reclaiming of diesel components." (Tr., p. 14, ll. 1-3) "An advanced helper is when there is [sic] not enough journeymen available to fill all the machinist's jobs we will take a helper and advance him to what we call, in short, a set-up man, it is called at times, and he will work this journeyman machinist's jobs until a journeyman becomes available. This is what Brian [claimant] was doing." (Tr., p. 14, ll. 16-22)

The defendant is an interstate common carrier by rail operating in eleven states. (Tr., p. 23) The function of the Oelwein shop is to rebuild and repair locomotives and locomotive component parts. The locomotives come from various states throughout the system. (Tr., p. 24) When the locomotives are reconditioned they are assigned back out to someplace in the system. (Tr., p. 25)

As the action which is being maintained is for a skin rash claimed to have developed while working with oils and chemicals in the machine shop (Petition) and while cleaning engine parts with water treatment additives and solvent (Attachment to Petition), it is the duties connected with the use of these properties which need be determined to be in interstate or intrastate commerce.

ISSUE

The limited issue on remand is for findings regarding the interstate or intrastate nature of claimant's duties. A sub-issue to this finding is whether or not the industrial commissioner has the power or jurisdiction to make an award.

APPLICABLE LAW

The court annulled a state workers' compensation award to a railroad's car repairman, who at the time of his injury was repairing a maintenance car, used in removing obstacles from tracks overwhich interstate and intrastate commerce moved, holding that the FELA was the only remedy available. Southern P. Co. v. Industrial Acci. Commission, 120 P.2d 880 (1942).

An employee of an interstate railroad who is injured while engaged in building new cars which are to be used by the railroad in interstate commerce is within the coverage and entitled to the benefits of the FELA as amended in 1939. (a) Under the 1939 amendment of section 1 of the Act, the test of coverage is whether any part of the employee's duties as a railroad employee furthers interstate commerce or in any way directly or closely and substantially affects such commerce.

An employee of an interstate railroad who was employed as a wheel molder in the railroad's wheel foundry, where worn wheels are sent from the railroad's lines for remolding and eventual return to the railroad's rolling stock is within the coverage of the FELA. Southern Pacific Co. v. Gileo et al., 351 U.S. 493 (1955).

An employee engaged in operating a crane which was used in lifting locomotive wheels in a repair shop was held to be engaged in the furtherance of interstate commerce within the provisions of the amended act.

> The word "futherance" is a comprehensive term. It's periphery may be vague, but admittedly it is both large and elastic. It would not be an undue stretching of it to hold that one who is engaged with others in the process of repairing the car so that it may thereafter be moved in interstate (or by happenstance in intrastate) commerce, is engaged in an occupation "in furtherance" of interstate commerce. Shelton v. Thomson, 148 F.2d 1 (1945).

An employee engaged in repairing a boxcar which had been withdrawn from service for repairs was held to be covered by the FELA. The court held that it was not necessary to find that the boxcar itself was being employed in interstate commerce while it was in the yards under repair, stating that all that was necessary for the application of the Act as amended was a finding that the employee's duties or any part of them were in furtherance of or closely affected interstate commerce. From the facts of the case, it appeared that the plaintiff was regularly employed in repairing and rebuilding freight cars which were used in interstate commerce. Maxie v. Gulf, M. & O. R. Co., 358 Mo 1100, 219 S.W.2d 322 (1949).

An employee who was injured while repairing an engine, which had previously been used in interstate commerce and was to resume such service as soon as repaired, is covered by the FELA. Edwards v. Baltimore & O. R. Co., 131 F.2d 366 (1942).

A tinsmith employed in the locomotive repair shop of an interstate railroad, who was injured while repairing a locomotive, is covered by the FELA. Bretsky v. Lehigh Valley R. Co., 156 F.2d 594 (1946).

Coverage of the FELA extended to a railroad employee whose duties were to clean, paint, and make minor repairs on engines used in interstate transportation who was injured while walking across the yard to his work after reporting at the defendant's office. Williams v. Chicago, R. I. & P. I. Co., 155 Kan 813, 130 P.2d 596 (1942).

An employee who was injured while doing repair work on a train engine which had been taken out of interstate commerce was held to be covered by the FELA, even though the ICC had been notified that the engine was taken out of the stream of commerce. Wheeler v. Missouri - Kansas - Texas R. Co., 205 S.W.2d 906 (Tex. 1949).

The Federal Employers' Liability Act (45 U.S.C. §§51 et seq.), makes comprehensive provision for the liability of interstate railroads in cases of injury to or death of employees in the course of their interstate employment and arising from the negligence of the employer. The theories of the worker's compensation and employers' liability act are at variance. The compensation act, ideally, should give automatic protection to the worker for all industrial accidents, irrespective of fault. The amount of recovery is limited by statute, and payment should be immediate and automatic. The employers' liability act, on the contrary, imposes liability only for negligence, and the amount of damages is commensurate with the injury. See Richter and Forer, Federal Employers' Liability Act-A Real Compensatory Law For Railroad Workers, 36 Cornell L.Q. 203 (1951).

In rulings dating from the enactment of the federal statute it has almost invariably been stated that the FELA superseded state law insofar as the two cover the same field. The first case to squarely present the question of a state's power to award workers' compensation where the FELA also applies came before the supreme court in New York C. R. Co. v. Winfield, 244 U.S. 147 (1917). In that particular case a railroad employee was injured while working, not due to any fault or negligence on the part of the carrier. The supreme court first ruled that the employee was working in interstate commerce, and then held that the employee's sole remedy existed in the FELA which operated to supersede the state compensation statute. The language of the majority opinion left little doubt as to the court's position:

> It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Id. at 148
>
> ....
>
> Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the law should be uniform and not change at every state line. Id. at 149

In quoting the House Committee report on the FELA the court stated: "A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce." Id. at 150

Later in the opinion the court stated:

> True, the act does not require the carrier to respond for injuries occurring where it is not chargable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imported to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the state free to require compensation where the act withholds it. Id. at 150

The rule expounded in New York C. R. Co. v. Winfield, appears to have withheld the test of time to become firmly established supreme court case law. The issue apparently has not been directly addressed since Winfield, although the court has made inference to the Winfield rule on several occasions and indicated approval thereof. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Collins v. American Buslines, 350 U.S. 531 (1956); Baltimore & Ohio R. Co. v. Kapner, 314 U.S. 54 (1941).

The courts in Iowa have generally followed the lead of the U.S. Supreme Court. In Johnston v. Chicago & N.W. Ry. Co., 208 Iowa 202 (1929), the Iowa Supreme Court stated: "It is apparent that, if the facts bring the case within the Federal Employers' Liability Act, then the industrial commissioner was without power or jurisdiction to grant relief, for in that event the employee must result to the federal act." In O'Neill v. Sioux City T. R. Co., 193 Iowa 41 (1922) the court stated: "The decedent was doubtless engaged in both interstate and intrastate commerce. The rule is, where an employee is at the same time engaged in both interstate and intrastate commerce, and receives an injury, recovery for such injury can only be had under the Federal Employers' Liability Act, as the state statute on the same subject is excluded by reason of the supremacy of such act."

Early FELA litigation primarily concerned "who" was working in interstate commerce. In 1939 the FELA was amended to add the following:

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered so being employed by such carrier in such commerce and shall be considered or entitled to the benefits of this chapter. 45 U.S.C. §51.

The effect of this amendment was to significantly broaden the scope of the FELA and made it clear that the act applied even when it appeared that an employee whose general duties consisted of servicing interstate and intrastate activities of a carrier may have been engaged in the intrastate operation at the time of the injury. The rule, existing prior to the 1939 amendment, that the FELA superseded all state law on the subject covered by the federal statute apparently has not been affected by the 1939 amendment, even as to cases brought within the scope of the act by the amendment. The only state court to take exception was the South Carolina Supreme Court which stated: "...if it had been the intention of Congress to completely abrogate all state law on the subject, it seemed most reasonable to suppose that the amendment would have carried the definite provision that the FELA was to be exclusive." Boyleston v. Southern R. Co., 211 S.C. 232 (1947).

One area of FELA litigation which opened up after the 1939 amendment is the right of parties to "waive" their rights under the federal statute, thus becoming eligible for compensation under the state workers' compensation statute. Section 5 of the FELA provides:

> Any contract, rule, regulation or device whatsoever, the purpose of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 U.S.C. §§51 et seq.] shall to that extent be void; provided, that in any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. 45 U.S.C. §55.

While this section of the FELA clearly prohibits an employer from exempting itself from the FELA as a condition of employment, the supreme court has indicated that the parties may voluntarily waive their federal rights in order to facilitate the final compensation of an injured worker. Such a waiver of rights may not be unilateral and is subject to the statutes of the individual states. In New York, §113 of the Workers' Compensation Law provides for such a waiver:

> [a]wards...may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer, and the insurance carrier waive their admiralty or interstate commerce rights and remedies.

In South Buffalo Ry. v. Ahern, 344 U.S. 367 (1953), a railroad employee was injured (in 1945) and awarded compensation under the New York Workers' Compensation Laws, despite the employers' contention that there was no causal connection.111he employee died in 1949. At a hearing to determine the final disability death award, appellant challenged the state board's jurisdiction, claiming that the FELA applied. This argument was rejected by the state board, the New York courts, and the U.S. Supreme Court which stated: "Section 113 is a permissive statute allowing the interested parties to forego voluntarily their federal rights and choose a third party, the state Compensation Board, to compromise a personal injury claim." Id.

ANALYSIS

The record in this case concerning the nature of the employee's work is basically not in dispute; he was a machinist who worked on the repair and rebuilding of diesel locomotive engines which came to be repaired from a common carrier which operated in eleven states. Therefore, although claimant himself may have only worked within the state of Iowa, his duties for that common carrier, his employer, were in the the furtherance of interstate commerce as defined by the numerous cases cited above. As indicated in Johnston, 208 Iowa 202, and O'Neill, 193 Iowa 41, if coverage is provided by the FELA the Iowa Workers' Compensation Act is excluded by reason of supremacy and the industrial commissioner is without power or jurisdiction to grant relief. Here, by reason of the nature of his employment, claimant would thus not be covered by the Iowa Workers' Compensation Law. There is no evidence that a waiver of the provisions of FELA was intended.

FINDINGS OF FACT

1. Claimant's duties included honing cylinders with cylinder oil and solvents and pressure testing cylinder heads.

2. Claimant's action is based on dermatitis caused by contact with oils and chemicals in his employment.

3. The cylinders were for use in diesel locomotives and engines.

4. Defendant operated an interstate carrier by railroad in eleven states.

5. The locomotives and locomotive component parts repaired, rebuilt and reclaimed in the Oelwein shop were for use throughout the defendant's rail system.

6. Claimant's duties were in the furtherance of interstate commerce.

7. There was no bilateral waiver of the provisions of FELA.

CONCLUSIONS OF LAW

1. Claimant, at the time of his exposure to oils, solvents and chemicals, was engaged directly or closely and substantially in the furtherance of interstate commerce as an employee of a common carrier by railroad covered under the provisions of the Federal Employers' Liability Act.

2. The FELA is superior to the Iowa Workers' Compensation Act and Iowa Occupational Disease Law.

3. The Iowa Industrial Commissioner is without power or jurisdiction to grant relief to claimant.

ORDER

THEREFORE, the claim for benefits under the Iowa Workers' Compensation Act or Iowa Occupational Disease Law is denied.

Signed and filed this 24th day of January, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HENRY L. EHRHARDT, Claimant, vs. BENDEROFF & ASSOCIATES, INC., Employer, and BITUMINOUS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 605257 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Henry L. Ehrhardt, claimant, against Benderoff & Associates, Inc., employer, and Bituminous Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on September 4, 1979. Claimant's rate of compensation as stipulated by the parties and indicated in the memorandum of agreement previously filed in this proceeding is $154.74. A hearing was held before the undersigned on April 13, 1982. The case was considered fully submitted upon receipt of the trial transcript on May 6, 1982.

The record consists of the testimony of claimant, Marilyn June Heatherton and Ronald Monson; claimant's exhibits 1 through 9; and defendants' exhibits A through K and M.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing are whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim; the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; and whether some of claimant's medical bills were unauthorized.

FACTS PRESENTED

On September 4, 1979 claimant received an injury arising out of and in the course of his employment with defendant when while attempting to pick up two other employees, his pickup was hit in the rear by another vehicle. Claimant indicated he did not think he was seriously injured, but did feel a little dizzy. Claimant disclosed that he went back to work and worked for a couple of days. Claimant testified that driving began to bother him. Claimant stated:

> Q. What were your symptoms at this point then?
>
> A. Ah, just--Well, what was bothering me, basically, was just driving. Every time I'd hit a bump, my whole spine would just--oh, the whole thing hurt. It was painful. Headaches. I was getting severe headaches from where I couldn't hardly even see. I mean, it was painful.
>
> Q. Had you ever had any symptoms like that before the accident?
>
> A. Never.

Two or three days after the accident, claimant called defendant by radio and told them he was going to see a doctor. Claimant was given some pain pills and told to return to work. Claimant indicated that a day or two later he went to Mercy Hospital where he saw a different doctor. He was given a cervical collar and told to remain off work for a week. While off work he went to see his own physician, Robert L. Borgman, M.D., who in turn referred claimant to S. J. Laaveg, M.D.

Claimant testified that he was released to return to work on January 9, 1980, but was informed by defendant that they did not have any work for him. Claimant stated he had restrictions at that time of no lifting, but that he could work into it gradually. Claimant testified that he tried to get work with defendant several times, but was told by them that his work had not been satisfactory. Claimant indicated he has continued to try to find employment even though he is under doctor's orders not to work. Claimant stated:

> Q. What sort of work have you applied for?
>
> A. Oh, such as pumping gas. I've been tryin' to go back to school, and really I haven't looked for work that hard. It's hard to find a job where you can sit most of the time and get up and walk around when you want to or go lay down. (Trans., p. 23.)

Claimant indicated that he tries to do exercises three times a day. Claimant stated:

> Q. Would you just briefly describe where you have your pain right now?
>
> A. I have constant low back pain. My mid back has bothered me at present, and my neck is bothering me again. Get headaches. Got one right now.
>
> Q. Would you describe where your head hurts?
>
> A. At the base of the skull, right at the very top of your spine. And headaches seem to start there and they go into your temples. At times I see spots now, little white spots flying every which way. I'm not seein' them at this time, no, but--
>
> Q. Do you have any pain when you do your exercises?
>
> A. Yes, sir.
>
> Q. And where would this pain be localized?
>
> A. It's in my back. Just all of it. Just my shoulders even. They get extremely painful. I've got another exercise I do where I'm supposed to lay on my stomach and raise my arms as high in the air as I can and hold it for a count of four. I don't remember the names of 'em, but I just do 'em. (Trans., p. 25.)

Claimant disclosed that his arms, hands and fingers go numb on him and that he loses the use of them when said condition is upon him. Claimant indicated that this condition has increased in duration since his injury.

On cross-examination claimant revealed that he has a drinking problem, but indicated that it did not affect his work. Claimant also disclosed that at the time of the accident, he did not think he was injured. Claimant stated:

> Q. How long did you work before you took any time off or before you no longer went back to work, do you remember?
>
> A. No, sir. I'm certain that you got the records.
>
> Q. Okay. And you worked up until you were excused from work by a doctor, and then you never went back to work again, did you?
>
> A. No, sir.
>
> Q. Except only after you were released by Doctor Laaveg in January?
>
> A. When I was released by Doctor Laaveg, I tried to go back to work, and I looked for work during that time.
>
> Q. During what time?
>
> A. During the time that I--from the time that Doctor Laaveg released me to go back to work up until the time that my back really started botherin' me again, I've been looking for work.
>
> Q. Now, let's see if we can't clarify a little bit as to what the situation was when Doctor Laaveg released you to go back to work. If I understood it correctly, you said that Doctor Laaveg put restrictions on you, that you were to do no lifting and to work gradually; did I get that right?
>
> A. That's right.
>
> Q. And if you had any severe pain, to get back in touch with him?
>
> A. Yes, sir.
>
> Q. Now, do you recall being given a return back to work slip by Doctor Laaveg?
>
> A. Yes, sir, I do.
>
> Q. And in fact, you testified I think in your deposition that that work slip had restrictions written on it; did it not?
>
> A. I believe so.
>
> * * *
>
> Q. I'm gonna hand you what's marked Defendants' Exhibit H. Would you please take a look at that and tell me what that is?
>
> A. It's just a release to go to work. It says can return to regular work, physical education, on 1-7-80. Restrictions, it doesn't have any.
>
> Q. It's signed by Doctor Laaveg; is it not?
>
> A. Apparently.
>
> Q. And dated 12-13-79, and allowing you to return back to work without restriction on January 7, 1980?
>
> A. Those are not the orders he gave me, though.
>
> Q. I see.
>
> A. Apparently--
>
> Q. You've had an opportunity, I assume, to see Doctor Laaveg's written report. Do you recall any restrictions in his written report that are not contained on this?
>
> A. I know that I had a slip that was smaller, narrower and longer. It had it right on it that I was not supposed to be doing any lifing.
>
> Q. Are you saying that Doctor Laaveg would have made out two return to work slips, one with restrictions and one without?

A. This had my orders on it, is what I was supposed to do. This is a release to go to work. But it still had my doctor's orders. (Trans., pp. 51-53.)

Claimant revealed that approximately a year passed from when Dr. Laaveg released him to return to work and when he next saw him. Claimant was in the hospital from November 8, 1979 until November 14, 1979 because of back pain, GI bleeding and alcohol abuse. Claimant indicated he did not recall being in a hospital in April or May 1980. Claimant stated:

Q. Now, in the history that you gave to Doctor Powell, you refer to nausea, headaches, with numbness and tingling in the extremities, which was a long-standing problem over ten years. Do you remember that?

A. It's possible. I don't recall exactly, no. He's a psychiatrist, anyway. He's not an MD. (Trans., p. 62.)

Claimant was again hospitalized in February 1981. Claimant revealed that since his injury, he did go over a bump too fast while driving. Claimant stated:

Q. Okay. Now I'm gonna refer you to what I understand to be the next time that you were hospitalized, and that was on April 3 through 4, 1981, as shown on Exhibit G, and this was again for alcoholism and alcohol and amphetamine chemical dependency. Do you remember that?

A. No, I don't recall all of these. Which doctor do we have now?

Q. Now, that was shortly after you had been examined by Doctor Walker, a few weeks later--excuse me, a few weeks earlier, and I note in this particular instance you do refer to the fact that you had a bad back, and that you had two fractures on your right hand. Do you remember what happened to cause you to fracture two bones in your right hand?

A. That cannot be correct, because the only fracture, I broke my right finger. A drive shaft fell on it. And my left finger I broke when I laid my van on its side in a rainstorm one night.

Q. Well, this refers to two fractures of the distal fourth and fifth metacarpals on the right hand.

A. This is the only finger I can ever remember breaking on this hand.

Q. Do you remember how that got broke?

A. Oh. Wait a minute. I did break a bone in my little finger. I did have both of these broke on my right hand. I slapped a guy and I broke my hand above the knuckle, just above my little finger.

Q. And that would have been when?

A. I don't know.

Q. Shortly before you were hospitalized?

A. I guess so.

Q. In April, 1981?

A. They put a cast on it, and I took it off, threw it away.

Q. Doctor McCoy put the cast on or Doctor Laaveg, do you remember?

A. It wasn't Laaveg. I know that.

Q. Do you remember when you were next hospitalized.

A. No, sir.

* * *

Q. Now, in fact you have been experiencing the problems regarding numbness since you were about nineteen years of age; isn't that true?

A. The numbness in my arms?

Q. And the tingling in your arms.

A. Yes. For approximately nineteen or twenty years of age. But that's only when I was sleeping or, you know, with my arms above my head. That's the only time it ever bothered me until that accident. (Trans., pp. 65-68).

Claimant also revealed that as a result of going over a bump in June 1981 in a car, his spine felt like it had been injured.

Marilyn June Heatherton testified that she works for defendant as a secretary and office manager. Ms. Heatherton stated that claimant gave her his return to work slip, but did not state he had any restrictions. Ms. Heatherton indicated that at the time she was given the slip, everyone was layed-off except salaried supervisors. Ms. Heatherton testified that claimant was not hired back in the spring because they did not have as much work as the previous year.

Ms. Heatherton indicated it was company policy to allow employees who were injured on the job to use a doctor. Ms. Heatherton disclosed that claimant worked through September 14, 1979.

Ronald Monson testified that in 1979 and 1980 he worked for defendant as a superintendent. Mr. Monson also indicated that in January of 1980 only salaried employees remained on the job while all hourly employees were layed-off.

In his report of October 7, 1981, S. J. Laaveg, M.D., stated:

IMPRESSION:
1. Persistent cervical pain following a motor vehicle accident.
2. Persistent low back pain with congenital abnormality and left L5 sacralization neurologically intact.
3. D12 fracture, probably acute. (Note the patient offered no history of recent accident and it was only by looking at the x-ray jacket from Mercy Hospital that I picked up the above history.)
4. Long standing history of alcohol abuse.
5. History of duodenal ulcer disease with frequent G.I. bleeds.
6. Intermittent diagnosis of thoracic outlet syndrome with no obvious clinical evidence but symptoms consistent with this.
7. Old fracture of the right clavicle.

I discussed the above with the patient. I would suggest to him that he would not be doing any heavy lifting in the next 5-6 weeks since he apparently had a fresh fracture of D12. I still am not finding any major reason for organic disease of his cervical pain or lumbosacral pain. I would expect this to continue to gradually resolve with time. I do not think there is any permanent impairment on the basis of his pain from the accident in 1979. The D12 fracture will result in some permanent partial impairment on the basis of the fracture but appears unrelated to the previous injury.

The patient volunteers that he has worked intermittently as a guitarist in a band which he has done for several years. He refuses to tell me what the name of the band is "because of tax purposes." The patient has presently undergone a divorce with the last few months.

The second page of defendants' exhibit F, which appears to be from Dr. Porter, M.D., and dictated February 20, 1981, contains the following:

MEDICATIONS: The patient takes ____p.r.n. for dosage up to 75 mg. at times. ALLERGIES: None stated. SURGERIES: None. HOSPITALIZATIONS: The only one mentioned was for the previous GI bleed.

Patient denies recent illness. No problems with eyes or ears. Denies any fainting or seizure problems. No known heart or lung problems aside from mild asthma which appears to be primarily seasonal. Smokes three packs of cigarettes a day. No other history of GI complaints. No episodes of melenotic stools in the past and denies liver disease. No GU complaints. No other back, neck or extremity problems except for some numbness in the right arm which is intermittent. Denies hypertension, diabetes.

In a report dated March 20, 1981, John R. Walker, M.D., stated:

OPINION: This patient seems to have had in the past, symptoms of a thoracic outlet syndrome. There does not seem to be a true cervical rib as I see it. The accident seems to have increased the so called thoracic outlet syndrome, at least temporarily. This patient feels that the chiropractic treatments may have helped this and I presume that this is possible. He certainly has a sprain of the cervical spine which is producing the headaches and possibly some of the radicular pain that he describes in the upper extremity. He also has a sprain of the low back with a very minimal sprain of the dorsal region, as indicated above.

All-in-all I would think that with proper treatment and an exercise program, it might be possible to rehabilitate this patient. However, as far as true rehabilitation is concerned, I think he would be much better off, being trained for something he could handle, which would not involve the heavy work that he was involved with in construction. It is my feeling, that after listening to his story and examining him, that he has suffered some permanent injuries which are likely not to clear up and they are directly a result of the accident. This is particularly in lieu of the diagnosis of:

1.) Sprain of the cervical spine with referred headache, of if you wish, whiplash.

2.) Sprain of the lumbar spine.

3.) A probable mild, exacerbation of his thoracic outlet syndrome.

Dr. Walker, in his report of July 24, 1981, states:

The above captioned patient comes in and he is not particularly improved. When he left the hospital he seemed to be doing quite well, but seems to have slipped back. According to his statement, he now continues to have the same complaints as on my initial examination of 3-20-81. His headaches have eased up some according to his statement. He has two to three a week and they originate and stay in the frontal region. However, he complains of numbness in his arms and fingers rather markedly. He states that his low back hurts "like the dickens" all of the time. He complains rather bitterly of the numbness in his hands and arms. It is not well-localized.

Examination today is not remarkable again. It is about the same. His grip on the right is 110 kiloponts and on the left it is 120 kiloponts and this is a fairly good grip bilaterally. The reflexes are $1^+/1^+$ including the biceps, triceps and forearm reflexes. the patellar, ankle and plantar reflexes are also $1^+/1^+$. He is tender throughout the cervical spine. Motion is fairly good, but uncomfortable and there is some crepitation. He is tender in the lumbosacral area.

OPINION: It appears that this man is going to continue on with this course of pain and discomfort complaint. Basically I would certainly think that he should have a cervical and lumbar myelogram, but because of his emotional problems and the drinking problem and all the problems that he does have, perhaps it is not well to pursue this course of treatment. He undoubtedly had some permanent disability prior to this but as a result of his injuries I would say that he has an additional permanent, partial disability of 22% of the body as a whole.

In his report of December 2, 1981, Dr. Walker noted that claimant had another injury to his dorsal spine in June 1981, but he did not change his rating of claimant's permanent impairment.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 4, 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 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, 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).

ANALYSIS

It must be pointed out that the undersigned finds the claimant not to be credible. There are a great number of inconsistencies in claimant's testimony as well as an inability on claimant's part to remember certain events. Some of his testimony is contradicted by other witnesses and some of his testimony is contradicted by the reports that were received into evidence. At the time of hearing, the undersigned was not impressed with claimant's demeanor. It is apparent that claimant has exaggerated some and appears to have a lack of candor. Obviously, the evidence which is based on claimant's declarations is also suspect.

Claimant has failed to prove he has any permanent partial disability which is causally connected to his injury of September 4, 1979. The opinion of Dr. Laaveg that claimant has no permanent impairment is given more weight than that of Dr. Walker because Dr. Laaveg saw claimant closer in time to his injury. Furthermore, the history that claimant gave Dr. Walker regarding the onset of symptoms is contradicted by the police report of the accident.

Claimant, in his argument at the conclusion of the hearing, appeared to argue that he is entitled to permanent partial disability because he has an actual reduction in earnings resulting from defendant's failure to rehire him. The greater weight of evidence indicates that defendant did not rehire claimant because they did not have any work to do. Claimant's injury appears to have had no effect on claimant's decision not to rehire claimant.

It should be noted that claimant failed to prove that his second injury, which occurred when he was riding in another car in June 1981, was caused by his injury in 1979.

Claimant has met his burden of proving that he is entitled to temporary total disability benefits from September 15, 1979 (the first day claimant missed work as a result of his injury) until he was released to return to work by Dr. Laaveg on January 7, 1980. It would appear from the greater weight of evidence that claimant reached maximum recovery at that time.

The greater weight of evidence indicates that claimant did not attempt to get authorization for medical care from defendants regarding treatment by Dr. Walker or any chiropractors. Since claimant did not follow the requirements of §85.27, defendants are not liable for the expenses related thereto. Claimant's exhibit, which appears to be from Schoitz Memorial Hospital, is apparently related to the treatment of Dr. Walker. Claimant has failed to causally connect exhibit 9 to claimant's injury and no itemization was presented which would help the undersigned determine its relevance. Furthermore, since claimant's exhibit 8 is not itemized, the undersigned cannot determine whether defendants are liable for it.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, IT IS FOUND:

FINDING 1. On September 4, 1979 claimant was injured while working for defendants.

CONCLUSION A. By filing a memorandum of agreement, the defendants admitted that claimant's injury arose out of and in the course of his employment with defendant.

FINDING 2. As a result of his injury, claimant has no permanent impairment.

FINDING 3. Although claimant was not hired by defendant when released to return to work, the decision regarding claimant's reemployment by defendant was in no way based on his injury.

FINDING 4. Claimant last worked for defendant on September 14, 1979.

FINDING 5. Claimant was released to return to work without any restrictions on January 7, 1980.

FINDING 6. Claimant reached maximum recovery on January 7, 1980.

CONCLUSION B. Claimant met his burden of proving he is entitled to temporary total disability benefits from September 15, 1979 until January 7, 1980.

FINDING 7. Defendants did not authorize claimant's treatment by Dr. Walker or by any chiropractors.

FINDING 8. Claimant did not attempt to get any authorization for treatment by Dr. Walker or by any chiropractors.

CONCLUSION C. Defendants are not responsible for the medical bills of Dr. Walker or Masters Chiropractic Clinic.

FINDING 9. Claimant did not show what the charges shown in exhibits 8 and 9 are for.

CONCLUSION D. Claimant failed to causally connect the charges in claimant's exhibits 8 and 9 to his injury.

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant sixteen (16) weeks and two (2) days of temporary total disability at the rate of one hundred fifty-four and 74/100 dollars ($154.74) per week.

That defendants are to be given credit for all benefits previously paid.

That defendants are to pay the costs of this action which shall include ten dollars ($10) to be paid to this agency for rental of space at the Post Office for hearing.

That all accrued benefits shall be paid in a lump sum together with interest at the rate of ten (10) per cent per year pursuant to §85.30, Code of Iowa, as amended.

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

That if the parties are unable to determine the amount of credit to be given to defendants because of the settlement entered into with the third party, they can resubmit that issue to the undersigned.

Signed and filed this 24th day of September, 1982.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD FELDHACKER,	:	
	:	File No. 666873
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
WILSON FOODS CORPORATION,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

This is a proceeding in review-reopening brought by Edward Feldhacker, the claimant, against Wilson Foods Corporation, the employer and holder of a certificate of exemption as contemplated by §87.11, Code of Iowa 1981, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an admitted industrial injury which occurred on October 22, 1980 and became disabling on February 14, 1981 and continuing until April 12, 1981, resulting in lost time by the claimant of 8.286 weeks from employment at the agreed weekly rate of $269.69.

This matter was heard in Storm Lake, Iowa on November 2, 1982 and considered as fully submitted at the conclusion of the hearing.

The record in this matter consists of the testimony of the claimant, Lottie Sweet, Faith Utesele and Keith Garner, M.D. Due to the technical character of Dr. Garner's testimony, the undersigned requested a transcript of his testimony. The record also contains the evidentiary deposition of John Connolly, M.D., and Leo Jordahl, together with claimant's exhibits 1 through 4; defendant's exhibits A and B; and commissioner's exhibit 1.

Defendant filed a memorandum of agreement on April 23, 1981 disclosing that beginning on February 14, 1981 claimant was paid a period of temporary total disability of 8.286 weeks.

Defendant's first report of injury states that claimant's injury occurred on February 13, 1981. Based upon the evidence submitted, the date so described is in error; February 13, 1981 being the day that claimant began to lose time from his normal duties. It is found that claimant fell at work on October 22, 1980. The vital question then appears to be whether or not defendant may now dispute claimant's claim for permanent partial disability or whether or not the defendant is estopped from doing so in accordance with the doctrine of Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975) which precludes inquiry as to "whether an employer-employee relationship existed" and "as to whether the injury on that date arose out of and in the course of the employment."

Defendant makes no claim that its memorandum of agreement was erroneously filed due to fraud or mistake. It follows then that defendant is bound by its filing and admits as a matter of law that the injury did occur and arose out of and in the course of claimant's employment.

The issue so formed requires a determination of the extent of claimant's disability, if any.

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

Claimant is aged 39 and married with two dependent minor children, and who may be described as having ten years of meat packing experience. In 1979 claimant began to work for the defendant and is now foreman of the converting room being in charge of a fifty-nine man crew, having had substantial production line experience.

On March 10, 1977 while employed by Spencer Foods, Inc., claimant fell while loading hides into a box car. (Defendant's exhibit B; industrial commissioner's file 466972.) As a result thereof, claimant suffered a ten percent functional impairment of the body as a whole by reason of a compression fracture of D-4. Claimant returned to work on July 24, 1977.

Claimant testified that he began to experience left shoulder problems while sawing pork loins immediately after commencing employment with the defendant on April 4, 1979. Claimant's first visit to the company-retained physician regarding shoulder complaints was on October 3, 1979 and again on December 21, 1979 (commissioner's exhibit 1). Claimant testified that on November 3, 1980 his left shoulder was "still bothering [him] since [the] injury of December of 1979" as well as from the industrial fall on October 22, 1980. Claimant stated he slipped on a piece of fat causing him to catch his left bicep on a four foot post as he fell on his buttocks.

Claimant was referred to A. D. Blenderman, M.D., an orthopedic surgeon in Sioux City, Iowa, by a company physician.

Dr. Blenderman reported his findings in a report to the defendant on November 11, 1980, in part, as follows: "DIAGNOSIS: BICIPITAL GROOVE TENDINITIS. (2) POSSIBLE, THOUGH NOT PROBABLE ROTATOR CUFF INJURY." After a number of visits claimant ended his treatment by Dr. Blenderman on December 9, 1980 who then reported, in part, as follows (claimant's exhibit 3):

> Therefore, the patient had decided he is going to try to do some exercises on his own and wait for one or two and possibly three months before he makes his decision as to whether or not he wants to have any surgery done on the shoulder. If he does, he will let me know.
>
> On the basis of the bicipital groove tendinitis, which is probably work-related, I would feel he has a 10 percent disability of the upper extremity. No further appointments have been made for the patient, but I would re-evaluate at his request.

Dr. Blenderman concluded by inference that claimant's diagnosed tendinitis was caused by claimant's work activity and rated claimant at fifteen percent functional impairment of the shoulders.

Dr. Keith O. Garner, the company physician, testified that on November 3, 1980 the claimant failed to advise a fellow physician that he had fallen on October 22, 1980.

In light of defendant's subsequent filing of a memorandum of agreement, this decision is bound by defendant's admission that an industrial injury did occur on the date and circumstances as alleged by the claimant as a matter of law.

Dr. Garner referred claimant to John Connolly, M.D., an orthopedic surgeon and chairman of the Orthopedic Department of the University of Nebraska Medical Center.

Following his examination and surgery Dr. Connolly reported on February 20, 1981, in part, as follows (claimant's exhibit 4):

> This is a follow-up note on Ed Feldhacker, the gentleman we admitted with the left shoulder problem. As I mentioned, I felt he had findings consistent with bicipital tear. We explored his shoulder on Tuesday and found that he had completely ruptured the long head of the biceps and this had retracted down into his arm. I explored the bicipital groove and found the proximal end of the tendon frayed considerably and degenerative. I removed the proximal end of the tendon and brought up the distal end of the tendon and fixed it into a keyhold in the humerus. This gave him good fixation and I anticipate we will allow him to start moving the elbow in approximately two weeks.

On April 12, 1981 claimant returned to employment following his surgery of February 17, 1981.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on October 22, 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).

In applying the foregoing to the case at hand, it is clear that the claimant sustained an industrial injury on October 22, 1980 and that said injury arose out of and in the course of his employment duties.

Defendant raises the issue in its brief that the injury found in claimant's left bicep at the time of Dr. Connolly's surgery was not caused by the fall, but by claimant's deer hunting activity during the bow and arrow season. Defendant's filing of a memorandum of agreement following its own investigation gives little credence to its posture of denial.

Leo Jordahl, labor relations and personnel manager at the time of claimant's October 22, 1980 injury, testified by evidentiary deposition. Mr. Jordahl's major concern in this matter appears to be that claimant went deer hunting with a bow and arrow during the 1980 deer season. Claimant testified that while he did go deer hunting, he used an illegal crossbow. Official notice is taken of the fact that a crossbow is cocked with a mechanical lever and that the cocking operation is done with one arm due to the mechanical advantage supplied by the lever, and defendant's posture that claimant sustained this arm injury as a result of deer hunting is not well taken.

The key medical witness in this matter is the operating orthopedic surgeon. Dr. Connolly discovered a "Popeye" effect in claimant's left bicep upon examination. (Depo., p. 4, l. 15.)

Surgical intervention disclosed a ruptured tendon which was repaired. (Depo, p. 5, l. 12.)

Of note is Dr. Connolly's testimony as follows (depo., p. 8, l. 8):

> Q. All right. Now, as far as the injury, you described that as a rupture. And your patient described a painful-or pain from a period of about some 15 months or so before the rupture. What, in your opinion, was the cause of the pain prior to the rupture?
>
> A. I think he had an irritation of the tendon, constantly kind of rubbing the tendon in its groove there, and eventually it wore the tendon down sufficiently that it ruptured under a sudden strain.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 22, 1980 is causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id., at 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, 257 Iowa 516, 133 N.W.2d (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

In applying the above legal principles to the case at hand, it is concluded that the claimant has borne his burden of proof and that he has sustained a functional impairment of five percent of the body as a whole. (Connolly depo., p. 8, l. 2.)

This claimant has failed to produce any evidence while would support an award beyond his functional impairment of his shoulder. His work performance and attendance as a management supervisor has not been affected by this episode. Claimant's physical appearance and attitude indicates that this minimal impairment will not limit claimant's ability to discharge his assigned duties.

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 the claimant fell on the defendant employer's premises on October 22, 1980.

2. That the claimant had been suffering from tendinitis, which condition was aggravated by the industrial fall.

3. That the claimant had been paid his statutory healing period benefits.

4. That most of claimant's medical expenses have been paid.

5. That claimant has a five (5) percent functional impairment of the body as a whole.

6. That based upon the current condition of this record, claimant has not sustained an industrial disability.

THEREFORE, IT IS ORDERED that defendant pay the claimant a twenty-five (25) week period of permanent partial disability beginning on April 13, 1981 at the stipulated weekly rate of two hundred sixty-nine and 69/100 dollars ($269.69) together with ten (10) percent interest from that day.

Accrued benefits are payable in a lump sum.

It is further ordered that defendant pay the claimant the following medical expenses:

Nebraska Clinicians' Group	$11.00
University Hospital	$71.75

Costs are charged to the defendant by virtue of Industrial Commissioner Rule 500-4.33 and shall include an expert witness fee of one hundred fifty dollars ($150) payable to John Connolly, M.D.

Defendant is ordered to file a final report within twenty (20) days from the date of this decision.

Signed and filed this 2nd day of **February, 1983**.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD R. FELLOWS, Claimant, vs. DAY'S MOVING & STORAGE, Employer, and FIREMEN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 494091 D E C L A R A T O R Y R U L I N G

Claimant on February 22, 1983 moved for a declaratory ruling:

Comes now claimant and pursuant to Rules of the Industrial Commissioner, Chapter 5, 500-5.1(86) 17A, and requests a declaratory ruling as to the applicability of statutory provision, rule or written statement, law or policy, decision or order of the Industrial commissioner, and in support thereof states as follows:

1. Mr. Richard R. Fellows of Evergreen Park, RR 2, Davenport, Iowa 52804.

2. That the petitioner had on October 11, 1982 filed an application for review reopening under the name and title Richard R. Fellows v. Day's Moving & Storage, and Fireman's Fund Insurance Co. bearing Industrial Claim No. 494091.

3. The petitioner states that his employer has alleged by way of answer that credit for good faith overpayments made on temporary total disability can be offset to any permanent partial award that may be made, citing Wilson Food Corporation v. Cherry, 315, N.W.2d 756 (Iowa 1982); Section 85.34(4),Code of Iowa effective July 1, 1982.

4. That the employee has filed a reply to affirmative defense as amended, copy of which is appended hereto.

5. This issue requested by this petition for declaratory ruling is:

(1) Whether the statute, 85.34(4), has application to the circumstances where the overpayment was made in advance of the effective date of such statute;

(2) Whether an insurer is entitled to credit for any overpayment on a review-reopening application;

(3) Whether the alleged overpayment of temporary total disability, plus the payment of permanent partial disability, to the employee on or about 9/15/81 constituted an accord and satisfaction of the rights and liabilities of the party at that time.

WHEREFORE, the claimant prays that the Industrial Commissioner grant oral hearing in this matter, and upon such hearing to declare that the insurance carrier is not entitled to a credit for any overpayments made on an application for review reopening for the grounds asserted herein.

(1) Section 85.34(4) states:

> If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credit against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

The legislature did not provide for retroactive application of this statute. Therefore, it would not apply to injuries which occurred prior to its effective date of July 1, 1982 and would not govern the instant case.

(2) There are situations, as shown by Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982), wherein an employer can receive credit for an overpayment. One must, however, know the notice and manner of such overpayments. The question of whether or not an insurer is entitled to credit for any overpayment on a review-reopening application cannot be answered short of an evidentiary hearing. Therefore, the undersigned deputy industrial commissioner refuses to rule on the second issue of the application for declaratory ruling.

(3) Section 85.26(2) provides for review by the commissioner but says nothing about any payments or overpayments amounting to an accord and satisfaction. Further, the workers' compensation statute does not use the term "accord and satisfaction" in the common law sense. Therefore, an accord and satisfaction in the sense of discharge from further liability would not have any application to the workers' compensation law. (Of course, a settlement under §85.35, Code of Iowa, or a commutation might have a final effect; however, these are specific procedures under the workers' compensation law and do not derive from the common law.)

WHEREFORE, it is hereby ruled that §85.34(4) does not apply to injuries which occurred prior to July 1, 1982. Since an accord and satisfaction is not a part of the workers' compensation law, an alleged overpayment of temporary total disability plus the payment of permanent partial disability cannot have the force and effect of an accord and satisfaction.

Signed and filed at Des Moines, Iowa this 15th day of March, 1983.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LLOYD FELTON,	:	
	:	
Claimant,	:	File No. 699336
	:	
vs.	:	A R B I T R A T I O N
	:	
FRENCH & HECHT,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This matter came on for hearing at the Scott County Courthouse in Davenport on January 31, 1983, at which time the matter was considered fully submitted.

No filings were made prior to the submission of the original notice and petition. The record consists of the arguments of counsel and claimant's exhibit 1. The parties stipulated that claimant substained a hearing loss arising out of and in the course of his employment on December 18, 1980, the levels noted below, and that the rate of compensation in the event of an award is $278.81.

ISSUE

The sole issue for resolution is how the hearing loss should be computed.

STATEMENT OF THE EVIDENCE

At the commencement of the hearing the parties stipulated that claimant sustained a hearing loss arising out of and in the course of employment, caused by excessive noise levels, and that the rate of compensation was $278.81.

There is no dispute that the claimant has the following hearing level at the following frequencies:

Left Ear Hearing Level	Frequency In Hertz	Right Ear Hearing Level
35	500	45
35	1000	50
60	2000	70
70	3000	75

The parties differ in the manner of the computation of the loss.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction on this agency in workers' compensation cases. Section 85B.2, Code of Iowa, confers jurisdiction on this agency in occupational hearing cases cases.

2. Section 85B.9 provides:

> Measuring hearing loss. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards used to define occupational hearing loss shall be used for measuring hearing levels, and the audiograms shall be taken and the tests given in an environment as prescribed by accepted national standards. If more than one audiogram is taken following notice of an occupational hearing loss claim, the audiogram having the lowest threshold shall be used to calculate occupational hearing loss. If the measured levels of hearing average less than those levels that constitute an occupational hearing loss, the losses of hearing are not a compensable hearing disability. If the measured levels of hearing average ninety-two decibels American national standards institute (ANSI) or international standards organization (ISO), or more in the four frequencies, then the levels constitute total, or one hundred percent, compensable hearing loss. In measuring hearing loss the lowest measured levels in each of the four frequencies shall be added together and divided by four to determine the average decibel level. For each resulting average decibel level exceeding twenty-five decibels ANSI or ISO, an allowance of one and one-half percent shall be made up to the maximum of one hundred percent, which is reached at the average level of ninety-two decibels ANSI or ISO. In determining the binaural percentage of loss, the percentage of loss in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of loss in the poorer ear, and the sum of the two divided by six. The final percentage shall represent the binaural hearing loss. Audiometric examinations shall be made by a person who is certified by the council of accreditation in occupational hearing conservation or by persons trained by formal course work in air conduction audiometry at an accredited educational institution or licensed as audiologists under chapter 147, as physicians under chapter 148, as osteopathic physicians under chapter 150, or as osteopathic physicians and surgeons under chapter 150A if such licensed persons are trained in air conduction audiometry. The interpretation of the audiometric examination shall be by the employer's regular or consulting physician who is trained and has had experience with such interpretation, or by a licensed audiologist. If the employee disputes the interpretation, the employee may select a physician similarly trained and experienced or a licensed audiologist to give an interpretation of the audiometric examination. This section is applicable in the event of partial permanent or total permanent occupational hearing loss in one or both ears. (Emphasis added.)

3. Section 85B.6, Code of Iowa, provides for 175 weeks of permanent partial disability compensation in cases of total hearing loss.

ANALYSIS

The entire dispute in this case concerns the underlined portion of section 85B.9, Code of Iowa.

Claimant's computation is as follows:

Left Ear Hearing Level	Frequency In Hertz	Right Ear Hearing Level
35	500	45
35	1000	50
60	2000	70
70	3000	75
200	Total (Divide the "Total" by 4)	240
50	AVERAGE	60
-25	Subtract the "Low Fence"	-25
25	"Excess"	35
x 1.5%	Multiplication factor	x 1.5%
37.5%	Percent loss per ear	52.5%
37.5%	Loss in the BETTER ear (Smaller number)	
x 5	Multiply by weighting factors	
187.5	Equals product for the better ear	
+ 52.5	Add percent loss worse ear (larger number)	
= 240	"Weighted Sum"	
- 6	Divide by six for weighted average,	
40	Equals: Total both ears, binaural hearing loss percent.	

Under claimant's computation, claimant would have sustained a 40% hearing loss, entitling him to 70 weeks of permanent partial disability compensation.

Let us now look at defendant's assertion:

Left Ear Hearing Level	Frequency in Hertz	Right Ear Hearing Level
35	500	45
35	1000	50
60	2000	70
70	3000	75
200	Total (Divide the "Total" by 4)	240
50	AVERAGE	60
-25	Subtract the "Low Fence"	-25
25	"Excess"	35
x 1.5%	Multiplication factor	x 1.5%
.375%	Percent loss per ear	.525%
.375%	Loss in the BETTER ear (smaller number)	
x 5	Multiply by weighting factor:	
1.875	Equals product for the better ear	
+ .525	Add percent loss worse ear (larger number)	
= 2.4	"Weighted Sum"	
- 6	Divide by six for weighted average.	
.4%	Equals: Total, both ear, binaural hearing loss percent	

Under defendant's computation, claimant would have sustained a .4% hearing loss entitling claimant to 7/10 of a week of permanent partial disability compensation.

Claimant's version, of course, prevails. Although the underlined portion of section 85B.9 indicates that the multiplication factor is 1 1/2 percent (.015), it is clear that the multiplication factor is 1.5, the reasons set forth below.

Since the excess over 92 decibels is one hundred percent (less than the 25 low fence), the number 67 is an important factor (subtract excess). Under the formula advanced in defendant's argument, a claimant could never obtain more than a 1 percent hearing loss in any one ear.

Let us take defendant's argument to the extreme. The figure 92 (100% loss) will be used:

Left Ear Hearing Level	Frequency in Hertz	Right Ear Hearing Level
92	500	92
92	1000	92
92	2000	92
92	3000	92
368	Total (Divide the "Total" by 4)	368
92	AVERAGE	92
-25	Subtract the "Low Fence"	-25
67	"Excess"	67
x 1.5%	Multiplication factor	x 1.5%
1.005%	Percent loss per ear (Decimals are dropped)	1.005%

1.000% Loss in the BETTER ear (smaller number)

x 5 Multiply by weighting factor:

5.000 = Equals product for the better ear

1.000 Add percent loss worse ear (larger number)

= 6 "Weighted Sum"

: 6 Divide by six for weighted average.

1% Equals: Total, both ear, binaural hearing loss percent.

The decimals were omitted in the example set forth above because of the conversion of decimals to percent.

Under defendant's argument, reduced to this becomes absurd. Using defendant's formula, one could never sustain more than a one percent hearing loss even if the loss were total. Defendant's argument is rejected in its entirety. The legislature could not have intended this result..

To quote a now deceased judge, defendant's interpretation "is not the law, never was the law, and never will be the law."

FINDINGS OF FACT

1. Claimant was employed by defendant.

2. The parties stipulated that claimant sustained a permanent hearing loss at the following levels because of work:

Left Ear Hearing Level	Frequency in Hertz	Right Ear Hearing Level
35	500	45
35	1000	50
60	2000	70
70	3000	75

3. The rate of compensation is $278.81

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant sustained a permanent occupational hearing loss which arose out of and in the course of his employment to the extent of 40 percent.

3. Claimant should be paid 70 weeks of permanent partial disability compensation.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant seventy (70) weeks of permanent partial disability compensation at the rate of two hundred eighty-seven and 87/100 dollars ($287.87) per week.

Costs of the proceeding are taxed against defendant.

Defendant is ordered to file a first report of injury and a final report upon payment of this award.

Signed and filed this 27 day of April, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID C. FINCH,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

THE TRAVELERS INSURANCE CO.,

Insurance Carrier,
Defendants.

FILE NO. 660925

R E V I E W -

R E O P E N I N G

D E C I S I O N

Mr. Arthur C. Hedberg, Jr.
Attorney at Law
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Des Moines, IA 50309 For Claimant

Mr. David H. Luginbill
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INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines on January 19, 1982. The undersigned was advised that the case was fully submitted on August 10, 1982.

A review of the commissioner's file reveals that this case has been the subject of prior contested case proceedings. An Arbitration Decision was filed on January 12, 1978, holding that claimant had sustained a knee injury arising out of and in the course of his employment and awarded 56 6/7 weeks of healing period. A subsequent Review-Reopening Decision was filed on January 23, 1980, holding that claimant's low back difficulties were related to the original injury and that claimant was entitled to the payment of an additional 31 6/7 weeks of compensation. An Appeal Decision was filed on July 29, 1980, affirming this decision. A Final Report was filed on January 28, 1982, showing that claimant had been paid 200 3/7 weeks of healing period compensation and 65 weeks of permanent partial disability compensation based upon a 13 percent loss to the body as a whole. The record consists of the testimony of the claimant; the depositions of Robert N. Kreamer, D.O., John P. Albright, M.D., and Robert Bianchi; claimant's exhibits 1 through 11; and defendant's exhibits A through F.

ISSUES

The issues for determination are:

1. The nature and extent of disability caused by the injury.

2. Whether claimant's heart attack is related to the injury.

STATEMENT OF THE EVIDENCE

Claimant, age 42 at the time of hearing, sustained an injury arising out of and in the course of his employment on October 29, 1975. The facts surrounding this injury and the events which followed have been fully set forth in the prior decisions. They will be recapitulated in summary fashion. On October 29, 1975, claimant slipped on some oil and grease and wrenched his left knee. Claimant had surgery in March 1976. This surgery was performed by Sidney Robinow, M.D., since deceased. Claimant was then referred to the University of Iowa, where claimant was treated by J. P. Albright, M.D., who performed another surgery on the knee. Claimant had back problems and was referred to Thomas R. Lehmann, M.D. A bilaminotomy was performed at L5-S1 in March 7, 1979. No definite disc herniation was observed at the level; consequently, it was felt that a decompression by virtue of the bilaminotomy would be sufficient treatment. Claimant underwent yet another knee surgery in November 1979. This surgery was performed by Dr. Albright in order to stabilize the trick knee. On June 4, 1981, an arthoscopy was performed and another arthoscopy was conducted on August 26, 1981. An attempt was made to shave the portions within the knee which caused the claimant pain.

It has been previously found that claimant's knee and back surgery were related to claimant's injury of October 29, 1975. Claimant's examination at the Mercy Hospital Evaluation Center yielded a 20 percent functional impairment of the left knee which converted to a 3 percent impairment of the body as a whole. The functional impairment of the spine was 2 percent of the body as a whole, but because of the surgery, it was fixed at 10 percent. Dr. Albright testified that claimant had a 20 percent disability to his leg and a 10 percent disability to his back which combined as a 15 percent disability to the body as a whole.

Part of claimant's case is based upon a cardiac condition which he insists is related to the employment. In June 1980 claimant went on a trip with a neighbor. Claimant started to

have chest pains and on June 17, 1980, was admitted to the Blessing Hospital in Quinap, Illinois. He had an anterior septal myocardial infarction. On June 23, 1980, claimant was transferred to the Mercy Hospital Medical Center in Des Moines when his condition had stabilized. Coronary arteriography demonstrated complete occlusion of the left anterior descending coronary artery with resultant moderately large anterior infarction. Left ventricular dysfunction was also identified. Claimant was discharged on June 28, 1980, and directed to see his personal physician, Dewitt Goode, D.O. Claimant was again admitted to the hospital on July 19, 1980. Claimant had been coughing and noted pain between his shoulder blades. Serial electrocardiograms and enzymes after admission showed no evidence of infarction. Claimant's treating physician during this hospitalization was Robert Kreamer, D.O. Claimant was released from the hospital on July 22, 1980. Claimant continued to be treated by Dr. Kreamer and Dr. Goode.

As a crucial portion of the claimant's assertion that the heart attack is related to the employment, an exploration of the psychological aspects of the case is necessary. In May 1981, as a portion of the Mercy Hospital Medical Occupation Evaluation study, claimant was examined by Todd Hines, Ph.D., a clinical psychologist. He explained claimant's condition and its relation to the reactive depression which he indicates stems from the injury:

> This patient gives evidence of chronic, reactive depression of significant magnitude. There exists a cognitive style which combines with denial as a primary psychological defense to heighten internalized stress responses; this cognitive style is characterized by concrete rather than abstract thinking, quick decisions, rejection of issue complexity in favor of simplistic polar extremes and the solidification of perceptions which are then maintained regardless of conflicting information. Denial and this style of cognition cause internalized conflict responses which have few externalized outlets and which then result in self-directed anger and guilt experienced as depression and in hypochondriacal intensification of somatic symptoms as a safety-valve or release mechanism. This psychological pattern is often associated with coronary risk and has very likely caused or greatly exacerbated the hypertension and coronary trauma experienced by this gentleman, as well as the experience of pain associated with his back and knee. It further causes significant difficulty in moving past the history of trauma and into a process of recovery and rehabilitation. His belief system regarding disability comes to be crucial to future capabilities, as well as to the continuing experience of pain and emotional disruption.

He went on to say that claimant's inability to accept the psychological basis of his condition made him a poor candidate for psychological therapy, although it was recommended.

Dr. Kreamer testified by way of deposition in this case. He explained the relationship between the claimant's emotional state and the heart condition:

> Q. Are there any other findings or observations or portions of history that you think are significant that you have not found in the history and so on provided here in the blue booklet, sir?
>
> A. Well, I really am not sure that this booklet brings out how much he is aggravated about this knee in terms of it, just personal ability to function as the way he would like to and how much he worries about it and his compensation with the involvement of a conflict. I think it does give him angina, and I think it does aggravate his cardiac condition.
>
> Q. Explain to me what you are talking about there a little bit. I am not sure I understand.
>
> A. When somebody is aggravated, a number of physiologic changes occur. The blood pressure goes up placing an additional demand on the heart. The pulse rate goes up placing an additional demand on the heart. Certain hormones are liberated into the bloodstream causing demands on the heart, and I do believe that it has been well established that these things can act to aggravate coronary irrigation of the remaining muscle cells.
>
> Q. Well, you had mentioned that these problems tend to aggravate his angina. What are you talking about there, sir?
>
> A. I think when he gets to worrying about himself and his situation, then his angina increases.
>
> Q. Is there anything else as far as additional history or additional observations that you made about the patient that you thought were significant over and above what is included in the blue report, sir?
>
> A. Well, I do believe that he smiles a lot, and I think sometimes he smiles when he really doesn't feel like smiling. And I think that might falsely give an impression that he does'nt -- or he is not really as aggravated or he is not really suffering as bad as he really is. I think somebody somewhere told him you always got to smile and be nice to people, and I think he has tried to do this all of his life, and I think it's one situation I am afraid has backfired for him.
>
> Q. So what you are saying is, to some extent at times at least, he may well be hiding his problems or the extent of his problems or complaints because of his --
>
> A. Because of his facade, yes.
>
> Q. The evaluation report, Doctor, includes a two-page report by Todd Hines, Ph.D. And on the second page of that report, I would direct your attention to the first full paragraph there on that page which discusses to some extent the reactions, I believe, that a patient may have to physical injury and the things that follow from it, correct?
>
> A. Yes.
>
> Q. It would seem to indicate there that that the writer at least recognizes that the psychological problems oftentimes tend to increase the coronary risk and to bring on heart attack at the time that it occurs, would that be correct, sir?
>
> A. Yes. That's been documented in the medical literature.
>
> Q. Does this sort of syndrome or phenomena seem proper, sir, in describing the kind of history that Mr. Finch has had and in describing the onset of his cardiac problems?
>
> A. Can you read me that because I want to be really sure I understand.
>
> MR. WARD: Why don't you read that back.
>
> (Requested portion of the record was read.)
>
> A. I think my answer to that is yes.
>
> Q. What do you find with this patient as to his emotional situation or his emotional stress level leading up to the time of his heart attack, sir?
>
> A. Well, as I understand it, he was -- I did not see him at the time of the heart attack, but as I understand it, he was having some conflict in his mind about his inability to get the matter of his knee cleared up and his back.
>
> Q. With an injury and the long period of recovery or the delayed recovery or the lack of recovery, what effect, if any, might that commonly have upon a person's emotional level or his stress level, sir?
>
> A. I think that when somebody is chronicly [sic] ill, physically having pain and an acute knowledge of physical limitations, when this continues day after day, it tends to become an agitation inwardly in the patient.
>
> Q. Is that sort of description consistent with the history we have on Mr. Finch here, sir?
>
> A. As interpreted by Doctor Hines, yes.
>
> Q. As I understand it, there are various things that are medically recognized as tending to increase or aggravate an atherosclerotic condition so as to produce a heart attack, would that be correct?
>
> A. Yes, that is correct.

He went on to discuss the studies which tie emotional problems and cardiac problems. He testified that he believed there were emotional overlap "and...a history of hypertension" (p. 18, ll. 8, 9).

At the end of Direct Examination, Dr. Kreamer testified as follows:

> Q. Doctor, of anything present in Mr. Finch's case that would be of a nature to react to the diseased heart so as to bring about a heart attack, is there anything here in Mr. Finch's case that is a more likely thing to do than the emotional stress that we have discussed?
>
> A. I think one thing is the cigarette smoking. Another thing is that he had some elevated blood lipids which would, of course, make him more of a risk for having a heart attack.
>
> Q. So he has the elevated blood lipids, he has the fact that he smokes, and he has the stress situation that we are talking about?
>
> A. That is correct.

The report of the Mercy Hospital Center makes the statement that the "cardiac problems is not related to...employment or to any surgical procedures or other treatment subsequent to his injury and other therapy condition. The cardiac problem is due to coronary atherosclerosis, not aggravated, hastened, or lighted up by his work injuries." (p. x-4).

Robert Bianchi, benefits representative for claimant's union local, testified as to the personnel policies in effect.

As far as the issue of healing period is concerned, it is the claimant's position that he is entitled to healing period from March 26, 1976, until "at least January 12, 1982." The record indicates that benefits have been paid by the defendants for the following periods:

1. March 28, 1976, through April 28, 1977, (56 6/7 weeks).

2. December 17, 1977, through May 24, 1978, (22 5/7 weeks).

3. January 13, 1979, through August 21, 1979, (31 6/7 weeks).

4. November 24, 1979, through August 7, 1981, (89 weeks).

The record reveals that the claimant worked from October 14, 1978, through January 13, 1979. At all other times since the injury, claimant has not been gainfully employed. The original arbitration awarded compensation from March 26, 1976, through April 28, 1977. The second decision (Review-Reopening) awarded further benefits from January 13, 1979, through August 23, 1979. Apparently then, the only dates which the award of healing period is disputed is from April 29, 1977, through October 13, 1978, (some of which has been paid) and August 24, 1979, through the present (some of which has been paid).

The orthopedic section of the Mercy Hospital report which was authored by William R. Boulden, M.D., indicates that claimant's knee had reached maximum healing as of May 18, 1981. Dr. Albright indicates that he does not feel that claimant has been able to work from the injury to the present time (deposition p. 17, ll. 9-10). Dr. Albright indicates that claimant reached maximum recuperation from the November 1979 surgery some sixteen months thereafter in May 1981 (see also, Dr. Boulden's opinion, above). Claimant, however, had subsequent surgery (August 26, 1981) which Dr. Albright revealed that claimant had reached recuperation from on January 7, 1982, although there was no significant change after September 10, 1981.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon this agency regarding injuries arising out of and in the course of employment.

2. The claimant has the burden of proving by a preponderance of the evidence that the injury of October 29, 1975, 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).

3. 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).

4. 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.

5. Section 85.34(1), Code of Iowa, provides as follows:

> 1. Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, 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.

6. Rule 8.3 of the Industrial Commissioner provides:

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

ANALYSIS

There appears to be no controversy that claimant has sustained an injury to the back and leg and that permanency resulted therefrom. The previous proceedings bear this out. Both injuries have been related to the employment and necessitated a total of five surgeries.

The causation and possible relationship of the heart attack is in issue. Dr. Kreamer's testimony on the matter leads to the inference that many factors contribute to heart attacks, including personality type. The "more likely" causes for this attack, in Dr. Kreamer's opinion, are cigarette smoking and blood lupids. Accordingly, it cannot be said that the disability was proximately caused by the injury, or that the attack itself was proximately caused by the injury under the De Shaw rationale.

The issue of healing period in the instant case is difficult to resolve. This difficulty is engendered by the amount of time which has elapsed, the number of decisions, and the many surgical procedures which have been performed. The greater weight of the evidence would indicate that claimant was entitled to healing period compensation from March 28, 1976, through October 13, 1978; from January 13, 1979, through May 18, 1981; and from August 26, 1981, through January 7, 1982. The latter periods are awarded because of the multitude of surgical procedures which took place. The heart attack took place during the second period of healing period, but Dr. Albright testified as to the extended period of convalescence from the surgery of November 1979. The cessation coincides with Dr. Boulden's evaluation.

As far as permanent partial disability is concerned, it is found that claimant's disability, because of the injury, is 40 percent of the body as a whole. Claimant is 42, has had training as a welder and manager of civil engineering personnel. He has one semester of college and some aircraft maintenance training. He has been a military aircraft maintenance specialist, a land surveyor, welder, interstate truck driver, and a forklift operator. He will not return to these employments, chiefly because of his inability to perform many of the contorted motions inherent in these trades.

FINDINGS OF FACT

1. Claimant is a resident of Iowa and defendant-employer does business in Iowa.

2. Claimant was employed by defendant-employer in October of 1975.

3. An Arbitration Decision was filed on January 12, 1978, holding that claimant sustained an injury arising out of and in the course of his employment in October 1975.

4. Claimant, because of the injury, sustained injuries to his leg and back.

5. The injuries to the back and leg are permanent and to the body as a whole.

6. Claimant's heart attack was not proximately caused by injury or by the disability.

7. Claimant's permanent partial disability for industrial purposes is 40 percent of the body as a whole.

8. Claimant had several surgeries and was disabled from gainful employment starting March 28, 1976, and returned to employment on October 14, 1978. Because of the injury, he was disabled from January 13, 1979, until May 18, 1981, when he recuperated fully from the surgical procedures; he was again disabled from work from August 26, 1981, through January 7, 1982, the last time of maximum medical recuperation.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and subject matter.

2. Claimant was employed by defendant-employer in October 1975.

3. On October 25, 1975, claimant sustained an injury arising out of and in the course of his employment.

4. Claimant is entitled to be paid 274 4/7 weeks of healing period compensation at the rate of $160 per week.

5. Claimant is entitled to be paid 200 weeks of permanent partial disability compensation at the rate of $147 per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant two hundred seventy-four and 4/7 (274 4/7) weeks of healing period compensation at the rate of one hundred sixty dollars ($160) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant two hundred (200) weeks of permanent partial disability compensation at the rate of one hundred forty-seven dollars ($147) per week.

Defendants are to receive credit for amounts previously paid.

Costs are taxed to defendants.

Interest is to accrue pursuant to section 85.30, Code of Iowa.

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

Signed and filed this 27th day of August, 1982.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEFFREY FINK,	:	
	:	
Claimant,	:	File No. 666014
	:	
vs.	:	A R B I T R A T I O N
	:	
SAM'S PARADISE,	:	D E C I S I O N
	:	
Employer,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Jeffrey Fink, claimant, against Sam's Paradise, employer, for benefits as a result of an injury on December 29, 1979. On January 25, 1983 this case was heard by the undersigned. This case was considered fully submitted upon receipt of claimant's brief on February 1, 1983.

The record consists of the testimony of claimant, Rena Pogge, Gene Sorenson Jr., and Sam Longo; claimant's exhibits 1 through 10; and defendant's exhibit A.

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. The parties stipulated that if claimant were to prove his case, his rate of compensation would be $74.00 per week.

FACTS PRESENTED

Claimant testified that to the best of his recollection he was injured on December 29, 1979 when, while working for defendant, his hand slipped off a safety device on a meat slicer resulting in a laceration to his right index finger. Claimant stated that he went to the hospital and then remained off work for approximately three weeks before returning to work for defendant. Claimant indicated he worked an additional week or two and then was fired.

Claimant testified that at the time of his injury his duties consisted of washing dishes, cutting cole slaw and slicing roast beef for customers. Claimant stated that defendant's cooks would tell him when to slice meat.

Rena Pogge testified that at the time of claimant's injury she was employed by defendant as a cook and was present when claimant's injury occurred. Ms. Pogge indicated that claimant appeared at defendant employers indicating that he was going to work for a friend of his. Ms. Pogge indicated that claimant's only duties were as a dishwasher and that he was not authorized to use the meat slicer on which he was injured. Ms. Pogge testified that claimant told her, at the time of his injury, he was making a sandwich for himself. Ms. Pogge stated that this was the only time claimant used the meat slicing machine. Ms. Pogge revealed that on occasion defendant's employees would eat sandwiches. Ms. Pogge indicated she never saw claimant work for defendant after his injury.

Gene Sorenson, Jr., testified he worked for defendant at the time of claimant's injury and that claimant was only filling in for a friend who was a dishwasher. Mr. Sorenson indicated he couldn't remember claimant working for defendant after his injury. Mr. Sorenson stated that workers were allowed to eat a sandwich while working, but someone else would make it for them.

Sam Longo testified he owned defendant business but never employed claimant to work for him. Mr. Longo stated that claimant just came in to fill in for his friend who was a dishwasher. Mr. Longo indicated that claimant's only duties would have been as dishwasher and that claimant would not have any reason to cut or prepare food. Mr. Longo testified that claimant only worked three days and never came back after his injury. Mr. Longo disclosed that he did allow his employees to eat while working.

In a report dated August 31, 1981, H. F. Trafton, M.D., stated:

> This patient was treated in the emergency room by the emergency room physician on January 5, 1980. He apparently was working at Sam's Paradise with a meat slicer, according to the emergency room report when his right index finger was caught by the slicer. He lost a portion of the skin and sub-cutaneous tissue and a portion of the nail in this injury. The injury was as a result of the industrial accident.
>
> The treatment consisted of replacement of the avulsed skin and steri-stripping the covering in place. A splint was applied, and at the time he was referred to me on the 9th of January 1980. The avulsed skin was healing nicely and the patient was subsequently seen on the 14th and 21st of January 1980. The patient was seen the last time on February 23, 1981. At this time it was evident that he had a keloid or fibrous scar at the site of the replantation of the skin, some deformity to the finger nail consisting of a ridge down the nail itself. Functionally, it appeared to be functioning well. However, the large scar is rather unsightly. The only future treatment that would be available to remedy this unsightly scar on the finger would be that of excision of the scar and skin grafting.
>
> The only permanent disability anticipated is abnormal appearance of the scarring of this portion of the index finger. Functionally, he should have no permanent disability.

In his report of October 6, 1982, Dr. Trafton stated:

> This patient was subsequently seen by myself in April, 1982. It was felt that this keloid (or scar) should be excised and indeed this was carried out. He has a small ridge in the nail itself and was felt that this should not be corrected, because that would cause him no difficulty.
>
> I have seen him several times since then. I saw him in May and again saw him in October at this time to get a final appraisal of the appearance of the finger. He has 100% function of the finger. He is doing some carpenter work, part time I guess, as he describes it. Also some cement work and this scar does not interfere with his work. This is the right index finger. There is still the ridge in the nail which will be there with no functional disability at all. He still has some elevation of the former keloid scar, which of course, the scar will be permanent. However, there is no functional disability to this finger.

Dr. Trafton indicated that claimant should be off work for four weeks following the above mentioned operative procedure. A review of the doctor's notes reveals that claimant was released to return to work on January 21, 1980 and that claimant had no permanent disability at that time.

APPLICABLE LAW

Iowa Code section 85.3(1) provides: "Every employer...shall provide, secure, and pay compensation...for any and all personal injuries sustained by an employee arising out of and in the course of employment...."

Iowa Code section 85.61(6) provides:

> The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business 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 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 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" related to time, place and circumstances of the injury. McClure v. Union County, et al., Counties, 188 N.W.2d 283 (Iowa 1971). An injury occurs "in the course of" employment when it is within the period of employment at a place where the employee may be performing his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. Id. at 287.

Claimants have the burden of proof. Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607. With respect to the course of the employment, "the test is whether the employee was doing what a person so employed may reasonably do within the time of the employment and at a place he may reasonably be during that time." Buehner v. Hauptly, 161 N.W.2d 170 (Iowa 1968). Further, at 172, the opinion states, "it is sometimes a thin line which divides a finding that the ultimate act itself is prohibited from one that the act was proper and was merely performed contrary to instructions." See also Stahle v. Holtzen Homes, 33rd Report of the Iowa Industrial Commissioner, p. 157 (1978), and Larson on Workmen's Compensation, Vol. 1A pp. 6-22 through 6-26.

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

Section 85.16 states in part:

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 29, 1979 is causally

related to 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 (1955). 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

Prior to an analysis of the issues presented by the parties it is necessary for the undersigned to indicate that he finds that both claimant and Mr. Longo were less than totally candid at the time of hearing. However, Mr. Longo's version of events is supported by the greater weight of evidence.

Claimant has met his burden in proving he was defendant's employee at the time of injury. Although in his testimony Mr. Longo indicated he did not hire claimant, the greater weight of evidence does indicate that claimant was working for defendant and defendant intended to pay claimant for that work. This is further supported by Mr. Longo's own testimony that he instructed claimant as to what his duties were and that claimant worked three days. Claimant would not have had any duties unless he was an employee or an independent contractor and no argument was made that claimant fit within the second category.

The greater weight of evidence indicates that claimant's duties only consisted of washing dishes. The question then arises as to whether claimant's use of the meat slicer in order to make a sandwich was such a deviation from his employment as to amount to an abandonment of that employment.

The greater weight of evidence discloses that defendant allowed its employee's to eat while working and provided the food which they were to eat. Although a sign was posted restricting the operation of machines to authorized personnel only it is not inconceivable that claimant thought he was authorized to use the equipment because he was in fact working for defendant. Claimant was allowed to eat on the job but apparently went about getting his snack the wrong way. Claimant's deviation did not amount to abandonment from his employment.

Although defendant raised the question of intoxication they failed to prove that claimant was in fact intoxicated or that his intoxication was the proximate cause of his injury.

Claimant has failed to meet his burden in showing he has any permanent functional impairment as a result of his injury. The reports of Dr. Trafton as well as a view by the undersigned support such a holding.

Claimant has met his burden in proving he is entitled to some temporary total disability benefits. Claimant was unable to work from the date of his injury, January 5, 1980, until he was released by Dr. Trafton on January 31, 1980. The report of Dr. Trafton also revealed that claimant would need four weeks to recuperate from his corrective surgery in April 1982.

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 January 5, 1980 claimant was injured while working for defendant.

FINDING 2. At the time of his injury claimant was working as a dishwasher.

FINDING 3. Defendant's employees were allowed to eat while on the job and defendant provided the food.

FINDING 4. Claimant was injured while making a sandwich for himself.

FINDING 5. Claimant had not been given authority to use the machine on which he was injured.

FINDING 6. Claimant's use of the meat slicer was not such a deviation as to be an abandonment of his employment.

CONCLUSION A. Claimant received an injury arising out of and in the course of his employment with defendant.

FINDING 7. At the time of his injury claimant was not intoxicated.

FINDING 8. Claimant has no permanent functional impairment as a result of his injury.

CONCLUSION B. Claimant failed to show he is entitled to any permanent partial disability benefits.

FINDING 9. Claimant was unable to work from January 5, 1980 until January 31, 1980 and from April 15, 1982 until May 13, 1982.

THEREFORE, defendant is to pay unto claimant eight (8) weeks of temporary total disability benefits at a rate of seventy-four dollars ($74) per week.

Defendant is also to reimburse claimant for the following medical expenses:

Mercy Hospital	$970.97
Cogley Clinic	351.00
Medical Anesthesia Associates, P.C.	168.00

Accrued benefits are to be paid in a lump sum together with statutory interest at the rate of ten (10) percent per year pursuant to section 85.30, Code of Iowa, as amended.

Costs are taxed to defendant pursuant to Industrial Commissioner Rule 500-4.33.

Defendant shall file a final report upon payment of this award.

Signed and filed this 31st day of March, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

REGINA E. FORNEY, Claimant, vs. GLENWOOD STATE HOSPITAL SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 662323 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Regina E. Forney, claimant, against Glenwood State Hospital School, employer, and the State of Iowa, defendants, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of her employment on December 21, 1980. It came on for hearing on November 23, 1982 at the Pottawattamie County Courthouse in Council Bluffs, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received March 26, 1981. No other filings have been made.

The parties stipulated the rate in the event of an award would be $130.24, that the time off work was from December 21, 1980 through February 22, 1981; and that the medical expenses were fair and reasonable.

The record in this matter consists of the testimony of claimant, Kendall Forney and Irving J. Hanssmann, M.D.; claimant's exhibit 1a, a history and physical dated December 23, 1980; claimant's exhibit 1b, a discharge summary dated January 20, 1981; claimant's exhibit 1c, an operative report from R. D. Schultz, M.D.; claimant's exhibit 1d, an operative report from J. W. Monson, M.D.; claimant's exhibit 1e, a pathology report dated January 10, 1981; claimant's exhibit 1f, a pathology report dated January 13, 1981; claimant's exhibit 2, a letter from Gerald J. Langdon, M.D., dated May 8, 1981; claimant's exhibit 3, a report from John D. Roehrs, M.D., dated March 30, 1981 and a report dated January 22, 1981; claimant's exhibit 4, letters from Dr. Monson dated March 23, 1982 and January 27, 1981; claimant's exhibit 5, a bill from Archbishop Bergan Mercy Hospital; claimant's exhibit 6, a bill from Radiology Consultants, Inc.; claimant's exhibit 7, a statement from Diagnostic Associates, Inc.; claimant's exhibit 8, a statement from Dr. Roehrs; claimant's exhibit 9, a statement from Dr. Schultz; claimant's exhibit 10, a statement from Dr. Monson; claimant's exhibit 12a, the deposition of claimant; claimant's exhibit 12b, the deposition of Dr. Langdon; claimant's exhibit 12c, the deposition of Dr. Roehrs; claimant's exhibit 12d, the deposition of Dr. Monson; claimant's exhibit 12e, the deposition of Jerome Charles Tanous, M.D.; claimant's exhibit 13, a statement of recovery by claimant in her suit against Dr. McDonald; defendants' exhibit A, the

records from claimant's hospitalization of December 23, 1980; defendants' exhibit B, records from her hospital admission of October 16, 1979; defendants' exhibit C, a job description for a nurse; defendants' exhibit D, a job description for a nurse clinician; defendants' exhibit E, a job description for a treatment project supervisor; defendants' exhibit F, a record of claimant's jobs and salaries; defendants' exhibit G, claimant's employment physical; defendants' exhibit H, an accident report; defendants' exhibit I, a letter from Duane D. Warden, M.D., dated July 27, 1979; defendants' exhibit J, a letter from claimant dated November 8, 1979; defendants' exhibit K, attendance records from defendant employer; defendants' exhibit L, a resignation report; defendants' exhibit M, an application for reinstatement; defendants' exhibit N, various employment applications; defendants' exhibit O, a To Whom It May Concern letter from claimant; defendants' exhibit P, a letter from Dr. Hanssmann dated May 7, 1981 with accompanying exhibits; defendants' exhibit R, the deposition of Raymond G. McDonald, M.D.; and defendants' exhibit S, the deposition of Duane D. Warden, M.D. The parties made closing arguments at the time of hearing. Defendants' objection to deposition summaries is sustained and those were not considered. The second ground for defendants' objection to exhibits 2, 3 and 4 was weighed in evaluating that evidence as were the objections to exhibits 12 and 13.

ISSUES

The issues in this matter are whether or not claimant had an injury arising out of and in the course of her employment; whether or not claimant has a disability which is related to her injury; whether or not claimant is entitled to healing period and permanent partial disability benefits; and whether or not Iowa Code section 85.20 has applicability here.

STATEMENT OF THE CASE

Thirty year old married claimant, mother of two sons, is a high school graduate. She is a registered nurse with additional training. Her only work outside the nursing field occurred in 1970 for a plastics manufacturer.

She recounted her nursing experience as follows: Her first job was on a surgical unit. Later she moved to a medical unit. She was unaware of exposure to tuberculosis in either area. She then worked in a hospital where she was involved in all aspects of nursing including care for a terminally ill patient with tuberculosis in approximately 1976. Her duties with that patient consisted of suctioning, bathing, starting IV's and caring for urinary and bowel needs. Claimant had skin tests and chest x-rays subsequent to this exposure. She believes they were normal. Her family moved to Minnesota where she became a staff nurse. She had vague recollections of someone's having tuberculosis, but she was unable to remember specifics, and she was not involved in one to one contact.

She commenced work for defendant in January 1979. Her duties consisted of caring for the patients' daily medical needs. She left her employment in October 1979 because of a pregnancy. Her child was born on October 17, 1979. She returned to work and worked until December 22, 1980 when she was hospitalized with severe abdominal pain. She testified:

A. ...it was right after the delivery and after the section I had some minor, minor abdominal pain, and I just attributed that to nerves, taking care of two kids, and just kind of threw it off, and it was like November that the abdominal pain started becoming severe.

Q. How long after the surgery was it that you had some abdominal pains?

A. Abdominal pains, probably two, three months later.

Q. You're talking now about the first of the year?

A. Uh-huh, and see I had had discomfort from the abdominal surgery prior to that, so, you know, I had had a little bit ever since the surgery, 'cuz, you know, I had the abdominal incision and that was a little bit painful, but as far as the internal feeling of something wrong, it was the first of the year somewhere.

Q. Can you give any more description other than just abdonimal pains?

A. Well, it was somewhere in the abdomen and it was just kind of, I don't know, just a discomfort, it just felt like a nerve-type thing, is what I attributed it to, and I'd go to bed and then the next morning it would be okay to start out with.

Q. Did you ever consult with your doctor about those?

A. No.

Q. How long did those continue?

A. Until November when they got real severe.

Q. So you were having them gradually from that time on?

A. Uh-huh.

Q. Did you ever take any medicine for them?

A. No.

Q. In other words they were not severe enough that you took even aspirin or anything like that?

A. No, 'cuz I'm not a big one to take medicine. No, I didn't.

Q. Usually your experience would be they would go away overnight?

A. Uh-huh?

Q. And they'd come back the next day?

A. It wasn't always every day, it was here and there and just kind of random until November when it started getting consistent.

Q. If I understand then in November, are you saying in November they started getting more severe and more constant?

A. Both.

Q. And you went back to Dr. Warden at that time, is that right?

A. Uh-huh, because I didn't know what the problem was. I thought it might be a gynecological problem somewhere, so I went to him.

Dr. Warden gave her medication which did not work. Later she was admitted to the hospital by Dr. Langdon. Care also was provided by a surgeon and a pulmonary specialist. Chest x-rays were done and it was thought she had tuberculosis. A skin test was negative. Claimant reported that her doctors spent some time deciding what to do. Surgery was performed on January 9, 1981.

Following her release from the hospital claimant continued to have abdominal pain and diarrhea as often as eight times a day and through the night. She suffered fatigue and loss of strength and weight. She went back to work on February 23, 1981 and returned to teaching CPR, but she said that she was not as active as usual as she used to get down and work very closely with students when she showed compression and ventilation using a manneguin and as she was a strict teacher. She claimed that she was weak and tired easily. She also was embarrassed by having to leave the room because of the diarrhea.

She stated that one of her physicians thought her diarrhea was related to her medicine. Her current medications include drugs for tuberculosis and for diarrhea. It is her understanding that a valve replacement may be needed at some future time.

Claimant asserted that her strength did not return and that lack of strength to lift and to manuever is a restriction on her ability to do her work which is currently in positioning therapy. She also is concerned about her capacity for handling stress. She continues to have diarrhea about four times a day. She reported that she has been given promotions, that she had not had complaints about her work and that she has not had assistance in completion of her work. She has not sought other employment.

She denied any family history of tuberculosis or positive skin tests. She admitted that she had not been exposed to active cases of tuberculosis on her job and that none of the residents had evidenced symptoms, but she said that some of her patients had tuberculosis in their histories. She was unable to think of specific patients and she acknowledged her information was hearsay. After her assignment to staff development training in February 1980 she was not working with residents on a regular basis. Her contact with the terminally ill patient occurred in 1976 and covered six hour periods for three to five days.

Claimant and her spouse sued Dr. McDonald, a radiologist, because her tuberculosis was not discovered when her child was born in 1979. They recovered. Defendants herein were not consulted regarding the settlement. Some medical expenses have been paid by Blue Cross and Blue Shield.

Claimant's spouse of eleven years, Kendall Forney, who is a special education instructor for defendant employer, testified that prior to claimant's contracting tuberculosis there were no restrictions on her abilities to do her household duties or to work as a nurse. He said that post-surgery she was bedfast. He observed that she is practically normal now; but she is weaker, sleeps more, has lost weight and evidences a changed disposition which he attributed to constant bowel movements.

Although his contacts with her at work are infrequent, he reported that he has taken the CPR course taught by his wife.

Exhibits offered by defendants provide a job description for a nurse, for a nurse clinician and for a treatment project supervisor. Records indicate claimant was employed as a nurse on January 5, 1979 at a biweekly salary of $484. In 1981 she was promoted to a nurse clinician with a biweekly salary of $591.20. In March 1982 she became a treatment project supervisor with an increased salary. Following a cost of living increase in July she was earning $724.80 every two weeks.

On July 27, 1979 Dr. Warden wrote a To Whom It May Concern letter stating that as claimant was having false labor she should commence working only half-time. Claimant herself wrote a To Whom It May Concern letter dated September 5, 1979 stating she would like to take maternity leave as of September 28, 1979. A second letter was written November 8, 1979 giving the effective date of her resignation as December 15, 1979.

Medical records show claimant was admitted to the hospital on October 16, 1979. Her history was recorded as a pregnancy without complications. She had a previous Caesarean section and a paralytic ileus postpartum. Her lungs were clear to percussion and auscultation. A report of an x-ray read on that date states: "There is a small area of impaired aeration in the apical segment of the right upper lobe; this probably represents scarring, or may even represent the density of chest wall soft

tissues. I doubt if there is an acute process. The heart has a normal size."

A Caesarean section was done on October 17, 1979.

Duane D. Warden, M.D., board certified obstetrician and gynecologist, testified that he relies on the radiologist to read and to interpret x-rays he orders as a screening process in nonsymptomatic patients. He said that chest x-rays are a routine of the hospital. Dr. Warden stated that if pathology were found, the radiologist would recommend further procedures deemed necessary for establishing a diagnosis. He would anticipate a call from the radiologist if something were wrong.

Dr. Warden first saw claimant on April 4, 1979. He interpreted the radiologist's report from the time of claimant's delivery as telling him that claimant had a previous process in her chest that was not acute at the time. He read nothing in the report which suggested to him another x-ray should be ordered.

On December 23, 1980 claimant was hospitalized with lower abdominal pain of one month's duration, decreased appetite and weight loss. Vomiting and increased pain had developed on the day of admission.

A sputum specimen collected January 1, 1981 grew acid fast bacilli. Bronchial and gastric washings and sputum samples eventually grew mycobacterium tuberculosis. On January 2, 1981 a bronchoscope and brush biopsy were done. Findings were normal with the exception of an erythematous and slightly friable mucosa involving the right upper lobe bronchus. Spirometry and static lung volumes were done January 7, 1981 and were pronounced normal.

On January 9, 1981 a portion of the small bowel was resected and the ileocecal valve was excised. The pathology report contained a diagnosis of tuberculosis ileocolitis.

Gerald Joseph Langdon, M.D., general internist, described persons with potential for tuberculosis as being those who are run down or indigent or in poor health or those who work in particular environments such as the Salvation Army, state hospitals or prisons. He stated that it is possible to contract tuberculosis from a small inoculum.

He first saw claimant on December 22, 1980 with complaints of pain on her lower right side of about one month's duration, weight loss and general fatigue. She was admitted to the hospital the following day.

Routine initial studies were ordered including a chest x-ray which showed an active granulomatosis infection in the apex of the right lung. Treatment of a delaying nature was undertaken while the physicians attempted to reach a more accurate characterization of claimant's problem. After specimens were taken, it was decided to do a bronchoscope with brushings. Sarcoid or a nonspecific inflammatory condition of the lungs and lymph nodes was given consideration. Vasculitis or an inflammation of the blood vessels also was considered. When the bronchoscope initially failed to turn up anything, an open lung biopsy was scheduled. That procedure was cancelled when positive results were obtained from one of the cultures.

Although he had looked at the chest film, he claimed it is his practice to rely on the expertise of the radiologist.

Dr. Langdon last saw claimant on February 3, 1981 at which time she was on INH, Enthambutal and Prednisone. Dr. Roehrs was designated for a follow-up. Dr. Langdon did not assess any permanent partial disability as he considered claimant's illness a curable infectious disease.

John W. Monson, M.D., board certified general surgeon with a subspeciality in peripheral vascular surgery, first saw claimant whom he recalled on December 24, 1980 at the request of Dr. Heffron. After examining her and reviewing her x-rays he suspected tuberculosis ileocolitis and bowel obstruction, secondary to tuberculosis. In arriving at this diagnosis he considered a tuberculosis cavity in the right upper quadrant of the right upper segment of the right upper lobe coupled with the idea of an obstruction and a firm mass in the right lower quadrant. As he felt strongly claimant's problem was tuberculosis ileocolitis, he proposed treating her conservatively, repeating x-rays and monitoring distension of the bowel. Claimant was started on antituberculant therapy. Subsequently, gastic washing, urine and sputum were checked for acid fast bacilli in an attempt to confirm what was seen on x-rays. The bronchoscope did not obtain any acid fast organisms.

Dr. Monson asserted that the radiologist was definite in telling him that tuberculosis was present on the films taken on December 23, 1980. He had also reviewed x-rays from the year before which he said showed a lesion in the right upper lobe. The surgeon stated that claimant had tuberculosis in October 1979. He thought there was some progression of the lesion between October 1979 and December 1980. He did not interpret the report of impaired aeration in the apical segment of the right upper lobe as representing a not abnormal. He characterized impaired aeration as a lack of air going in or out and infiltration as a disease process mingling into the parenchym of the lung. Atelectasis and pneumonia produce impaired aeration and infiltration. Tuberculosis or cancer would also be concerns. He thought impaired aeration and infiltration would prompt investigation.

The surgeon described tuberculosis as both chronic and acute--chronic when there is no active disease process present and acute when the tuberculosis "bugs" are active. As to whether or not x-rays could be used to assess a chronic or acute state, he said that it is difficult to tell with a scarred down lesion, but that an old infiltrate filling an upper lobe would be acute. He acknowledged a stage of tuberculosis at which there are no clinical findings, infiltration or shadow on the lung. He explained the manner in which tuberculosis is transmitted from the lungs to the bowel thusly:

> The patient coughs up the active organisms and then swallows them, and they transgress to the stomach and arrive at the ileum where they're held up, so to speak. And most organisms, tuberculosis organisms, are probably killed or destroyed by the acid in the stomach. But a few of them can get to the small bowel. And in the small bowel, the body has no protection, so they invade the wall of the bowel and then produced the colitis or the invasion.

Dr. Monson released claimant to return to work on February 23, 1981.

Regarding claimant's future he said that if she continued to be bothered by diarrhea, she should have a reoperation with excision of the terminal ileum or anastomosis of part of her colon. The surgeon testified that claimant has lost some of the absorptive surface of the small bowel and could have diarrhea. He rated claimant's permanent disability at twenty to twenty-five percent apparently based on both the small bowel and the lung.

In a letter dated March 23, 1982 Dr. Monson expressed the feeling that claimant contracted tuberculosis while working for defendant employer. In response to a letter from defendants' counsel, however, he answered "no" to the question of whether claimant had contact with an active case of TB. He acknowledged that he had conducted no investigations into the circumstances at the school. He was unable to state with medical certainty whether there was any relationship between contact claimant claimed in 1979 and her hospitalization.

John D. Roehrs, M.D., internist with a subspecialty in pulmonary disease, testified that he saw claimant at the request of Dr. Langdon who told him there was difficulty with claimant's diagnosis. Dr. Roehrs ordered blood gasses and pulmonary function tests to establish the state of oxygenation and ventilation of claimant. He examined the claimant, looked at two of her smears and reviewed the chest x-rays. On examination he heard a diminution of sounds in the right upper zone of the lung and a few rales. This finding suggested such things as bacterial pneumonia, tuberculosis, histoplasmosis, fungal disease or a neoplasm. The doctor was questioned about the incidence of tuberculosis in someone like claimant. He responded:

> If you take an Iowa female from a small town and know that -- that's the only informatin you have about her, the incidence of TB is very low. When you add on, this is a nurse who works in a state TB -- or in a state school, your incidence of -- or your index of suspicion would go much higher. And if you add on the fact that she had been recently pregnant, with that x-ray, the index of suspicion goes even higher, because tuberculosis has a notorious habit of reactivating around around the time of the end of pregnancy.

More specifically, he said that tuberculosis is a chronic disease that can reactivate

> [a]round the perinatal period. Now, it can -- you can get your infection when you are pregnant and it will smolder and the term reactivation would not be appropriate but progress would be appropriate. So if you -- say, for example, you had your tuberculosis, initial contact when you were five years old and you got pregnant at age twenty, the incidence of reactivation would be higher toward the end of pregnancy and that would be a case of reactivation.

He thought the x-ray at the time of claimant's hospitalization definitely showed tuberculosis as infiltrate was present in the upper zone of the lung and in the posterior aspect. He was unable to say if an acute or chronic process was represented. He thought there had been progression from the previous film with an increase in the size of the infiltrate and a slight increase in density. He did not feel Dr. McDonald's report red flagged an abnormal condition. Dr. Roehrs agreed that the diagnosis of tuberculosis cannot be established conclusively from x-rays alone. It was his opinion that CT scans are not sensitive in picking up the disease.

An open lung biopsy was proposed for diagnostic purposes. Dr. Roehrs reported he began to fear an arteritis which would require a different sort of therapy from that claimant was undergoing. However, acid fast bacilli were found and tuberculosis was confirmed. After her operation claimant was placed on drug therapy including Prednisone which was used in an attempt to reduce the recurrence of abdominal trouble and constrictive pericarditis.

When claimant was seen February 3, 1981 her Prednisone was reduced. In April claimant told the physician of trouble with diarrhea. That problem persisted on later visits and Dr. Roehr's impression remained diarrhea of undetermined etiology. Dr. Roehrs indicated that had the diagnosis of mycobacterium tuberculosis been established in 1979, there would have been no progression to the small bowel; no weight loss; no hospitalization; no surgery; no diarrhea, assuming the later is attributable to the surgery; and less permanent destruction of lung tissue.

On January 22, 1981 Dr. Roehrs stated in a To Whom It May Concern letter:

> Because of the social and family situation of the patient, the circumstances around her employment at the state school in Iowa make it likely that she contracted her tuberculosis while an employee at the state school in Iowa. It is our opinion that the likelyhood [sic] of this occurence [sic] is upwards from 90%. We believe that this should be considered a workman's compensation case."

In a subsequent letter dated March 30, 1980 Dr. Roehrs wrote to defendants' counsel:

> She [claimant] most likely had her initial primary contact while employed at the state school as there is always a clustering of subacute and chronic cases of TB at institutions like this and other state institutions such as prisons.
>
> I have no historical evidence of any contact with active TB by Mrs. Forney.

Dr. Roehrs proclaimed claimant's prognosis "excellent" and foresaw no permanent or partial disability as a result of her illness or surgery. The doctor stated that claimant's pulmonary function is normal, but she has a damaged lung and bowel with plus minus five percent of her lung being affected.

Irving J. Hanssmann, M.D, staff physician at Glenwood State Hospital-School for over eight years and a practicing internist for more than thirty-five years, testified to duties including medical care of the residents and employee examinations. The institution maintains a committee on infection control of which the doctor is chairperson. The purposes of that group are to control and monitor infections, to detect the origin of infections and to prevent epidemics. An infection control policy provided by the doctor shows that infections are to be recorded by the nurse epidemiologist and reported to the state health department.

Dr. Hanssmann explained that tuberculosis is an infection contracted by exposure to a person who has the disease. The usual contact would be through droplets coughed up or spit out by the infected person. The person transferring the disease must have an active case. He wrote in his letter that "a long period of exposure on a limited level [may] make up for the lack of any specific intimate exposure."

He described reinfection tuberculosis as a situation in which a person has the disease, but it is stopped. The lesion heals. Later it may be reactivated by such things as old age, malnutrition or lowered resistance. The doctor agreed that pregnancy and particularly a difficult pregnancy could stir up an old lesion. Although he had first said he was not able to say where within the period of pregnancy a person might be more susceptible to the flare-up of an old lesion, he thought it might possibly be near the end.

The physician stated that he and the infection control committee had investigated claimant's case in an attempt to locate the source of disease and were unable to find any case from which claimant's might have originated. The search found no resident or employee with tuberculosis. The doctor reported in a letter to defendants' counsel dated May 7, 1981 that the committee had not investigated any cases of chronic disease since 1978. Although it was apparently thought that claimant had contact with a Pat Walker who had tuberculosis, Dr. Hanssmann was later "dubious" about Walker's having the disease. The doctor wrote that "the patient [Walker] either never did have tuberculosis or certainly was cured of it as far as infection or contagion goes by the date of January 6, 1978...."

A letter from Woo Rhee, M.D., to the department of health dated January 24, 1978, relates to Patrick Walker who was hospitalized in the fall of 1976 with an empyema on the right. Although cultures were negative, sputum samples showed an acid fast organism on smear. Walker was given antituberculin therapy. A tuberculin test on August 23, 1977 was negative. In January 1978 he had no chest disease or changes suggestive of tuberculosis and his therapy was discontinued.

An August 9, 1978 history of Walker reports his treatment for aspiration pneumonia followed by empyema in October 1976 with a possible pulmonary abscess.

Walker's treatment after January 1, 1979 includes no mention of respiratory problems. He was given pneumovax on March 9, 1979. A tuberculin test in August 1979 was negative. Chest x-rays the following year were negative for pulmonary infiltrates.

In response to a hypothetical question regarding the cause of claimant's tuberculosis, Dr. Hanssmann said that no active case was found in the institution which could have caused the infection. He acknowledged that claimant's exposure in Missouri would be a possible cause and that there was a "good possibility" that an old lesion was reactivated by claimant's pregnancy.

Jerome Charles Tanous, M.D., board certified radiologist, testified that the x-ray taken at the time of childbirth showed an area of infiltration of the right upper lung field which was less extensive and less developed than that seen on later films. The infiltrate meant alveolar or air space disease, but not necessarily tuberculosis. The area might also be an artifact. He stated that his report might say "it's probably an infiltrate most likely of an inflammatory nature, possibly infectious in origin." Later he testified he would dictate: "I'd say the heart is normal in size and configuration, the left lung is clear, there is a hazy poorly defined area of increased density in the right upper lung field, perhaps an apical lordotic view or repeat film would be helpful for further evaluation." While the doctor thought there could be an acute process, he did not think the location alone would be indicative of an acute process.

It was the doctor's opinion that tuberculosis could not be diagnosed from an x-ray, but it could be suggested as a likely possibility. Although scarring is usually an indication of healing, the doctor said that

> [i]n tuberculosis it is not at all uncommon to be able to culture or grow tuberculosis organisms from scar tissue.
>
> The fact that there is scarring in tuberculosis does not indicate cure, it could mean it's an old or chronic process, perhaps of many years duration.

Raymond G. McDonald, M.D., board certified radiologist and nuclear medicine specialist, testified that the procedure used in x-ray is for the requisition to come in, an entry to be made in the log and a card to be typed. Surgery studies are done first. The radiologist looks for something acute which might create problems for the anesthesiologist.

The doctor was questioned about the relationships among pregnancy, tuberculosis and x-rays:

> Q. Being aware that Regina Forney was present and that she was admitted to the hospital for a "C" section, would that cause you to be particularly interested to be looking for anything specific in a chest x-ray?
>
> A. No, sir.
>
> Q. The fact that someone is pregnant coming in for a "C" section, does that make them more susceptible to any type of disease that you might want to concern yourself particularly in looking at a chest x-ray?
>
> A. Oh, gee, I don't know if I can answer that. I don't know that much about pregnancy.
>
> Q. Well, what about TB, does pregnancy in any way enhance the chances of TB?
>
> A. I don't know that. I think that it was once perhaps ingrained in texts that it did, but I don't know that that's true.
>
> Q. But I take it you are aware that there are certain medical opinions that have said that pregnancy does enhance TB, is that what you are telling me?
>
> A. Enhances it, it may be that a person who is pregnant may possibly be more susceptible.

Dr. McDonald stated that the impaired aeration means that a portion of the lung does not have the density associated with air. Impaired aeration, according to the physician, has almost endless causes including tuberculosis. He said that his statement regarding scarring meant that at one time there was an acute process which had healed and undergone scarring. Possible acute pathological processes would include viral pneumonia, bacterial pneumonia, a parasitic infection or histoplasmosis.

He was unsure whether or not he might have suggested other x-rays; however, he claimed it would be his usual practice to alert someone to a problem.

Comparing the film of 1979 with that of 1980, he pronounced the second showing more impairment.

APPLICABLE LAW AND ANALYSIS

The first issue to be resolved is whether or not claimant had an injury arising out of and in the course of her employment.

In order to receive compensation for an injury, an employee must establish the injury arose out of and in the course of employment. Both conditions must exist. Crowe v. DeSoto Consolidated School District, 246 Iowa 402, 68 N.W.2d 63 (1955).

In the course of relates to time, place and circumstances of the injury. An injury occurs in the course of the employment when it is within a 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, 286 (Iowa 1971).

In addition to establishing that an injury occurred in the course of the employment, the claimant must also establish the injury arose out of her 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 followed as a natural incident of the work. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Preponderance of the evidence means greater weight of the evidence; i.e., the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 38 (1935). Claimant's burden is not discharged by creating an equipoise. Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960). It is recognized that preponderance of evidence does not, however, depend on the number of witnesses on a given side. Ramberg v. Mason, 209 Iowa 474, 218 N.W. 492 (1929).

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, 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 testimony of a medical expert may be rejected when the opinion is based upon an incomplete or inaccurate history. Musselman, 261 Iowa 352, 154 N.W.2d 128. 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). Expert testimony coupled with nonexpert testimony is sufficient to sustain an award but does not compel one for "[i]t is for the finder of fact to determine the ultimate probative value of all the evidence." Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 1072-73, 146 N.W.2d 911, ___ (1966).

Claimant acknowledges that she had close contact with a terminal tuberculosis patient in 1976 and she admits that she was not exposed to any active cases at Glenwood and that none of

the residents showed symptoms of tuberculosis. While the record does not clearly establish that claimant had contact with a Pat Walker, in light of the evidence presented concerning his medical condition, her contact with him, if any, did not produce the tuberculosis.

Defendants properly point out that the causal connection between claimant's work at Glenwood and her tuberculosis expressed by Drs. Monson and Roehrs is speculative. Neither knew of contact with an active case at Glenwood. There is nothing in the record to indicate that any of these experts, with the exception of Dr. Hanssmann, knew claimant had in fact been exposed to an active case of tuberculosis earlier in her nursing career. As the expressions of causation by these experts are based on incomplete histories and are speculative, little weight can be given to them.

Dr. Hanssmann is in an excellent position as chairperson of the Infection Control Committee to testify to claimant's exposure to tuberculosis. He asserted that an investigation at Glenwood had been conducted and no cases were found from which claimant's case might have come.

Dr. Roehrs, a specialist in pulmonary disease, testified that pregnancy, and particularly late pregnancy, can reactivate tuberculosis. The testimony of the other experts is consistent in suggesting that tuberculosis may lie dormant for a period of time and be reactivated by particular conditions in a person's life.

Viewing this record as a whole and following the analysis set out above, claimant has not carried her burden. She has not established by a preponderance of the evidence that the tuberculosis which was diagnosed in January 1981 arose out of and in the course of her employment.

As this claimant has failed to carry her burden on the first issue, the other issues presented herein will not be discussed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is married and has two sons.

That claimant is thirty years old.

That claimant is a registered nurse who has worked in various aspects of nursing.

That claimant commenced work at Glenwood in January 1979 at a job that provided daily contact with patients.

That claimant delivered a child by Caesarean section on October 17, 1979.

That an x-ray report at that time recorded "a small area of impaired aeration in the apical segment of the right upper lobe."

That claimant began experiencing abdominal pain in early 1980.

That claimant has hospitalized in December 1980.

That claimant was given a diagnosis of tuberculosis in January 1981.

That claimant had surgery on January 9, 1981 involving a resection of the small bowel and excision of the ileocecal valve related to the tuberculosis.

That claimant returned to work on February 23, 1981.

That claimant continues to have diarrhea.

That claimant has received promotions and has not had complaints about her work.

That claimant has not sought other employment.

That claimant has never had a positive tuberculin skin test.

That claimant was closely involved in the care of a terminally ill tuberculosis patient in 1976.

That claimant was not exposed to any active case of tuberculosis at Glenwood.

That claimant settled a claim against Dr. McDonald.

That claimant has a permanent impairment as a result of tuberculosis in that she has lost absorptive surface in her small bowel and has residual scarring and impaired ventilation in the right lung.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence that the tuberculosis which was diagnosed in January 1981 arose out of and in the course of her 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 with those costs to include only expenses incurred in the workers' compensation matter and not expenses resulting from claimant's suit againt Womens' Christian Association of Council Bluffs, Iowa, and Raymond G. McDonald, M.D.

Signed and filed this 14th day of January, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DELORES FRANCIS,	:	
Claimant,	:	
vs.	:	File No. 658503
ARLAN BARGLOFF d/b/a BARGLOFF'S,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
IOWA KEMPER INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed arbitration decision filed April 2, 1982 wherein claimant was denied death and burial benefits as surviving spouse of George Francis.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Douglas Simons, Arlan Bargloff, Michael Gordon Harrington, Ellen Kathleen Wilbur, and Douglas W. Hansen; the deposition of claimant; claimant's exhibits 1 through 18 inclusive (exhibit 7 consisting of exhibits 7A through 7DD but excluding 7W); defendants' exhibits A through Z inclusive plus exhibits AA, BB, and CC; and the briefs of all parties on appeal.

ISSUES

The issues on appeal are:

1. Whether claimant's decedent was an employee of defendant employer or an independent contractor.

2. Whether claimant's decedent, if an employee, died from injuries arising out of and in the course of his employment and, if so, the applicable rate of compensation.

REVIEW OF THE EVIDENCE

Claimant asserts that the decedent was an employee of Bargloff's and died as the result of injuries arising out of and in the course of his employment. The decedent, George Francis, died from injuries sustained in a motor vehicle accident on September 29, 1980 while enroute to work. It is necessary to review the record on appeal concerning the relationship between the decedent and Bargloff's in determining whether decedent's status was as an independent contractor or an employee.

Alan Bargloff was the owner of a business involved in the selling and construction of steel buildings and grain bins. Bargloff first became acquainted with decedent after seeing some of his work. Bargloff and the decedent negotiated extensively to reach agreement on a contract for services. Bargloff testified at hearing that the decedent demanded $10.00 per hour plus a 10 percent surcharge for expenses. Bargloff declined this offer because such a salary would have been in excess to that paid to other employees. An oral agreement was reached, according to Bargloff, wherein the decedent's salary demands would be met as an independent contractor. An associate of decedent, Carlson, was to be paid $7.50 per hour. Further, Bargloff was not to withhold taxes or make social security payments on behalf of the decedent or Carlson. Bargloff testified that it was the decedent that proposed an independent contractor relationship after

salary demands could not be met. (Transcript, pp. 26-27)

Bargloff called the decedent a "subcontractor" and paid the decedent out of "subcontractor" accounts as he did with others who did work for Bargloff's on an independent contractor basis. (Tr., pp. 117, 336) The decedent regularly submitted invoices to Bargloff for his own and Carlson's time and expenses while other workers kept time cards. (Tr., p. 48) Other workers were subject to withholding for taxes and social security with contributions for unemployment paid by Bargloff's. (Defendants' exhibit J) Employees of Bargloff's received overtime, were given clothing allowances, private insurance allowances, bonuses and free trips to conventions. The decedent received none of the employee benefits. (Tr., pp. 125-133) Bargloff testified that all of his independent contractors were required to supply their own equipment and insurance. (Tr., p. 32) The decedent drove his own vehicle, and supplied his own tools. What equipment decedent could not store at his home was kept at Bargloff's place of business. The decedent maintained no office or warehouse. (Tr., p. 40) Bargloff further testified that he instructed the decedent to secure his own workers' compensation insurance policy. (Tr., p. 137)

Bargloff regularly worked with a number of independent contractors. These included "bin-Jackers" from South Dakota (Tr., p. 94), plumbing and heating contractors (Tr., p. 101, Defendants' ex. D), electrical contractors (Tr., p. 103, Def. ex. E), and carpenters (Def. ex. B). Bargloff testified that another subcontractor that regularly performed work for him was a business known as C & L Builders. C & L was apparently organized in 1980 by Bargloff's two salesmen, Bob Caylor and Gene Lyster as a personal investment. While there were outside construction projects, C & L provided the same subcontracting services to Bargloff as the "bin-Jackers" from South Dakota. C & L maintained its own books and employees. C & L employees were not considered Bargloff's employees and did not receive the same "fringe" benefits as noted above. Caylor and Lyster maintained C & L during their off hours from Bargloff's. (Tr., pp. 96-98) Bargloff testified that he exercised no control over C & L and received no benefits other than subcontracting services. (Tr., p. 146)

The record is clear that the decedent was a highly skilled and proud worker. Most of his work for Bargloff's involved the pouring of concrete on which Butler grain bins would later be erected. Bargloff indicated, however, that the decedent would often assist in other carpentry and steel erection work side by side with Bargloff's employees. (Tr., p. 68) Bargloff testified that because of the decedent's carpentry skills, he would ask the decedent to do general carpentry tasks when concrete work ran out rather than "lay off" the decedent. (Tr., pp. 79-80) After the decedent was killed, Bargloff hired another independent contractor for concrete work. (Tr., p. 78, Def. exs. B and C)

Bargloff testified that the decedent either charged his materials to him or billed Bargloff's for them. The decedent would be given a job assignment by Bargloff, but decedent was responsible for how that assignment would be done. (Tr., p. 352) Bargloff also considered the decedent free to enter into contractual arrangements with other people for building services. (Tr., pp. 144, 352)

Bargloff indicated that during 1980 the decedent worked on most of Bargloff's jobs. Likewise, the record indicates most of the decedent's work during this period was for Bargloff's or C & L. However,the decedent did work on the other jobs having no relationship to Bargloff's or C & L. One such project was the construction of a house for one Lowell Hansen. The decedent hired C & L employees for the project and paid them directly. The decedent directed the project and billed Hansen directly for labor and expenses. No agreement existed between Hansen and C & L or Bargloff's. (Tr., pp. 173, 144) Additionally, the decedent did work for C & L under a similar arrangement as with Bargloff's. (Def. exs. Y and Z)

Prior to 1979, the decedent was primarily self-employed. Until 1978, the decedent was an independent dealer of Watkins farm and household products. As sales for Watkins fell off, the decedent also offered services for the artificial insemination of cattle. Throughout the period, the decedent did carpentry jobs on the side for additional income. As his skill in carpentry grew, so did the demand for his services. The decedent came to rely more heavily upon carpentry as a sourse of income. In 1978, the decedent became an employee of a small business known as Professional Seed Associates or "Mellow-Dent". Initially, the decedent worked as a carpenter but was later moved to a sales position. Apparently, the decedent became dissatisfied with his salary and not being able to perform carpentry jobs, so an agreement was struck with Bargloff's in May of 1979. (Tr., pp. 221-223) During his association with Bargloff's and C & L, the decedent continued to operate the Watkins dealership as well as performing assorted small carpentry jobs (in addition to the Hansen job noted above). (Tr., p. 222)

At all times before his death, the decedent filed his tax returns showing himself to be a self-employed businessman and carpenter. Social security payments were computed on "Form SE" indicating a sole proprietorship. Additionally, for the years 1976 through 1980, the decedent utilized "Schedule C" to deduct salaries paid to others, depreciation on equipment, supplies and transportation expenses. (Def. exs. P, Q, R, S, and T) Only during the period the decedent was employed with Professional Seed Associates did he receive a "W-2" or consider himself an employee on tax returns. It is noted that the tax return for 1980 differs from all others not only in the respect that it was prepared by Attorney Hurd, but in the fact that compensation from Bargloff's is omitted from "Schedule C" although other compensation and deductions remain the same. It is further noted that Bargloff never prepared a "W-2" for the decedent. (Tr., p. 343)

Finally, Michael Harrington, an employee of C & L, testified at hearing on behalf of the claimant. He varified the testimony of Bargloff by stating C & L was independent of Bargloff's, that the employees of the two companies were treated separately and that the decedent was not treated as an employee of Bargloff's or C & L. (Tr., pp. 180-182) Harrington testified that the decedent and C & L employees were open about their pay and varying relationships with C & L and Bargloff's. (Tr., pp. 184-185) The witness also stated that while most of the decedent's jobs were with Bargloff's or C & L, the decedent considered himself to be a highly skilled worker and to be self-employed. (Tr., pp. 195-196)

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. Iowa Code section 85.3(1).

Iowa Code section 85.61(2) and section 85.61(3)(b) states:

> 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 any employer, every executive officer elected or appointed and empowered under and in accordance with the chapter 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.
>
> "Workman" or "employee" shall include an inmate as defined in section 85.59.
>
> 3. The following persons shall not be deemed "workers" or "employees":
>
> * * *
>
> b. An independent contractor.

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

> This court has consistently held it is a claimant's duty to prove by a preponderance of the evidence he or his decedent was a workman or employee within the meaning of the law, and he or his decedent received an injury which arose out of and in the course of employment. See section 85.61, Code, 1962.
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

Given the above, the court set forth its latest standard for determining an employer-employee relationship in Caterpiller Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). The court stated in part:

> I. The employer-employee relationship. As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contract of service ... for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. McClure v. Union, et al., Counties, 188 N.W.2d 283, 285 (Iowa 1971). (Emphasis added.)

If a claimant has established a prima facie case for an employer-employee relationship, the defendant may assert the affirmative defense that claimant's decedent was an independent contractor. The test for meeting the burden of proof on this affirmative defense goes back to Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254 (1931), wherein the court states:

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

It is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship of independent contractor. Hassebroch v.

Weaver Construction Co., 246 Iowa 622, 628; 67 N.W.2d 549, 553 (1955).

ANALYSIS

Even if it were assumed that the claimant could establish a prima facie showing of an employer-employee relationship, a review of the record makes it clear that the decedent was an independent contractor under the Nelson, 259 Iowa 1209, 146 N.W.2d 261; Caterpiller Tractor Co., 313 N.W.2d 503; and Mallinger, 211 Iowa 847, 234 N.W. 254, tests.

Decedent was employed at the fixed rate of $10.00 per hour plus 10 percent for expenses. He was not paid on a piece work or per job basis. (Test 1) The decedent's primary function was the pouring of concrete for foundations, although he did perform general construction functions while not pouring concrete. Because Bargloff acquired another subcontractor to complete the decedent's unfinished job rather than have a general employee finish the work, it is assumed that a worker with distinct talents was needed for the work which the decedent performed. (Test 2) The decedent was specifically granted the right to use his own assistants and in fact did so even if for a short period of time. (Test 3) Although materials were provided by Bargloff's, the decedent was expected to supply his own tools and did so. (Test 4) Bargloff directed the decedent to a job and, of course, expected usable results. Beyond this, Bargloff relied upon the decedent's skill to perform the assignment as the decedent saw fit. (Test 5) A working relationship existed between the decedent and Bargloff which lasted approximately 16 months. However, intervening jobs with others, small and large, were performed, indicating an independence of vocation. (Test 6) The decedent was paid by the hour rather than by the job. (Test 7) Bargloff was not in the business of pouring cement. Nor did any other Bargloff's workers possess the skill that the decedent did in working with concrete. Yet, concrete work was a necessary element of all Bargloff's jobs. (Test 8)

It is not controlling that the facts preponderate on any one of the above tests, but that the evidence as to these tests taken as a whole preponderates. Nor are the tests set forth in Mallinger and Nelson of mystical significance which exclude consideration of closely related factors which assist in establishing the true relationship of the parties. Rather, the eight tests of Mallinger are recognized elements normally present in an independent contractor relationship.

The evidence in the record on appeal, taken as a whole, indicates that claimant's decedent was an independent contractor of Bargloff's. The decedent had the right to hire assistants and to control how a particular job was done. He had the responsibility of supplying his own equipment. Furthermore, Bargloff did not replace the decedent with one of his general laborers to complete the tasks left unfinished by the decedent's untimely death. Rather, Bargloff replaced the decedent with another independent contractor. The fact that Barloff paid the decedent on an hourly basis, paid him on the same day of the week, and used the decedent for concrete and general construction consistently for approximately sixteen months is noticed. However, it is the experience of this agency that such practices are not uncommon in construction enterprizes such as Bargloff's where independent contractors are used. It must be remembered that the decedent was free to work elsewhere when work was available. The decedent not only participated in large jobs not associated with Bargloff's, he charged everyone in the same manner for his services.

The right to control the physical conduct of a worker is often considered one of the more important considerations in determining whether that person is giving service as an employee or independent contractor. Every contract for work reserves to the employer a degree of control, at least to enable him to determine that the work is done according to the contract. But such limited control does not necessarily indicate the existence of a master-servant relationship. Hassebrock, 246 Iowa 622; 67 N.W.2d 549 (1955). The record is uncontroverted that the decedent was a skilled and proud carpenter capable of not only carrying out a job without supervision, but also capable of putting together an entire job as is evidenced by the Lowell Hansen job. Bargloff had the confidence in the decedent not only to contract for his services under special circumstances, but also to allow the decedent to perform assigned jobs as he saw fit. The testimony of Michael Harrington further verifies these facts.

As Caterpiller Tractor Co. points out, the intent of the parties is the overriding, though not necessarily the sole issue for determining whether an employer-employee relationship existed. The matters discussed above are helpful in determining that intent. The decedent had long been an independent salesman when he went to work for Bargloff's. He negotiated with Bargloff and entered into a contract that called for a higher salary than the employees of Bargloff's and the right to employ others or be employed by others. Bargloff's employees knew of salary and benefit differences between themselves and the decedent. And the decedent carried out business relationships with others wholly uncontrolled by Bargloff's.

Finally, the decedent's tax returns go far in indicating intent. Bargloff did not withhold any taxes from the decedent's salary nor ever issue a "W-2" withholding form. Moreover, the decedent's tax returns indicate that he actively reaped the benefits of sole proprietorship. Only for the year that the decedent worked for Professional Seed Associates did he report wages as an employee. Upon commencement of the association with Bargloff's, decedent again indicated on his 1979 tax returns that he was a self-employed carpenter.

Claimant seeks to discount the weight of this evidence by asserting that tax status was never an enumerated element considered in Nelson. Nonetheless, the decedent's tax status and lack of withholding on the part of Bargloff are facts that have long been regarded as evidence relevent to determining the existence of an employer-employee relationship. Nelson v. Herbert d/b/a Dugout Lounge, Thirty-first Biennial Report of the Industrial Commissioner, p. 81.

While evidence exists which points to factors in favor of the claimant's position it does not preponderate. The record as a whole clearly preponderates in favor of and establishes the fact that the parties not only intended that the decedent be regarded as an independent contractor, but that the decedent actively enjoyed the special benefits which this status conferred. It is therefore concluded that the decedent was an independent contractor and that the claimant has failed in her burden to prove an employee status as contemplated by Iowa Code section 85.61.

Because of this holding, examination of the case concerning the second issue is not necessary.

FINDINGS OF FACT

1. That claimant's decedent was allowed wage advantages by negotiating a special relationship with Bargloff's.

2. That claimant's decedent had the contractual authority to hire assistants not associated with Bargloff's.

3. That Bargloff did not withhold taxes for claimant's decedent.

4. That claimant's decedent did not receive allowances and "fringe" benefits as did Bargloff's employees.

5. That claimant's decedent supplied his own tools and transportation.

6. That Bargloff regularly hired independent contractors.

7. That Bargloff would direct claimant's decedent to a job and allow the decedent control over the method in which the job was completed.

8. That claimant's decedent entered into similar contract arrangement with others not controlled by Bargloff during his association with Bargloff.

9. That claimant's decedent has a long history of self-employment.

10. That claimant's decedent filed tax returns indicating that he was a sole proprietorship.

11. That the parties intended the creation of an independent contractor relationship.

CONCLUSIONS OF LAW

That claimant has failed to meet her burden of proof that an employer-employee relationship existed between the decedent and Bargloff's as contemplated by Iowa Code section 85.61.

That claimant's decedent was an independent contractor for Bargloff's at the time of his death.

That claimant is not entitled to death or burial benefits under Iowa workers' compensation law.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision filed April 2, 1982 are proper.

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

Costs of these proceedings are taxed against the defendants pursuant to Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 29th day of September, 1982.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK GIESE,

Claimant,

vs.

CAPITOL FOODS/CRESCENT BAKING COMPANY,

Employer,

and

LUMBERMENS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 628639

D E C I S I O N

O N

85.27 B E N E F I T S

INTRODUCTION

This is a proceeding seeking benefits under section 85.27, The Code, brought by the claimant, Mark A. Giese, against his employer, Capital Foods/Crescent Baking Company, and their insurance carrier, Lumbermens Mutual Casualty Company.

The case came on for hearing before the undersigned deputy industrial commissioner at the Bicentennial Building in Scott County, Davenport, Iowa, on February 8, 1983. The case was considered fully submitted on that date.

An examination of the industrial commissioner's file reveals that a first report of injury was filed March 7, 1980. Subsequently, a memorandum of agreement was filed March 17, 1980. A Form 2A was filed August 12, 1982 indicating the amount of benefits paid to claimant.

The record in this case consists simply of a stipulation into the record by counsel for the claimant and agreed to by counsel for the defense.

ISSUE

The issue for determination is whether a pair of shoes, specially designed to accommodate claimant's injured foot are considered an appliance or prosthetic device under the law. Additionally, if these shoes become unusable through normal wear and tear must they be replaced by the employer/insurance carrier and if so, on how many occasions.

RECITATION OF THE EVIDENCE

At the time of hearing it was stipulated by and between the parties:

That as a direct consequence of the work injury of February 28, 1980 claimant lost three smaller toes plus his big toe on the left foot.

That claimant has received all weekly workers' compensation benefits as well as associated healing period benefits to which he is entitled.

That as a direct consequence of the work injury, a special pair of shoes was designed and provided to claimant at the employer/insurance carrier's expense.

That the initial pair of shoes provided claimant was unsatisfactory and a second pair, designed by Dr. Tack, was provided claimant and was satisfactory.

That the pair of shoes designed by Dr. Tack became unusable due to normal wear and tear.

That claimant returned to Dr. Tack and another pair of shoes was constructed for him at a cost of $250.00.

That the defendants have refused to pay this charge and Dr. Tack refuses to give claimant the shoes until the charge is paid. As a consequence, claimant has not received the shoes in question.

That the defendants stipulated and agreed that the aforementioned $250.00 charge for the shoes is fair and reasonable.

The old shoes were physically presented to the undersigned for examination and are indeed worn out and not in a condition to be used.

APPLICABLE LAW

Section 85.27 provides in pertinent part:

The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one permanent prosthetic device.

Industrial Commissioner Rule 500-8.5 provides:

Appliances. Appliances are defined as hearing aids, corrective lenses, orthodontic devices, dentures, or any other artificial device used to provide function or for therapeutic purposes.

Appliances which are for the correction of a condition resulting from an injury or appliances which are damaged or made unusable as a result of an injury or avoidance of an injury are compensable under section 85.27, Iowa Code.

ANALYSIS

There is no dispute in this case that claimant's injury arose out of and in the course of his employment. The injury and resulting disability were limited to claimant's foot and in fact, benefits were paid under the law to compensate claimant for this injury.

The only cutting dispute is whether a pair of shoes which were designed and provided to claimant, and necessitated because of the disability caused by the injury, should be replaced at defendants' cost. In the absence of case law directly in point or statutory guides, the undersigned concludes that the shoes in question are an applicance as opposed to a permanent prosthetic device. As a consequence, just as hearing aid batteries must be replaced by the employer/insurance carrier, so also special shoes must be replaced on an as needed basis. Permanent prosthetic devices by its title, seems to contemplate little, if any, loss due to normal wear and tear. Shoes, on the other hand, clearly will become unusable with normal wear. It would not seem logical, under the law, to only present a seriously and permanently injured claimant one pair of specially built shoes and when those have worn out, in substance, indicate he is then "on his own." The shoes, in this case, are clearly "intended to correct or relieve an employee of the physical effects of the injury."

FINDINGS OF FACT

That the special shoes prescribed for claimant and designed and built for him are appliances.

That the original shoes wore out through normal wear and tear.

That the replacement shoes are necessary for claimant to carry on a normal existence.

CONCLUSIONS OF LAW

Claimant has sustained his burden of proof and established that the replacement shoes are appliances and shall be replaced under the terms of section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants shall pay unto claimant the following medical expense under section 85.27:

Dr. Tack $250.00

That the obligation of defendants to furnish replacement shoes for the claimant shall continue as long as the disability continues.

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

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

Signed and filed this 23rd day of February, 1983.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL GILLESPIE,	:	
Claimant,	:	
vs.	:	File No. 660540
WEITZ COMPANY, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
EMPLOYERS MUTUAL CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in arbitration wherein claimant was denied healing period benefits and permanent partial disability benefits. Claimant's notice of appeal was filed September 24, 1982.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Debora Ann Gillespie, Kenneth L. Bowen, and Franklin Dan Robison; claimant's exhibits H-1 through H-12; defendants' exhibits A and B; the depositions of claimant, Franklin D. Robison, Michael Taylor, M.D., Sinesio Misol, M.D., and Todd F. Hines, Ph.D.; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether or not the injury sustained by claimant on January 29, 1981 arose out of and in the course of claimant's employment so as to be compensable as a matter of law.

2. Whether or not the deputy commissioner erred in failing to order that claimant has sustained an injury to his body as a whole, and thus is entitled to healing period benefits and an industrial disability rating.

REVIEW OF THE EVIDENCE

The record establishes that at the time of the arbitration hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $246.27 per week. It was also stipulated that all medical expenses were fair and reasonable. (Transcript, p. 4)

Claimant, 30 years old at the time of the arbitration hearing, is married and has three children. He graduated from high school in 1969 and has taken one year of freshman course work at a community college in Montana. Claimant has had no vocational or trade school training. (Tr., pp. 10-12)

Upon leaving college, claimant began work as a laborer for a road construction company in Montana. Claimant relocated in the Des Moines area in 1975 and held jobs as a laborer with H. Mosher, Iowa Road Builders, and Central Asphalt. He began working for the Weitz Co., Inc. (defendant employer), in the spring of 1977 or 1978 as a laborer. Claimant stated that his wage had been approximately $10.75 or $10.95 per hour at the time his injury caused him to leave his employment with Weitz. (Tr., pp. 13-18)

On January 29, 1981 claimant suffered a severe cut on his left hand while operating an electric table saw which was owned by the Weitz Co., and located within the confines of the Locust Mall construction site in Des Moines. Claimant had been attempting to cut two broom handles which he had intended to use in the construction of a fabric stretcher for his wife. One of the broom handles had been brought from claimant's home and the other had been taken from a tool shed on the job site with the permission of Frank Robison. Claimant testified that he had sought and received permission from Robison, the laborer foreman on the job site, to use the table saw on the day the accident occurred. While cutting one of the broom handles, the saw caught the wood and pulled claimant's hand through the blade before he could release his grip. A cut started at the thumb, crossed his palm and extended behind the little finger. An ambulance was called, and claimant was taken to the hospital where surgery was performed. (Tr., pp. 23-27; Gillespie Deposition, pp. 20-23)

Claimant testified that his normal working hours were from 8:00 a.m. to 4:30 p.m., but that he usually arrived at the job site early. Time clocks were not used at the job site. The usual routine called for laborers to stop their regular work at 4:15 and to perform general cleanup and grounds policing duties until 4:30. Claimant testified that he would often remain on the work premises until approximately 5:00 when his wife could pick him up. Claimant sometimes would complete unfinished tasks between 4:30 and 5:00 while waiting for his ride, despite not being paid for the additional time. (Tr., pp. 66-69, 83-84)

Claimant admitted that he had driven himself to work on January 29, 1981 and had parked his pickup about two blocks away from the job site. He further admitted that just prior to his injury he had completed his workday and that there was nothing preventing him from going to his truck and driving home other than his desire to use the table saw to cut the broom handles. (Tr., pp. 84-85) At the time of the hearing claimant testified that his accident occurred at or before 4:30 p.m. (Tr., p. 25) At an earlier deposition taken August 24, 1981, when asked if the accident occurred after 4:30 or before, claimant stated: "I have no idea." (Gillespie Dep., p. 22)

It was admitted by claimant that laborers did not use table saws in their regular work duties and further, that his union contract prohibited him from performing work with table saws. (Tr., pp. 83, 87) Although claimant was unable to remember the actual conversation, he testified that he had gotten Frank Robison's permission to use the saw several days prior to his injury, and stated that he would not have used the saw without having first secured permission. (Tr., pp. 85-86) During the period of his employment with defendant, claimant had borrowed hand tools to use at home on at least one dozen occasions. These tools included a drill hammer, skil saw, and chain saw and were borrowed only after having secured permission from Frank Robison. Claimant testified that during the time that he was operating the saw, Robison and John Jenkins walked within 25 or 30 feet of him, but said nothing. John Jenkins was identified as a carpenter foreman.

On cross-examination claimant was questioned as to previous warnings and reprimands about using tools on the job site for his own purposes:

> Q. Hadn't you been warned previously by Harry Hagen, as well, not to use tools on the job site for your own purposes?
>
> A. No.
>
> Q. You don't recall specifically being warned about using cutting torches on the premises for your own personal use?
>
> A. No. He laid me off because I was using a welder one time.
>
> Q. Okay. Maybe I got--
>
> A. But he didn't say I couldn't use it.
>
> Q. He just laid you off for it?
>
> A. Yeah. May I say something?
>
> Q. No, not right now. Your lawyer will ask you. (Tr., pp. 87-88)

On redirect examination the following transpired:

> Q. Could you tell us what the circumstances were concerning that layoff?
>
> A. The superintendent had business that--the superintendent that day had business somewhere at home. I don't remember what it was. But he laid out several things that I should do, and so I did all of them. I was done by 2 o'clock, or so. So I had a couple of pieces of pipe that I was going to weld together for a fireplace that I was putting in at home, and Mr. Hagen dropped by that afternoon and walked through the project and left. Later I found out that he didn't like the idea of me-- As far as I was concerned, I was done for the day, but he decided to lay me off for two or three months.
>
> Q. When was that?
>
> A. The previous winter or fall, I believe.
>
> Q. And had you asked anyone permission to use the welder at that time?
>
> A. There was nobody to ask.
>
> Q. So you had not asked?
>
> A. No.
>
> Q. And how do you know that your layoff was related to that welding incident?
>
> A. I just assumed it was.
>
> Q. Were you ever told that it was?
>
> A. No, I don't think so. That's the only reason I could--because I had worked year round until that time.
> (Tr., pp. 91-92)

Claimant admitted, on cross-examination, that the act of cutting the broom handles on the table saw was not directed by defendant employer, that the decision to use the table saw was a voluntary decision on his part, and that his use of the saw was solely for his own convenience due to the fact that he did not have a saw at home. (Tr., pp. 84-85)

Kenneth L. Bowen, general superintendent for defendant employer at the Locust Mall job site, testified at the hearing. He confirmed the normal working hours of laborers on that job site to have been 8:00 a.m. to 4:30, and stated that there had been no overtime hours scheduled in the afternoon of January 29, 1981. He recalled becoming aware of claimant's injury shortly after 5:00. Bowen testified that while he remains in control of a job site after 4:30, he does not have control of an employee past quitting time unless the employee has been asked to continue by a foreman and is being paid. He also testified that claimant had no reason to be on the job site after 4:30 on January 29, 1981, except perhaps to wait for his wife to pick him up. (Tr., pp. 111-116)

Bowen denied giving claimant permission to use a table saw on January 29, 1981, nor did he recollect anyone else having given such permission. He stated that in conformance with union regulations, table saws were for use by carpenters only, and

that a laborer's request to use a table saw would have been rejected because of the danger involved. (Tr., pp. 117-119)

While Bowen stated that the Weitz Co., had no written policy regarding the lending of tools to employees for home use, he did know of several instances of its being done to reliable employees. He agreed that allowing employees to make use of tools at home helped maintain good employer/employee relations, but distinguished between tools which were easily moved and tools such as a table saw which would stay on the job site at all times. Bowen admitted that he had taken tools home with him, but had not, however, done personal work on the job site. (Tr., pp. 118-122)

Franklin Robison testified both at the hearing and through deposition. Robison was the laborer foreman for defendant employer and was responsible for scheduling and assigning claimant's work on January 29, 1981. He testified that on that particular day, claimant had been tending for a carpenter crew and that no work was done past 4:30 p.m. Robison admitted, however, that he was authorized to call laborers back to work after 4:30. He stated that the laborers' duties include checking the work area for tools, and that he locked up the tool trailer once everything was cleaned up. Robison recalled that he had locked the trailer and was leaving the job site at approximately 4:33 on January 29, 1981 and that he did not see claimant after 4:30. (Tr., pp. 132-136)

Robison recalled giving claimant permission to take a broken broom handle from the job site, but denied that claimant had asked his permission to use the table saw. He stated that he would not give a laborer permission to use a table saw because they lack the right training to operate the saws. Robison also testified that he had once given permission to claimant to borrow a company chain saw for use at home and that small hand tools were loaned to employees in an attempt to keep them happy. (Tr., pp. 136-137)

Surgery on claimant's hand was performed at Iowa Lutheran Hospital by Sinesio Misol, M.D., on January 29, 1981. Claimant was discharged on January 31, 1981. Further surgery was performed by A. I. Packiam, M.D, a plastic surgeon, on June 10, 1981 and by Dr. Misol on June 13, 1981. Dr. Misol's last visit with claimant was on December 1, 1981 at which time claimant complained of discomfort in his hand with cold weather, loss of sensation, and decreased mobility. He evaluated range of motion and sensation as follows:

> The thumb has normal active and passive range of movement. The index finger has normal active and passive range of movement. The long finger, or middle finger, it is also normal as far as the mobility.
>
> The ring finger, the first knuckle -- that is, the one that joins the finger to the hand -- goes mobility-wise from zero degrees to eighty degrees. Normal would be ninety or ninety-five degrees. The second knuckle -- that is, the PIP joint -- which normally goes from zero to about a hundred degrees, it is fixed; fixed at sixty degrees, and it has no motion one way -- that is, in extension -- or the other way -- that is, into flexion. The last knuckle of the ring finger, it is fixed at fifteen degrees.
>
> As far as the little finger, the first knuckle is fixed at forty degrees with no flexion or extension. This is the one that the saw completely transected part of the articular head. The second knuckle, which is the one I fused in the second surgery, it is solid in the position that we decided to put it, which is at zero degrees. The last knuckle, it is solid or fixed at thirty-five degrees.
>
> As far as the blood supply to the hand, the little finger and the ring finger are colder than the others, but they do have blood flow.
>
> As far as the sensation, one side of the thumb has protective sensation, but not normal. It is what we call hypostatic; that is, below normal sensation. One side of the index finger is the same. One side of the long finger, it is also less than normal sensation. The whole volar aspect, or palm side, of the ring finger feels thay way, and the entire aspect of the little finger, not only on the one side but the top as well.

Dr. Misol estimated claimant's physical impairment to be "in the neighborhood of thirty-five percent of this hand." (Misol Dep., pp. 7-13)

Claimant was examined by G. Charles Roland, M.D., at the request of defendants. The following was reported in a February 17, 1982 letter to defendants' attorney:

> Physical examination of the left hand reveals a well healed volar incision in the mid palm. Sensation is decreased at the thumb ulnar aspect, index radial aspect, long finger tip, as well as radial aspect. He has no sensation in the small finger. The motor evaluation with range of motion for the thumb starting at the MCP joint measures 0 to 40 degrees. At the DIP joint he hyperextends 40 degrees and flexes 50 degrees. At the index finger MCP joint is 0 to 80 degrees, PIP motion 0 to 80 degrees and DIP motion 0 to 10 degrees. At the long finger MCP motion is 0 to 90 degrees, PIP motion is 12 to 80 degrees and DIP motion is 0 to 30 degrees. At the right finger the MCP joint motion is 0 to 70 degrees, PIP is ankylosed to 90 degrees and at the DIP joint was fixed and ankylosed at 20 degrees. At the small finger has 15 degrees of radial deviation through the MCP joint. MCP motion is fixed at 10 degrees of flexion. PIP is ankylosed at 0 degrees and DIP is ankylosed at 40 degrees. The grip strength on a poor-good-excellent scale measures poor. Wrist flexion is 4+ and wrist extension is 4- in motor strength with a normal range of motion. There is a well healed incision and full thickness skin graft at the web space between the thumb and the first finger.
>
> ....
>
> The disability for this patient if 46% permanent partial disability of the hand and 41% of the right upper extremity. (Def. Ex. B)

Claimant's first paying job following his accident was driving a truck for Bork Transport. He started the job in August of 1981, but quit approximately two months later because "I just couldn't handle it" and "things just never went right." About one week after leaving his job with Bork, claimant went to work driving a grain truck for a farmer. This was seasonal work for which he was paid $4.50 per hour. When that work was finished claimant hauled grain for another farmer, and later helped the farmer build a house. Claimant was paid $5.00 per hour and did not always work a full week. At the time of the hearing claimant had been driving a dump truck hauling asphalt and shoulder rock at the rate of $4.40 per hour. He had not contacted defendant employer about returning to work there. (Tr., pp. 44-56)

Claimant testified that he began to experience emotional problems including frustration and difficulty adjusting to his impairment. As he was used to working each day, he said that staying home changing diapers got to him. He began to drink heavily to forget his problems and to relax. He drank a twelve pack a day of beer and sometimes other alcoholic beverages as well. He carried a bottle in his truck. When marital problems developed, his spouse suggested he see Dr. Hines.

Todd F. Hines, Ph.D., clinical psychologist, first saw claimant on August 16, 1981. In a deposition taken February 26, 1982 Dr. Hines related that claimant felt himself to be incompetent and unable to hold a job. Claimant was seen by Dr. Hines seven times between August 31 and December 1, 1981. (Hines Dep., pp. 9-11) Dr. Hines testified during the deposition as follows:

> What I would convey at this point, Mr. Spellman, is that I think Mr. Gillespie is totally disabled at this time vocationally because of simply the psychological aspect of this injury. I think it's essentially impossible for him to hold or to maintain for any period of time employment. The job I mentioned earlier I discovered over the course of the time that I spent with him he ultimately lost, and he lost it in my opinion for purely psychological reasons and highly predictable ones, because of the errors that he made on the job and because emotionally he was unable to get along and maintain relationships with his supervisors and his co-workers. I would expect that kind of situation to prevail without treatment. Some [sic] my opinion would be that he's 100 percent disabled vocationally at this point without treatment. And I think if he goes on without treatment, and if through some stroke of good fortune he does not kill himself through suicide or destroy himself through some form of substance abuse, he will continue to be completely disabled.
>
> I connot conceive of him holding a job in his current emotional condition which in my opinion will go on if treatment is not rendered psychologically. It's my opinion that if treatment is received and if that treatment is adequate and competent and if he can be worked with so that he participates fully and actively in a treatment regimen, I think there will be an ongoing residual. And I think that ongoing residual will have its source in the fact that based on what I know now and what he believes at this point, he will very likely not be able to return to the kind of work that he did previously. And I think the ongoing inability to return to construction and to basically manual work, I think that ongoing lack of ability will cause a permenant [sic] partial psychological residual that I would place somewhere in the area of 10 to 15 percent.
>
> I would also want to say in relation to that question, if I may, that this gentleman has good vocational training potential. As part of the problem that I have attempted to describe to this point, he characteristically underestimates his potential. I feel strongly that he has cognitively and intellectually significant potential that he has never utilized. He right now, because of the depth of his depression, because of the anger and because of the anxiety, he does not see himself as a candidate for schooling or rehabilitation. (Hines Dep., pp. 21-23)

Michael Taylor, M.D., board certified psychiatrist and neurologist, who has treated persons suffering from depression and other related psychiatric disorders and from substance abuse, first saw claimant at the request of defendants on March 2, 1982 and found claimant "significantly depressed." He diagnosed a major depressive episode beginning at least by August of 1981. As factors leading to his diagnosis, the psychiatrist cited sleep disturbance, decreased appetite, loss of ability to concentrate, increased nervousness, heightened irritability, spontaneous crying spells and a "markedly decreased" level of interest. As to suicide, Dr. Taylor recalled that claimant told him, "the subject is always there," and "I don't think it's the best way out at this time." Claimant was urged

to stop drinking and was started on increasing doses of Elavil. During a deposition taken July 1982 Dr. Taylor testified as follows:

> Mr. Gillespie reported that onset of his depressive symptoms occurred after he was led to believe, and did believe, that he would not ever be able to return to construction business.
>
> Q. And of what significance is that to you?
>
> A. I don't know, nor does anyone else know for sure what causes depression. If we look at the sequence of events, it would appear that coming to hold the belief that he would never be able to return to the construction business at least was a factor in precipitating the depression.
>
> Q. Now, Doctor, you have indicated that, I believe, as of May 1982, the depressive symptoms had cleared. Is that correct?
>
> A. That's correct.
>
> Q. Do you have a precise date in mind?
>
> A. I can't tell you when exactly the depressive symptoms cleared.
>
> Q. When you saw him--
>
> A. I saw him on May 18, 1982, and at that time he reported that all the symptoms were gone.
>
> Q. Doctor, have you reviewed--in addition to your notes from the course of your treatment and examination, have you reviewed the deposition of Daniel Gillespie dated August 24, 1981?
>
> A. Yes.
>
> Q. Are you also familar with Mr. Gillespie's physical injury, including from reading the medical reports and the deposition of Dr. Misol?
>
> A. I've read all the medical reports, yes, and have read Dr. Misol's deposition.
>
> Q. Have you also read the deposition of Dr. Hines?
>
> A. Yes.
>
> Q. Doctor, I would now ask you whether you have an opinion, within a reasonable degree of medical certainty, as to the duration of the major depressive episode which you diagnosed with respect to Mr. Gillespie?
>
> A. Yes.
>
> Q. And what is that opinion, Doctor?
>
> A. Well, Mr. Gillespie estimated that symptoms began one to two months after the date of injury. We have documentation of the symptoms from Dr. Hines, beginning in August of 1981, so at the very least we have documentation that symptoms persisted from August of 1981 through May of 1982.
>
> Q. Doctor, do you have an opinion, within a reasonable degree of medical certainty, as to whether or not the depression which you have diagnosed will be permanent in Mr. Gillespie's case?
>
> A. It clearly has not been permanent. It is gone.
>
> Q. Okay. I just want that clear.
>
> Doctor, do you have an opinion, within a reasonable degree of medical certainty, as to whether Mr. Gillespie has any psychiatric functional limitations with respect to his life activities or work activities?
>
> A. Yes.
>
> Q. And what is that opinion, Doctor?
>
> A. That there are no--absolutely no psychiatric functional limitations. (Taylor Dep., pp. 9-11)

APPLICABLE LAW

Iowa Code section 85.3(1) provides: "Every employer...shall provide, secure, and pay compensation...for any and all personal injuries sustained by an employee arising out of and in the course of the employment...."

Iowa Code section 85.61(6) provides:

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

"It is well settled that the words 'arising out of' and the words 'in the course of' are used conjunctively, and so both conditions must exist to bring the case within the statute." Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

A determination that an injury "arising out of" the employment contemplates a causal connection between the conditions under which the work was performed and the resulting injury; i.e., the injury followed as a natural incident of the work. Musselman v. Central Tel. Co., 261 Iowa 352, 154 N.W.2d 128 (1967); Reddick v. Grand Union Tea Co., 230 Iowa 100, 296 N.W. 800 (1941).

It was stated in McClure v. Union, et al., Counties, 188 N.W.2d 283 (Iowa 1971) that, "'In the course of' the employment refers to time, place and circumstances of the injury....An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto."

In Bushing v. Iowa R. & L. Co., 208 Iowa 1010 (1929), it was stated that:

> 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. [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.

ANALYSIS

Claimant's first issue on appeal is whether or not the injury sustained by claimant's hand arose out of and in the course of employment. The undisputed facts in this case are that claimant was injured as he used a table saw owned by defendant employer and located on the employer's premises, that the decision to use the saw was his own, that claimant's motivation for using the saw was strictly for his own benefit and not that of defendant employer, and that defendant employer in no manner directed claimant to use the saw. The deputy commissioner concluded that claimant's injury did not arise out of and in the course of employment. This tribunal affirms the decision of the deputy commissioner.

Under Iowa's workers' compensation laws, compensation is due an injured employee only when his injury satisfies both the requirements of "arising out of" and "in the course of" the employment. These two elements are separate, equal, and distinct. Because they are clearly expressed in conjunctive rather than disjunctive language, both requirements must be met before an injury is compensable under Iowa's workers' compensation laws.

A determination that an injury "arises out of" the employment contemplates a causal connection between the conditions under which the work was performed and the resulting injury, while a determination that the injury occurred "in the course of" relates to the time, place, and circumstances under which the injury is sustained. Claimant's injury occurred on the employer's premises. An issue of fact is presented, however, as to time at which the injury occurred, and whether or not claimant was still under the control of defendant employer at that time. We believe claimant not to have been sufficiently within the control of his employer so as to fulfill the element of occurring "in the course of" employment. While the exact time at which claimant's injury occurred is not readily determinable, the greater weight of the evidence indicates that it was after 4:30 p.m. The fact that claimant would sometimes do odd jobs at the job site without pay after 4:30 while waiting for his wife to pick him up is noted, as such activity might have been deemed as being beneficial to the employer's interests. On the day of the accident, however, claimant had driven himself to work and had no compelling reason to remain on the job site after his normal working hours other than to use the table saw for his own personal benefit. Defendant employer's supervisor and laborer foreman both testified that no workers had been requested to work overtime on January 29, 1981, and claimant admitted that all of his job related duties had been completed prior to his injury. As such, the injury did not occur in a place where claimant was performing his employment duties at a time during which he was fulfilling those duties or was engaged in doing something incidental thereto.

Even if the element of occurring "in the course of" employment had been fulfilled, the requirement of "arising out of" employment necessitates an evaluation of whether the claimant's presence on the job site (and particularly at the table saw) was causally connected to the requirements of his employment. Claimant's job title of "laborer" carried with it duties and responsibilities which were separate and distinct from those of "carpenters." Both positions are filled by union members, and union members are charged with knowledge of union rules and regulations. The evidence indicates that under union rules, table saws were to be used only by carpenters. Testimony by Kenneth Bowen and Frank Robison indicated that they would refuse use of the table saw by any laborer, either during or outside of working hours. Claimant's actions in using the table saw could in no way be interpreted as being a natural incident of his work since the rules of employment by which he was to abide specifically precluded the use of the table saw from the scope of a laborer's employment. Furthermore, prohibition against the use of some tools, particularly for personal benefit during working hours, must certainly have been apparent to claimant. While small tools were often loaned to employees overnight in an attempt to build good employee/employer relationships, claimant's testimony concerning his use of a welder during working hours, and a resulting two month layoff,

indicates that claimant should have known any rule against the use of a tool would be strictly enforced. Ken Bowen's testimony drew a sharp distinction between the lending out of a small tool to an employee for his use at home, and the prohibited use of a stationary tool such as a table saw. Under the evidence presented it cannot be inferred that claimant had permission to use the table saw. No causal relationship appears to exist between claimant's use of the table saw and the conditions under which his work was to be performed. As such, claimant's injury did not "arise out of" his employment.

In light of the resolution of the first issue, the issue as to disability benefits need not be addressed.

FINDINGS OF FACT

1. On January 29, 1981 claimant suffered an injury to his left hand while operating a table saw.

2. The table saw was owned by defendant employer (Weitz Co., Inc.).

3. The table saw was located on the premises of defendant employer.

4. Claimant was attempting to cut two broom handles on the table saw when the injury occurred.

5. Claimant's use of the table saw was for his personal benefit.

6. Claimant was in no manner directed or instructed to use the table saw by defendant employer.

7. Defendant employer derived no benefit from claimant's use of the table saw.

8. Claimant's injury occurred after the completion of his daily work duties and normal quitting time.

9. Claimant did not have permission to use the table saw.

10. Use of table saws by "laborers" is prohibited under labor union rules.

11. Claimant had not been requested to work overtime on January 29, 1981.

CONCLUSION OF LAW

Claimant has failed to sustain his burden of proving an injury arising out of and in the course of his employment.

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 28th day of February, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW GLOVER,	:	
	:	File No. 542032
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
J. I. CASE COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Andrew Glover, the claimant, against his self-insured employer, J. I. Case Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on June 5, 1979. This matter came on for hearing before the undersigned at the Scott County Courthouse in Davenport, Iowa on December 1, 1982. The record was considered fully submitted on that date.

On June 13, 1979 defendant filed a first report of injury concerning the June 5, 1979 injury and a memorandum of agreement indicating that the weekly rate for compensation benefits was $180.94. (The 1978 benefit schedule, which applies to injuries occurring after July 1, 1978 and before July 1, 1979, indicates this is the proper rate for a claimant earning a gross weekly wage of $317.20 and entitled to one exemption.). On July 17, 1979 defendant filed a final report indicating that 3 5/7 weeks of temporary total disability (June 6, 1979 through July 1, 1979) had been paid pursuant to the memorandum of agreement.

The record consists of the testimony of the claimant; claimant's exhibit 1, an emergency department report dated June 6, 1979; claimant's exhibit 2, a June 19, 1979 report from Frank I. Russo, M.D.; claimant's exhibit 3, Dr. Russo's office notes; claimant's exhibit 4, physical therapy records; claimant's exhibit 5, January 28, 1982 report from F. Dale Wilson, M.D.; and defendant's exhibit A, a June 25, 1982 report from Steven R. Jarrett, M.D.

ISSUE

The issue to be determined is the extent of permanent partial disability, if any.

REVIEW OF THE RECORD

Claimant testified that he was hit in the right side of his back around the belt area by the edge of a 2-3" thick sheet of steel at work on June 5, 1979. He recalled that he had been standing on top of the large sheet as it was being moved by forklift and that he flew off of it approximately 15 feet when struck. Claimant experienced immediate severe numbness throughout his back and then his body became numb. Claimant was taken to St. Luke's Hospital emergency department. X-rays of the pelvis and lumbar spine were normal. The emergency room doctor's diagnosis was that of a contusion to the back and right gluteus area. He recommended that claimant be off work one day and then attempt light duty. If claimant could not return to such work, it was recommended that he see a Dr. Fesenmeyer. Claimant testified that he did see Dr. Fesenmeyer a few times. When Dr. Fesenmeyer tried to release him to return to work, claimant told defendant he did not feel capable of returning to work. Defendant then referred the claimant to Frank I. Russo, M.D., at the Franciscan Hospital Rehabilitation Center.

In a letter dated June 19, 1979, Dr. Russo states that he saw the claimant on that date. He received a history of the injury which was essentially consistent with the record as a whole. Dr. Russo then set forth claimant's complaints, his examination findings, impressions and recommendations:

> However, he does relate he had a very large hematoma on the right side of his back. He was quite tender to the touch in this area and has continued to have complaints of pain in the area with any significant moving such as bending, twisting, etc. He apparently was treated with pain pills but has not been on any sort of physical therapy or been on any sort of exercise program. Apparently the suggestion was made yesterday that this man return to a restricted job, however, this gentleman does not feel at the present time that he could carry this out. He denies any radiation of pain into either lower extremity, denies any paresthesias in the lower extremity, denies any significant increase in his symptoms with coughing, sneezing or Valsalva maneuvers; no significant change in bowel or bladder function.
>
> EXAMINATION: This gentleman's low back reveals a small resolving hematoma over the right sacroiliac joint. This area also appears to be slightly indurated and is quite tender on palpation. There is minimal tenderness of the right paraspinal muscles. Forward flexion is limited to about 60°. There is a good deal of splinting while this

maneuver is carried out. Left lateral flexion is about 75% of normal with complaint of discomfort on the extreme of motion. Right lateral flexion and hyperextension are near normal in range with mild discomfort on the extremes of motion. Straight leg raising is negative to 90° on the left, elicits complaints of back pain at about 75° on the right. Patrick's Faber maneuver elicits mild complaints of back pain on the right. Deep tendon reflexes at the knees and ankles are brisk and symmetrical. This gentleman was able to walk on his heels and toes. He shows no atrophy or weakness in either lower extremity. Sensory examination to pin-prick did not reveal any consistent sensory abnormality. There is a rather diffuse mild relative decrease in the left lower extremity vs. the right over several dermatomes and conversely a subjective decrease on the left vs. the right over several other dermatomes which I don't feel are on a physiological distribution. Toe signs are bilaterally plantar flexor.

IMPRESSION: Contusion to the left tissues of the low back and right sacroiliac joint.

RECOMMENDATIONS: At the present time I do feel this gentleman has some substantial inflammation in the right sacroiliac joint and surrounding tissues. I feel he would probably benefit by oupatient physical therapy to try to further accelerate the resolution of any residual extravasated blood and also to cut down the inflammation. It would probably be most advisable for this gentleman to be off work for an additional week. I will recheck him in one week and see at that point if we can't get him back to a more vigorous job duty. He will also be on a supervised exercise program during his outpatient therapy program. (Claimant's exhibit 2.)

Claimant received physical therapy the same day he saw Dr. Russo and on four more occasions during the subsequent week. (Claimant's exhibit 4.) Dr. Russo released the claimant to return to work on July 2, 1979 without restriction. He advised that if the claimant had further difficulty re-evaluation would probably be in order. He did not anticipate any such problem. (Claimant's exhibit 3.)

Claimant testified that when he returned to his job of stacking steel on July 2, 1979 his back pain had subsided. However, after less than an hour of lifting approximately 30 pound sheets of metal, the pain returned. He saw the company nurse who informed him the matter would be reviewed. Claimant was advised by either the nurse or his foreman that his employment was terminated. He testified that he was given no reason for the firing. According to the claimant, July 2, 1979 was the last day of his probationary period.

Claimant saw Dr. Russo on July 6, 1979. Claimant disputed Dr. Russo's comment that he (the claimant) reported no significant pain as of that date. Claimant did not remember Dr. Russo recommending he return to work. In office notes for July 6, 1979, Dr. Russo states:

> I re-examined this gentleman today at the request of Eileen Elliott from J.I. Case and Company. Mr. Glover states he does not have any significant pain. He states that the main thing he notices is still some loss of flexibility in his back and a tendency to "lead with his right foot" while walking. I don't see any particular abnormalities perhaps some very mild guarding when he walks. Straight leg raising does elicit some mild complaints of hamstring pain at about 90 degrees bilaterally. Neurologically he is intact. This gentleman informs me that he was fired from his job because he was unable to lift objects at work. Specifically the things he indicated to me that were problems for him to lift involve what appears to be following good rules of lifting that is squatting and lifting primarily with the legs. Whereas he states he felt he could bend over at the waist better and felt more flexible in that direction which does not seem to follow very well. This gentleman has minimal discomfort on palpation of the right sacroiliac joint. At the present time I really don't see any significant physical reasons why this gentlemen wasn't capable of carrying out his job duties. I did explain that some of the residual stiffness and lack of flexibility which he is noticing are probably still due to lack of completely stretching himself out and encouraged him to follow the exercises. I do feel this gentleman probably expects a very high level of flexibility as he was following yoga prior to this time. I encouraged him that if he continued to work with these he should be able to get himself back into this condition. I have not set up any sort of recheck with this gentleman but would be willing to evaluate him if the need arose. (Claimant's exhibit 3.)

Dr. Russo saw the claimant again on July 27, 1979. The physical findings remained essentially unchanged -- hamstring tightness was noticed during straight leg raising at 85°. Dr. Russo indicated that he was "not tremendously impressed with claimant's findings." (Claimant's exhibit 3.) He ordered a sed rate be done and placed the claimant on a short course of Indocin. The results of such testing and treatment are not documented.

Claimant saw F. Dale Wilson, M.D., at his attorney's request on January 25, 1982. Dr. Wilson received a description of the injury that was similar to claimant's testimony at the hearing. (The subsequent course of treatment, attempted return to work and termination were somewhat confused in Dr. Wilson's report. He understood from the claimant that claimant could lift only 20-25 pounds at the time of the examination.) He set forth his examination findings, diagnosis and disability evaluation in a letter dated January 28, 1982:

> He walks without a limp. He can stand on either leg. He can walk on his toes and heels. This last gives him pain in the right hip and in the right sacroiliac area. He can squat; this aggravates his back pain, but he can recover without the use of his hands. He can kneel with either leg down and recover without his hands. However, with either leg down, it creates pain in the right lumbosacral area.
>
> Examination of the back: Reveals no scoliosis. There is a normal lumbar curve. The discomfort is in the right lumboscral mass below his ribs and to the right of L5-S1. The sacroiliac joint is prominent but it is lateral to the area of maximum tenderness. The back is negative to pressure in the sciatic notch on either side.
>
> Motion of the back as follows: He lacks 22 cm. of reaching the floor.

		Expected	Loss
A. Flexion 90 degrees			
Back	10		
Range	100 degrees	120	20

Tender in the right hip area and right sacroiliac mass and to the right of L5-S1. There is no difficulty with percussion or deep pressure of the spine. Interspaces are negative.

		Range	Expected	Loss
B. Lateral	Left 48			
	Right 45	93	60	0
C. Rotation	left 44			
	Right 36	80	65	0

Complains of pain and difficulty in the right sacroiliac area but there is no loss of function.

Sensation is satisfactory over the legs, thighs, sacrum.

Reflexes are 4 plus at the knees and 3 plus at the ankles and equal.

When he lies flat there is a good arch to his back. He complains of some pain in the right sacroiliac area.

Measurement of the legs.	25 cm.	Patella	15 cm.
Left leg:	44.5	33	32
Right leg:	44.8	33.5	32

The measurements in the above chart that the legs are equal in length.
INTERPRETATION: No atrophy of either leg.

Straight leg raising test: Left 84 degrees. Right 80 degrees. With a considerable degree of discomfort and tightness of the hamstring muscle but this can be considered a negative straight leg raising test.

He sits up eacily [sic] without using his hands, and this causes some tenderness in the muscular structure of his right lower back.

An X-ray taken of his lower spine and sacroiliac area was negative for bone disease.

DIAGNOSIS: A. Contusion of the right lumbar area in the soft tissue and sacroiliac area.

1. Hematoma - which is now resolved.

2. Residual myositis in the lumbosacral muscle mass and in the muscle of the Gluteus maximus and minimus resulting in local tenderness and stiffness of his lower back, right leg (on the right side).

The injury on the 6th of June, 1979 is the causative factor with respect to symptoms, pathology and disability found on this examination. There is no recommendation for further medical care except to continue the exercise program, and he is advised to continue on with his Karate training program which he is doing and this will help him as much as anything we can do for him.

Some restrictions to be imposed are: protection against weight lifting; he is not able yet because of the sore muscles to go over a fifty pound weight lifting limit. I find no evidence of injury to the spine, discs, or to the nerves.

Prognosis is favorable for this back. It has been long enough for his back to reach maximum improvement. Resistance of sore muscles has persisted, and he is no longer a candidate for heavy lifting or factory work. He should find some other occupation.

DISABILITY EVALUATION:

A. Motion loss - Flexion 28°

B.	Pain	2%
C.	Weakness in his weight lifting ability	5
D.	Nerves - no involvement	0
		9% chiefly subjective functional disability.

With this goes the employer's aversion to hire any man with any kind of back disability. This precludes factory jobs of any kind, and he may not at the present time compete on the labor market. (Claimant's exhibit 5.)

Claimant was also evaluated by Steven R. Jarrett, M.D., at the Franciscan Hospital Rehabilitation Center on June 25, 1982. He set forth his examination findings and recommendations in a letter under the same date.

> EXAMINATION: On examination, there was no tenderness to palpation of the low back. He had 90° of forward flexion with good rounding of the lumbar curve. He appeared to be limited for further forward flexion due to hamstring tightness. He had full hyperextension and full lateral flexion bilaterally. Strength in his lower extremities was normal to manual muscle testing. No atrophy or fasciculations were noted. He had the ability to toe and heel walk without difficulty. Knee and ankle reflexes were two plus and symmetrical. Sensation was normal. Toe signs were flexor bilaterally. Straight leg raising was negative bilaterally but slightly diminished due to hamstring tightness in both lower extremities.
>
> RECOMMENDATIONS: Based on my clinical examination today, I find no evidence of permanent disability in regards to this gentleman's lumbar spine. I did not order x-rays as he indicated he recently had some by a medical doctor. I would be happy to review those x-rays if you so desire. (Defendant's exhibit A.)

Although claimant indicated he had no prior back problems, he mentioned that he sought deep muscle massage for his pain from a chiropractor he has visited over the years. Apparently, the chiropractor also recommended certain oils and vitamins for claimant's complaints. Claimant further indicated that he resumed his Kung Fu classes three months after the injury because his instructor thought it advisable for him to pursue a stretching program. Claimant explained that such discipline is less aggressive than the martial arts but does require a lot of twisting. Claimant noted that it takes him longer to warm up now than before the injury.

At the time of the hearing, claimant was working as a waiter at the Red Lobster restaurant. He observed that his lower back and buttocks are sore after he completes a shift. He thinks he has a slight limp. He carries the trays on his left arm. He does not "bus" because he cannot carry tubs of dishes. Claimant reported that the discomfort occasionally goes into his thigh. He has noticed no weakness or numbness in his legs. He has no scheduled doctor's appointment.

Claimant who was 20 years old on the date of injury, has a high school education and has completed many hours of Kung Fu training. Prior to working for defendant he pumped gas and stocked shelves in a grocery store. Sometime after being terminated by defendant, claimant made pizzas at Happy Joe's for seven months and then worked for K & K Hardware before going to Red Lobster. Claimant indicated both job changes were based on securing better pay.

APPLICABLE LAW

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 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 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.

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. McSpadden, 288 N.W.2d 181 (Iowa 1980).

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. Id. at 181.

ANALYSIS

The overwhelming weight of the medical evidence indicates that claimant suffered no permanent impairment as a result of the June 5, 1979 injury. Dr. Fesenmeyer was ready to return the claimant to work very soon after the injury. Dr. Russo indicated claimant was ready to return to work without restriction less than a month after the injury and after only a week of physiotherapy. When Dr. Russo examined the claimant on two occasions following claimant's attempted return to work, his clinical findings failed to justify claimant's complaints or claimant's contention that he was unable to perform the work required by defendant on July 2, 1979. Dr. Jarrett's examination in June of 1982 was similarly non-supportive of claimant's alleged symptomatology. Only Dr. Wilson was willing to give a 9 percent disability rating based chiefly on what he describes as "subjective functional disability." Clearly, his examination findings did not warrant such rating. His opinion that the claimant should limit his lifting to 50 pounds similarly is based on claimant's subjective complaints. Whether Dr. Wilson reviewed any of the other medical records is doubtful since he makes reference to claimant attempting to return to work after Dr. Fesenmeyer's release, does not note that claimant was released to return to work without restriction by Dr. Russo, and comments that at the time of the examination claimant reported being yet unable to lift more than 20-25 pounds. Hence, Dr. Wilson's opinion appears to be based more on justifying claimant's complaints than assessing them. (It should be noted that claimant's account of what occurred at the time of the injury became more elaborate with time as is evident from the history he gave to Dr. Wilson and at the time of the hearing as compared to that recorded by the emergency room doctor and Dr. Russo. Claimant lamented that Dr. Jarrett [who was seen after Dr. Wilson] did not take a history from him. While no history is repeated in Dr. Jarrett's report, it cannot be overlooked that he worked at the same institution where Dr. Russo treated the claimant and made reference to Dr. Russo's records.)

The record does not establish that defendant employer refused to keep claimant on after his probationary period was over because claimant had sustained a work injury. Despite claimant's speculation to his doctors that his inability to lift was the reason for his termination, he acknowledged at the hearing that no reason was stated. Moreover, claimant's conclusion that he was unable to lift was not justified by Dr. Russo's reports either at the time he released the claimant to return to work or after the July 2, 1979 termination. Hence, it would require conjecture and speculation to determine that claimant was terminated because of any resultant injury. Finally, although claimant's earnings were not explored, it appears that he has been able to find other suitable work in light of his age, education, and limited work experience to date.

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 contusion to his low back and right gluteus area when struck by a sheet of steel at work on June 5, 1979.

FINDING 2. Claimant was treated with medication and a week of therapy. He was released to return to work without restriction on July 2, 1979.

FINDING 3. After claimant attempted lifting 30 pounds of sheet metal on July 2, 1979 for less than an hour, he reported to defendant that he was unable to do the work. Claimant was terminated by defendant at that time -- at the end of his probationary period.

FINDING 4. Sometime after being terminated by defendant, claimant secured work making pizzas, then doing floor duty at a hardware store and most recently waiting on tables at a restaurant. He resumed his Kung Fu classes three months after the injury.

FINDING 5. Claimant continues to complain of low back and buttock discomfort, occasionally radiating into his leg.

FINDING 6. The weight of the medical evidence indicated that claimant's subjective complaints are not corroborated by the clinical findings, that claimant has no permanent impairment as a result of the work injury and that claimant should have been able to perform his job assignment for defendant.

CONCLUSION A. Claimant has not established that he is entitled to an award based on industrial disability.

ORDER

THEREFORE, it is hereby ordered that the claimant take nothing from the present proceeding.

Costs of the proceeding are taxed to defendant. See Industrial Commissioner Rule 500-4.33.

Signed and filed this 29th day of December, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM H. GRAHAM, Claimant, vs. DIAMOND VOGEL PAINTS, Employer, and U. S. INSURANCE GROUP, Insuance Carrier, Defendants.	File No. 667735 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by William H. Graham, the claimant, against his employer, Diamond Vogel Paints, and the insurance carrier, U. S. Insurance Group, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on or about August 21, 1980. This matter came on for hearing before the undersigned at the Henry County Courthouse in Mt. Pleasant, Iowa on October 12, 1982. The record was considered fully submitted on that date.

On April 24, 1981, defendants filed a first report of injury regarding the alleged injury. On August 24, 1981, defendants filed a denial of liability. At the time of the hearing, the parties stipulated that $127.81 was the applicable rate of weekly compensation.

The record consists of the untranscribed testimony of the claimant, of claimant's wife, of Gerhart Baker, of Leonard McKibben, of Blair Vogel; joint exhibit 1, packet of medical records from the Burlington Medical Center; claimant's exhibit 1, report made to Leonard McKibben by claimant on August 22, 1980; deposition testimony of Koert R. Smith, M.D. (including claimant's deposition exhibits 1-9). The testimony of Charles Van Winkle was presented by an offer of proof.

ISSUES

The issues to be determined include whether claimant sustained an injury in the course of and arising out of employment; whether there is a causal connection between the alleged injury and disability; the nature and extent of the disability; whether claimant is entitled to medical benefits; and whether defendants' affirmative defense based on Code section 85.23 has merit and thereby bars claimant's recovery.

REVIEW OF THE RECORD

Claimant testified that his work for defendant employer had been varied. He drew paint which entailed filling buckets with paint, crimping lids on the containers and then lifting and stacking them. He estimated that a filled bucket weighed between 40 and 55 pounds, and that he handled a couple hundred an hour. Claimant also washed tanks, shoveled dirt, moved sledge and transferred barrels of paint in and out of trucks. Claimant recalled that he had been working for the defendant employer about a year when he began to experience low back pain.

Claimant testified that he reported his problem to his foreman, Leonard McKibben, and indicated that he could not pinpoint how he hurt himself because he had been doing different jobs. According to the claimant, McKibben did not ask him if he hurt his back at work. During cross-examination claimant insisted he discussed the matter with McKibben a couple of times. Defense counsel then referred to claimant's deposition testimony on July 21, 1982:

> Q. When you first noticed the pain, did you discuss it with anybody at Diamond Vogel?
>
> A. Yes, I did.
>
> Q. The first time you noticed it?
>
> A. I told them my back was bothering me.
>
> Q. Who was that that you told?
>
> A. I told Mr. Leonard McKibben.
>
> Q. Did you discuss this with any of the other people who worked there other than Mr. McKibben?
>
> A. I'm not for sure.
>
> Q. And what did Mr. McKibben say to you when you told him that you had this pain?
>
> A. Well, he never really talked too much about it. He just said maybe it was a hard night, or whatever.
>
> Q. And did you continue doing your regular job or did he put you on some other job?
>
> A. Well, he put me on light duty for a while and then he put me back on hard duty again.
>
> Q. And how long were you on light duty?
>
> A. I can't remember for sure.
>
> Q. More than one day?
>
> A. I'm sure I was, yes.
>
> Q. Less than a week?
>
> A. I'm not sure. I can't quite--
>
> Q. Okay. As I understand, then he put you on light duty for some period of time and then put you on your regular job as a paint drawer; is that right?
>
> A. Well, it was early in the morning, my back was still bothering me, and a truck of sledge came in. We are talking about 50-gallon barrels. He told me get up there with my wheel cart, get up there in the truck and get those out of there and he had--and you have to pull them and you got a big bunch like that jars you also. I was in pain at that time too, and I did do what he told me.
>
> Q. When he told you to do that, did you tell him your back was hurting at that time?
>
> A. He already knew. I told him that my back was hurting.
>
> (Claimant's discovery deposition, p. 13, l. 14 to end of p. 14.)

Claimant told the cross-examiner that he advised McKibben he did not know how he hurt his back "at work." Defense counsel again referred to claimant's deposition:

> Q. When you told him your back hurt that time, did you tell him that you hurt your back while at work?
>
> A. I didn't know for sure how I hurt my back.
>
> Q. I understand you didn't know for sure how you hurt it. What I want to know, Mr. Graham, did you tell Mr. McKibben at that time that I hurt my back here at work at Diamond Vogel?
>
> A. Not in that sense. I told him I didn't know for sure how I hurt it. I was doing different jobs.
>
> (Claimant's discovery deposition, p. 18, ll. 18-25.)

During redirect examination, claimant first testified that "at work" was not specified in his conversation with McKibben and then he agreed those words were verbalized but added, again, that he did not know how he actually hurt himself.

McKibben did grant claimant's request for lighter duty for awhile but then assigned claimant back to the paint job. Claimant testified that the work bothered him so much that he or his wife called defendant employer to report he would be absent. Claimant denied any prior falls or back pain or treatment. (He did sustain a neck injury when his foot went through the floor while he was working for the Burlington Basket Factory, the job he held prior to becoming employed with defendant employer. Claimant stated that he was off work less than a week, and that the matter resolved itself after treatment conisting of hot packs and a neck brace.)

Claimant testified that he initially sought treatment from a chiropractor but obtained only very temporary relief from his pain. He next went to his family doctor, P. H. Breckner, M.D., who hospitalized him on August 26, 1980. In a history and physical examination record prepared at the time of admission, Dr. Breckner states in part:

> HISTORY: This 30 yr. old w.m., was admitted from the office where he came stating that he developed severe low back pain, about 4 days ago, he states he did not do any special lifting or that he can not remember what caused this problem. He states he stayed in bed the past 2 days and had difficulties sitting up and the pain increased on standing. On examination the pt. had severe pain in the rt. lower back area with the pain increasing on coughing and standing with the pain radiating to the rt. hip and rt. leg. There was however no paresis present and the reflexes were within normal limits, straight leg rising [sic] was positive at 15 degrees of the rt. and 45 on the lt. The pt. was admitted with the preliminary diagnosis of low back st rain [sic] with possible disc disease.
>
> PAST HISTORY: The pt. had no serious illnesses. He states he has had no previous hospitalization and no surgery and he denies any allergies. He has had previously some muscular strain of the neck but no other problems.
>
> ....
>
> Back reveals some tenderness in the rt. paravertebral muscle area of the lower back, with pain on trying to sit up and on standing. Straight leg rising is positive at 15 degrees on the rt. and 45 on the left.
>
> NEUROLOGICAL: There is no neck stiffness. Babinski is negative and the DTR's are present and physiological.
>
> IMPRESSION: 1. LOW BACK STRAIN WITH POSSIBLE DISC DISEASE.
>
> (Jt. exhibit 1, p. 5.)

In a consultant's record dictated on the date of claimant's admission to the hospital, Koert R. Smith, M.D., orthopedic surgeon, reported:

This is a 30 year old male who noted the onset of pain in his low back about 6 days ago. He states that during that day while working at Diamond Vogel he was involved in lifting a number of heavy objects. He did not note sudden onset of pain while doing this, but towards the end of the day began to note aching pain in his low back. The following day, or 5 days ago, he went to work, advised his employers that he did have some discomfort and did only light work that day. The following morning he had again increased pain in his back. Was unable to get out of bed; at that time he began to note pain down the postero-lateral aspect of the right leg to the level of the knee. On that day and the following day he saw Dr. Reitz who manipulated his back. Advised him that he probably had a pinched nerve. Because of no improvement he remained in bed most of the time until he saw Dr. Breckner today. He states the last couple of days he noticed that if he coughs he has severe increase in his back pain, but no exaggeration of his leg pain. He has not noted any numbness or tingling or not any weakness in his legs. He states that sometimes when the pain is severe he feels that his leg might be weak, but feels that this is more due to pain than actual weakness. He has had no loss of bowel or bladder control. Had no other medical problems. No fever or chills. Takes no medications regularly, no allergies. About 4 or 5 years ago he had mild episode of achy pain in his back. Did miss a few days of work, but was not hospitalized. He had no interval difficulty with his back.

Examination today reveals tenderness localized in the midline of the L5, S1 level. No significant paraspinal tenderness. No SI joint tenderness. No sciatic notch tenderness. Straight leg raising at 30 degrees on the right and 60 degrees on the left causes pain in the back, but no radicular pain, [b]oth sides. This is worse in the dorsi-flexion of the ankle.

Neurological exam: reveals knee jerks and ankle jerks 0 over 0. Plantar responses are down going. There is no motor or sensory deficit. X-rays of the lumbar spine have been obtained. I will review these.

IMPRESSION: PROBABLE HERNIATED NUCLEUS PULPOSUS WITHOUT NEUROLOGIC DEFICIT PROBABLY AT THE L5, S1 level, VERSUS ACUTE LUMBAR STRAIN

RECOMMENDATION: I would concur with bed rest and flexor. In addition would start an anti-inflammatory medication, probably Butazolidin, 2 TID with meals for 2 days and then one TID.

(Jt. exhibit 1, p. 7, Dr. Smith testified that claimant "related this [onset of pain] to lifting heavy objects at his work at Diamond Vogel, did relate that he didn't note any sudden onset of pain or injury but just that he began to have pain in his back after lifting" at the time he first examined the claimant. [Smith deposition, p. 8.]. Dr. Smith had no recollection of reviewing the history taken by Dr. Brekner.)

Claimant's subsequent course of treatment while hospitalized is summarized in the discharge summary dictated October 20, 1980 (claimant was discharged September 19, 1980):

FINAL DIAGNOSIS: HERNIATED NUCLEUS PULPOSUS RIGHT L 5, S 1. PROCEDURES AND DATE: 9-7-80, epidural steroid injection per Dr. Calderon. 9-12th. rt. L 4, L 5 hemilaminectomy and diskectomy per Dr. Smith. Consultants: Dr. Breckner and Dr. Calderon.

....

LS xray exam showed no disturbance of alignment or narrowing of disc spaces and no evidence of fracture, dislocation, bone destruction or production.

By 9-4th, pt. was still maintained at bed rest and thought he felt somewhat better, additionally he stated he had noted while in the hospitalhhis [sic] hands would go to sleep during the night. Stated he had to shake them to wake them up, however did not know which fingers were involved, thought it was probably the whole hand. We asked him to check when that occurred to feel which fingers were numb and localized for distribution of numbness. Neurological exam was intact to upper extremities. Rt. straight leg raising was 30 degrees positive, lt. straight leg raising caused pain in the back at 60 degrees. Assessment was possible carpal tunnel or ulnar neuropathy and herniated nucleus pulposus on the rt. without neurological deficit.

On 9-5 myelogram revealed a H. N. P. on the rt. at L 5 S 1. Exam revealed straight leg raising to be positive at 30 degrees on the rt. contralaterally positive at 60 degrees on the lt. Dr. Calderon was consulted regarding an epidural steroid injection which the pt. wished to proceed with. On 9-11 pt. felt he was slightly more comfortable and he was allowed to be up and ambulate in his corset at which time he had a nearly immediate recurrence of pain in his back and in his rt. hip and calf. Surgical intervention was discussed with pt. and he elected to proceed.

On 9-12th. pt. was taken to the O. R. and under general anesthesia per Dr. Petersen underwent surgery for rt. L 5, S1 hemilaminectory and diskectomy. There were no intraoperative complications and he was transferred to R. R. in satisfactory condition. Microscopic diagnosis was consistent with a. ligamentum flavum, clinically from L 5 S 1 b. fragmented nucleus pulposus, clinically L 5, S1. On 9-16th pt. was allowed to bathroom wearing corset and permitted to ambulate as tolerated in corset. On 9-19th. pt. stated he had walked quite a bit the previous day and got only mild aching in his rt. leg which disappeared when he laid down. He was afebrile and wound was well healed. Straight leg raising at about 45 degrees caused pain mostly in the back bilaterally, on the rt. side caused slight discomfort in hip. Neurologic exam was intact. He was dismissed home in improved condition and advised to ambulate wearing his corset, sit very little and gradually increase his activity. He was given a Rx for Darvon Compound to take prn for pain. He was advised to return to the office in 3 weeks for re-evaluation.

(Jt. exhibit 1, pp. 3-4.)

Dr. Smith opined that claimant's herniated disc was related to claimant's employment activities which, according to his understanding, included heavy lifting.

Dr. Smith testified that he continued to treat the claimant on a regular basis after the hospitalization. It was his opinion that claimant reached a plateau or maximum level of recovery as of September 8, 1981. As of August 2, 1982, the date of his deposition, Dr. Smith had last seen the claimant on June 17, 1982 at which time claimant complained of some low back and right leg pain and occasional left hip pain, all related to activity. Examination revealed "essentially full range of motion of his lumbar spine. Straight lef [sic] raising sitting is 90/90. Supine it is 65 degrees on the right, 75 on the left, both causing pain in the back as opposed to down the leg. Neurologic exam is intact with exception of an absent ankle jerk on the right side." (Smith deposition exhibit 6, p. 6.) Dr. Smith's assessment was status post laminectomy with persistent intermittent sciatica. He recommended claimant remain as active as possible and continue exercising.

With regard to permanent restrictions, Dr. Smith testified: "He would be significantly limited in repetitive bending, repetitive lifting types of activities. He would be restricted in the amounts that he can lift; prolonged standing or prolonged sitting in one position without position change would tend to aggravate his symptoms." (Smith deposition, p. 19.) Using the Manual for Orthopedic Surgeons and taking into account the surgical excision of the disc without fusion and the moderate persistent pain and stiffness aggravated by heavy lifting necessitating modification of activities, Dr. Smith rated claimant's impairment at 20 percent of the body as a whole. Dr. Smith indicated that claimant's impairment rating would be only 7 percent of the body as a whole using the AMA Guidelines, with 5 percent attributable to the excised disc and with 2 percent attributable to a 5 percent neurological deficit in the lower right extremity.

Dr. Smith commented that the Guides were more subjective than the Manual because they were based in part on range of motion which varies daily and included pain, a subjective element, in the assessment of residual nerve root deficit. He also felt the Guides were unfair in certain circumstances:

A. I think that the AMA guidelines with--that allows a five percent impairment rating with the operated disk without any residual, somebody that's able to go back to their prior employment, prior job, no difficulty, they rate a five percent impairment; and I think that that's fair in that those people as a group are more likely to get recurrent episodes of sprain, strain back pain types of problems.

I think people--Mr. Graham and people like him that have a disk operated on and continue to have significant back pain, significant functional limitations, I think that the AMA guidelines don't really fairly account for the amount of impairment that they have and I think that if you compare somebody that's able to go back to their old job with no difficulties at all and they are fairly given a five percent rating, to someone like Mr. Graham who really can't do his old job and has not been able to do so for nearly a couple years, I think the difference between five and seven percent doesn't fairly reflect the difference in those two people.

(Smith deposition, p. 34.)

Dr. Graham identified deposition exhibit 8 as a copy of an Insurance Claim - Group Daily Income form filled out by Sue Nudd of his office on November 19, 1980 and regarding the claimant's case. He indicated deposition exhibit 9 was a copy of an altered exhibit 8 which was brought to his office by a Mr. Carlson from Equi-Fox. Regarding the changes and possible chain of possession, Dr. Smith testified:

A. The changes apparent are under Part B, Number 2 and Number 3. Part Number 2 question is "Is condition due to injury or sickness arising out of patient's employment?" The original copy from our office said, Yes. The copy brought by Mr. Carlson indicated the answer to be, No.

Part B Number 3, "Dates of Service," the original or copy of the original from our office indicated the dates of service were 8-26-80 through 9-19-80, 10-9-80, 11-6-80. And on the copy brought by Mr. Carlson, the information is absent.

Q. All right. Doctor, do you understand that both Exhibits 8 and 9 are supposed to represent copies of the same report? The same document?

A. Yes, in all other respects they're the same.

Q. Other than those two things you already noted?

A. Yes.

Q. All right. Do you have any idea how Exhibit Number 9 was changed?

A. No.

Q. Which of the two exhibits is the report as your office filled it out?

A. The report as it would have been sent out from our office would have indicated that condition was due to the patient's employment or it would say, Yes, and the dates of service would have been filled in.

Q. So that would have been Exhibit Number 8, correct?

A. Yes.

MR. CROWLEY: All right, I'm going to offer Exhibits 8 and 9 at this point.

MR. SHIELDS: Same reservation.

Q. (By Mr. Crowley) Doctor, do you know where or to what office, specific address, your office sent Claimant's Exhibit 8--the original of Claimant's Exhibit 8?

A. The copy from our office that has the reverse side of that form says, Send all claims to Diamond Vogel, P. O. Box 605, Orange City, Iowa 51041.

Q. All right, Doctor.

A. I assume that's where it was sent.

(Smith deposition, pp. 24-26.)

Dr. Smith did not recall discussing claimant's case with anyone from defendant employer's local or Orange City offices but had some recollection that his office did contact defendant employer to clarify whether workers' compensation or the health insurance carrier should be billed.

Claimant recalled that while hospitalized, he talked to Gerhart Baker, one of defendant employer's chemists and the individual responsible for production, quality control and purchasing. According to the claimant, Baker told him not to worry about finances and that he (Baker) had switched him (claimant) from one program to another. Claimant did not know what had been switched to what. Claimant further testified that he told Baker he hurt hs back doing heavy lifting at work and Mr. Baker responded it was too late to make such a claim.

Claimant's 24 year old wife, who completed her G.E.D. last year, generally verified claimant's testimony. She appeared to have some trouble correlating dates with appropriate days of the week. She attested to claimant's poor communicative skills.

Claimant's wife indicated that the basket factory injury occurred in May or June of 1978, that claimant received no workers' compensation for such incident and the physical problem was resolved in 1 1/2 months. She recalled that claimant's low back began bothering him in late August of 1980. Claimant's wife testified that the second day she called in to report claimant's absence due to back pain, Baker asked her how the claimant hurt his back. She remembered stating "pobably at work", to which Baker responded that the claimant had not mentioned a work injury. According to the claimant's wife, she, in turn, contended that claimant's problem had to be related to work because claimant had done nothing strenuous at home. (Claimant earlier testified that he and his family were living in an apartment at the time of his injury.) Apparently, claimant and his wife subsequently went down to work to pick up his check. She recalled that they spoke with McKibben about claimant's back condition and he recommended that claimant see a chiropractor because his wife went to one for back discomfort and learned she had a kidney problem. Claimant's wife testified that McKibben did not ask about a work injury and they did not bring the topic up at that time.

When claimant was hospitalized, claimant's wife reported the admission to defendant employer who advised her that claimant would be receiving sick leave and a check for the prior days off. They gave her forms to complete with regard to the hospital bill. Claimant's wife did not recall to whom she talked at that time or if she mentioned claimant's problem was work related. She reported that claimant began receiving disability income checks in September of 1980. When she received notification from Bankers Life in November of 1980 that the checks would be terminated, she contacted Baker who informed her the checks would resume if she signed a paper saying she did not know where the claimant had been injured. Claimant's wife explained that since she did not know what activity was responsible for claimant's problem she signed the requested document and gave it to Baker. Claimant's wife alleged that she did not inquire further into the origin of the benefits or why the injury was not under the workers' compensation program because she was afraid her husband would lose his job. She kept claimant advised of the sequence of events and left any questioning to him.

Apparently long term benefits from New York Life were suspended again at a later date and then reinstated with a check for unpaid past amounts. According to claimant's wife reinstatement followed notice from Social Security that claimant was not eligible for benefits under that government program.

Gerhart Baker testified that McKibben usually discusses work injuries with him but McKibben actually handles the necessary paperwork. Baker denied that claimant or claimant's wife ever told him in person or by phone before, during or after claimant's hospitalization that claimant's back problem was due to a work-related injury. Baker said he first learned about the claim for workers' compensation in April of 1981 when the defendant employer received a call from Dr. Smith's office regarding unpaid bills and indicating the condition was work related. A first report of injury was prepared at that point. Baker gainsaid telling the claimant at any point that it was too late to claim workers' compensation or advising claimant's wife to specify the injury did not occur at work in order to obtain long term disability benefits. He did recall a conversation regarding short term versus long term disability benefits. He explained that after the short term benefits, sponsored by defendant employer, run out, additional forms have to be filled out for long term benefits. Baker testified he sent those forms to the claimant's wife but did not suggest what information she should record. Baker could not explain the reason for the discrepancies between Smith deposition exhibit 8 and exhibit 9 and commented that he had no part in processing the forms.

Baker acknowledged that he first learned of claimant's back complaints from McKibben on August 21, 1980. He agreed with McKibben's decision to put the claimant on light duty. Baker testified that he similarly learned that claimant and his wife came down to work on August 22, 1980 from McKibben but that was all he knew about such meeting. Thereupon, claimant's counsel read from the transcript of Baker's deposition taken on July 21, 1982:

Q. Did he relate to you on Friday, August 22nd, any of the substance of that conversation that he had had with Mr. and Mrs. Graham?

A. Some of it.

Q. What was that, at best you can recall?

A. He had asked Bill and his wife what they were going to do, and William had said he was going to the doctor. Too much more of it I cannot remember except Leonard asked him if it was work related, and Bill said he did not know, he could not say it was work related, and this is all the conversation that I do remember now.

(Baker deposition, p. 12, l.l. 3-13.)

Baker identified claimant's exhibit 1 as one page out of a notebook that defendant employer maintains regarding any health related matters reported at work, as opposed to information received from calls from home. Baker testified that the following report regarding the claimant was prepared by Paul Knapp, another individual in the quality control division but one under his supervision:

Note: Initial Report Made to Leonard Friday Aug. 22, 1980

Monday. 8-25-80

William Graham - (Not Job Related -)

Reported to Leonard McKibben that he was having considerable pain in his back. In fact, he had been having much discomfort and had planned on going to a chiropractor. He was advised to go to a medical doctor instead. 8-26-80 - X-rays of back shows "slipped disc," and was admitted to hospital. Awaiting developments - Report entry being made in log, although William Graham stated he has no idea how or when he might have injured himself. (Report will be lined out when injury has been definitely established as "not job related," as recommended in O.S.H.A. Booklet.) 8-28-80 - William Graham being placed on temporary disability - approximately 3 months. Report application being made with Bankers Life Insurance Co.

(Claimant's exhibit 1.)

Baker explained that it was customary to strike out the words "not job related" if contrary information was received at a later date.

McKibben testified that claimant first complained of low back pain in late August of 1980 but did not relate the pain to any work activity. McKibben indicated that when the claimant came to work to report he was going to the doctor, he asked the claimant whether he could have hurt himself at work and the claimant responded he did not know how he hurt his back. McKibben was not familiar with the lining out process with regard to claimant's exhibit 1 and reported that he only took claimant's word that the matter was not work related when he discussed the matter with Knapp.

McKibben related that he spoke with the claimant on one occasion during the claimant's hospitalization and again at Christmas time when he and Knapp delivered a gift collection from work. He spoke with the claimant's wife at New Years. McKibben recalled no mention of a work injury being made during any of those encounters.

McKibben testified that claimant's usual job had been drawing paint. He described how two employees work together in that assignment and that they might handle 100 50 pound buckets of paint in an hour. The routine was broken by cleaning tasks and moving, no lifting, barrels. Although he indicated on direct examination that defendant employer had some light duty jobs, McKibben conceded there was nothing suitable for a person

with a 10-15 pound weight limit and low intelligence. He observed that claimant had been a slow but good worker.

Blair Vogel, general manager and vice president for defendant employer, testified that he received no indication that claimant had injured himself at work when he spoke with the claimant on August 29, 1980 at the hospital. Vogel first learned that claimant was contending the back problem was work related when Dr. Smith called on April 21, 1981 inquiring about payment of his bill. At that point he questioned Knapp, Baker and McKibben about the matter. The consensus was that there had been no indication of a work injury.

Regarding Smith deposition exhibits 8 and 9, Vogel testified that Mary Easton, the bookkeeper at the Orange City site, gives the form in question to employees who report a non-work injury and then sends them on to the long term disability carrier in New York. He assumed that the New York contact saw the "yes" checked regarding a work injury and contacted the Grahams regarding no coverage and that the change thereafter was made. Vogel verified no one of defendant employer's representatives had the authority to make such changes. He also testified that defendant employer does not rely upon information presented on that form for report of a work injury.

Vogel testified that as he walked through the plant on the date of the hearing an employee by the name of Charles Van Winkle approached him with information about the case. Defendants wished to call Van Winkle as a witness, despite the fact that such name had not been exchanged with the claimant as required by the pre-hearing order, for the reason that the testimony of such witness was material and relevant to the case and was recently discovered. Claimant's objection to such witness testifying was sustained. Defendants' contention that Van Winkle was a newly discovered witness was deemed to lack merit in light of the passage of time since claimant's petition was filed -- defendants had more than ample time to discover a material witness on defendant employer's premises. Accordingly, defendants were allowed to present Van Winkle's testimony by means of an offer of proof for the limited purpose of preserving such testimony.

Claimant, who turned 33 years old on March 25, 1983, completed grade school and high school through a special education program. Claimant's employment history consists of general labor that requied use of his back. He received no special training for any of the various jobs he has held, and he has never belonged to a union. Claimant specifically recalled working as a lead smelter after high school and then at a pole mill. He has worked with hammers quite a bit. He has never operated heavy machinery. Claimant moved with his wife and child from Arkansas to Iowa seven years ago. Claimant's first employment in this state consisted of making pallets with a nail gun. Claimant earned not over $100 per week at that piece rate job. Claimant next worked at a basket factory, stacking boxes, pushing carts and unloading trucks. He related earning not more than $4.00 per hour on that job. At the time of the injury, claimant was earning $4.60 per hour and working 8 1/2 hours a day and on Saturday when he got the chance.

Claimant's present complaints include frequent back and leg pain apparently commensurate with the amount of activity he attempts. Claimant alleged that his foot bothers him on occasion causing him to limp. Claimant's wife testified that claimant's right foot has turned purple on occasion. Claimant testified that he has done nothing strenuous at work and does not think he could return to work for defendant because he is afraid of further back injury and hospitalization. Claimant indicated he would like to return to work but it was his understanding that Dr. Smith recommended he seek only light work, meaning no lifting over 10-15 pounds and no repetitive bending. Claimant explained that he has not looked for work, even light duty, because he assumes there is nothing he can do physically and earn good money. He acknowledges that some of the tasks he performed for defendant employer were of a light nature. He pursued further reading and writing classes in vain. Claimant started learning upholstery a few months before the hearing. He observed that such work entailed turning over, not lifting, furniture. Claimant related that he continues to do the exercises recommended by Dr. Smith and walks as much as possible. Since Claimant's wife has a housekeeping job, claimant spends a lot of time with his five year old 50 pound daughter. He does not lift the child. The heaviest items he carries are a carton of milk and light groceries.

Claimant's wife testified claimant no longer fishes, hunts nor engages in metal detecting. His present hobby is collecting Avon bottles. She accompanies him on walks in the country and occasionally they plant seeds. She carries the necessary equipment and does the actual work.

Claimant testified that medical expenses recited into the record at the outset of the hearing were incurred for treatment of his injury. Claimant indicated he has not sought other medical care because he cannot afford it.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 21, 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 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:

> 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.

In Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979), the Iowa Supreme Court again explained the meaning behind and distinction between "in the course of" and "arising out of":

> ..."in the course of" his employment. This element refers to the 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 the employee may reasonably be, and while he is doing his work or something incidental to it. McClue v. Union, et al. Counties, 188 N.W.2d 283, 287 (Iowa 1971).
>
> ...arose "out of" his employment. This element refers to the cause and origin of an injury. Id. The injury must be a natural incident of the work. This means it must be a rational consequence of a hazard connected with the employment. Musselman vs. Central Telephone Co., 261 Iowa 352, 355, 154 N.W.2d 128, 130 (1967); Burt v. John Deere Tractor Works, 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1956).

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.

Lack of notice or actual knowledge of the work injury is an affirmative defense and the burden of proof rests upon the employer. De Long v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1941).

In Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980), the Iowa Supreme Court discussed what constitutes actual notice:

> Section 85.23 does not expressly require any information in addition to knowledge of the injury to satisfy the actual knowledge prong of the statute. Furthermore, we cannot defeat the beneficent purpose of the workers' compensation statute by reading something into it which is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979). In seeking the meaning of a statute, however, we must consider its entirety rather than only one portion and must give it a construction which does not make any part superfluous. Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 11 (Iowa 1978).
>
> As a result, the actual knowledge provision of section 85.23 cannot be construed in isolation from the alternative requirement of notice. Obviously the notice requirement cannot be satisfied without an allegation that the injury was work-connected. Section 85.24 provides a form of notice which not only includes information about the injury but "that compensation will be claimed therefor." The provision includes a summary of what a notice must contain: "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." (emphasis supplied). If the actual knowledge requirement were satisfied without any information that the injury might be work-connected, it should not be necessary to allege the injury was work-connected when giving the statutory notice. In fact, however, it is necessary to allege the injury was work-connected when giving notice. It logically follows 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 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.
>
> This is the meaning which has been given the actual knowledge requirement under similar statutes in other jurisdictions. See e. g., Bollerer v. Elenberger, 50 N.J. 428, 432, 236 A.2d 138, 140 (1967) ("The test is whether a reasonably conscientious employer had grounds to suspect the possibility of a potential compensation claim.") The principle is stated in 3 A. Larson, Workmen's Compensation § 78.31(a), at 15-39 to 15-44 (1976):
>
> 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.
>
> We hold that this principle applies to the actual knowledge provision of 85.23.

The discovery rule applies to the notice provision of Code section 85.23. Jacques v. Farmers Lumber and Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951). The 90 day period commences when the claimant, as a reasonable person (judged by his or her own education and intelligence) should recognize the nature, seriousness and probable compensable character of his or her injury or disease. Again, the notice given to the employer must convey the work-related nature of the alleged injury. Robinson, at page 812.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 21, 1980 is causally related to 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 (1955). 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 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 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.

Section 85.34(1), Code of Iowa, states:

> Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

ANALYSIS

Claimant sustained his burden of proving that his back problem arose out of and in the course of employment. The record is devoid of evidence regarding any non-work injury or physical activity that might have caused claimant's herniated disc. The prior work injury at the basket factory apparently did not involve the low back and the mention of an aching back years earlier did not appear to be significant. Based on claimant's description of the work he performed prior to the onset of symptoms, Dr. Smith opined that claimant's problem arose out of his employment. Parenthetically, it is noted that Dr. Smith's understanding of claimant's work was non-specific as to the amounts lifted or with what frequency. Whether such knowledge would have had a bearing on his opinion is highly doubtful in light of the absence of any other etiological candidates.

With regard to the notice issue, the record indicates that the defendants had actual knowledge that claimant's back problem might be work related in August of 1980. That claimant reported to defendant employer that he was unsure how he hurt his back does not obviate a finding in claimant's favor. It was clear to this observer that claimant had difficulty expressing himself and became easily confused by questioning on fine points. Likewise, with regard to McKibben's testimony, the undersigned made the following marginal notes at the time of the hearing: "witness struck me as one who hears what he wants to...communicative skills questionable" and "witness' answers to questions are not on point all times - may have misunderstood claimant." More important than the communication gap are the facts that McKibben did inquire into the question of whether claimant's injury was work related and that the defendant employer's report stating the matter was not considered to be a work injury also left open the possibility that further investigation might reveal contrary information. Hence, whether the claimant added the words "at work" to his statements that he did not know how he injured himself is not crucial. That claimant presented complaints of back pain of unknown origin and that defendant employer by virtue of knowing what claimant's job entailed questioned whether the condition might be work related satisfies the intent of Code section 85.23.

In analyzing actual notice in the Robinson case, the Iowa Supreme Court referred to the language of Code section 85.24 which provides that "[n]o 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." It must be emphasized that the statutory language does not require the claimant to report that his injury "arose out of employment," which fact is essentially a medical determination. Yet, in cases like the present, where a specific accident did not occur, confusion between "in the course of" and "arising out of" often generates a notice issue. Clearly, the claimant had no knowledge of what activity caused his back problem. Advising his employer of that fact was all he reasonably could be expected to do. Again, the defendant employer knew what kind of work claimant performed and was aware of claimant's contention that he did not know how he hurt himself (which implied no known non-work injury as well as no work injury) and therefore had information amounting to notice that claimant's back condition might have occurred during the course of employment, not that it in fact did so nor that it arose out of employment.

If it had been determined that the defendant employer did not have actual knowledge, the defendants would not have sustained their burden of proving that claimant failed to give them notice within 90 days of the occurrence of the injury because when claimant discovered his injury is not clearly establsihed in the record. Dr. Smith's testimony that claimant on August 26, 1980 referred his complaints to the work he had been doing for defendant employer is suspect in light of the history taken by Dr. Breckner on the same day. That is, the medical experts established the probable compensable nature of the claimant's injury based on the history he gave them. At what point they first expressed such fact to him is not ascertainable from the evidence. Whereas, the employer is seemingly held to a "possible" standard with regard to actual knowledge, a claimant is required to give timely notice when he or she learns of the "probable" compensable nature of the injury. The reasonableness of the claimant's conduct is to be judged in light of his education and intelligence. The record demonstrates that claimant would not have discovered his injury unless someone explained the compensable nature to him in direct, simple and definite terms.

The record contains no evidence of any subsequent injuries or independent contributing factors to claimant's present condition of status post-laminectomy with persistent intermittent sciatica. Hence, claimant's alleged disability is directly traceable to the work injury.

Claimant's injury is to the body as a whole and therefore he is entitled to an assessment of his loss of earning capacity. Dr. Smith's rating of 20 percent based on the Manual for Orthopedic Surgeons better mirrors the actual restrictions he gave the claimant than the 7 percent rating based in the AMA Guides. Dr. Smith indicated that claimant would not be able to return to his work as a paint drawer and specifically noted that claimant should avoid repetitive bending and lifting and prolonged standing and sitting. While Dr. Smith further noted that claimant should limit the amount he (claimant) lifted, he did not specify how much claimant could lift. Claimant thought Dr. Smith told him to restrict lifting to 10-15 pounds. McKibben testified that defendant employer had no suitable work for someone with low intelligence and a 10-15 pound weight restriction. As discussed earlier, Dr. Smith did not receive detailed information regarding claimant's job. Likewise, whether Dr. Smith did tell claimant he had a 10-15 pound weight limit and whether he indicated such degree of restriction was permanent is subject to debate in light of claimant's intelligence and poor communication skills. In any event, the restrictions Dr. Smith did verify by his testimony suggest that claimant's capacity to earn has been substantially affected by the compensable injury.

Claimant's work history has been that of a general laborer and accordingly has entailed substantial use of his back. Unfortunately, claimant has made no attempt to discuss suitable work with defendant employer or to seek gainful employment elsewhere. By his own admission he decided there was no work he could do that would pay well. His poor motivation does not appear to be attributable to the work injury. Rather, McKibben's testimony that claimant was a good but slow worker, claimant's earnings from the prior incentive job and claimant's general

demeanor suggest that he has never been an energetic worker. That such fact may be related in part to his low intelligence and limited education does not justify overlooking the significance of such factor in assessing claimant's loss of earning capacity.

The undersigned has seen many claimants with similar injuries, poor educational skills and limited work histories take advantage of every oppotunity to better their position in life. Claimant is relatively young by today's standards and should be able to be retrained for some form of gainful employment. Apparently, claimant attempted some form of retraining, but whether it was of the type contemplated by Code section 85.70 is not clear. At least, claimant's recent interest in learning the upholstery trade provides some evidence of interest in bettering himself. Whether he masters and utilizes such skills is another matter. Accordingly, claimant's loss of earning capacity attributable to the work injury is deemed to be 30 percent.

Dr. Smith's testimony regarding when claimant reached maximum recovery essentially satisfies the language of present Code section 85.34(1). The recent amendment to such subsection was meant to clarify rather than change the intent of the legislature and therefore applies to all cases presently in litigation regardless of the date of injury. Therefore, claimant's healing period terminated on September 8, 1981.

The medical reports and claimant's testimony establish that the medical expenses recited into the evidence were for treatment that was reasonable and necessary in the care of claimant's work related disability as contemplated by Code section 85.27.

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 had been working for defendant employer as a paint drawer for approximately one year when he began to notice low back pain on or about August 21, 1980.

FINDING 2. Claimant had sustained no prior low back injuries and did not engage in any stressful non-work activity.

FINDING 3. Claimant was hospitalized from August 26, 1980 to September 19, 1980 during which time he underwent a hemilaminectomy and diskectomy for a herniated nucleus pulposus at L5, S1.

FINDING 4. The medical evidence indicated claimant's injury was related to his work as a paint drawer.

CONCLUSION A. Claimant sustained his burden of proving that he suffered an injury arising out of and in the course of employment.

FINDING 5. The day after claimant first noticed symptoms of back pain, claimant advised defendant employer of the matter and indicated that he was uncertain about the specific cause of his discomfort.

FINDING 6. Defendant employer, who knew what activity claimant's job entailed and who knew claimant was uncertain about the origin of his complaint, questioned whether the back problem might be related to claimant's employment.

FINDING 7. Based on findings 5 and 6, defendant employer had actual knowledge that claimant's injury might be related to employment one day after the claimant first noticed his pain.

CONCLUSION B. Defendants have failed to sustain their burden of proving an affirmative defense pursuant to Code section 85.23.

FINDING 8. Claimant sustained no subsequent injuries nor was there evidence of any independent factors contributing to his present impairment.

FINDING 9. The medical evidence establishes that claimant's present status post-laminectomy with persistent intermittent sciatica is directly traceable to the work injury.

CONCLUSION C. Claimant has sustained his burden of proving that his present disability is causally related to the work injury.

FINDING 10. Claimant's permanent functional impairment is rated at 7 percent based on the AMA Guides and at 20 percent based on the Manual for Orthopedic Surgeons.

FINDING 11. Claimant must avoid repetitive lifting and bending and proloned standing and sitting. He should monitor the amount he lifts.

FINDING 12. Claimant did not seek suitable work with defendant employer nor attempt a return to any form of gainful employment. At the time of the hearing he had recently become interested in upholstering.

FINDING 13. Claimant is 33 years old.

FINDING 14. Claimant completed 12 years of special education.

FINDING 15. Claimant's work history is that of a general laborer. He was a good but slow worker.

FINDING 16. Claimant complains of back, leg and foot pain commensurate with activity.

CONCLUSION D. Claimant has sustained 30 percent loss of earning capacity as a result of the work injury.

FINDING 17. Significant improvement in claimant's condition was not medically anticipated as of September 8, 1981.

CONCLUSION E. Claimant's healing period terminated as of September 8, 1981 in accordance with Code section 85.34(1).

FINDING 18. Varied medical expenses recited into the record were for treatment of the work-related condition.

CONCLUSION F. Claimant is entitled to reimbursement of such expenses 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 twenty-seven and 81/100 dollars ($127.81) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of September 9, 1981.

Defendants are ordered to pay the claimant healing period benefits from the date of injury through September 8, 1981 at the rate of one hundred twenty-seven and 81/100 dollars ($127.81) per week.

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:

Burlington Medical Center	$5,251.91
Anesthesiologist	195.00
Dr. Calderon	132.00
Prescriptions	55.26
Dr. Breckner	14.00
Dr. Smith	1,260.50

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

Interest shall run in accordance with section 85.30, Code of Iowa, 1983.

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

Signed and filed this 30th day of March, 1983.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELMER ERNEST GRIGSBY,	:	
Claimant,	:	File No. 683285
vs.	:	R E V I E W -
STATE OF IOWA,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Elmer Ernest Grigsby, claimant, against State of Iowa, for the recovery of further benefits as the result of an injury on September 29, 1981. Claimant's rate of compensation, as indicated in the memorandum of agreement previously filed in this proceeding, is $135.81. A hearing was held before the undersigned on February 16, 1983, at which time the record was considered fully submitted.

The record consists of the testimony of claimant; claimant's exhibits 1 and 2; and defendant's exhibit A.

ISSUES

The issue presented by the parties at the time of the hearing is the extent of permanent partial disability benefits claimant is entitled to.

FACTS PRESENTED

Claimant received an injury arising out of and in the course of his employment with defendant on September 29, 1981 when two of his fingers of his left hand came into contact with a turning fan of an air conditioner on which he was working. As a result

of his injury claimant had a portion of the distal phalange of his index finger (first finger) amputated and the majority of the distal phalange of his long finger (second finger) amputated. Upon viewing claimant's fingers the undersigned noted that the distal joints of both fingers were still present. A portion of the fingernail of the first finger was still present and what appeared to the undersigned to be a part of the fingernail of the second finger was also present.

The only medical evidence presented was a letter from Peter D. Wirtz, M.D., dated April 26, 1982 in which he stated:

> This patient's left index partial amputation of the distal tuft would be 2% impairment of the finger which is a 1% impairment of the hand. The left long finger amputation through the distal tuft would be a 8% impairment of this finger which is a 2% impairment of the hand. These impairments of the hand would be a 3% impairment of the upper extremity.

APPLICABLE LAW

Section 85.34, Code of Iowa, which contains the scheduled members indicates that loss of the first finger, more commonly called the index finger, is worth 35 weeks of compensation and loss of the second finger, 30 weeks of compensation. Section 85.34(2) goes on to state, in part:

> f. The loss of the first or distal phalange of the thumb or of any finger shall equal the loss of one-half of such thumb or finger and the weekly compensation shall be paid during one-half of the time but not to exceed one-half of the total amount for the loss of such thumb or finger.
>
> g. The loss of more than one phalange shall equal the loss of the entire finger or thumb.

ANALYSIS

Although the record was left open so that defendant could file a brief, a reading of claimant's brief discloses that this matter can be decided without waiting on anything else.

A view of claimant's fingers clearly reveals that claimant has only lost a portion of the distal phalange of the first and second fingers of his left hand. Because he has only lost a portion of the distal phalange of each finger he is not entitled to benefits under either subsection (f) or (g) of section 85.34(2), The Code. This conclusion is also supported by the letter from Dr. Wirtz. Claimant is only entitled to the functional impairment caused to each finger as it relates to that finger. The letter of Dr. Wirtz remains uncontradicted. Claimant has had a functional impairment of two percent of his first finger and eight percent of his second finger.

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. While working on an air conditioner claimant injured the first and second fingers of his left hand.

Finding 2. As a result of his injuries a portion of the distal phalange of each of those fingers were amputated.

Finding 3. As a result of his injury claimant has a two percent (2%) functional impairment of his first finger and an eight percent (8%) functional impairment to his second finger.

Conclusion A. As a result of his injury claimant is entitled to three and one-tenth (3.1) weeks of permanent partial disability.

THEREFORE, defendant is to pay unto claimant three and one-tenth (3.1) weeks of permanent partial disability benefits at the weekly rate of one hundred thirty-five and 81/100 dollars ($135.81) for a total of four hundred twenty-one and 01/100 dollars ($421.01).

Claimant is to pay the costs of this action.

A final report is to be filed by defendant upon payment of this award.

Signed and filed this 28th day of February, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANK GUYTON, JR., Claimant, vs. IRVING JENSEN COMPANY, and CHUBB PACIFIC INDEMNITY COMPANY, Insurance Carrier, Defendants.	File No. 502038 A P P E A L D E C I S I O N

By order of the industrial commissioner filed December 29, 1982, 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. Claimant appeals from a review-reopening decision.

The record on appeal consists of the transcript of the hearing (in two parts, covering August 4, 1982 and August 5, 1982); claimant's exhibits 1-15 inclusive (exhibit 11 being the deposition of Arnold E. Delbridge, M.D., taken June 16, 1982, and exhibit 13 being the deposition of George Mosley); defendants' exhibits 1-13 inclusive; and a second deposition of Dr. Delbridge dated August 18, 1982, all of which evidence was considered in reaching this final agency decision.

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

REVIEW OF THE RECORD

Claimant hurt his back at work on May 5, 1978. A memorandum of agreement was filed on April 4, 1979, showing a weekly rate of $139.27. Claimant was paid some weekly benefits in June, July and August, 1978. He filed his petition for review-reopening on February 17, 1981. The case was heard on August 4 and 5, 1982 and a decision of November 2, 1982 awarded claimant 100 weeks of compensation benefits for a 20 percent permanent partial disability for industrial purposes.

Claimant was hurt when he was struck in the left hip by a cement truck. He has been treated by orthopedic specialists, but has had no surgery. He was examined at University Hospitals in Iowa City in December, 1980 where his permanent partial disability to the body as a whole was estimated at 20 percent.

Claimant was also examined by James E. Crouse, M.D., a Waterloo orthopedic surgeon, who recommended that claimant perform only light activities.

Arnold Delbridge, M.D., a qualified orthopedic surgeon, treated claimant in 1981 and 1982. According to Dr. Delbridge, claimant had a 12 to 15 percent permanent impairment with 15 percent being the most likely. Dr. Delbridge testified twice by deposition, the second time occurring after claimant had been observed and photographed doing some work in loading and unloading a pickup. Even after viewing the pictures of claimant's activities, Dr. Delbridge held fast to his estimate of 15 percent permanent partial impairment, explaining that claimant would be better some days and worse others.

Marian Jacobs, a vocational consultant, testified on behalf of claimant. The record shows that claimant is a 41 year old man who is not sure of his own age nor how long he lived in Mississippi before moving to Iowa. He is illiterate, does not know his height or weight, cannot tell time, and had a total formal schooling of one month. Based on these facts as well as testing and considering claimant's impairment, Ms. Jacobs testified that claimant would have a very narrow range of jobs open to him. This testimony was reinforced by exhibit 7, a report by Owen Duffy, IV, Ph.D., a licensed psychologist who stated that claimant's full scale IQ is 64. Ms. Jacobs' full report can by found as exhibit 14.

ISSUES

Claimant states the issues:

> The evidence of the claimant established that the claimant was an odd lot employee placing the burden on the employer to establish that there was some kind of work that is regularly and continuously available to the claimant and the employer did not meet its burden.
>
> ....
>
> The decision of the industrial commissioner that claimant was only 20 per cent industrially disabled was not supported by substantial evidence and as a matter of law, claimant has established that he is permanently and totally disabled on an industrial basis.

....

Evidence of isolated incidents of physical activity are immaterial to the extent of industrial disability suffered by the claimant.

....

APPLICABLE LAW

Claimant's disability is industrial, which is reduction of earning capacity and not mere functional impairment. Such disability includes considerations of the functional impairment, of age, education, qualifications, experience and claimant's inability because of the injury to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Martin v. Skelly Oil Co., 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).

Claimant has the burden of proof to show the extent of his industrial disability. Olson v. Goodyear Service Stores, supra.

Other propositions of law are discussed below.

ANALYSIS

Claimant's first argument concerns the odd lot doctrine as discussed in Larson, The Law of Workmen's Compensation, volume 2, pages 164.60 and 164.95-.113. Under that theory, where a claimant's abilities and other attributes are of a low order, he or she may be totally and permanently disabled although not altogether incapacitated from work. Larson, volume 2, page 164.24.

Claimant goes further, however, and urges that if a claimant can be considered as covered by the odd lot doctrine, "the burden of proof to show that employment is available shifts then to the employer." (Claimant's brief, page 14.)

The Iowa court has not adopted specifically the odd lot doctrine; however, it has held that "a claimant's inability to find other suitable work after making bonafide efforts to find such work may indicate that relief should be granted." McSpadden, supra, page 192. As claimant's brief states, the McSpadden case discusses industrial disability. The McSpadden case, however, does not rule that the burden of proof shifts to defendants. The Iowa test for industrial disability, referred to above, certainly seems broad enough to cover claimant's situation. That is, the Iowa test measures the extent of claimant's disability, taking into account many factors, including how much his physical incapacity contributes to the overall disability. The burden of proof, however, remains with the claimant.

The second and third of claimant's issues relate to the extent of claimant's industrial disability. Since this is a de novo review, the entire record has been examined, and the evidentiary facts will be considered in the light of the tests for industrial disability.

First, it may be observed that claimant is indeed a limited person both as to intellect and experience. That is shown by his own testimony as well as others, including a vocational expert.

The question of disability remains the same for this claimant as for any other claimant: what does the evidence show that he can or cannot do? The evidence clearly shows what he cannot do due to his non-physical limitations, and the medical testimony shows that he indeed has some physical limitations which stem from the injury. However, the photographic evidence shows that his physical limitations are not so complete as to totally incapacitate him from work.

There are some 90 pictures in the exhibits (some are duplicates) which are discussed in the testimony of the private investigator. These pictures and that testimony clearly establish that on the first three days of June, 1982, claimant was able to load a box springs and other miscellaneous items onto his pickup truck, drive it to a landfill, and dispose of the items there. Also, he was able single-handedly to lift a heavy roto tiller onto the pickup. He was observed doing this work, driving the pickup, and other normal activities. It is true that claimant obtained pain medication after doing this work, but it is also true that he apparently continued to do such work because, as of the week of the hearing, the private investigator found that claimant's vehicle was again loaded with "junk." (Tr., August 5, 1982, p. 61) From that fact, one takes the inference that claimant continued his loading, hauling and unloading activities.

The testimony and pictures show that claimant can do work which is within his capabilities for extended periods of time. That being the case, he cannot be said to be permanently and totally disabled.

The findings of fact and conclusions of law of the hearing deputy will be adopted. One finding of fact, number six, is that of the undersigned.

FINDINGS OF FACT

1. Claimant alleges an Iowa injury.

2. Defendants filed a memorandum of agreement on April 4, 1979.

3. Claimant is entitled to five income tax exemptions, is single and has a weekly wage of $235.

4. Claimant reached maximum medical recuperation on August 14, 1978. Claimant should be paid healing period benefits for periods of hospitalization.

5. Claimant is disabled to the extent of 20 percent of the body as a whole because of the injury of May 9, 1979.

6. Although claimant has a permanent partial impairment to the body as a whole of 15 to 20 percent, he is able to perform such activities as loading light to moderately heavy items onto a pickup and is at times able to load an item as heavy as a roto tiller onto a pickup and is able to drive a pickup.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant sustained an injury arising out of and in the course of his employment on May 9, 1978.

3. Claimant's rate of compensation is $152.03.

4. Claimant should be paid 100 weeks of permanent partial disability compensation at the rate of $152.03 per week.

5. Claimant has been paid healing period for the appropriate time, save those periods when claimant was hospitalized.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred (100) weeks of permanent partial disability compensation at the rate of one hundred fifty-two and 03/100 dollars ($152.03) per week. Defendants are further ordered to pay claimant the difference between the awarded rate and that paid for the healing period to date.

Defendants are ordered to pay unto claimant seven and one-sevenths (7 1/7) weeks of healing period compensation and healing period compensation for the periods of hospitalization after August 14, 1978.

Interest will accrue beginning November 2, 1982, at ten (10) percent per year pursuant to section 85.30, Code of Iowa.

Defendants are to file a final repot in twenty (20) days.

Costs are to be divided equally between the parties.

Signed and filed at Des Moines, Iowa this 8th day of June, 1983.

Appealed to District Court:
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WANDA R. HALTERMAN, Claimant, vs. WESTCO PRODUCTS, Employer, and AID INSURANCE, Insurance Carrier, Defendants.	:	File No. 682418 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in arbitration wherein claimant was awarded two days of temporary total disability benefits, medical expenses, and travel expenses as a result of an occupational disease pursuant to section 85A.5, Code of Iowa. Claimant's notice of appeal was filed September 15, 1982.

The record on appeal consists of the hearing transcripts which contains the testimony of claimant, Joan Feight, and Melvin Halterman; claimant's exhibits 1 through 6 (exhibit 1 being the deposition of John S. Strauss, M.D., and exhibit 2 being the deposition of Ahmad Al-Shash, M.D.); defendants' exhibits 1 and 2; and the briefs of all parties on appeal.

ISSUE

The issue on appeal as stated by claimant is as follows: Whether "the deputy industrial commissioner erred in failing to make findings of fact and conclusions of law to provide healing period benefits for the period May 15, 1981 through October 9, 1981."

REVIEW OF THE EVIDENCE

The record establishes that at the time of the arbitration hearing the parties stipulated the applicable workers' compensation rate in the event of an award to be $97.86 per week. It was also stipulated that the claimant left her employment on May 14, 1981 and has not returned to work, and that all medical bills are reasonable. The deputy's findings as they relate to the above are uncontroverted. (Transcript, pp. 3-4)

Claimant was 48 years old at the time of the arbitration hearing. Claimant began her employment with defendant employer on October 13, 1976, usually working five days each week and occasionally an additional half day on Saturdays. Her duties at work consisted of assembling packaging tubes, packaging, sweeping floors, and mixing radiator sealant. The latter job entailed measuring the various ingredients of the sealant with a hand scoop and mixing them together in a barrel. Claimant did not wear gloves or protective clothing when working with the sealant ingredients, and her bare hands were often in contact with compounds such as aluminum powder and linseed meal. She testified that the mixing process and cleaning afterwards created dust in the work environment, some of which would inevitably settle on her clothing and in her shoes. (Tr., pp. 25-29).

Claimant testified that after approximately seven months of employment with defendant employer her hands started to become sore, red, cracked, and scaly. Similar skin conditions appeared on her arms, legs, feet, and elbows. Claimant recalled seeing a doctor at the Dietz Clinic about the condition of her skin either in 1977 or 1978. (Tr., pp. 28-29) Records from the Dietz Diagnostic Center reflect that claimant was seen in 1978 with a twisted knee and medial meniscus tear. In May of 1980 she was seen for "scaly red patches" which were diagnosed as eczema. The same records note that claimant is allergic to dogs and soap. (Defendants' Exhibit 1)

On May 14, 1981 Dr. Cox saw claimant at the Dietz Clinic because of splinters in her hand which had caused an infection. Claimant testified that Dr. Cox, after seeing the scaly condition of her hands, told her not to return to her job. (Tr., pp. 52-53) A June 29, 1981 medical report signed by Dr. Cox, relating to the treatment of claimant on May 14, 1981, shows that a diagnosis of contact dermatitis/cellulitis was made at that time. This diagnosis apparently relied upon the statement of claimant that she was exposed to chemicals daily in the work environment, and had had recurrent infections. The report indicates that Kelfes was prescribed for seven days, and that claimant was advised to "avoid contact irritants." (Claimant's Ex. 3)

Claimant also saw L. R. Cornish, M.D., her regular physician, on May 19, 1981. She testified that Dr. Cornish examined her hands and told her to "get out and stay out" of her job. However, claimant also testified as follows concerning Dr. Cornish's advice:

> Q. He advised you that you could put cream on your hands and that you could go back to work?
>
> A. Yeah -- no, he didn't say go back to work. He said everything I done at work, makes no difference where I was at, I was to wear rubber gloves, either that, or cotton gloves, padded with cotton, because he said my hands were in bad shape,....(Tr., pp. 53-54)

A June 9, 1981 medical report prepared by Dr. Cornish states that a diagnosis of infected contact dermatitis was made following the May 19, 1981 examination, and that Kelfes and Kenalog cream were prescribed. The report further states that claimant was able to resume work on May 20, 1981. (Cl. Ex. 3)

Ahmad Al-Shash, M.D., who specializes in internal medicine and allergy, testified by deposition in these proceedings. Dr. Al-Shash first saw claimant on June 16, 1981 for the problem with her hands on a referral from the insurance carrier. Claimant discussed the condition of her hands with Dr. Al-Shash, relaying to him the opinions of other doctors that the rash was probably work related. She also produced a sample of the sealant which she mixed at work, but Dr. Al-Shash was unable to test claimant for allergies because the mixture had not been broken down. Dr. Al-Shash stated:

> You know, my diagnosis was contact dermatitis; and I did not test her for particulars in that chemical mixture she has been using because we did not have individual items to test her with. And she was advised, you know, that to avoid the job or wear gloves, at that time my recommendation. She said -- I can't determine if it is definitely related to the job; but definitely the job will make it worse as well as exposing to any hot water, chemicals or handling too much detergents and silver aluminum in her hands. And I advise her to be transferred to a different job if possible and she does not handle any of those materials by her hands. And also I put her on Topicort Cream. It's a Cortisone kind of cream to be used twice a day on her hands and advised to wear gloves if she is going to continue her job. (Al-Shash Deposition, pp. 4-8)

In September of 1981 claimant went to Iowa City where she saw a number of different physicians. While several drugs and ointments were prescribed for claimant's hands, actual improvement was slow. According to claimant, a patch test was performed by Roger I. Ceilley, M.D., in Des Moines using linseed meal, aluminum powder, cheap metal, wool, and baking soda. The patches were removed after forty-four hours and no allergy was found. (Tr., pp. 33-35) Records from Dr. Ceilley show that claimant was tested for a reaction to Potassium Dichromate, Wool Alcohols, Nickel Sulfate, and three powders--a white, a gray, and a brown. The records reflect a negative allergy response to all substances tested. (Cl. Ex. 4)

John S. Strauss, M.D, a board certified dermatologist who testified by deposition, reported that he first saw claimant in the allergy and dermatology clinic at University Hospitals in Iowa City on September 16, 1981. Dr. Strauss testified that claimant had a scaling and blistering type dermatitis on her hands as well as open sores on her upper and lower extremities and a rash at the bra line. Patch testing was repeated in late October. Claimant was tested with linseed meal, baking soda, aluminum powder, a mixture of the three, burlap, and a blank patch by placing a small amount of each in a cup and taping it in place on her back. The cups were removed from claimant's back after forty-eight hours at which time there was a slight redness at the site of the linseed meal, while all of the other patch sites showed no reaction. A day later blisters had formed throughout the area where the linseed meal had been in contact. Dr. Strauss testified that the blistering indicated a positive patch test to linseed meal. Dr. Strauss opined that if claimant were to work with linseed meal without protecting her skin, she could develop a dermatitis which could involve fissuring or cracking of the hands, and might be aggravated by bending. (Strauss Dep., pp. 4-9)

Dr. Strauss described the types of contact dermatitis as follows:

> Well, there are two types of contact dermatitis. There is a contact dermatitis where a patient is allergic to the material. This is something that requires a certain amount of exposure, and then they are sensitized to it and will show a response to that. The second type of contact dermatitis would be called primary irritancy contact dermatitis, which is the type of reaction under appropriate circumstances any individual can react to. A good example of this would be if you stuck your hand in lye. Anybody who is going to stick his hand in lye is going to develop a primary irritancy contact dermatitis. It does not involve an allergic mechanism. It does not involve previous exposure and sensitization. Those are two kinds of contact dermatitis. (Strauss Dep., p. 38)

Dr. Strauss emphasized that direct physical contact with a material is necessary in order to cause a case of contact dermatitis. On October 31, following the positive patch test, claimant was advised to try working fully covered and with gloves, and to use Urea in aquaphilic ointment in the morning and a ten percent salicylic acid in vaseline at night. (Strauss Dep., pp. 12-13)

While Dr. Strauss did state that it would be possible that claimant's dermatitis was related to her exposure to linseed meal, he indicated several times that there were other factors to be considered. The following exchange occurred during direct examination by claimant:

> Q. And that her condition when you saw her hand on October 27th would have been -- well, okay. Let me just start over with the hypothetical. Assume, Doctor, that Mrs. Halterman had worked for approximately four years seven months with the substance or substances which she used in the patch test. Then on about May 14, 1981, due to the condition that her hands were in at that time, she at least felt that she could not continue with her employment and that she sought medical treatment and ultimately became a patient here at the hospital and you saw her on October 27, 1981. Her other activities

other than the employment activities remained the same throughout the period we're concerned with, which would have been four years seven months before May 14 '81, and through the present, the only change in her activities at least that she's aware of would have been that she terminated that employment on May 14, 1981. And assume further that at the present time after using the materials which were prescribed for her by you and your associates here, that her hands have improved considerably and that there is less redness, less of the scabbing and less fissures. Would you just state what significance, if any, her leaving her employment would have in your opinion?

MR. GOETTSCH: Same objection. I interpose the same objection and for the further ground that the hypothetical posed fails to include reference to the fact that the patient had been prescribed medicine for her dermatitis as early as May and at repeated times with contact with physicians subsequent to that and prior to presenting herself at University Hospitals had been prescribed medicine and treatment, and that the question is insufficient as a hypothetical because it fails to include those facts.

Q. Okay. Let's include all those facts which were included in that objection, Doctor, for you also to consider.

A. Basically this is one of the things that's very confusing in her history. If she really was reacting to a material that she was handling in the work place, removal of her from the work place as took place five or so months before we saw her should have resulted in considerable clearing. And the fact that this was going on for this length of time and that new areas were appearing during this time and new areas such as the feet were appearing during this time, one has to really look for another cause rather than her direct exposure at work, because we're dealing with a five-plus month interval. And we would think that during that five-plus month interval there should be some dramatic improvement. And so that's another fact that really makes one think very seriously as to whether this is a toally [sic] work-related reaction. (Strauss Dep., pp. 24-25)

Under cross-examination Dr. Strauss testified as follows:

Q. But in terms of your diagnosis and what you are able to determine, if the only problem that she suffered from were a contact dermatitis to linseed meal, avoidance of contact with linseed meal should take care of that?

A. If that's the only problem she had, that's a true statement.

Q. Okay. And you attempted to test for all of the things that may have been present in her work environment that she brought to you, and of those items that you tested linseed meal was the only one to show a positive test, is that correct?

A. That's correct.

Q. You've indicated earlier today that if linseed meal was the only source of a problem, avoidance of that should result in the clearing up of eczematous--the eczematous condition within two to three months, isn't that correct?

A. Yes.

Q. And the fact that her appearance in your clinic in October, some five months after termination of the work exposure to linseed meal, showed an eczematous condition would indicate that there were sources other than linseed meal that may have been causing that, is that correct?

A. Well, that there was more to it than just linseed meal. I mean, when you say sources, defining what a source is, I mean, it could have been chronic hand washing, chronic handling of detergents at home -- factors I think is a better word. There were other factors involved in the persistence of her dermatitis.

Q. Okay. And the dermatitis that you're talking about is a contact type of dermatitis so that there must be actually physical contact with an item either through actual physical contact with particles of the item, is that correct?

A. If she is having a contact dermatitis to the linseed meal, yes, that is true. She would have to have some physical contact with the material.

Q. And you are saying that there may be other problems that are causing the eczematous condition in her hands?

A. Well, one's the problem is [sic] that the hands are what come in contact with the outside world, everything you handle, and one's the skin could be damaged from any source. Things which might under normal circumstances might not be irritants can become irritant. The best example of that is soap. Normally our skins can tolerate most soaps. But if we have a dermatitis on the hand and then you have a lot of contact with soap, this is a secondary aggravating factor. So that it's very hard in most instances to truly run down the exact cause of a hand dermatitis. (Strauss Dep. pp. 43-45)

....

Q. Doctor, I'm going to ask you to respond to a hypothetical question. Assuming that the problem of Mrs. Halterman's hands is a result of the contact dermatitis to linseed meal and that that is the only source of problem, and assuming that she works in an environment free from that, and whether it be for another employer, and under those circumstances would you expect that she could perform any function with the use of her hands or whatever by simply avoiding contact with linseed meal?

A. Well, there's an assumption that you have to add in there. Mainly assuming her hands are in good condition, which they weren't at the last time I saw her, assuming her hands were in good condition, that would be a fair statement.

Q. And isn't it your expectation that if linseed meal were the sole irritant and the patient avoided linseed meal and properly treated her hands there, her hands would recover?

A. Yes. (Struass Dep., p. 46)

....

Q. Okay. And then also one area that I'm unclear, and I think you've stated it clearly but I'm just not positive, but that is once the skin on the hand became to be in a weakened or whatever condition, eczematous condition that exists there, what, if anything, determines really the length of the healing period?

A. Probably the most important factor in determining that healing period is what else they're getting into during that period of time. You know, there are two processes here, injury and repair. A surgeon makes an incision. That's an instantaneous injury. But no matter how skilled he is, the sutures in and everything else, you need a period of time for repair to take place. If a patient continues to get his hands into irritants, they're continuing to injure it. And if they're doing it on a basis that is more frequent than the finite period of time that's needed for repair, then you don't get better.

Q. Okay. The irritants that Mrs. Halterman might have got into after leaving the employment around a home could be what normally?

A. Just about every household product; wall cleaners, soaps, detergents. (Strauss Dep., pp. 49-50)

....

A. I'm not at all convinced that the linseed meal was the original cause of this.

Q. Do you have any thought as to what was? I'm just trying to find out.

A. Well, you know, once again we go back into this story of what we get. This woman started to have a reaction some several months after she started to work at this company and then continued to have the reaction. I think if she was really truly reacting to linseed meal all this time, she would have had a much more severe reaction. It would have stopped her working long before she stopped working, because if a patient is sensitized to a particular material and they continue to get exposed to it, it becomes a rather violent type of reaction which should have precipitated out of work at a much earlier period of time. (Strauss Dep., p. 47)

The testimony of Dr. Al-Shash also indicated that claimant is sensitive to at least two elements other than those found in her work environment. He testified, in part, on redirect examination:

Q. Doctor, did you on June 16, when you first saw Mrs. Halterman, did she ever take off her shoes so you could examine her feet?

A. Yes, all the skin was examined.

Q. You examined her feet?

A. Yes, all the skin. Okay. I didn't see anything. We did not put it here, but usually when someone comes for the skin, we examine completely.

Q. So she did disrobe then?

A. Yes.

Q. And you did not find anything on the feet at that time?

A. No. (Al-Shash Dep., p. 20)

On cross-examination:

Q. And my question was that if she had not been present in the work environment since the 14th of May, 1981, and she presents herself with a rash on

her feet in October of 1981, it would have been unlikely that that rash was as a result of some work-related exposure?

A. True.

Q. Would that be an indication that she may be allergic to something other than the conditions in the work environment?

A. The one on her feet, yes.

Q. Yes, that's correct?

A. Yes.

Q. And the fact that a rash appeared on her bra line in October would indicate that she was probably allergic to something other than the condition in her job environment?

A. Yes.

Q. Whatever it was that caused the rash on her feet in October may very well have participated in causing a reaction on her hands in June; isn't that correct?

A. What's that? I didn't get it.

Q. Okay. If she was reacting with her feet -- if her feet were reacting in October to an exposure to something --

A. Yes.

Q. -- that same irritant or allergent could have been a cause of a problem to her hands at that time or back in June of 1981; isn't that correct? I'm saying could have been.

A. Not necessarily because she could have a different problem on her feet to be a fungus which is very common in people. And that would not affect her hands except if it affected the hands, it has to present both at the same time; and her feet were not bothering her when I saw her so I think there are two different -- completely different -- entities.

Q. So the patient at least reacts to at least two separate --

A. -- entities.

Q. -- items?

A. Entities are items, probably antigen.

Q. Antigen?

A. Antigen.

Q. So there are -- at least based on what you know of her records from examination -- there are at least two antigens that you think affect her?

A. I know about the linseed. I don't know about the other, but the cheap metal is part of the problem on her back.

Q. It would be difficult to postulate cheap metal causing a rash on the feet?

A. Oh, that's unusual.

Q. That would be unusual?

A. Yes.

Q. So to the extent that there was a rash, if it is a contact dermatitis reaction on the feet, then based on the fact that she had been absent from the work environment for five months or longer prior to the appearance of the rash on the feet, then we can say that there may be three antigens that may cause her to react in a rash; is that correct?

A. Yes. (Al-Shash Dep., pp. 18-22)

On direct examination Dr. Al-Shash was also questioned as to claimant's ability to work with her hands at that time (March, 1982):

Q. What recommendation would you make to her presently in regard to working with her hands in physical labor?

A. Advise her to change her job if possible or if -- apparently she was eager to continue with her work, but she could have protect [sic] her hands from handling this stuff she is allergic to by wearing special gloves with lining inside.

Q. Would she be able to go to another job, for instance, where the linseed meal was not present and work with her hands in physical labor?

A. Oh, I will say yes but, you know, she could develop more allergic [sic] to different stuff since she already -- they would be more subject to develop future allergies.

Q. Would her hands be more sensitive to mechanical injury, for instance, striking a sharp object or running against a rough object?

A. Yes, definitely. (Al-Shash Dep., pp. 10-11)

In an October 9, 1981 letter to Dr. Al-Shash, Hal B. Richerson, M.D., of the staff of the Division of Allergy - Immunology of University Hospitals, wrote with regard to claimant: "Recommendation: 1) Refer to Dermatology for evaluation. Recommended patch testing to be carried out by them; 2) We feel that the patient is currently disabled. We recommend avoidance of causative agents (eg [sic] radiator sealant)." (Strauss Dep. Ex. 5)

At the time of the hearing, claimant complained of an inability to do much with her hands as her skin is thin and even her own fingernails can make holes in it. She also testified that she uses rubber gloves to bathe and wash her hair. (Tr., pp. 44-45)

APPLICABLE LAW

Iowa Code section 85A.8 states:

> 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.

In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980), the Iowa Supreme Court provided that "to prove causation of an occupational disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease given in section 85A.8. First, the disease must be casually 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."

Compensation is awarded for incapacity to earn or industrial disability and not for an injury as such. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 466 (Iowa 1969). The claimant has the burden of proving by a preponderance of the evidence that the injury of May 14, 1981 is causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id. at 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, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Iowa Code section 85A.4 states:

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

Iowa Code section 85A.5 states:

> Compensation payable. All employees subject to the provisions of this chapter who shall be disabled from injurious exposure to an occupational disease herein designated and defined within the conditions, limitations and requirements provided herein, shall receive compensation, reasonable surgical, medical, osteopathic, chiropractic, physical rehabilitation, nursing and hospital services and supplies therefor, and burial expenses as provided in the workers' compensation law of Iowa except as otherwise provided in this chapter.

Iowa Code section 85.33(1) states:

> Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which

the employee was engaged at the time of injury, whichever occurs first.

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.

ANALYSIS

The stated issue on appeal in this proceeding concerns the failure of the deputy to make findings of fact and conclusions of law to provide claimant with healing period benefits from May 15, 1981 through October 9, 1981. On its face, the stated issue appears to be inconsistant with the forms of relief provided for in the Iowa Workers' Compensation laws. The Iowa Code provides for awards of healing period benefits only when an employee has suffered a personal injury causing permanent partial disability. The proposed decision in arbitration from which this appeal arises awarded claimant temporary total disability benefits. While an award of temporary total disability does serve to provide benefits until the employee has returned to work or is medically capable of returning to work, such an award is not to be confused with healing period benefits as defined in Iowa Code section 85.34(1). The issues on appeal as we perceive them to have been intended by claimant are (alternatively):

1) Whether the deputy erred in failing to make findings of fact and conclusions of law to provide temporary total disability from May 14, 1981 through October 9, 1981.

2) Whether the deputy erred in failing to make findings of fact and conclusions of law to provide for permanent partial disability and for healing period benefits in connection therewith from May 14, 1981 through October 9, 1981.

In order to prove an occupational disease, claimant need only show that the disease is due to the exposure to harmful conditions in the work environment, and that those harmful conditions are more prevalent in the work environment than in everyday life. Patch testing in Iowa City confirmed claimant to be allergic to linseed meal. While persons in everyday life are generally not exposed to linseed meal, claimant had regular contact with that substance in the scope of her employment. Claimant has established an occupational disease in her allergy to linseed meal.

Compensation, however, is not based on the disease itself, rather upon disability. Disablement, as defined in Chapter 85A, Iowa Code, describes a condition where an employee becomes actually unable to work or to earn equal wages in other suitable employment as the result of an occupational disease. A review of the record indicates that discrepancies exist between the medical evidence and records introduced, and the testimony of claimant as to whether she could return to her work on May 20, 1981. While claimant holds that all of the physicians who examined her following May 14, 1981 advised her not to return to work, the medical exhibits and doctors' testimony indicate that she more than likely could have resumed her employment with proper precautions. The medical report by Dr. Cox simply advised claimant to avoid contact with any substance which might irritate her hands and prescribed medication for a single week. Dr. Cornish reported that claimant was able to resume her work on May 20, 1981, and according to claimant's testimony, suggested that she wear gloves at work and at home. Dr. Al-Shash testified that while he did suggest that claimant be transferred to a different job if possible, he also suggested she wear protective gloves if she chose to continue the same job. On October 31, 1981, Dr. Strauss wrote that he felt claimant could return to work, at least on a trial basis, as long as protective gloves were worn. The aggregate of the foregoing reports and opinions indicate that claimant most probably could have returned to work on May 20, 1981, assuming that she took the precaution of protecting her skin with protective gloves and clothing. Such conclusion would necessarily cause temporary total disability benefits or healing period benefits (had there been a permanent partial disability) to terminate on May 20, 1981.

In attempting to prove that her occupational disease caused disablement for an extended period (at least through October 9, 1981), claimant apparently relies upon the medical opinion by Dr. Richerson. That opinion, expressed in an October 9, 1981 letter to Dr. Al-Shash, recommended that claimant avoid causitive agents and stated: "We feel the patient is currently disabled." While there is no reason to doubt the opinion of Dr. Richerson that claimant was disabled on that date, no competent medical evidence serving to connect such disability with claimant's occupational disease has been presented.

Dr. Strauss testified that he was not convinced that linseed meal caused the condition that he observed on claimant's hands on October 27, 1981. The length of period that claimant had been out of the work environment, the fact that she was not affected until after she had worked for seven months, the fact that she was able to continue to work for four years, and the possibility of irritation from other sources such as "[j]ust about every household product; wall cleaners, soaps, detergents" all were cited by Dr. Strauss as contributing to his doubts. In addition, Dr. Al-Shash noted that claimant was allergic to at least two substances aside from linseed meal. Rashes which appeared on claimant's feet after she had left her employment indicated an allergy to something found outside of the work environment. Claimant is also allergic to cheap metals, as evidenced by a rash at the bra line and her inability to wear jewelry. Finally, records from the Dietz Clinic indicate that at one time claimant had been allergic to dogs and soap. Based upon the foregoing factors, it cannot be concluded to a reasonable degree of medical certainty that the contact dermatitis from which claimant was suffering on October 9, 1981 was necessarily connected with her former work environment.

This tribunal affirms the decision of the deputy in awarding to claimant temporary total disability from May 15, 1981, her first day off work, to May 20, 1981, the date Dr. Cornish found claimant able to return to work. Likewise, the medical and travel expenses awarded in the arbitration decision are upheld.

WHEREFORE, based upon the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Claimant began working for defendant employer on October 13, 1976.

2. Claimant's hands became red, sore, cracked, and scaly approximately seven months into her employment.

3. Claimant continued to work for defendant employer until May 14, 1981.

4. Claimant developed rashes on her hands, arms, elbow, legs, and feet.

5. Claimant's condition was diagnosed as contact dermatitis on May 14, 1981.

6. Claimant was released to return to work on May 20, 1981.

7. Patch testing indicated that claimant was allergic to linseed meal.

8. Claimant came into contact with linseed meal regularly in the scope of her employment.

9. Claimant's contact with linseed meal in the employment caused temporary disablement by dermatitis to her hands.

10. Claimant was advised that she attempt to return to work while making use of protective gloves and clothing.

CONCLUSIONS OF LAW

Claimant has met the burden of proving an occupational disease -- an allergy to linseed meal.

Claimant has not met the burden of proving disablement beyond May 20, 1981 so as to mandate an award of disability benefits after that date.

Claimant was temporarily totally disabled from May 15, 1981 through May 19, 1981.

THEREFORE, it is ordered:

That defendants pay unto claimant two (2) days of temporary total disability benefits (allowing for the three (3) day waiting period) totalling twenty-seven and 99/100 dollars ($27.99).

That defendants pay unto claimant the following medical expenses, if they have not already done so:

Ahmad Al-Shash, M.D.	$ 30.00
L. R. Cornish, M.D.	14.00
Deitz Diagnostic Clinic	10.00
Roger I. Ceilley, M.D.	51.00
Iowa Methodist Medical Center	47.50
University of Iowa	234.75
Drug Expenses	112.24

That defendants pay mileage expenses for two (2) trips to Iowa City totalling nine hundred twenty (920) miles at a rate of twenty-two cents ($.22) per mile.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That interest shall accrue pursuant to section 85.30, The Code, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

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

Signed and filed this 21st day of January, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MERLE HAMELTON,

Claimant,

vs.

MIDWEST CARBIDE,

Employer,

and

FIDELITY & CASUALTY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 607919

R E V I E W -

R E O P E N I N G

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INTRODUCTION

This is a proceeding in review-reopening brought by Merle Hamelton, the claimant, against his employer, Midwest Carbide Corporation, and the insurance carrier, Fidelity & Casualty Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on October 4, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Henry County Courthouse in Mount Pleasant, Iowa on February 3, 1982. The record was considered fully submitted on April 10, 1982.

An examination of the industrial commissioner's file indicates that a first report of injury was filed October 15, 1979. A memorandum of agreement was filed October 30, 1979. A form 2A was filed March 8, 1982 indicating that the employer/insurance carrier continues to pay permanent partial disability benefits to the claimant.

The record in this case consists of the testimony of the claimant, Karen Hamelton, Pat Hamelton, Dan Smith and James Griffin; the expert medical testimony contained in the depositions of Albert E. Cram, M.D., Marc J. Williams, D.C., Steven Miller and Jerry L. Jochims, M.D.; claimant's exhibits 1, 2 and 3 inclusive; and defendants' exhibits A through N inclusive. Only a partial transcript of the hearing was provided to the undersigned deputy.

ISSUES

The issues to be resolved in this proceeding are the existence of a causal relationship between the back injury and psychological difficulties that claimant experiences and the work injury of October 4, 1979, as well as the extent of permanent partial disability.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the rate in the event of an award is $234.56. The length of time off work is not an issue and the parties agreed that all medical bills had been paid.

The claimant, Merle Hamelton, testified that he is 40 years old and married with two dependent children. He has completed high school.

The claimant confirmed that on October 4, 1979 he was employed by Midwest Carbide. He had been in their employ approximately 16 years prior to this date. Mr. Hamelton testified that in the early hours of October 4, 1979, a carbide furnace exploded at the defendant's plant. The force of the explosion blew claimant eight to ten feet out of the building containing the furnace and slammed him against a railing. He was then blown down a flight of stairs, on his back. At the same time as a result of the explosion, claimant was covered with a hot carbide material which caused the extensive burns over his body. The nature and severity of these burns is detailed in the medical testimony. Immediately after after the incident, claimant went to the first aide station. He was covered with burning carbide. His hands were severely burned and his eyes were also filled with the burning material. Mr. Hamelton was transferred to the hospital by ambulance and subsequently removed by helicopter to University of Iowa Hospitals in Iowa City for specialized treatment. The claimant immediately came under the care of Albert E. Cram, M.D., at that institution.

Dr. Cram testified by deposition that he is an associate professor of surgery and director of the emergency department and burn center at the University of Iowa Hospitals. He came in contact with claimant on October 4, 1979 when Mr. Hamelton was admitted to the burn unit. He confirmed that the claimant's burns were consistent with the history received of a carbide furnace explosion. Dr. Cram's initial examination of claimant disclosed the following:

> Well, the examination disclosed burns covering 41 percent of the body surface area. It involved primarily his face and back, his buttocks, both hands, which appeared to be the deepest area of burn, both forearms, and there were scattered areas on his abdomen, his shoulders, and I believe his right posterior thigh, which were also burnt. He also had some corneal injury when initially seen.

The claimant was admitted to the burn center where he remained approximately 30 days.

The course of treatment at University of Iowa Hospitals included extensive debridement procedures as well as substantial physical therapy. Dr. Cram confirmed that claimant was experiencing substantial discomfort during this period of time. Dr. Cram confirmed that the claimant, after his his initial release, has returned to University Hospitals on multiple occasions for continuing examination and treatment. Claimant also underwent reconstructive surgery in January 1981 on the palmar surface of his left hand. Due to the contracture of that surface, the use of the hand had been interfered with. Subsequent procedures were also performed on his fingers and right thumb. With respect to the extent of disability sustained by the claimant, Dr. Cram testified:

> Well, it would be my opinion that due to the loss in motion of his hand, especially in regard -- although we've done the best surgical release we can, he still has some palmar contracture on both hands, and I believe that this would correspond to a 10 percent disability. In addition to that, I feel that the inelasticity of the skin in all the areas that have been burned, the severe -- the degree of inability to tolerate hot and cold temperatures and abrasive materials, would equal approximately another 10 percent disability, so that I feel his total disability is approximately 20 percent.

Dr. Cram confirmed that the claimant suffered burns on other parts of his body including his back, legs and arms, but the most severe burns were on his hands. In Dr. Cram's opinion, the present disability that claimant experiences is secondary to the burn injuries.

On cross-examination the physician admitted the initial corneal injuries were only superficial and no residual problems have resulted to the best of his knowledge. With respect to the restrictions in range of motion in the claimant's hands, Dr. Cram testified:

> Well, the primary problem he has is still extreme stiffess. He has on the palmar surface, where one does most of their grasping work, a thin epithelium, a grafted epithelium, that will never be as strong and pliable as normal palmar skin. That is, palmar skin is essentially irreplaceable. It's a specialized area on the body and there's no skin from elsewhere you can put there that will do the job as well as palmar skin. In spite of the release, his hand is somewhat squeezed in toward the center. That is, the thumb and the little fingers, all the fingers of the hands are somewhat pulled in toward the center, and we've done as good a release as I feel we can do and still do not have a normal flat palmar surface for him. In addition, he does have some loss of the extensor mechanisms in his left hand so that he has partial type of swan-neck deformity, which we've been able to overcome somewhat with splinting and physical therapy, but still does not have normal grasp. His grasp is weakened in both hands over normal, and until the last release, his little finger was pulled down into the palm of the left hand, and certainly even now is not completely straight. That is, it partially interferes with use of the hand because it hangs lower and in the way of his palmar working surface.

With respect to the extent of disability, Dr. Cram continued to testify:

> A. No, I would say that 10 percent -- I feel that he's disabled in the neighborhood of 20 percent total, and I would say that half of that disability is directly due to the loss of motion and the discomfort that he experiences in working with his hands.
>
> Q. Doctor, if you had to rate his physical impairment based only on the loss of motion in the hands, what would that physical impairment be, that rating?
>
> A. I guess I would put that rating at 10 percent then.
>
> Q. 10 percent of each hand?
>
> A. The disability to the person, you want how much each hand is disabled from normal?
>
> Q. Yes.
>
> A. Well, I guess I would say that each hand is about half as good as it was prior to his injury.
>
> Q. So --
>
> A. In terms of motion and useability.

On redirect examination the physician confirmed that the claimant is more sensitive to heat and cold due to the burns.

Claimant testified that his back hurt after the October 4 injury. Subsequently, he went to Dr. Helling, a general practitioner and his family physician, for this problem. This occurred in 1981, according to the claimant. The claimant related to

this physician that he was having chest pains and back problems. Dr. Helling referred Mr. Hamelton to a physical therapist for treatment. This procedure was undertaken for one month without relief of the painful symptoms. Subsequently, the claimant was examined and treated by Dr. Marc Williams, a chiropractor. Claimant confirmed that he is receiving relief from Dr. Williams' involvement. He testified that he did not have any back problems or back complaints prior to the October 4 injury. Complaints today with respect to his back are a general ache in the lower back and inability to bend over and do any sit-ups of any kind, or exercise. He also indicated his back stiffens up.

The claimant testified at length concerning the present status of his hands, the restrictions and problems he is having with them. He must keep his hands continuously covered with Vaseline Intensive Care lotion in order to keep them soft and pliable. If he fails to do this, his hands will tighten up and he is unable to move them. His fingers are not as they were prior to the date of injury. He wears two braces--one in each hand, at night, to prevent the palm of his hand and the thumb from curling up. These braces must be worn on a daily basis. He also wears special leather gloves to keep pressure on his hands and prevent them from deforming. These were prescribed by Dr. Cram.

Prior to the date of injury, the claimant did mechanical work on his car. He is unable to do this today because oil adversely affects his skin. He is also afraid of breaking his skin open. Dust also affects the burn areas and makes them red and irritable.

Mr. Hamelton is able to walk fairly well, but has trouble climbing steps and cannot run because his back stiffens up. There are a lot of stairs to be climbed at Midwest Carbide and claimant has some difficulty negotiating them. He was not affected in this way prior to the date of injury.

Cold weather causes substantial discomfort in the areas that were burned. Claimant must continue to use Vaseline Intensive Care lotion and insulated gloves when he goes out into the cold. He had not experienced this problem prior to the date of injury. He also experiences difficulty in sitting on hard surfaces for any length of time. Claimant is able to drive a car, but many times in cold weather his wife will take him to work. Mr. Hamelton has difficulty sleeping and perspires extensively at night. His body perspires differently now than it did prior to the date of injury. He did not have these problems prior to October 4, 1979.

The claimant testified to continuing nightmares and some difficulty sleeping. He cannot tolerate any form of fire in his house, such as a fireplace. He also does not like people smoking in his home. Claimant continuously grinds his teeth and indicated that they are worn off on the bottom. He has had three root canal procedures to try to remedy this problem.

The claimant returned to work for the defendant on October 15, 1981. He indicated that he is "fairly well" pleased to be back. Mr. Hamelton indicated that prior to returning to work, he was afraid of going back to the job site. His decision to return to work was very difficult to make. The claimant indicated that he is being treated by a psychologist, Steve Miller. Through Mr. Miller's involvement and assistance, the decision to return to work was easier. The defendant did not send claimant to Dr. Miller and the expenses of Dr. Miller are being picked up by the group insurance plan.

Initially, upon returning to work, the claimant's job involved climbing ladders in order to inspect dust collectors. He is unable to do the climbing because of lack of strength in his hands. The job was eventually tailored to suit his needs and he is no longer required to climb. He testified that due to the work being performed at defendant's plant, small explosions occur and these cause him to tense up and become very frightened. He becomes disoriented as a result. Claimant is required to wear a helmet at work and it is difficult for him to do this because his forehead was burned in the explosion.

Prior to the date of injury, the claimant did a lot of swimming, but testified that after the date of injury he does not care to swim because he does not want to be in public because of the scar tissue and poor appearance of his skin. He gets the feeling that everybody is staring at him. He has seen people stare at him and is often questioned about his hands. As a result, he tries to keep his hands in his pockets.

With respect to his work, the claimant feels that he is doing a good job, but is concerned that the employer will fire him if they have an opportunity. He has no tenure or seniority at the defendant and could be fired at will.

Claimant testified that his prior work history included that of a combat engineer in the U.S. Army, working for the Steel Casting Company and being a supervisor for the defendant prior to the date of injury.

On cross-examination the claimant indicated that his counsel had set up the examination and treatment administered by Dr. Williams, a chiropractor. He confirmed that he had no prior back problems of any consequence prior to the date of injury. He confirms that there is flexibility in his job and he is able to walk around as his physical needs require. He confirmed that Dr. Miller put him on medication which helps with the sleeping problems. He confirmed that the defendant is cooperative in designing a job that will fit claimant's limitations, but continues to express a concern about losing his position. Since returning to work, he has received an increase in his salary and there has been some talk of future raises.

With respect to his back, the claimant testified that he experiences discomfort in the middle and low area of his back as well as stiffness. He confirmed that from the date of accident to approximately October 1981, he did not seek treatment for this situation. He continues to have chest discomfort in the right and left sides of the upper chest in what is described as a build-up of pressure. Claimant testified that after sitting for long periods of time, he has back pain which then moves into his chest and gives him the feeling that he will explode.

On redirect examination the claimant denied ever indicating to a nurse that he had a prior disc problem. He confirmed that he was being given substantial amounts of medication in October 1979 immediately after the work injury.

Karen Hamelton, claimant's daughter, testified on his behalf. She is 16 years of age, in the tenth grade and lives with her parents. She is familiar with the claimant's condition both prior to and subsequent to the work injury. She indicated that prior to the injury he was able to play softball, bowl, fish, swim and be very active. Post-injury, he is tense and difficult to get along with. He is withdrawn and does not undertake the physical activity he did prior to injury. She confirmed the claimant's testimony concerning many of the difficulties he has with his hands.

Pat Hamelton, claimant's wife of 17 years, testified on his behalf. She lived with the claimant both prior to and subsequent to the work injury. She confirmed the problems that the claimant has sleeping. She also confirmed that he has undergone a personality change since the date of injury and is now very moody and tense. He is depressed and she concedes that there have been some marital problems.

Dan Smith, the personnel and safety director at the defendant's plant, testified on their behalf. He has known the claimant since 1972. He stated that claimant has performed a variety of jobs to the date of injury at the defendant's plant including general laborer, forklift worker, pace plant operator and shift foreman. He described the claimant as a good employee, very dependable and above average. He confirmed that his salary on the date of injury was $1,850 per month. He confirmed the claimant's testimony that he returned to work in October 1981. Initially, claimant began part-time and then moved to a full-time position. Initially, he was placed in a job doing extensive paper work. This position was created especially for the claimant. Mr. Hamelton expressed a dislike for this position and subsequently was placed back on supervisory duties. When claimant returned to work, he was paid the same salary as on the date of injury. This witness confirmed that claimant received a wage increase in January 1982 and now is paid $2,035 per month. He indicated that the claimant's job performance is acceptable. This witness indicated that this claimant is getting along well and that they plan to keep him employed.

James Griffin, age 51, testified on behalf of the defendant. He is the plant superintendent and is the claimant's present supervisor. He has known the claimant for 15 years. He indicates that the claimant is doing a good job and he is satisfied with his performance. He indicated that the claimant has a good attitude and is a good employee.

Marc J. Williams, D.C., testified that he is a chiropractor and has had an opportunity to both examine and treat the claimant. The treatments commenced in January 1982. The history claimant gave of this practitioner is consistent with the testimony at trial. An examination was conducted, x-rays were taken and various tests were performed. Based upon those tests, this practitioner testified:

> Q. On the basis of the findings, what was it that you believe that he suffered as a result of those injuries?
>
> A. Acute distortion of the lumbar spine and pelvis resulting in a sciatic radiculitis complicated by thoracic and cervical distortion.

He is of the opinion that the injuries he treated claimant for are causally related to the work injury described by the claimant. He is of the opinion that claimant has sustained a 25 percent permanent impairment of the whole man as a result of these injuries. He bases his opinion upon the AMA Guides to the Evaluation of Permanent Impairment. On cross-examination this witness indicated that he has not had an opportunity to review any other medical data related to claimant's condition.

Jerry L. Jochims, M.D., testified on behalf of the defense. He is an orthopedic specialist and board certified. He is involved in treating patients with industrial injuries and spends a substantial portion of his practice in this involvement. He had occasion to examine the claimant on February 8, 1982. He also had an opportunity to examine the multitude of medical records and data related to this case. He obtained a history from the claimant and conducted an examination which included x-rays and tests. Claimant indicated to this physician that he had been treated by a Dr. Williamson for some minor back problem in 1977. It does not appear that there has been any residual problem related to the prior treatments.

This physician is of the opinion that claimant has sustained a nine percent permanent functional impairment to the body as a whole as a result of the extensive hand burns. He used the guidelines as set out by the American Medical Association Guides to the Evaluation of Permanent Impairment to reach this figure.

With respect to the neck discomfort, this physician attaches a four percent permanent disability to that impairment. Concerning the neck discomfort, Dr. Jochims testified:

> Q. Doctor, you said before that problems that Mr. Hamelton has with his hands caused some neck pain, is that correct?
>
> A. I believe so.
>
> Q. Could you explain that, please.
>
> A. I believe that he has a carpal tunnel syndrome in his wrists attributable on the basis of his multiple scars and contractures in his hands and

wrists and that these have caused a carpal tunnel syndrome which is a secondary compression of the median nerve. The syndrome of carpal tunnel is very commonly accompanied by cervical complaints of stiffness and pain, occasionally with radiation of such symptoms out into the shoulders and not uncommonly with frequent headaches.

Q. Doctor, I'll repeat my question--my earlier question.

If Mr. Hamelton underwent the carpal tunnel releases, how would that improve his present impairment, if any?

A. I believe that that would alleviate his neck symptoms and thereby his neck stiffness, also.

Q. Are you saying, then, that you could eliminate the four percent rating that you have now given Mr. Hamelton with regard to the neck?

A. I believe within a reasonable degree of medical certainty, yes.

This physician did not find that the claimant's hips were misaligned. He also found no misalignment of the vertebra and disagrees with Dr. Williams on both of these points. He found no sensory impairment of the claimant's legs and no motor impairment. A loss of motion was noted in the lumbar spine to which the physician attached a four percent impairment. He is of the opinion that the lumbar spine problems were caused by the furnace explosion on October 4, 1979. With respect to the low back pain, Dr. Jochims testified:

A. By way of reviewing his history of injury and the pattern of complaints of his pain while at the University Hospitals, it seemed evident to me that the injury which was described caused a series of falls down a stairway subsequent to the explosion, and these seemed well-related to the patient's history. And in addition to that, he had multiple injuries in his University of Iowa Hospital records which indicated that the pain was most present when he sat and was kept in bed for a long period of time. These were referred to the low back area but were constantly related to midline type of pain and they were related with subjective complaints about the buttocks and posterior thighs, which to me again indicated a causal relationship.

Q. So in your opinion the explosion caused his coccyx problem, is that correct?

A. I believe so.

He is of the opinion that claimant has a five percent impairment due to the coccyx problem. This coupled with the low back problem totals nine percent. Surgery was suggested on the low back and coccyx area, and it is suggested that perhaps the nine percent impairment might be removed due to that surgical procedure. This surgery has not been undertaken as of this date. This physician does not know of any reason why claimant cannot continue to work in his present capacity. In summary, the evaluation of impairment is as follows:

Q. (By Ms. Nix) Doctor, in summary with regard to your physical impairment rating of Mr. Hamelton, am I correct that you have given him a nine percent rating for the hands, a four percent rating for the cervical area, a four percent rating for the lumbar, and a five percent rating for the coccyx, equaling a total of twenty-two percent physical impairment rating of the body as a whole?

A. Orthopedically, yes.

Dr. Jochims is aware that the claimant was under medication when admitted to the University Hospitals and admits that this will change a person's thought pattern. This testimony is given specifically in request to minor nurse notes and indications of some prior back problems. With respect to the neck problem, Dr. Jochims testified:

Q. Within a reasonable medical certainty, do you have an opinion as to whether or not the limitations of motion and stiffness of the neck is causally connected to the injury that he suffered at Midwest Carbide that's been previously explained to you?

A. Yes.

Q. Is that causally connected?

A. I believe so.

Q. Would that also be true of the lumbar limitations and complaints of Mr. Hamelton also gives?

A. Yes.

Steven L. Miller, a psychologist and executive director of the Lee County Medical Health Center, testified in this case. He has had occasion to treat claimant commencing November 12, 1981. He has seen him on five separate occasions since that date. An additional diagnosis of "adjustment disorder with depressed mood" was made. It was anticipated that this disorder would be temporary in nature. Mr. Miller testified as follows with respect to impairment:

Q. Excuse me, permanent psychological impairment.

A. I think there would be a chance that there may be a permanent emotional problem.

Q. And, specifically, if there would be any permanent problem, what would the nature of that problem be expected to be?

A. It would probably range from mild anxiety, and I could use an example here like a neighbor burning leaves or a fire in the fireplace-- something like that-- some mild anxiety with reference to that at one end of the scale and at the more severe end of the scale perhaps an anxiety attack or what they call a panic attack in response to that.

Q. Basically, would his concern be about fire?

A. Fire and related sorts of things-- safety and, of course, explosions.

Q. Mr. Hamelton can still function in society with those effects, can't he, Mr. Miller?

A. Yes.

Q. He can still work and live on a day-to-day basis with that in the back of his mind?

A. That's true.

The claimant is presently undergoing therapy with this psychologist and improvement has been noted. This physician testified as follows with regard to the claimant's return to work:

A. Most dramatic improvement, I think, has been at work for him.

Q. Would you elaborate on that?

A. At the time of the intake, he felt that he was emotionally not ready to go back to work, and he had a lot of anxiety about it. Most recently when I've seen him, and that's the 28th of January, he has had a lot of successes at work and has coped rather well. He's feeling more comfortable and probably the only anxieties he has right now are still having to do with the possibility of an explosion which happens in some-- sometimes there at that place he works and coping some with his physical difficulties. Basically, he's improved greatly.

This individual confirmed that the claimant has some problems with withdrawl. On cross-examination this individual indicated that the presence of the burn condition will be a continuing stress for the claimant. The presence of fire and noise are also a stressful situation. This physician expressed the following opinion:

Q. Within a reasonable degree of medical certainty, has there been a permanent change in his emotional life and reactions due to the explosion that he experienced and the burns he experienced from that explosion?

A. I would say there has been a permanent change with him.

He further testified:

Q. In other words, doesn't a person's own personality and their ability to cope with themselves-- have self-control, manage their own mind-- also influence their ability to perform work?

A. Yes.

And further:

Q. And when you wrote a letter at that time you said that he had a favorable prognosis for the future, were you saying that he would be cured and would never have any emotional problems as a result of this explosion?

A. No, I wasn't saying that.

Q. I take it it would be that he would improve; is that right?

A. Yes.

Q. To the full extent of improvement, I mean improvement in the psychological world that is difficult to ascertain what the full amount of improvement really will be; is that right?

A. That's true.

With respect to the claimant's future sensitivities, this individual testified:

A. He's going to be sensitive to those things you mentioned before-- the loud noises and fire, things like that-- and the issue of safety, I think that's come up at home-- being very conscience [sic] about the safety of his children and what's plugged or unplugged at home. He's going to be concerned about, you know, his physical abilities, that's changed drastically. It's going to take some adjustment.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 4, 1979 is the cause of the disability on which he now bases his claim. Bodish v.

Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. 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).

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."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, ___, cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted.

Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, ___ (1963).

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).

In Floyd Enstrom v. Iowa Public Service Co., appeal decision filed August 5, 1981, the industrial commissioner stated:

> 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.

ANALYSIS

Claimant has suffered a severe burn injury as a result of the October 4 incident. At trial the undersigned observed the extensive scarring on claimant's hands. In addition to the burns, the claimant sustained a back injury which, according to the medical testimony, is causally related to the October 4 explosion.

A number of qualified individuals have testified concerning the claimant's medical status. After a complete analysis of the record and considering all the evidence, the greater reliance will be placed on the opinion of Dr. Cram with respect to the burn condition. The record establishes that he is a highly qualified specialist in this area. Dr. Jochims' opinions will also be given more weight over the chiropractor's opinions because of his status as a board certified specialist.

Dr. Jochims stated the opinion that claimant has sustained a nine percent permanent disability to his body as a whole as a consequence of the back injury. Dr. Cram attached a 20 percent impairment rating to the body as a whole as a consequence of the burns.

The record reveals that in addition to the limitations claimant experiences as a consequence of the back injury and the burns, he also has some emotional difficulties. Steven L. Miller, a psychologist, testified to his involvement in this case. His testimony is uncontroverted.

Defendants have taken steps in accordance with the decision of Blacksmith v. All-American, Inc., 290 N.W.2d 348 and returned claimant to work. This return to work occurred a few months prior to hearing. Without returning claimant to work, this deputy would be of the opinion that claimant might be permanently and totally disabled. The return to work does not, however, detract from the fact that claimant has experienced an injury of extreme severity, i.e., the burns. The location and severity of the injury are valid considerations in reaching a final determination of claimant's industrial disability.

Based on the record as a whole and taking into consideration all of the industrial disability considerations, it is determined that claimant has sustained a permanent disability for industrial purposes of 60 percent of the body as a whole.

FINDINGS OF FACT

That there exists a causal relationship between claimant's back injury and emotional problems and the work injury of October 4, 1979.

That claimant returned to work in October 1981.

That the claimant has sustained a permanent impairment of nine (9) percent of the body as a whole as a result of the back injury of October 4, 1979.

That the claimant has sustained a permanent impairment of twenty (20) percent of the body as a whole as a consequence of the burns he sustained on October 4, 1979.

That the claimant has residual difficulties as a result of the aforementioned injuries including certain emotional problems, loss of strength in his hands and arms, inability to bend, pain and discomfort in his back, difficulty sitting for long periods of time and nervousness.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and established a causal connection between the back injury and psychological problems he is experiencing and the work injury of October 4, 1979.

That based on the industrial disability considerations, claimant has sustained an industrial disability of sixty (60) percent of the body as a whole as a result of the October 4, 1979 injury.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the stipulated rate of two hundred thirty-four and 56/100 dollars ($234.56).

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

That defendants are given credit for all benefits previously paid.

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 21st day of July, 1982.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MERLIN HAMILTON,

Claimant,

vs.

DAILY INDUSTRIES, INC.,

Employer,

and

PENN NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 442372

A P P E A L

D E C I S I O N

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STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision filed April 21, 1982 wherein claimant was awarded permanent partial disability pursuant to Iowa Code section 85.34(2)(o) and healing period benefits plus related medical expenses as a result of an admitted industrial injury of August 7, 1975.

At the time of hearing the parties stipulated that the applicable workers' compensation rate in the event of an award is $134.66 per week. There was no stipulation as to the time off work other than that period of time for which the claimant has already been paid benefits. There was a stipulation that the medical bills received into evidence in this litigation were fair and reasonable but there was no agreement that they were causally related to the work incident in question. The deputy's findings as they relate to the above are uncontroverted on appeal.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Linda Hamilton, and Donald Dingman; claimant's exhibits A through F inclusive, exhibit F being the deposition of Sterling Laaveg, M.D.; defendants' exhibits 1 through 11 inclusive; and the briefs of all parties on appeal.

ISSUES

The sole issue on appeal is whether claimant's disability is causally related to an injury arising out of and in the course of his employment on August 7, 1975.

REVIEW OF THE EVIDENCE

The record establishes that claimant was in the United States Army stationed in Viet Nam from 1963 through 1966. On April 26, 1966, claimant suffered a gun shot wound to the right knee, the result of snipper fire. (Tr., p. 14; claimant's exhibit B) Claimant was diagnosed to suffer from osteomyelitis in the right lower extremity and was discharged from active duty in 1967.

Claimant underwent between 20 and 23 separate surgical procedures designed to either repair the right knee or relieve the osteomyelitis. (Tr., p. 15) The last of these surgical procedures took place in 1973. (Tr., p. 15) From that date until August of 1975, no further surgical procedures were required. Claimant testified that he experienced no difficulties in that period and, in fact, the condition appeared to be quiescent at that time.

As of August 1975, claimant had worked for defendant employer approximately two years as a terminal manager. Duties as terminal manager included preparing loads for shipment, conducting safety inspections, and preparation of paper work with regard to the shipments. Additionally, claimant performed heavy manual labor and drove heavy equipment such a backhoes or forklifts onto trailers for eventual shipment. (Tr., pp. 12-13)

In the period from early 1973 until August 1975, claimant was able to work without restriction. Additionally, claimant was able to perform farming activities during this period as well as participate in family activities. (Tr., pp. 16-17) On the date of the injury, claimant was married with two dependent children. Claimant and his wife have had another child since. (Tr., p. 11)

On August 7, 1975, while cleaning trailers, claimant stepped through rotted floor boards with his right leg. The right leg protruded through the trailer floor to a point just above the knee. Claimant felt immediate pain in his right knee area. Soon thereafter, the knee began to swell and bleed profusely. (Tr., p. 19) Claimant continued to work the next day, optimistically thinking that the swelling would decrease. On August 11, 1975 claimant sought medical attention from a Dr. Vaughan, his family physician. Dr. Vaughan immediately referred claimant to the Veterans Administration Hospital in Iowa City. (Tr., p. 20)

Claimant was hospitalized from August 12, 1975 to August 15, 1975. Bed rest and antibiotics were prescribed as the only treatment. (Tr., p. 22) Claimant was released for work aproximately two weeks after his hospitalization. (Tr., p. 23)

Claimant was able to work only to early September of 1975 before continuing pain, swelling, and fever forced a repeated hospitalization. Claimant underwent a surgical debridement procedure and remained hospitalized for approximately 10 days. (Tr., p. 24). Claimant returned to work on October 13, 1975. His right leg continued to worsen as pain, swelling, and fever impeded his ability to work. (Tr., p. 27) Claimant last worked for defendant employer on February 28, 1976. At no time from the date of his injury did claimant regain full use of his right leg.

Claimant was hospitalized yet again on March 1, 1976 and underwent another debridement procedure. Claimant testified as to the findings thereafter:

> Q What did you understand your options to be?
>
> A The options were was, one, amputation, and the other was-- I'm not sure the exact medical treatment. I will describe it in my own words. It amounted to shortening my leg which amounted to six inches by virtually taking a piece of bone out and bringing the leg together and pinning it; however, they told me that the probability of success was about 50-50, and the main concern being that if they did this and the osteomyelitis was able to stay or spread, that at a future date I would be faced with a probability of leg amputation at a higher range than what I have currently, of it making it extremely difficult, if not impossible, to wear a prosthesis.
>
> Q Did they get your consent on the medical procedure then that was ultimately performed on you--the amputation?
>
> A Yes, they did.
>
> Q Why did you elect the amputation as opposed to the other procedure?
>
> A I felt that the way--the procedure--the option was described to me, I felt the other options were unacceptable, and I felt it just wasn't worth the gambling with the possibility of going through this and maybe coming up with--and have to go through--live with not being able to wear a prosthesis or a useable prosthesis. (Tr., pp. 28-29)

On March 12, 1976 claimant underwent a surgical procedure to amputate his right lower extremity above the knee. Claimant was later fitted with various prosthetic devices and by March of 1977 was able to return to work. (Tr., p. 32)

Claimant has returned to full time farming. He testified that his job with defendant employer had been filled. (Tr., p. 32) Claimant further testified that he has difficulty moving freely and that his gait is marred by a limp. He also states that walking causes blisters to develop around the area where the right stump meets the prosthesis. (Tr., p. 35) Finally, claimant testifies that he now tires much more easily and no longer is able to participate in family activities.

Linda Hamilton, claimant's wife, testified on his behalf. She confirmed the claimant's testimony that between 1973 and 1975 his leg was in good condition and that he was able to function physically without restriction. She described claimant as being active physically and able to do heavy labor without difficulty. Based on her observations, she indicates that during this period, there was no drainage or swelling in the right leg. She described his osteomyelitic condition as being in remission. (Tr., pp. 51-52)

Mrs. Hamilton testified that after the August work injury her husband's leg became swollen and the drainage began. The leg became progressively worse and was badly discolored. She confirmed that the claimant was in pain and was severely restricted in his activities after the August injury. (Tr., pp. 54-55)

This witness accompanied the claimant in March of 1976 to Veterans Hospital in Iowa City and confirmed that his physical condition was poor. She indicated that Dr. Laaveg "pushed amputation." After consultation and based on the medical advise, the amputation was undertaken. (Tr., p. 58)

Don Dingman testified at hearing that he worked with claimant from before August of 1975 until claimant left on February 28, 1976. He testified that the claimant, prior to the date of injury, was able to drive equipment, semi tractors and forklifts without restriction. Claimant was required to climb on equipment continuously and do heavy physical labor. Dingman had occasion to observe claimant's right leg during this period of time and indicated that it did not prevent him from walking or doing the heavy physical labor required of the job. Claimant never complained of leg or knee pain. This witness was present on the date of injury and confirmed the claimant's recitation of the facts of the incident. He described the status of the claimant's leg immediately after the injury as appearing as though it went through a "meat grinder". (Tr., p. 69)

The witness worked with the claimant between the date of injury until February 28, 1976. He stated that claimant limped substantially during this period and favored the right leg. Claimant was not able to work as fast or as vigorously as he did prior to injury. (Tr., p. 70)

Sterling Laaveg, M.D., a certified orthopedic surgeon, testified that he assisted in claimant's treatment in March of 1976. Dr. Laaveg testified that he was a resident at the V.A. Hospital in charge of orthopedic surgery under the direction of Carol Larson, M.D., now deceased. (Laaveg depo., p. 5)

Dr. Laaveg defined the condition of osteomyelitis as follows:

A. Osteomyelitis at the bone means that there is a deep infection inside the bone all through the marrow cavity and through even down into the very small cells of the bone cells. Chronic just means that it's been there for a long period of time. It's somewhat of a misnomer because if you once have osteomyelitis, it never really is completely cleared up. So chronic, meaning in this instance, that he was having repeated episodes of drainage from it.

Q. Are there occasions then when osteomyelitis, which is often referred to as chronic osteomyelitis, does flare up?

A. It is not unusual to have flareups of osteomyelitis. In fact, it's rather routine. There are people, for example, who had an episode of osteomyelitis and thirty years later have a flareup of osteomyelitis. So it's not unusual to either have it cleared up enough that it's done well and then something happens and they have another flareup of it, or it's not unusual at times to have it drain on and off for several months to years.

Q. Doctor, what might aggravate or accelerate a condition of chronic osteomyelitis so that it would flare up?

* * *

A. In a general sense, anybody who has osteomyelitis can have a flareup either spontaneously, in otherwords, with no apparent cause, or it can be a relatively direct cause, for example, a direct blow to the area so that there's swelling; an indirect cause, for example, a fever in another location from say a pnuemonia with a sudden flareup of the osteomyelitis. It's not--If I sound evasive, it's because osteomyelitis isn't cookbook. It just doesn't, boom, go right down the money for anybody, and multiple things can cause a flareup.

Q. Do I understand your answer to be, though, that one of the things that could cause a flareup would be trauma?

A. Trauma can cause a flareup of osteomyelitis. (Laaveg depo., pp. 6-8)

Dr. Laaveg testified that he left his residency at the V.A. Hospital shortly after claimant's discharge and that Dr. Fulton became the senior resident within the department of orthopedic surgery. (Laaveg depo., p. 17) In a report dated May 21, 1976, J. M. Robertson, Chief of Medical Administrative Services at the V.A. Hospital wrote:

> We again referred your letter of March 24 to the physician's caring for Mr. Hamilton. The following is the reply from Dr. Fulton, Orthopedics:
>
> > The amputation was done by patients request and our recommendations because of chronic osteomyelitis. As far as I can tell from the medical file, the osteomyelitis was not related to the fall. (Deft. exh. 1)

Dr. Laaveg stated that Dr. Fulton expressed the above opinion because claimant provided no history of an industrial injury at the time of his admission. (Lavegg deop., pp. 23-24)

In the deposition of Dr. Laaveg, claimant's counsel posed a lengthy hypothetical question outlining the history of the claimant's osteomyelitis and the injury of August 7, 1975. Counsel asked, based on the assumed facts, whether the injury of August 7, 1975 could have caused the flare-ups of claimant's osteomyelitis leading to amputation of the left lower extremity. Dr. Laaveg testified that it was "hightly probable" that such an injury would have caused the series of flare-ups. (Laaveg depo., pp. 13-14)

Dr. Laaveg testified that prior to the amputation surgery, the condition of claimant's right knee was as follows:

> A. He had at that time pain and swelling of his distal femur or the part toward his foot, which is his thigh bone, which was in the area of his previous osteomyelitis. He had destructive changes of his knee with limited motion of his knee of only approximately ten degrees. He was having pain and discomfort because of the flareup and was having some drainage at that time. It was our feeling that he had a recurrent episode of drainage from his osteomyelitis or a flareup at that time, and we proceeded from there. (Laaveg depo., p. 8)

Given the condition of claimant's right leg after the last debridement procedure, the V. A. Hospital staff discussed the outlook for future treatment. At this point, claimant was presented with a set of options. Dr. Laaveg testified:

> A. Umm, we talked to Mr. Hamilton at that time about his options. He had been having recurrent problems. He had had multiple episodes of drainage that was causing him a great economic hardship, and with a limited motion at the knee with a painful knee, his options at that time are continue as he was with possible repeated flareups, or perhaps continued closure of the wound, to have his knee fused, which would be difficult in light of having an infection and maintain fusion in and of itself, or to proceed with an amputation, which although it sounds terrible, would be definitive. It would clear up his osteomyelitis because you would have amputated the wound--or I mean the bone at the distal end or the foot end. He would then be able to function economically, and even though he would not have his leg, he would be able to at least have a predictable lifestyle.
>
> Q. What decision was made?
>
> A. He himself decided after reviewing the options and after we had discussed it with obviously my staff people and the service at the University of Iowa, to have an amputation, and he had an amputation. (Laaveg depo., pp. 9-10)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 7, 1975 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. 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).

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. U. S. Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, (1961).

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 299 (1961); 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, and cases cited.

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).

ANALYSIS

Defendants point to the fact that claimant suffered three flare-up episodes from August 8, 1975 to the amputation of March 12, 1976. Given Dr. Laaveg's testimony that there may be several different causes for a flare-up, defendants assert that the last and most critical flare-up in late February of 1976 was unrelated to the injury of August 7, 1975. Despite the fact that flare-ups of osteomyelitis may occur spontaneously, the evidence is uncontroverted that claimant's condition was quiescent before August 8, 1975 and that claimant suffered significant pain and swelling immediately after the injury on that date. Further, unrebutted testimony establishes that while claimant was able to return to his job, his condition did not improve and in fact continued to steadily deteriorate until amputation took place.

While amputation was advised because of the chronic nature of claimant's osteomyelitis, the lay and medical evidence in the record clearly establishes that the injury of August 8, 1975 materially and significantly aggravated that preexisting condition. The fact that claimant failed to give a history of his injury does not allow Dr. Fulton's opinion to detract from that conclusion. The long standing case law of this state is that an employer takes an employee as he finds him. While the injury of August 8, 1975 did not cause claimant's osteomyelitis, it did aggravate the condition and ultimately led to amputation of the right lower extremity.

Finally, defendants place great emphasis upon the fact that claimant was presented treatment alternatives and voluntarily elected amputation. Any treatment, let alone a surgical procedure is always elective on the part of the patient. The choice of amputation was a valid treatment for claimant's condition according to Dr. Laaveg. Testimony in the record indicates that the treating physicians encouraged amputation. Moreover, claimant's testimony indicates that he carefully

weighed the factors and made his decision believing it to be the most practical. Defendants' liability extends to the effects of all treatment calculated to be reasonably necessary to improve claimant's condition. Claimant cannot be expected to live with a treatment that has the least expensive immediate consequences for a defendant. Had claimant refused amputation, the ultimate consequences may well have proved to be far more severe for all parties involved.

The deputy's other findings remain uncontroverted on appeal and with substantial evidence in the record to support those findings, they are deemed proper on appeal.

FINDINGS OF FACT

1. That claimant sustained an injury to his right lower extremity arising out of and in the course of his employment on August 8, 1975.

2. That claimant suffered from chronic osteomyelitis in the right lower extremity since 1966.

3. That claimant's osteomyelitis was quiescent from 1973 until August 8, 1975.

4. That the injury of August 8, 1975 caused a series of flare-ups of claimant's preexisting osteomyelitis.

5. That as a result of the forementioned aggravation, claimant's condition continued to deteriorate to the point that amputation was suggested by treating physicians.

6. That claimant's right lower extremity was amputated at a point above the knee on March 12, 1976 as a treatment for claimant's condition.

CONCLUSIONS OF LAW

That claimant has sustained his burden that his disability is causally related to an injury arising out of and in the course of his employment.

That claimant is entitled to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(o).

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision of April 21, 1982 are proper.

THEREFORE, it is ordered:

That the defendants shall pay the claimant, under the terms of Iowa Code section 85.34(2)(o), two hundred (200) weeks of permanent partial disability benefits as set out in Iowa Code section 85.34 at the stipulated rate of one hundred thirty-four and 66/100 dollars ($134.66) per week.

That defendants shall pay claimant fifty-two (52) weeks of healing period benefits at the stipulated rate of one hundred thirty-four and 66/100 dollars ($134.66) per week.

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

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

That interest shall accrue pursuant to Iowa code section 85.30.

The defendants shall pay unto the claimant the following medical expense: Veterans Administration Hospital, $4,262.00.

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

Signed and filed this 29th day of July, 1982.

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

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VALERIE HANDEL, Surviving Spouse of Ted Handel, Claimant,	:	FILE NO. 670157
vs.	:	
DETERMANN INDUSTRIES, INC., Employer,	:	R E V I E W - R E O P E N I N G D E C I S I O N
and	:	
BITUMINOUS INSURANCE CO., Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Valerie Handel, surviving spouse of Ted A. Handel, claimant, against Determann Industries, Inc., employer, and Bituminous Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury to Ted Handel on May 12, 1981. It came on for hearing on July 28, 1982, at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at that time.

The Industrial Commissioner's file shows a first report of injury received May 20, 1981. A memorandum of agreement was received on May 29, 1981, with an accompanying form 2B correcting the number of exemptions. A final report received August 5, 1981, shows the payment of 12 weeks of temporary total disability and $6,914.30 in medical expenses. Benefits were terminated when decedent returned to work.

The record in this matter consists of claimant's exhibit 1, a narrative report from Jay P. Ginther, M.D., dated March 11, 1982, Dr. Ginther's office notes, and medical records from St. Joseph Mercy Hospital; and defendants' exhibit A, claimant's responses to request for admissions. Attorneys for the parties presented oral argument.

ISSUE

The sole issue under consideration here is whether claimant is entitled to receive permanent partial disability benefit payments from August 4, 1981, to October 16, 1981.

STATEMENT OF THE CASE

Ted A. Handel, decedent, received an injury arising out of and in the course of his employment on May 12, 1981. A memorandum of agreement was filed. Decedent was paid benefits. Ted Handel's surviving spouse, Valerie, filed a petition in review-reopening on March 29, 1982.

Defendants requested admissions from claimant. She admitted that decedent had received temporary total disability benefits from May 13, 1981, through August 4, 1981, at a rate of $190.23 per week, totaling $2,282.76; that medical expenses were paid; that decedent returned to work on August 4, 1981; that decedent was killed in an accident on October 16, 1981; that decedent's death was soley a result of the accident on October 16, 1981; that there was no causal relationship between decedent's injury of May 12, 1981, and his death on October 16, 1981; that no agreement had been reached prior to decedent's death determining any permanent impairment or disability; that decedent had not received any permanent partial disability benefits; that review-reopening proceedings had not been instituted; and that on October 16, 1981, there had been no determination by the Industrial Commissioner as to whether or not decedent had sustained permanent impairment or permanent disability.

Claimant admitted, with qualification, that on October 16, 1981, there was no litigation pending before this agency to obtain additional benefits. However, she noted that reapplication for benefits had been made to the insurance carrier.

Claimant denied that decedent was still employed at the time of his death. Rather, she claimed he was layed off due to his disability. She also denied "[t]hat as of Claimant's [decedent's] last office visit to J. P. Ginther, M.D., Dr. Ginther had not taken Claimant off of work or given him any written slip indicating that he could not continue working at Kampmeier G.M.C. in Mount Carroll, Illinois."

Jay P. Ginther, M.D., saw decedent on referral from a Dr. Meyer on June 1, 1981. Decedent reported feeling a sudden popping sensation in his back. His complaint was that his right leg did not work properly. On physical examination, there was no tenderness in the para-spinous musculature. Decedent was unable to reach the floor because of tight hamstrings. There was some difficulty obtaining the ankle jerk on the right. Motor strength was markedly decreased on the right. There was a loss of sensation over the lateral and posterior aspect of the right calf and the dorsum of the right foot down to the first, second and third toes. X-rays showed an old spondylodesis

bilaterally at L-5 with a grade 1 spondylolisthesis. The doctor thought he was dealing with an L-5 root lesion and placed decedent on bed rest.

J. O'Shea, M.D., admitted decedent to the hospital on June 2, 1981. His impressions were low back strain and chronic anxiety with moderate to heavy alcohol use.

A myelogram was done on June 4, 1981, which demonstrated a probable herniated nucleus pulposis. Surgery was performed on June 12, 1981.

Decedent was seen in follow-up on June 26, 1981, and he was advised to increase his activity. On July 9, 1981, decedent was again urged to increase activity. At the end of the month, decedent still was complaining of aching in his calf and in his hip on the right, particularly after sleeping on that side. The doctor thought decedent could work as a mechanic on small trucks, but he was not released to full activities. Decedent worked, but he was bothered by forward bending. The doctor determined such positioning was not a good idea and discussed with claimant a way of avoiding leaning.

Decedent returned about one month later, complaining of right leg pain and his extensor hallucis longus. It was decided a TENS unit would be tried. Other laboratory tests were to be scheduled.

On March 11, 1982, Dr. Ginther wrote to claimant's counsel that he "felt that the residual problems he [decedent] was having could improve with time and plan to continue to observe his progress for several more months before coming to any conslusions [sic] as to whether he would have a permanent disability." The orthopedic surgeon thought that claimant's continuing to have muscle weakness and pain three months post-surgery implied that pain would remain a permanent problem and there would be a partial permanent loss of motor function. Dr. Ginther suggested that if after three months decedent's findings and symptoms were unchanged he would have given a rating "in the vicinity of 40% of the whole man."

APPLICABLE LAW AND ANALYSIS

The parties agree there is no issue as to whether or not claimant's injury arose out of and in the course of his employment. Nor can there be as a memorandum of agreement is on file. The opinion of the Iowa Supreme Court in Freeman v. Luppes, 227 N.W.2d 143, 149-50 (Iowa 1975), reviews the decisions relating to the memorandum of agreement and states:

> The decisions make clear that unless a memorandum of agreement is set aside on such grounds as fraud or mistake, it settles the first element of liability, that an employer-employee relationship existed at the time of the injury....A memorandum of agreement also settles the second element of liability, that the injury arose out of and in the course of the employment.

See also, Rankin v. National Carbide Company, 254 Iowa 611, 118 N.W.2d 570 (1962) and Bever v. Collins, 242 Iowa 1192, 49 N.W.2d 877. (1951).

Claimant conceded that on her husband's death, there was not a continuing entitlement to benefits. However, she proposes that permanent partial disability should be allowed from the time temporary total disability ended. Claimant claimed permanent partial disability benefits had accrued. Defendants argued they had not.

Both parties cite the industrial commissioner's decision in Lundeen v. Quad-City Construction Co., 34 Biennial Report of the Industrial Commissioner 193 (1980). The initial decision in Lundeen was based on an appeal of a proposed decision which awarded claimant healing period, permanent partial disability and medical benefits. Lundeen died from causes unrelated to his industrial injury. The parties stipulated an offer of additional evidence so the death would be a part of the record. The industrial commissioner found Iowa Code section 85.31(4) to be controlling and said:

> A fair interpretation of Iowa Code section 85.31(4) indicates that any portion of an award which has not accrued as of the date of a claimant's non-related death will abate along with any liability on the part of the employer. However, any award which has accrued prior to claimant's demise that is still owing upon the date of claimant's death does not abate.

Iowa Code section 85.31(4) states:

> Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

Professor Larson in 2 Larson's Workmen's Compensation Law at section 58.44 (1981) writes:

> If the injured employee dies before a formal award has been made, the impact of this fact may vary considerably between jurisdictions as a result of the many statutory and other variables affecting the result. In some states an award may be made even if claim had not been filed at the time of death, while in others proceedings cannot be initiated for the first time by the survivors. If claim has been filed by the injured worker, but no award made at the time of his death, many courts, but by no means all, will find the claim not abated by the intervening death. The same is usually held if death occured [sic] after an award was made but while it was pending on appeal, even if the original award was a denial.

The undersigned has examined the case law of other jurisdictions to familiarize herself with the ways such cases are handled. In undertaking such a review, it is important to keep in mind that the different jurisdictions vary to great degree. In all cases cited, the employee had died from unrelated causes.

Benefits have been awarded in those cases where a claim is pending. Yocum v. Chapman, 542 S.W.2d 510 (Ky. 1976); Henderson v. National Bearing Division, 267 S.W.2d 349 (Ct. App. Mo. 1954).

Middlesex County Court in Kozielec v. Machine Mfg. Corp., 29 N.J. Super. 272, 1021 A.2d 404 (Middlesex County Ct. 1953) held that under the New Jersey statute, a petition for benefits could be filed after the death of an employee and an award made to the administrator or the estate. A similar conclusion was reached by the Indiana Court of Appeals. Snyder Const. Co. v. Thompson, 248 N.E.2d 560 (Ct. App. Ind. 1969).

Contrary results have been reached in other jurisdictions. In Borquez v. John Burbank Trucking, 433 P.2d 767 (Colo. 1967), the Colorado law was held to require an award be made before the death of an employee, and benefits were not awarded to a widow whose husband was getting temporary total disability payments at the time of his death. The Oregon Supreme Court held in Fertig v. State Compensation Department, 455 P.2d 180 (Or. 1969) that pursuant to its law, the right to permanent partial disability did not survive unless the worker was already getting benefits at the time of death. The decedent in Umbreit v. Quality Tool, Inc., 225 N.W.2d 10 (Minn. 1975) was receiving temporary total benefits for an injury at the time of his death. Minnesota had no statutory provision to allow benefits to be paid to heirs. The court assumed healing period ceased, the extent of permanent partial disability was ascertainable and the right to a lump sum payment accrued. The opinion divided benefits into two categories--those for employees and those for dependents. As permanent partial benefits were to compensate the worker, they were found personal to him. Similar reasoning was applied in Rose v. City of Bristol, 315 S.W.2d 237 (Tenn. 1958).

A case with some factual similarity to that here considered is Spotsylvania v. Hart, 238 S.E.2d 813 (Va. 1977). Initially, it should be noted that the Virginia statute allows payment to be made to dependents when a worker dies from an unrelated cause. Decedent's impairment was rated the day after his death with the rating based on his last visit. The opinion observed that the doctor did not say the decedent had reached maximum improvement and that there were indications further surgery was contemplated. On those bases, benefits were denied.

Claimant's claim is for permanent partial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury to her spouse of May 12, 1981, is the cause of disability for which she now makes 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 sole piece of medical evidence presented relating to permanent partial disability is Dr. Ginther's letter of March 11, 1982. Initially, he admits the difficulty in attempting to rate a person who was not seen for that purpose. Dr. Ginther reported that claimant had residual problems which could improve. However, the doctor went on to state that if claimant's findings and symptoms remained unchanged, he would estimate a rating of 40 percent of the whole man. This amount, in the experience of this deputy industrial commissioner, is extremely high. On the other hand, claimant did have surgery. Only very rarely is back surgery performed with no functional impairment resulting.

Claimant makes claim for 10 3/7 weeks. Ten and three-sevenths weeks is only slightly more than a two percent impairment. Again, in the experience of this deputy industrial commissioner, a two percent permanent partial disability rating would be minimal following back surgery. Claimant will be awarded permanent partial disability benefits from August 5, 1981, to September 30, 1981 as claimant's permanent partial disability would be at least two percent. According to claimant's admissions, decedent was layed off due to disability as of September 30, 1981. As it is unclear whether or not healing period benefits would cover the period after that time until claimant's death, no benefits are being awarded as no claim for healing period is made in this action.

Claimant argued tangentially that decedent was not given an Auxier notice. One of the holdings in Auxier v. Woodward State Hospital, 266 N.W.2d 139 (Iowa 1978) at 142, was that "on the basis of fundamental fairness, due process demands that, prior to termination of workers' compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice.... As defendant properly pointed out, no Auxier notice is required in situations

such as the one here presented where the employee has returned to work.

FINDINGS OF FACT

WHEREFORE, it is found:

That claimant's decedent received an injury arising out of and in the course of his employment on May 12, 1981.

That a memorandum of agreement was received on May 29, 1981.

That decedent was paid temporary total disability and medical expenses.

That decedent's rate of weekly compensation is $190.23 per week.

That decedent returned to employment on August 5, 1981.

That decedent worked until September 30, 1981.

That on October 16, 1981, decedent was killed in an unrelated pickup-motor vehicle accident.

That prior to decedent's death, there was no agreement regarding his permanent partial disability.

That prior to decedent's death, he had not received any permanent partial disability benefits.

That prior to his death, decedent had not instituted any proceedings before the industrial commissioner.

That Dr. Ginther projected a functional impairment rating of fifty percent.

That decedent had at least a two percent permanent partial disability.

CONCLUSION OF LAW

THEREFORE, it is concluded:

That claimant is entitled to permanent partial disability benefits from August 5, 1981, through September 30, 1981.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant eight and one-seventh (8 1/7) weeks of permanent partial disability at a rate of one hundred ninety and 23/100 dollars ($190.23) per week.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants pay interest pursuant to Iowa Code section 85.30.

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

Signed and filed this 15th day of September, 1982.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VALERIE HANDEL, Surviving Spouse of Ted Handel,	:	
Claimant,	:	
vs.	:	FILE NO. 670157
DETERMANN INDUSTRIES, INC.,	:	N U N C
Employer,	:	P R O
and	:	T U N C
BITUMINOUS INSURANCE CO.,	:	O R D E R
Insurance Carrier, Defendants.	:	

The second paragraph of page 8 of the review-reopening decision filed September 15, 1982 is amended to read as follows: "That Dr. Ginther projected a functional impairment rating of forty percent."

In all other respects, the review-reopening decisions stands as filed.

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

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT J. HART,	:	
Claimant,	:	
vs.	:	File No. 707211
LEHIGH CEMENT,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
TRAVELERS,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed decision in arbitration filed October 29, 1981 wherein claimant was awarded payment of medical expenses. Defendants' notice of appeal was filed January 18, 1983.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Berle Hungerford, and Marvin Wade; claimant's exhibit 1, a letter from Addison W. Brown, Jr., M.D., dated June 14, 1982; claimant's exhibit 2, a letter from Dr. Brown dated September 16, 1982; claimant's exhibit 3, receipts of medical expenses; defendants' exhibit A, a letter from Dr. Brown dated September 16, 1982 (a duplicate of claimant's exhibit 2); defendants' exhibit B, a letter from Jon Stuart Scoles dated September 14, 1982; and the briefs and filings of all parties on appeal.

Defendants objected to claimant's exhibits 1 and 2 on the basis of claimant's noncompliance with Industrial Commissioner Rule 500-4.17, and further objected to the testimony of Berle Hungerford and Marvin Wade due to the failure of claimant to provide defendants with a witness list. Both objections were overruled in the deputy's arbitration decision.

ISSUES

1. Whether or not the deputy erred in permitting certain medical reports to be introduced into evidence without compliance with Industrial Commissioner Rule 500-4.17.

2. Whether or not the deputy erred in permitting certain witnesses to testify without compliance with the pre-trial order.

3. Whether or not the deputy erred in finding that the claimant had met his burden of proof in establishing that the treatment received and the expenses incurred were authorized in compliance with Iowa Code section 85.27.

REVIEW OF THE EVIDENCE

The record establishes that at the time of the arbitration hearing the parties stipulated as to the fairness of the medical expenses. (Transcript, pp. 2-3)

Claimant testified that he received an injury to his eye on Friday, February 28, 1982 while working for defendant employer. While operating an air rod for the purpose of clearing a clogged air slide, his arms and face came into contact with dust and dirt that was stirred up by the project. Claimant testified that despite having taken the precaution of wearing safety goggles while working, dirt eventually worked its way into his eyes. Claimant worked the following day and then had two days off. He recalled that his eyes had burned and itched Friday

night and Saturday, and that he had resorted to soothing them with warm wet washcloths during his two days off. (Tr., pp. 6-8, 14)

By Tuesday morning when claimant was preparing to return to work, swelling had begun to occur at the base of his right eyeball. Claimant asked defendant employer if he could take some time off to see an eye doctor. He was immediately sent to see John B. Dixon, M.D., who attempted to "squeeze" the infected area of the eye with his fingers, and then set up an appointment to treat claimant after working hours two days later. Claimant testified that the pain in his eye became "excruciating" after Dr. Dixon attempted to manipulate the infection with his fingers. (Tr., pp. 8-10)

Rather than returning directly to work after leaving Dr. Dixon's office claimant drove to see R. M. Heston, O.D., his regular optometrist. From there he phoned Lou Fasing at defendant employer's office to report his dissatisfaction with the treatment received from Dr. Dixon and that he was attempting to see another doctor. At that time Fasing informed claimant that defendant employer would be responsible only for bills from Dr. Dixon's office. (Tr., pp. 10-11)

After a brief examination, Dr. Heston arranged for claimant to visit the North Iowa Eye Clinic on that same day. Claimant was seen ahead of waiting patients by Addison W. Brown, M.D., who drained a chalazion on his right lower eyelid and prescribed antibiotics. (Tr., p. 11; Claimant's Exhibit 1)

Addision W. Brown, Jr., M.D., in a To Whom It May Concern letter dated June 14, 1982, recorded his diagnosis of "an acute chalazion of blockage of a meiboimian gland on the right lower lid with an abcess" which he stated "certainly may be the result of occlusion of the glands by either environmental dust, dirt, etc." (Cl. Ex. 1) Claimant testified that he gave that letter to Lou Fasing several months prior to the arbitration hearing. (Tr., p. 4)

In reply to a September 14, 1982 letter from defendants' counsel which inquired as to the emergency of treating the chalazion on claimant's eyelid, Dr. Dixon replied; "Definitely this was not an emergency situation." (Defendants' Ex. B) Defendants' counsel also received a reply to a similar inquiry in a September 16, 1982 letter from Dr. Brown which stated:

> In response to your recent request, a chalazion usually goes for a period of a few days to a week, prior to the time that most people arrive here for incision and drainage. Therefore, it is not an extreme emergency, and probably could wait for a perior [sic] of several days.
>
> The usual course of treatment if [sic] to treat it when the patient presents with the acute swelling, as it did in this case regarding Mr. Hart. (Cl. Ex. 2; Def. Ex. A)

Claimant submitted the following medical bills:

A. W. Brown, M.D.	$37.00
R. M. Heston, O.D.	$12.50
Easter's Super Valu Pharmacy	$ 9.11

(Cl. Ex. 3)

Berle Hungerford, an employee of Lehigh Cement, testified on claimant's behalf at the arbitration hearing. His testimony corroborated that of claimant as to the manner in which dirt had blown into claimant's eye as he attempted to clear a clogged air slide. He also testified that claimant's right eye was swollen when he returned to work the following Tuesday. (Tr., pp. 21-24)

Marvin Wade, a member of the Lehigh Cement joint safety committee, also testified on claimant's behalf. Wade discussed the inability of defendant employer and labor representatives to reach a mutual agreement as to which of claimant's medical expenses should be paid by defendants. He noted that defendant employer repeatedly refused to pay claimant's medical expenses on the basis that he could have waited two days to receive treatment from Dr. Dixon rather than going to Dr. Brown. (Tr., pp. 24-30)

APPLICABLE LAW

Iowa Industrial Commissioner Rule 500-4.13 provides in pertinent part:

> Method of service. Except as provided in 4.6 and 4.7, service of all documents and papers to be served according to 4.12 and 4.18 or otherwise upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the industrial commissioner. Service upon the attorney or party shall be made by delivery of a copy to or mailing a copy to the last known address of the attorney or party, or if no address is known, by filing it with the industrial commissioner's office.

Iowa Industrial Commissioner Rule 500-4.17 provides:

> Service of doctors' and practitioners' reports. Each party to a contested case shall serve all reports of a doctor or practitioner relevant to the contested case proceeding in the possession of the party upon each opposing party. The service shall be received prior to the time for the prehearing conference. 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).

Iowa Code section 85.27 provides in pertinent part:

> Professional and hospital services release of information-absolved from liability-charges-prosthetic devices. 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 there of and shall allow reasonably necessary transportation expenses incurred for such services.
>
> ....
>
> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity 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 first issue to be addressed is whether the deputy erred in permitting certain medical reports to be introduced into evidence. Defendants claim that claimant's exhibit's 1 and 2 were improperly received because claimant failed to comply with Iowa Industrial Commissioner Rules 500-4.13 and 500-4.17 which concern method of service and service of doctors' reports. Claimant, whose hearing appearance was pro se, appears to have not acted in strict conformance with the aforementioned rules. This tribunal, however, while believing that a claimant should not ordinarily be able to escape the requirements of the commissioner's rules simply because he elected not to be represented by an attorney, agrees with the deputy that under the circumstances presented in this case the exhibits were properly received into evidence. Claimant's exhibit 1 is a June 14, 1982 "To Whom It May Concern" letter from Dr. Brown describing his treatment of claimant's eye. Claimant's contention that he hand delivered that letter to the offices of Lehigh Cement several months prior to arbitration remains unrebutted. Furthermore, because the record does not indicate the point in time that defendants retained counsel to handle this particular matter, there is no means by which to determine whether service of exhibit 1 could have been made in conformance with Rule 500-4.13 at the time claimant made service to Lehigh Cement. Claimant's exhibit 2 is a September 16, 1982 letter from Dr. Brown addressed to defendants' counsel. Claimant was provided a copy of that letter by defendants who then listed it in a notice of intent to offer medical reports. It would be ludicrous not to permit claimant to introduce this letter into evidence simply because he did not serve it back to defendants. The record indicates that all parties did, in fact, have in their possession the original or a copy of both exhibits, and that none of the parties could claim surprise at the existence or content of either. Defendants' exceptions to claimant's exhibits 1 and 2 are overruled.

The second issue to be addressed is whether the deputy erred in permitting Berle Hungerford and Marvin Wade to testify on claimant's behalf. At the outset it is noted that neither witnesses' testimony appears to have significantly influenced the outcome of this action. Defendants contend that claimant failed to provide a witness list prior to October 11, 1982 as required by a September 27, 1982 pre-hearing order. The same pre-hearing order indicated that claimant intended to call one or two witnesses, and a certificate of analysis filed by claimant on September 1, 1982 lists Berle Hungerford and Marvin Wade as persons who would be testifying at the hearing. Because defendants were put on notice that claimant did intend to call witnesses at the hearing and the record contained the names of these witnesses before October 11, 1982, defendants' exceptions are overruled.

The final issue to be addressed is whether the treatment received and the expenses incurred by claimant were authorized in compliance with Iowa Code section 85.27. Defendants contend that they fulfilled the obligation of providing "reasonable services" to an injured employee by authorizing claimant to be treated by Dr. Dixon, and that claimant himself should be held responsible for any expenses arising out of his unauthorized visits to Dr. Heston and Dr. Brown. The evidence indicates that while a chalazion on the eyelid is generally not considered to be an emergency situation, such a condition is ordinarily treated when acute swelling occurs. In addition to Dr. Brown's report which indicated claimant's eyelid had become swollen, claimant described the pain in his eye following his visit to Dr. Dixon as "excrutiating." Because Dr. Dixon postponed treatment of the chalazion on claimant's eyelid for two days even though swelling was evident and claimant was in considerable pain, we hold that treatment was not offered promptly and it was not unreasonable for claimant to have sought out reasonable treatment elsewhere. This is not to say that if any case treatment selected by the claimant would be held to be reasonable and the responsibility for payment therefor charged to the defendants. This is such a case. The fee charged by Dr. Heston appears to be merely a short consultation visit which led to claimant being referred to Dr. Brown. Dr. Heston apparently was not qualified to perform the treatment required by claimant, and for that

reason his fees must be considered as unreasonable within the scope of section 85.27. The deputy's order will be modified so as to award claimant payment only for Dr. Brown's treatment and drug expenses at Easter's Super Valu Pharmacy.

As the deputy set out in her opinion, the opinion of the California Supreme Court in Zeeb v. Workmen's Compensation Appeals Board, 62 California Report 753, 432 P.2d 361 (1976) discusses the philosophy behind charging the employer with responsibility of providing medical care. The opinion states at 364:

> It will ordinarily be in the interest of both the employer and the employee to secure adequate medical treatment so that the employee may recover from his injury and return to work as soon as possible. Permitting the employer to control the medical treatment permits the employer, who has the burden, to provide the medical treatment, to minimize the danger of unnecessary extravagant treatment, and in light of the employer's interest in speedy recovery, the employer's control should rarely result in a denial of necessary treatment.

The holding in this matter is believed to be consistent with this philosophy. The prompt medical care placed the claimant on the road to recovery and the ability to return to work as soon as possible. The employer's control also minimizes unnecessary treatment. In this case prompt treatment was in the interests of both parties and, but for the charge of Dr. Heston, the cost of treatment would most likely have been the same whether provided by Dr. Dixon or Dr. Brown.

FINDINGS OF FACT

1. Dirt and dust worked its way into claimant's eyes on Friday, February 28, 1982 while working for defendant employer.

2. Claimant's right eye became irritated over the following weekend.

3. On the following Tuesday claimant asked defendant employer if he could visit an eye doctor.

4. Defendant employer authorized claimant to visit Dr. Dixon on Tuesday March 4, 1982.

5. Dr. Dixon further irritated claimant's eye by squeezing a chalazion on the right eyelid with his fingers.

6. Dr. Dixon postponed further treatment of claimant until two days later, after claimant's normal work hours.

7. Claimant notified defendant employer by telephone of his intention to visit another eye doctor on March 4, 1982.

8. Defendant employer refused to authorize payment of any medical expenses other than what was incurred from Dr. Dixon's treatment.

9. Claimant visited Dr. Heston who immediately referred him to Dr. Brown.

10. Dr. Brown treated an acute chalazion of blockage of a meiboimian gland on claimant's right lower eyelid on March 4, 1982.

11. Antibiotics were prescribed by Dr. Brown.

12. Claimant incurred medical expenses in the following amounts:

A. W. Brown, M.D.	$37.00
R. M. Heston, O.D.	$12.50
Easter's Super Valu Pharmacy	$ 9.11

CONCLUSIONS OF LAW

WHEREFORE, it is concluded:

That claimant's seeking of treatment from Dr. Brown was reasonable under the circumstances.

That claimant's seeking of treatment from Dr. Heston was unreasonable because he was not qualified to perform the treatment required by claimant.

THEREFORE, it is ordered:

That defendants pay unto claimant the following medical expenses:

A. W. Brown, M.D.	$37.00
Easter's Super Valu Pharmacy	$ 9.11

That defendants pay costs of these proceedings pursuant to Industrial Commissioner Rule 500-4.33.

That defendants pay interest pursuant to Iowa Code section 85.20.

That defendants file a final report in thirty (30) days.

Signed and filed this 31st day of March, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEONARD HARVEY, Claimant, vs. J. D. STEEL, Employer, and THE HARTFORD INSURANCE CO., Insurance Carrier, Defendants.	File No. 633807 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Leonard Harvey, the claimant, against his employer, J. D. Steel, and the insurance carrier, The Hartford Insurance Co., to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on April 16, 1980. This matter came on for hearing before the undersigned at the Scott County Courthouse in Davenport, Iowa on November 30, 1982. The record was considered fully submitted on the same date.

On April 21, 1980 defendants filed a first report of injury concerning the April 16, 1980 injury. On May 8, 1980 defendants filed a memorandum of agreement (Form 2) indicating that the weekly rate for compensation benefits was $208.78. On March 12, 1981 defendants filed a final report (Form 2A) indicating that 19 5/7 weeks of healing period (April 17, 1980 through September 1, 1980) and thirty weeks of permanent partial disability (12% of arm) had been paid pursuant to the memorandum of agreement.

The record consists of the testimony of the claimant; claimant's exhibit 1, records from the Muscatine General Hospital for claimant's April 1980 hospitalization; claimant's exhibit 2, records from the Muscatine General Hospital for claimant's May 1980 hospitalization; claimant's exhibit 3, a January 8, 1981 letter from P. Dale Wilson, M.D.; claimant's exhibit 4, a June 5, 1980 letter from William Catalona, M.D.; claimant's exhibit 5, a February 5, 1982 letter from John E. Sinning, Jr., M.D.; claimant's exhibit 6, an August 18, 1982 letter from Dr. Sinning; defendants' exhibits A and B, a November 28, 1980 letter and an August 27, 1980 letter from Dr. Catalona; and defendants' exhibit C, list of union jobs claimant has held. Claimant filed a letter brief.

ISSUE

The issue to be determined is whether the additional surgery (and any subsequent healing period) claimant seeks is for a condition that is causually related to the April 16, 1980 work injury.

REVIEW OF THE RECORD

On April 16, 1980 as he was carrying two 60 pound reinforcement rods on his right shoulder at work, claimant experienced a popping sensation and set the rods down. He was unable to lift them again. Claimant was hospitalized from April 18, 1980 to April 19, 1980 for an acute acromioclavicular dislocation and underwent a transfer of the coracoid process with attached conjoined tendon to clavicle. The final diagnosis was old and new acromioclavicular separation. X-ray study revealed evidence of previous inflammatory disease. The pathology report on the tissue removed at the time of surgery indicated claimant's problem was a chronic degenerative change without evidence of an acute recent injury.

Claimant testified that in 1968 when he was 17, he dislocated his right shoulder when he fell off a car and landed on that shoulder. He recalled that he was taken to an emergency room where someone pulled the shoulder back into place. Claimant remembered that he wore a sling for eight weeks and received some follow-up care. He recalled no subsequent problem with the shoulder but noted that a half inch high knot on top of his shoulder and two or three inches from his neck remained.

Claimant recalled that he was released from the April 1980 hospitalization with what he described as a wrap around his wrist to his neck. While recovering claimant fell going up some stairs at home and grabbed the guard rail. He pulled loose the screw fixing the coracoid process to the clavicle. The coracoid process and screw retracted distally and the prominence of the lateral end of the clavicle at the acromioclavicular joint recurred. Claimant was hospitalized from May 12, 1980 to May 15, 1980 for reattachment.

In a letter dated June 5, 1980 and addressed to claimant's attorney, William Catalona, M.D., who was claimant's treating physician, elaborated upon the cause and effect of claimant's injury and surgery:

> It appears this man suffered a recent injury on an old injury. Specifically, it appears this man suffered an acromioclavicular separation with fracture of the distal end of this clavicle thirteen years previously, and that he suffered a severe strain-sprain of this joint on 4/16/80. Apparently this joint has been separated all these years. I did a reconstruction of the joint and used the conjoined tendon of the short head of the biceps and coracobrachialis with part of the coracoid process from which these muscles arise as a stabilizing structure.
>
> The prognosis is that should the reconstruction fail, he will be no worse off than he was previously; and if it works he will have corrected the previous deformity of over-riding [sic] of the clavicle on the acromion and improved stability of this joint. There should be no disability from this injury.
>
> This man is still immobilized in a plaster Velpeaux bandage which I plan to remove six weeks postoperatively. I have estimated his time loss as 3 to 4 months; and as stated previously, there should be no permanent impairment from this injury. (Claimant's exhibit 4, p. 1.; Dr. Catalona's office notes for April 17 and April 18, 1980 suggest that the fracture may have occurred on April 16, 1980 rather than 13 years earlier. [Claimant's exhibit 4, p. 2.])

According to Dr. Catalona's office notes, claimant struck his right shoulder against a dashboard during a car accident sometime in July of 1980. Dr. Catalona reviewed the x-rays claimant brought from the emergency room of a local hospital where he had been treated and concluded that the repair was holding. Claimant had difficulty remembering when the accident occurred or what portion of his body struck the dashboard. He acknowledged receiving $700.00 in settlement of his claim from such matter.

Dr. Catalona advised defendant carrier on August 27, 1980 that the claimant could return to work on September 2, 1980. Noting that claimant's shoulder was then stronger than prior to the injury, Dr. Catalona found claimant had no permanent impairment as a result of the April 16, 1980 injury. Subsequent correspondence with claimant's attorney, Dr. Catalona stated that claimant's "shoulder had reached a static state of degeneration which can be expected to worsen in time." (Defendants' exhibit A.)

Apparently when claimant was ready to return to work, he had to wait for an assignment from the union hall but did log some 147 hours for Holman during October of 1980. Claimant emphasized that he was unable to do the first job given him on that assignment -- carrying buckets of bolts. He recalled that he had to set the pails down quite often because the weight bothered his shoulder. After two days he was transferred to yard work which entailed putting chokers on materials lifted by the crane operator into semis and taking the chokers off after the loading was completed. After working a month claimant was laid off and has not worked since. Claimant indicated that he has looked for other work. He is still an apprentice and was advised by the union apprentice coordinator that there was no available work. Prior to the April 1980 injury, claimant had been employed in the construction field for approximately one year and had no difficulty completing his assignments.

F. Dale Wilson, M.D., examined the claimant at the request of claimant's attorney on January 6, 1981. In a letter dated January 8, 1981, Dr. Wilson recited a history of the work injury and course of treatment that was essentially consistent with the record except that he reported claimant had surgery after the original separation of the coracolclavicular joint and made no mention of the car accident in July of 1980. Dr. Wilson itemized claimant's complaints at that time.

He has occasional pain which is caused by change of position. This occurs over the top of his shoulder and is not associated with any particular movement. Motions of the shoulder are restricted if he tries to put his hand up behind his back. He notices some limited anterior extension if he has occasion to lie face down; his arms do not reach out readily in front. Weight lifting, he is not aware of any particular restrictions except this right arm tires readily. He has an 18 month old son who weighs about 25 lbs.; he can carry him on his right arm for a short period of time only. He can carry a sack of groceries on either arm without difficulty. He has noticed that this arm tires readily when he is bowling. This has not changed over the last six months. Grip strength is satisfactory on either hand. He is aware of some numbness and loss of sensation over the ulnar side of his right hand. This hand aches and is troublesome in cold weather. He thinks the hand is weak. Ordinary grip strength does not disturb him; tools and the use of the hand on doors or car doors does not disturb him. He is aware that he can't do "push-ups"; about five is his limit. Also, there is much crepitus (cracking and popping) in the shoulder. (Claimant's exhibit 3.)

Dr. Wilson then reported his examination findings and conclusions:

> His posture is satisfactory. The right arm swings readily when he is walking. There is a reverse "C" scar over his right shoulder and distal clavicle; this is approximately 15 cms. around the curve; it is 2 cms. wide. It is well healed; the scar does not interfere with the motion of the joint. The outer end of his clavicle is deformed; there is a 1.5 cm. distal enlargement. Over the top of his shoulder, there is a soft tissue non-tender mass about 2 cms. in diameter; it is not movable. There are no tender areas about the top of the shoulder. The sensation is satisfactory about the whole area.
>
> Motion of the elbow, wrist, fingers, satisfactory. There is however, a noticeable decrease in sensation on the ulnar aspect of the right hand involving the 4th and 5th fingers. Space over the palm is 4.5 cms. wide and it extends up from the wrist fold 9 cms. It is not readily outlined on the dorsum of the hand. This is a satisfactory outline for a neuropathy of the right ulnar nerve.
>
> Grip strength shown on the mercury manometer, as follows:
>
> Right Hand: 195, 190, 185; Left Hand: 300, 300, 300 mms.
>
> This demonstrates weakness in the right hand.
>
> The shoulders, both sides, move equally well on the torso. Right shoulder motion as follows:
>
> A. Forward & Back
>
> | Back | Back expected | Loss |
> |---|---|---|
> | 50 | 40 deg. | 0 |
>
> | Fwd & Up | Expected | |
> |---|---|---|
> | 160 | 150 deg. | 0 |
>
> B. Lateral Motion:
>
> | In | Expected | Loss |
> |---|---|---|
> | 30 | 30 deg. | 0 |
>
> | Out & Up | | |
> |---|---|---|
> | 120 | 150 deg. | 30 |
>
> C. Rotation:
>
> | In | Expected | Loss |
> |---|---|---|
> | 90 | 90 deg. | 0 |
>
> | Out | | |
> |---|---|---|
> | 65 | 40 deg. | 0 |
>
> Behind his back, the man's right hand lacks 9 cms. of going up as high as his left hand (restricted rotation). As he is sitting, on the wall climb the heights are equal on the two arms, readjustment made with the shoulder motion.
>
> X-ray report enclosed. Comment. Shows screw holding distal clavicle.
>
> Diagnosis: Separation of the right acromioclavicular joint, repaired by Dr. Wm. Catalona, Muscatine orthopedist, April 18, 1980, with screw fixation and transfer of the acromium with residual pain in the joint, scar, deformity and restricted action. This required a re-operation on the 18th of May, 1980, replacement of the screw and fixation by plaster case. The residuals have been described in part and also includes
>
> a. Brachial nerve injury with residual ulnar nerve neuropathy.
>
> 1. Decreased sensation, distal nerve on the hand.
>
> 2. Weakness of the grip strength in the right hand.

b. Retained hardware.

The injury that was sustained on April 16, 1980, was the causative factor with respect to the symptoms, pathology and disability found on this examination. There are no recommendations for further medical care. The present condition of ill being has reached an essentially permanent state. The prognosis for further improvement in this is negative. The man is able to get his work done. There is no need for rehabilitation.

(Claimant's exhibit 3. Dr. Wilson opined that claimant had 20 percent impairment of the right extremity based on 3 percent loss of lateral motion, 1 percent loss of rotation, 1 percent loss due to pain, 5 percent loss due to nerve damage and 5 percent for the right arm per se.)

John E. Sinning, Jr., M.D., examined the claimant on February 4, 1982 for defendant carrier subsequent to claimant's request for further care. In a letter dated February 25, 1982 and addressed to defendant carrier, Dr. Sinning recites a history of the injury and course of treatment that is essentially consistent with the record except that he did not record the July 1980 car accident. Thereafter, Dr. Sinning set forth claimant's complaints and his examination findings and conclusions:

Since his recovery from surgery, he believes the strength in his arm and shoulder has been less. He is not able to lift as well. He complains of numbness along the ulnar border of his hand. Sometimes he has to take a hold of the hand and raise the arm up with the aid of the other in order to get his arm up overhead. There is a stiffness on and off.

He returned to work in October 1980 and after working for two or three weeks was laid off. He has had no treatment of his shoulder since then. Mr. Harvey indicates that he has not been able to work since his lay-off because of continued problems with the right shoulder.

EXAMINATION: Healthy appearing well-muscled young man, has an obvious scar over the right shoulder with a high riding clavicle. As he brings the arm up into abduction, the clavicle seems to impinge against the acromion. He complains then of pain and cannot comfortably bring the arm up overhead either in abduction or forward elevation. Rotation at the side is free. Strength pushing the arm away from the side and forward from the side is excellent. Strength in the abducted and overhead elevated position is poor. The distal clavicle is obviously unstable.

I was not able to elicit any anxiety sign, that is a sign suggesting instability of the shoulder with the arm abducted and externally rotated. External rotation strength with the arm at the side seems good.

Upper extremity reflexes are normal. Strength in the hands is normal. I was not able to elicit any signs of weakness in the ulnar innervated muscles to substantiate the possibility of ulnar neuropathy.

Full motion in the neck and upper back.

X-RAYS: X-rays of the right shoulder were taken in AP, oblique and axillary views with additional views of the acromioclavicular joint. The coracoid has been transferred to the clavicle with a screw, the clavicle rides high and the tip of the clavicle is rounded.

At my request further x-rays were carried out at Mercy Hospital, a shoulder arthrogram, looking for evidence of a tear in the rotator cuff. This was performed on February 9th by Dr. Eugene Johnson with a report of a normal rotator cuff. Dr. Johnson reported a somewhat larger shoulder capsule than usual and asked that a recurrent subluxation of the shoulder be considered as a diagnostic possibility. Some rounding of the glenoid fossa inferiorly was noted. He did not find evidence of a rotator cuff injury.

DISCUSSION: The original acromioclavicular separation occurred when Mr. Harvey was about 17. He tells me that following that injury he had no problems with his shoulder except that the clavicle tip was prominent. Based on that history I believe it is reasonable to consider that the present problem with his shoulder is a result of his injury at work in April 1980. The problem is knowing what the exact reason is for his continued impairment of function. The first and best possibility is the impingement of the distal clavicle against the acromion as he brings the arm up overhead. This could be largely alleviated by removing the distal end of the clavicle and repairing the muscle and fascia over the tip. This should stop the impingement symptoms. The other problem to be considered at the time of that surgery would be whether the transferred coracoid should be released from the clavicle. It is possible that with the transferred muscle and bone there is some tethering affect on the ulnar nerve and it is that difficulty causing the pain in the arm and numbness.

The other possibility is that the shoulder did spontaneously sublux or dislocate because of the position of his load and that the recurrent subluxation has been the cause of his continued symptoms. This does not fit exactly with his complaints but it is a difficult diagnosis to make. Dr. Johnson has come the closest with his speculation about the enlarged size of the shoulder capsule.

My recommendation would be first for resection of the distal clavicle which would be done under general anesthesia and from which he should make a rapid recovery. At the time of that surgery the shoulder could be examined for stability and with any question of instability a repair of the recurrent subluxation or dislocation could be carried out. If there is any question about the stability, surgery could be deferred and simply a resection of distal clavicle performed. That would speed recovery and leave the possibility of a repair of the shoulder dislocation for a later time if it became more apparent. That would be my recommendation.

Please let me know if you would like me to see Mr. Harvey about a discussion of this surgery.

I estimate permanency in the area of 10% of the upper extremity. This estimate will not be changed either with or without surgery. If you have any questions please let me know. (Claimant's exhibit 5.)

In an August 18, 1982 letter to claimant's attorney, Dr. Sinning clarified his opinion regarding causal connection:

I have gone over again my letter to the Hartford dated February 25, 1982. I believe that letter is clear in stating that Mr. Harvey's present problem with his shoulder is a result of his injury at work in April 1980. In that letter I outlined the alternatives of treatment and the recommendations that I made. I have no information about what has happened to Mr. Harvey since then but if the complaints remain the same and there has been no interval injury, then my recommendations would be unchanged. (Claimant's exhibit 6.)

Claimant testified that Dr. Sinning did not guarantee how much improvement would be accomplished by surgery.

Claimant's present complaints include right arm and shoulder weakness, stiffness and numbness upon lifting, throwing and reaching overhead. He did not have such problems prior to the date of injury. Claimant observed that since the date of injury the knot on his shoulder looks worse, his shoulder is lower and he has lost weight in the right arm and chest. Claimant testified that while he did bowl and play basketball after the second surgery he had to quit doing so because he noticed his shoulder would be sore and stiff for a few days after such activity.

APPLICABLE LAW

Code section 85.27 provides in part:

The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing ambulance and hospital services and supplies therefore and shall allow reasonable necessary transportation expenses incurred for such services....

....

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee; and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 16, 1980 is causally related to 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 (1955). 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, 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, 247, Iowa 691, 73 N.W.2d 732 (1955). In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. Sondag, 220 N.W.2d 903 (1974).

ANALYSIS

Despite Dr. Catalona's strong view that claimant's preexisting condition was the major source of any continuing problems claimant might experience and that his surgical reconstruction following the April 1980 injury really improved the preexisting override of the clavicle upon the acromion, it cannot be overlooked that claimant recalled no difficulty in using the

right arm and shoulder after the 1968 injury and before the April 1980 work injury and that he was engaged in construction work for approximately a year before the injury occurred. Yet, claimant was not able to perform the same tasks without some discomfort after he returned to work in the fall of 1980.

At this juncture, it should be noted that Dr. Catalona's notes and reports do not appear to be consistent with regard to when the fracture of the distal end of the clavicle occurred. His office notes suggest the April 1980 injury was the cause of such finding, but his letter reports refer to the earlier fall as the origin and ongoing basis of claimant's problem. (Dr. Catalona did not mention any documentation of prior diagnostic testing. Likewise, Dr. Wilson's mention of a surgery predating that done by Dr. Catalona was not supported by any evidence in the present record.) In any event, Dr. Catalona did describe the work injury as a severe strain-sprain of the preexisting condition and the final diagnosis at the time of the April 1980 hospitalization (stated after the pathology report) was that of both an old and new acromioclavicular separation.

Dr. Wilson related claimant's ongoing complaints in January of 1981 to the work injury. Dr. Sinning who recorded similar complaints from the claimant in February of 1982 likewise related such symptomatology to the April 1980 injury. Although Dr. Wilson found the claimant was able to perform his job and Dr. Sinning reported the claimant was not, their clinical findings were basically the same. The discrepancy may be due to the passage of time or claimant's custom of not exaggerating his problem. Likewise that claimant did not seek medical care following Dr. Catalona's release in September of 1980 until requesting treatment from defendants (which resulted in the consultation by Dr. Sinning) does not destroy the credibility of his ongoing complaints. Dr. Catalona released the claimant from his care and Dr. Wilson who saw him relatively soon thereafter did not recommend any further treatment. Yet, claimant's symptoms continued. Dr. Sinning has recommended certain procedures that might alleviate claimant's problem. While his initial report might be interpreted as suggesting separate surgical repair of the old and new problem, his subsequent note to claimant's counsel and review of the record as a whole indicates that the recommended surgery would constitute reasonable and necessary treatment of the materially aggravated underlying condition.

While neither Dr. Sinning nor Dr. Wilson record a history of the July 1980 car accident, such fact is not crucial to claimant's case. Dr. Catalona reviewed x-rays taken at that time and found no injury to the right shoulder. Dr. Catalona released the claimant to return to work soon thereafter. The focus on such event as a break in the causal connection is misplaced.

While the defendants are to be commended for not challenging claimant's right to continue benefits after the fall at home (which did not appear to be a result of the original injury but which may have been responsible for a longer healing period -- of which the additional amount would not have been the responsibility of the defendants), there is no evidence in the record to support finiding that the fall and repeat surgery increased claimant's impairment or separately contributed to his ongoing complaints. See De Shaw v. Energy Manufacturing Company, 192 N. W.2d 777, 780 [Iowa 1972].) It must be emphasized that the undersigned was not asked to decide the nature and extent of the resultant injury or the credit that might be proper with regard to any future healing period, and accordingly, no findings of fact or conclusions of law will be made on those matters.

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 dislocated his right shoulder in 1968 when he fell off a car and landed on that shoulder. He received emergency room treatment and wore a sling for eight weeks. Claimant experienced no subsequent problems as a result of such injury aside from the presence of a knot on the top of his right shoulder and two or three inches from his neck.

FINDING 2. Claimant sustained an acute acromioclavicular dislocation on the right at work on April 16, 1980 when carrying two 60 pound reinforcement rods on his right shoulder. Claimant was hospitalized for reconstruction of the joint -- the coracoid process with the attached conjoined tendon were transferred to the clavicle and fixed with a screw.

FINDING 3. Claimant pulled the screw loose in a fall at home in May of 1980 and subsequently was hospitalized for a repeat of the April 1980 surgery.

FINDING 4. Claimant struck his right shoulder against a dashboard during a car accident in July of 1980. X-rays taken at that time indicated the repair was holding.

FINDING 5. Claimant was released to return to work on September 2, 1980. When claimant secured an assignment the following month he logged some 147 hours before being laid off. Claimant found carrying buckets of bolts painful.

FINDING 6. Claimant's present complaints include right arm and shoulder weakness, stiffness and numbness upon lifting, throwing and reaching overhead. He no longer bowls nor plays basketball because he experiences shoulder discomfort following such activities.

FINDING 7. Claimant's present complaints are causally related to the April 1980 work injury.

FINDING 8. Defendants referred the claimant to a physician in response to claimant's request for additional care. Such physician recommended certain surgical procedures aimed at alleviating claimant's symptoms.

FINDING 9. Defendants paid claimant certain medical, healing period and permanent partial disability benefits pursuant to a memorandum of agreement regarding the April 1980 work injury.

CONCLUSION A. Claimant is entitled to payment for the recommended additional surgery and for a presently undeterminable period of time loss benefits.

ORDER

THEREFORE, defendants are hereby order to provide the additional care recommended by Dr. Sinning and to pay reasonable and necessary time loss benefits.

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

Signed and filed this 30th day of December, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT HEATH,	:	
Claimant,	:	
vs.	:	File No. 518421
SIDLES DISTRIBUTING CO.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
AETNA CASUALTY AND SURETY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed decision wherein defendants were ordered to pay unto claimant $155,144.96 in full commutation of an award of permanent total disability.

The record on appeal consists of the hearing transcript which contains the testimony of Lucille Manzo; the deposition of claimant along with the attached exhibit; and the briefs and filings of all parties on appeal.

ISSUES

The issues on appeal as set forth by defendants are as follows:

(1) Whether claimant failed to sustain the burden of proving that commutation would be in the best interests of the person or persons entitled to the compensation.

(2) Whether the period during which compensation would be payable can be definitly determined.

(3) Whether there was sufficient evidence to sustain the finding of disability for a period of 1482 weeks.

(4) Whether there was sufficient evidence as to the present worth of the lump sum ordered by the deputy, and whether an improper method was used to compute that lump sum.

Claimant has set forth an additional issue on appeal, as follows:

(1) Whether claimant is entitled to have his award of total permanent benefits commuted on the basis of the five percent discount table in effect of the time of filing his petition rather than the present ten percent discount table which took effect on July 1, 1982.

REVIEW OF THE EVIDENCE

Claimant, age 47 at the time of his commutation hearing, sustained an injury arising out of and in the course of his employment. As a result of his injury, claimant was found to be permanently and totally disabled.

A financial statement filed by claimant indicates that his family income (which includes workers' compensation, social security, and his wife's earnings) exceeds his expenses by over $700 per month. The financial statement depicts claimant as a prudent and conservative money handler who is debt free aside from the approximate $8,000 balance owed on his house. Claimant testified that he and his wife were able to add approximately $4,000 to their savings between the date of his injury and the commutation hearing. Claimant indicated that he desires to pay off the remaining balance on his house and invest the remainder of the commuted funds in C.D.'s at advantageous rates offered by his bank. Attached to claimant's financial statement is a statement indicating that he will receive in excess of $1,000 per month and plans to reinvest the unneeded portions thereof. (Heath Deposition and Dep. Exhibit)

Lucille Manzo, who works in defendant employer's personnel department, testified at the hearing that claimant, had he continued working, most probably would have retired at age 65. (Transcript, p. 8)

APPLICABLE LAW

Iowa Code section 85.45 provides in pertinent part:

> Commutation. 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 therefor.
>
> ....
>
> 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 not exceed the number of weeks which shall be indicated by probability tables designated by the industrial commissioner for death and remarriage, subject to the provisions of chapter 17A.

In Diamond v. Parsons, 256 Iowa 915, 129 N.W.2d 608 (1964) the court stated that commutation may be ordered "[w]hen it is shown to the satisfaction of the court or judge that commutation will be for the best interest of the person or persons entitled to compensation or that periodic payments as compared to lump sum payments will entail undue expense, etc. on the employer." The court indicated that a claimant's financial plans as well as his condition and life expectancy may properly be considered along with other matters in determining the best interests of the person or persons entitled to compensation. In adopting a reasonableness standard, the court in Diamond noted that only hindsight will tell whether commutation was in the best interests of a claimant, but simply because financial plans don't develop as profitably as had been hoped does not make them unreasonable per se.

Iowa Code section 85.47 provides:

> Basis of commutation. When the commutation is ordered, the industrial commissioner shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized as their present value and upon the basis of interest at the rate provided in section 535.3 for court judgments and decrees. Upon the payment of such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which the liability of the employer under any agreement, award, finding, or judgment shall be discharged of record.

Iowa Code section 535.3 provides:

> Interest on judgments and decrees. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

In Janda v. Iowa Industrial Hydraulics, Inc., 326 N.W.2d 339 (Iowa 1982) the supreme court entered judgment in Janda's favor in a breach of employment contract action. The judgment was modified to provide interest at ten percent from the date the petition was filed, pursuant to Iowa Code section 535.3 (1981). The defendants asserted that the prior statute in force when Janda's action was filed, providing for only seven percent interest and containing no language of retrospection, should have applied. The court stated:

> It is true, of course, that generally a statute will be given prospective application only, unless it appears the legislature clearly intended it to be applied retrospectively. Iowa Code § 4.5 (1981); see State ex rel. Leas in Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981). "An exception exists, however: when a statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively." Id. Here the interest rate increase and the period over which interest is computed, provided by the Iowa Code section 535.3 amendment, relate to a remedy. These were remedial provisions, not substantive.
>
> ....
>
> Deciding the statute is remedially applied and therefore deserving of a presumption of retrospectiveness is not conclusive of the underlying question whether the statute is given retrospective application.

The court further found that there was a problem to be solved by this legislation:

> The market interest rates prevailing before this amendment were higher than the seven percent then provided. Thus appeals and delays in appeals were encouraged. The amendment was adopted March 28, 1980. Ordinarily it would have been effective July 1, 1980. Iowa Code § 3.7 (1981). The legislature, however, delayed the effective date of this legislation until January 1, 1981, thus permitting and encouraging an orderly disposition of cases pending March 28, 1980, before the new interest rate would affect them. This is further evidence the legislature intended the amended act to be applied retrospectively.

In affirming the trial court's judgment insofar as it provided for section 535.3 to be applied retroactively, the court in Janda noted that there was no obligation of the defendants to pay judgment interest existing at the effective date of the amended statute because judgment had not been entered. Defendants were deemed not to have had a vested right to pay interest at seven percent from the date of judgment only.

All judgments bear simple interest rather than compound interest, even though the obligation on which judgment was rendered may have provided for compound interest. Op.Atty.Gen. 1916, p. 103.

ANALYSIS

The first issue presented by defendants is whether claimant sustained his burden of proving that commutation would be in his best interests. Claimant's financial statement indicates that his family income currently exceeds expenses by over $700 per month. Claimant has devised a financial planning scheme, however, whereby his expenses would decrease and income increase if a commutation were ordered. Claimant stated his intentions of paying off the debt on his home and investing the remainder of a commuted lump sum award in C.D.'s which bear a favorable rate of interest. His calculations show that he would draw $1,000 per month in interest, the portions of which are not needed being reinvested. It would be very difficult to conclude that the achievement of these goals would not be in the best interests of claimant and his family. As long as claimant's interests would be promoted by the commutation, the fact that claimant is currently able to live comfortably and even save money is of no consequence. Likewise, defendants' argument that fluctuating interest rates will hamper claimant's proposed investment returns is not persuasive enough to reverse the deputy's order for commutation. Investment interest rates may go up as well as down, and there is no way to look into the future to determine the best path to take. As the court said in Diamond, claimant's plans may not develop as profitably as he hopes, but they are not unreasonable. He may invest or spend unwisely, but that possiblity is present in every petition for commutation. The deputy's order for a full commutation will be affirmed.

The second issue presented by defendants, whether the period during which compensation would be payable can be definitely determined, and the third issue, whether there was sufficient evidence to sustain a finding of disability for a period of 1482 weeks, may be addressed together. While defendants have correctly recited the content of Iowa Code section 85.45(1) which requires a definite determination of the period during which compensation is payable prior to the commutation of an award, it must be recognized that the legislature has created an exception to this general rule. In Iowa Code section 85.45(4) it is specifically provided that future payments that are commuted for a permanently totally disabled employee are to be determined by the use of probability tables. Because of the publication requirements of chapter 17A.6 and the reference to the probability tables in section 85.45(4), judicial notice is taken of them precluding the need to have them formally received into evidence. Defendants contend, however, that the use of life expectancy tables as opposed to worklife expectancy tables is improper, and further, that a physically disabled worker necessarily becomes disabled by age upon reaching age 65. A permanent total physical disability which arose out of and in the course of employment in no way abates upon the injured party reaching retirement age. Because the physical disability continues to exist, so must compensation payments. The deputy did not err by finding a disability for a period of 1482 weeks, which was the life expectancy at that time

based upon the life expectancy tables duly adopted by rule pursuant to statutory mandate.

The fourth issue presented by defendants is whether there was sufficient evidence as to the present worth of the lump sum ordered by the deputy, and whether an improper method was used to compute that lump sum. As noted earlier, judicial notice is taken of the rules and tables promulgated by this agency. Defendants contend, however, that the deputy erred by computing the future payments to claimant by using simple interest rather than compound interest. At the outset it is noted that the Code does not specify which type of interest is to be used in computing future payments. Therefore, we must rely upon the opinion of the Attorney General that all judgments bear simple interest rather than compound interest, even though the obligation upon which judgment was rendered may have provided for compound interest. While an order for commutation order is not actually a judgment in form, we believe that the underlying principles concerning interest calculations are similar, and find no error in the deputy's calculations.

Claimant has also presented an issue on appeal, that being whether he should be entitled to have his award commuted on the basis of the five percent discount table in effect at the time of his petition was filed rather than the present ten percent discount table which took effect July 1, 1982. It is argued by claimant that the right to have workers' compensation determined by the statute in force at the time of the injury is a vested right. Such argument is not persuasive, however, in light of the recent Iowa Supreme Court decision Janda v. Iowa Industrial Hydraulics, Inc., in which the court held that Iowa Code section 535.3, which dictates the amount of interest on judgments and decrees, was to be applied retrospectively because it is remedial by nature and there is no obligation on the part of a defendant to pay interest prior to the time a judgment is entered. In concluding, the court ruled that a defendant did not have a vested right to pay interest at seven percent as opposed to ten percent simply because the lower rate applied at the time the action was initiated. Iowa Code section 85.47 specifically provides that the discount rate to be used in determining commutation values shall be the same rate provided in section 535.3 for determining interest on judgments and decrees. Therefore, in order for consistency to exist in the application of laws, it is clear that the ten percent discount rate should apply regardless of whether the action was filed at a time when the discount rate was five percent. Furthermore, section 85.47 provides that "[w]hen the commutation is ordered, the industrial commissioner shall fix the lump sum....upon the basis of interest provided in §535.3...." This statute is clearly read to mean that lump sum is to be determined when the commutation is made, not when the petition was filed. Claimant is thus held not to have a vested right to have commutation value determined at the date of filing his petition, rather all commutations made after July 1, 1982 are subject to the ten percent discount rate which is currently in effect.

FINDINGS OF FACT

1 Claimant was employed by defendant employer on February 22, 1978.

2. Defendants filed a memorandum of agreement regarding a February 23, 1978 injury.

3. As a result of said injury claimant is permanently and totally disabled.

4. Claimant's current family income exceeds expenses by approximately $700.

5. Claimant is a prudent money handler and investor.

6. Claimant wishes to pay off his house mortgage and invest the remaining commuted funds at an advantageous interest rate.

7. Commutation would be in claimant's best interest.

8. The period during which compensation is payable is definitely determinable.

9. Claimant's birthdate was July 9, 1935.

10. As of July 9, 1983, claimant has a remaining life expectancy of 1440 weeks, the commuted value of which is 689.6057 weeks times the rate of $222.13. The total present value on July 9, 1983 is $153,182.11.

CONCLUSION OF LAW

Claimant has sustained the burden of proving that the period during which compensation is payable is definitely determinable and in his own best interest.

WHEREFORE, defendants shall pay unto claimant one hundred fifty-three thousand, one hundred eighty-two and 11/100 dollars ($153,182.11) in full commutation on July 9, 1983. Regular weekly payments shall continue until July 9, 1983.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 27th day of June, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAREN P. HILGEMANN,	:	
Claimant,	:	
vs.	:	
WILTON COMMUNITY SCHOOL,	:	File No. 680988
Employer,	:	R U L I N G
and	:	
EMPLOYERS MUTUAL CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

On August 31, 1982 an arbitration decision was filed in this contested case. On September 22, 1982 claimant filed an unsigned appeal. On October 8, 1982 defendants filed a motion to dismiss claimant's appeal.

The essence of this matter is that claimant's appeal was filed twenty-two days after the arbitration decision was filed and was not served on the defendants.

Iowa Code section 86.24 states: "Any party aggrieved by a decision, order, ruling, finding or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter 85 or 85A may appeal to the industrial commissioner in the time and manner provided by rule." Industrial Commissioner Rule 500-4.27 states:

> Except as provided in 4.2 and 4.25, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in contested case proceedings where the proceeding was commenced after July 1, 1975, shall be commenced within twenty days of the filing of the decision, order or ruling by filing a notice of appeal with the industrial commissioner. The notice shall be served on the opposing parties as provided in 4.13. An appeal under this section shall be heard in Polk county or in any location designated by the industrial commissioner.
>
> This rule is intended to implement sections 17A.15 and 86.24 of the Code. (Emphasis supplied.)

This rule clearly states that the appealing party has twenty days following the day in which the deputy commissioner's decision, order or ruling is filed in which to file a notice of appeal with the commissioner.

Iowa Code section 4.1(22) provides the method for computing time in applying rule 500-4.27. It states in part:

> In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the third Monday in February, the last Monday in May, the fourth day of July, the first Monday in September, the eleventh day of November, the fourth Thursday in November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated.

Therefore, under rule 500-4.27, the last day on which an appeal could be filed from the August 31, 1982 decision of the deputy industrial commissioner was Monday, September 20, 1982.

No date of service of the appeal is shown. Service, however, does not constitute filing. "A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file." Mills v. Board of Supervisors, 227 Iowa 1141, 1143; 290 N.W. 50, 51 (1940); Bedford v. Supervisors, 162 Iowa 588, 591; 144 N.W. 301, 302 (1913).

It is recognized that Iowa R.Civ.P. 82(d) provides:

> Filing. All papers after the petition required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Whenever these rules or the rules of appellate procedure require a filing with the district court or its clerk within a certain time, the time requirement shall be tolled when service is made, provided the actual filing is done within a reasonable time thereafter.

The above rule is similar to Industrial Commissioner Rule 500-4.14 which provides: "All documents and papers required to be served upon a party under 4.12 shall be filed with the industrial commissioner either before service or within a reasonable time thereafter."

The fact that the above two rules appear similar does not dictate identical application in every circumstance. Industrial Commissioner Rule 500-4.14 is intended to facilitate prehearing procedures between the parties without rigorous formality. However, rule 500-4.14 does not relax the plain obligations of rule 500-4.27 in filing the notice of an appeal.

Even if there was good cause for the late appeal this commissioner could not allow such appeal. Section 17A.15(3) provides: "When the presiding officer makes a proposed decision, that decision then becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule." (Emphasis supplied.)

The Iowa Supreme Court in Barlow v. Midwest Roofing Co., 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) stated:

> The industrial commissioner can exercise only the powers and duties prescribed in the Workmen's Compensation Law. The legislature, of course, had the authority to create and restrict rights given workmen under the Act, as well as prescribe the power and duties of the commissioner. It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law.

It is noted that the Barlow decision was entered when the time limitation for filing an appeal from a deputy to the commissioner was ten days. This was expanded to twenty days in 1976.

Even if it were argued that Iowa R.Civ.P. 82(d) is applicable at the agency level, jurisdictional limitations do not allow for exception in light of section 17A.15(3). Jurisdictional limitations which confront this agency are far different from those confronted at the district court level as contemplated by Iowa R.Civ.P. 82(d). The jurisdiction of this agency terminates with the expiration of a prescribed number of days as mandated by the statute in section 17A.15(3) whereas the jurisdiction of the district court is not so limited by statute, but rather is of a continuing nature until final adjudication. Once a case becomes final at the agency level under Iowa Code section 17A.15(3), the agency lacks even a scintila of jurisdictional authority to overlook the most blameless oversight.

Thus, the commissioner has no jurisdiction to hear an appeal when the time prescribed for filing the appeal has passed. The commissioner is limited to the exercise of those powers prescribed in the workers' compensation law and Iowa Administrative Procedure Act. He cannot extend his jurisdiction to include matters expressly excluded by these laws.

The deputy's proposed decision was filed on August 31, 1982. The twenty-day period prescribed in Iowa Industrial Commissioner Rule 500-4.27 expired on September 20, 1982. Thus, the proposed decision became, by operation of law, the final decision of the agency on September 20, 1982. Based upon the above considerations, the motion to dismiss claimant's notice of appeal is sustained.

THEREFORE, claimant's notice of appeal is hereby dismissed.

Signed and filed this 20th day of October, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KELLY HILPIPRE, Claimant, vs. ATLANTIC BOTTLING COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 699350 A R B I T R A T I O N D E C I S I O N

This is a proceeding in arbitration brought by Kelly Hilpipre, the claimant, against Atlantic Bottling Company, his employer, and The Travelers Insurance Company, the insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred on March 19, 1981.

This matter was heard and fully submitted in Des Moines, Iowa on November 23, 1982 wherein the parties stipulated claimant's weekly entitlement to be $192.36.

In addition to this deputy's notes the record consists of the testimony of the claimant, Keith Hilpipre (his brother), Richard Nutting, Glen Clayton, Sue Tyler, Leonard DeWitt, Kirk Tyler, James Tyler and Bob Farr together with claimant's discovery deposition and his exhibits A through L.

The issue required to be determined is whether or not claimant sustained an industrial injury as alleged.

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

Claimant, aged twenty-five and divorced, began his duties as a route salesman for the defendant employer in July 1981. Claimant alleges in his testimony that while making a delivery he injured his left knee while unloading a case of pop. Claimant further testified that his brother, who had gone along with him that day, completed the deliveries that day. This mishap, on a Friday, was not reported to the claimant's supervisor. On Monday, March 22, 1981, claimant's knee was badly swollen. Claimant obtained assistance to help with his duties telling all of his coemployees and supervisors that he hurt his leg over the weekend wrestling with his brother.

Keith Hilpipre joined in this deception as he was physically present when claimant told his "wrestling story" to others.

On March 25, 1981 claimant reported the incident as work-connected. Claimant justified this conduct by testifying that he felt he would have been discharged by the defendant employer had he reported the industrial injury promptly. Claimant's version of this occurrence destroys his credibility and as a result his testimony and that of his brother, Keith, is given little weight in this decision. Claimant intended to deceive his six coemployees and his supervisor as to the truth of the occurrence.

The testimony of Richard Davidson stands only for the proposition that he saw claimant with a limp on Friday, March 19, 1982. Mr. Davidson did not witness the alleged fall.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on March 19, 1982 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).

In applying the foregoing legal principles to the case at hand, it is apparent that the claimant has not borne his burden of proof.

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

1. That this agency has jurisdiction of the parties and the subject matter of this litigation.

2. That on March 19, 1982 claimant was an employee of the defendant employer.

3. That the claimant did not sustain an industrial injury on March 19, 1982.

4. That the claimant sustained his leg injury while wrestling with his brother.

THEREFORE, IT IS ORDERED that the claimant take nothing further as a result of these proceedings.

Costs are charged to the defendants in accordance with Rule 500-4.33.

Signed and filed this 27th day of January, 1983.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PARKER L. HOLLAND, Claimant, vs. WODEN-CRYSTAL LAKE: COMMUNITY SCHOOL DISTRICT, Employer, and STATE FARM INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 700819 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Parker Holland, the claimant, against his employer, Woden-Crystal Lake Community School District, and the insurance carrier, State Farm Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on April 9, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Cerro Gordo County Courthouse in Mason City, Iowa on December 22, 1982. The record was considered fully submitted on February 2, 1983.

An examination of the industrial commissioner's file reveals that a first report of injury was filed on April 26, 1982. There are no other official filings. The record in this case consists of the testimony of the claimant, Debbie Holland, Marvin Snider; claimant's exhibits 1 through 18 inclusive; and defendants' exhibits 1 through 6 inclusive. Any objections lodged to the exhibits are overruled. They will be considered for whatever probative value they may contain.

ISSUES

The issues to be determined in this proceeding are whether the claimant sustained a personal injury which both arose out of and in the course of his employment, the existence of a causal relationship between the injury and the resulting disability, as well as the extent of disability. There is an additional issue concerning the appropriateness of certain medical charges under section 85.27 of the Code. There is a a prayer for penalty under section 86.13 of the Code. Additionally, there is an issue concerning the payment of wages in lieu of workers' compensation benefits.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $249.22. The parties agreed that the claimant was off work from April 9, 1982 until August 16, 1982. Additionally, the parties were able to stipulate as to the fairness of any medical bills involved in this proceeding.

The claimant, Parker Holland, testified in these proceedings. He is married and the father of two children. Claimant's exhibit 8 is a resume which provides detailed information concerning his background and employment history. The testimony revealed that he has had some experience operating a Coast to Coast store, but has been involved in the teaching profession most of his professional life.

The claimant's testimony revealed that prior to January 1982 he had been treated for a blood clot in his leg. The record is clear that prior to January 1982 the claimant had received no treatment of any sort for emotional or mental disorders. Mr. Holland also confirmed that there had been no family disturbances of any description which would lead to an emotional upheaval.

After January 1, 1982 the claimant testified that his job responsibilities and teaching responsibilities changed. He stated that he was placed in charge of changing the school scheduling and described this as a difficult job. He indicated that due to the variety of work he performed for the employer he was placed under substantial pressure post-January 1982. At this point in time, he commenced teaching a 10th grade English class as opposed to the normal 8th grade class that he taught previously. Mr. Holland further indicated that between the period January 1, 1982 and April 1982 he was involved in teaching, school administration, was the athletic director, worked on the new schedule, and presided at or participated in many board meetings in conjunction with his administrative duties. He was also involved in counseling students.

On April 9, 1982, the date of injury, claimant was involved in a termination hearing concerning one of his fellow instructors. Mr. Holland testified that this particular instructor had been employed by the school system a number of years. Apparently, a difference of opinion resulted concerning the duties of this individual. The individual in question became disruptive and caused many problems during the period January through April 1982. The claimant stated he found this particular teacher to be very difficult to deal with. This difficulty caused additional tension and upset Mr. Holland during the period in question. Claimant, as the principal of this institution, recommended that the teacher, aforedescribed, be terminated from the defendant's employ. The termination required the claimant to work closely with the school attorney in preparation for a mandatory hearing. The termination hearing was held on the date of injury, April 9, 1982.

Additionally, during the period January 1 to April 9, 1982 claimant lost a substantial amount of weight. Often, he would work very late hours at home trying to finish his school work.

On April 9, 1982 the claimant testified at the termination hearing. Mr. Holland indicated that after he had testified and while he was observing the hearing, he found himself "uptight" and a "bundle of nerves." He was nervous and shaking. The claimant also felt that the president of the school board, who was a good friend of the teacher being terminated, was staring at him in a peculiarly odd fashion.

After the hearing, the claimant went home, and then returned to school for additional materials. Upon leaving school the second time Mr. Holland drove his vehicle in an erratic fashion, which was not normal for him. He testified that on the way home he was very upset and very agitated, a sensation he had not experienced before. Upon returning home the claimant admitted that he stormed into his house and directed his family to pack their bags, stating that they were leaving. The claimant, when questioned by his wife as to the reason for leaving, began crying and became very upset. The testimony revealed that he then kicked a hole in the bedroom wall. Mr. Holland had never been this upset or acted in this fashion before.

On the night of this emotional upheaval, the claimant advised the school superintendent that he wanted to take some time off and needed a rest.

The next day the claimant was still very upset and his wife, who was employed at the Forest City Drug and Treatment Center, talked to individuals at that facility with respect to her husband's condition. Lutheran Social Services also contacted the claimant, and some counseling was immediately undertaken. A thorough physical examination was conducted and Mr. Holland sought and received psychiatric counseling by Dr. Larsen in Mason City. Claimant indicated that he checked himself into a local hospital and received an immediate examination from Dr. Larsen at the local psychiatric unit. Mr. Holland spent eight days in the psychiatric unit and testified that during this

period of time, he continued to be very agitated. Various medications were prescribed in an attempt to treat the problem.

Claimant's exhibit 2 is the discharge summary and attached medical notations from Dr. Larsen. The discharge summary confirms that the claimant was admitted to the hospital on April 13, 1982 and subsequently discharged on April 21, 1982. That discharge summary notes in part:

> The patient is a 41 year old male with depression and psychotic symptoms.
>
> Patient reports that he has been under unusual stress recently with having to fire a longterm [sic] teacher and coming into a great deal of pressure from social opinion about this move.
>
> The patient has noted, over the last several months, the onset of depression symptoms including low mood, worrying, change in energy, change in concentration and irritability. On the day of admission, he came to the Emergency Room, stating that he was a workaholic and he had trouble with his thinking, recently.

The claimant indicated that he has continued under Dr. Larsen's care up to the hearing date. He is still taking some forms of medication.

After discharge from the hospital the claimant sought a second opinion from Dr. Olson in Ames. On two occasions he visited the Methodist Midtown Hospital and Substance Abuse Center in Omaha. He stated that he was at this institution because of the April 9th incident. Mr. Holland denied any abuse of alcohol or other substances.

After April 9, 1982, and after some consultation with Mr. Snider of the school system, claimant resigned from his teaching position. It appears that the parties were concerned about claimant's health and his ability to continue in his position. The claimant's resignation was effective May 10, 1982. Claimant's exhibit 12 indicates, in part:

> By observation of Mr. Holland, and by discussions with others, and in the absence of a medical report, it appears Mr. Holland is suffering from a general condition that renders him unable to fulfill his duties in this school district. It further appears, in the absence of a medical report, that Mr. Holland's condition is directly job related and is a result of the stress (my personal opinion only) resulting from interaction with staff and students, and further as a result of a recent hearing before the Board of Education at which he gave testimony.
>
> I have temporarily placed Mr. Holland on medical suspension and this was done through Mrs. Holland on April 10, 1982.
>
> I did first observe this as a possible medical condition at approximately 8:00 p.m. on April 9, 1982.

Claimant's exhibit 13 is a letter from the superintendent of schools, M. D. Snider, to the claimant which indicates, "It is my unhappy duty to inform you that action taken by the Woden-Crystal Lake Board of Education on May 10, 1982, does terminate your employment with the School District."

Claimant indicated that normally the school year ended on July 1, 1982. Mr. Holland normally took a month off from July 1 to August 1 in preparation for the next school year. The claimant confirmed that he did not work during the period July 1 to August 1. Importantly, he was paid the balance of his salary under the terms of his contract for the period 1982, despite his resignation.

The record establishes that claimant interviewed for several jobs during the summer of 1982. He was eventually hired by the Blakesburg school system. It appears that Mr. Holland was not asked and did not indicate to the Blakesburg School System that he had had an emotional upheaval in April 1982. The claimant confirmed that he is presently a high school principal and athletic director at Blakesburg Community Schools. He began this job on August 16, 1982. He would like to continue to be employed in school administration.

Mr. Holland indicated that he does well with the day in and day out routine at the Blakesburg school system. He does note some difficulties with pressure at times. He notes a sense of being tired when being faced with situations involving pressure. The claimant indicated that he now lives in Blakesburg, and commutes between Blakesburg and Mason City for treatment by Dr. Larsen. Occasionally, the treatments will constitute telephone consultations, which have occurred on two or three occasions, each consultation lasting between five and ten minutes.

The claimant indicated that certain medical expenses incurred in conjunction with this illness have been paid by Blue Cross/Blue Shield. Claimant has had mileage and out-of-pocket expenses for his stay at the clinics in Omaha. These expenses amounted to $276.00. The cost of each telephone consultation with Dr. Larsen has been less than $10.00 per call.

Claimant's exhibit 9 is a compilation of all the mileage that the claimant incurred in conjunction with receiving treatment for his emotional condition. Additionally, he testified to four round trips to Omaha for treatment, at a total of 268 miles per round trip.

On cross-examination, claimant confirmed that the contract with the defendant employer ran for a period of eleven months, but the claimant was paid for a period of twelve months. He confirmed that in July, while he was not working, he was still paid his salary. He further confirmed that the Blakesburg Community School District contract commenced approximately as of August 15, 1982.

The claimant confirmed that he does not know what the Blakesburg Community School District knows about his past medical history. He confirmed that he took a physical examination to receive the Blakesburg job, and indicates in his opinion the Blakesburg job is not in jeopardy today. The claimant confirmed that his rate of pay at Blakesburg is higher than the salary he was paid by the defendant.

The claimant indicated that he views the April 9, 1982 incident as being a temporary episode brought on by stress. He does not think he has a significant permanent disability as a consequence and does not want to be considered disabled. He acknowledged that there may never be a re-occurrence of this incident.

On redirect examination, Mr. Holland indicated that he feels it is a combination of events that brought about his emotional upheaval in April 1982. This particular combination of events was, according to the claimant, a very unusual situation which added tremendous stress to his work activity.

Debbie Holland, the claimant's spouse, testified on his behalf. She had been married to the claimant for fourteen years prior to the date of April 9, 1982. The witness is not aware of any mental or emotional disabilities the claimant suffered during this fourteen year period. This witness confirmed that from about Christmas 1981 a change was noted in the claimant. He spent a great deal of additional time on his work. His work became very, very important to him, and he brought more work home in the evenings. She confirmed that the claimant got up in the middle of the night to do school work, an activity which he had never done before. She confirmed that the claimant was upset about the termination hearing and was very agitated about the general situation surrounding that proceeding. She confirmed the claimant's fears and complaints surrounding the hearing and confirmed his erratic behavior on the evening the hearing was terminated. She confirmed that he was very upset and angry, and was acting erratically. She confirmed that Lutheran Social Services intervened with advice, treatment and counseling. Mrs. Holland indicated that it was about mid-September 1982, after the claimant had begun his new job, that he began to act normal. She admits that he is getting along well today.

Marvin Snider testified on behalf of the claimant. He is the superintendent at the defendant school district, and has held that position since July of 1976. This witness heard all of the testimony at the time of trial and confirmed all the testimony previously given. This witness observed the claimant in the termination hearing of April 9th and confirmed his abnormal behavior. The balance of this witness' testimony has been considered in the final disposition of this case.

In a letter to claimant's counsel dated July 14, 1982, marked claimant's exhibit 3, Ronald M. Larsen, M.D., notes in part:

> Mr. Holland's schizo-affective episode was clearly precipitated by extreme stress of his job. Because of the job, he was placed in a precarious position with regard to the school board, an employee, and the community. This precipitated his psychotic episode and subsequent hospitalization and disability.

Employer's exhibit 1 is a letter from the claimant to Marvin Snider, Superintendent of Woden-Crystal Lake Community School District, and indicates:

> Based on certain consideration by the Woden-Crystal Lake District, I herein tender my resignation as Jr-Sr High School Principal and Teacher in the W-Cl District. In consideration of said resignation, to be effective as of the date of action by the Board, the Woden-Crystal Lake District will provide all financial and fringe benefits as per our mutually agreed 1981-82 Contract: and in further consideration the District shall assist me in establishing unemployment benefits eligibility and, if applicable, workmen's [sic] compensation eligibility.

In a psychiatric report, marked claimant's exhibit 5, Dr. Olson, of the McFarland Clinic, indicates:

> Discussion: I referred him back to Dr. Larson [sic] and said that I agreed with the assessment Dr. Larson [sic] had made, at least as it was presented to me. I do feel, however, that he might benefit by some "talk therapy" in addition to his medication. I am ambivolent [sic] about his returning to Eppley Institute in Omaha. I do not anticipate seeing him again at this time.

In a letter to claimant's counsel from Dr. Ronald M. Larsen, dated November 29, 1982, marked claimant's exhibit 7, he notes:

> I last saw Parker Holland in my office September 3, 1982. At that time, he reported that he continued to take 200 mg of Ludiomil at bedtime. On that amount of medication, he noted no major depression symptoms and no complaints. He offered that he has started a new job and, though there is continuing stress from the old school system, he thinks he is making good strides at getting back to a normal lifestyle. We talked about his plans for the future and encouragement was given.
>
> At that appointment, the patient was oriented times three. His flow of thought and thought content were within normal limits. He appeared

relaxed. His mood was normal and his insight was considered fair. My impression continues to be Schizoaffective Illness.

It appears that the patient's episode of Schizo-affective Illness is now controlled and has, perhaps, abated. It is my plan to continue him on this amount of medication for at least six months and then gradually cut it down. There is a fifty percent risk of a repeat episode based on the severity and statistical risk associated with this illness.

Mr. Holland has been cooperative with his treatment and has been informed of the above information. If you have any questions, please let me know.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on April 9, 1982 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 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, 246 Iowa 402, 68 N.W.2d 63.

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, 246 Iowa 402, 68 N.W.2d 63.

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.
>
> ....
>
> 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 claimant has the burden of proving by a preponderance of the evidence that the injury of April 9, 1982 is causally related to 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 (1955). 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).

Industrial Commissioner's Rule 500-8.4 provides:

> The excess payment made by an employer in lieu of compensation which exceeds the applicable weekly compensation rate shall not be construed as advance payment with respect to either future temporary disability, healing period, permanent partial disability, permanent total disability or death.

The Iowa Supreme Court has consistently recognized the potential compensability of psychiatric or emotional injuries. See Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (1968); Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (1969), and Coghlan v. Quinn Wire & Iron Works, 164 N.W.2d 848 (1969).

Section 85.33, The Code, provides:

> 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 increase in cases which section 85.32 applies.

ANALYSIS

Initially, there appears to be no dispute that the claimant was on April 9, 1982 an employee of defendant therein.

Based upon the claimant's uncontroverted testimony, it is clear that claimant did not suffer from any emotional or psychiatric difficulties prior to April 9, 1982. Based upon the record as a whole, it is the opinion of the undersigned that the claimant during the period January 1, 1982 through April 9, 1982 was under a great deal of work-related stress and tension. It appears that in addition to his teaching duties, he was doing counseling and handling scheduling problems. He was also deeply involved in the termination proceeding of a fellow instructor. All of these facts, taken in conjunction with the testimony that the claimant's onset of an emotional upheaval occurred in close proximity during the termination proceeding itself, leaves the undersigned to believe that the employment of the claimant was the precipitating factor in the emotional upheaval. This is affirmed by Dr. Larsen's report of July 14, 1982, where he specifically and directly tied the claimant's emotional episode with his stressful work situation.

It is not vigorously argued and the record upholds the finding that the claimant's condition arose in the course of his employment; that is, during a time and place where he might reasonably be expected to be in the furtherance of his employer's business.

Based upon the medical data in the record, there appears to be a direct causal relationship between the injury and the claimant's resulting disability.

It appears from the record and stipulated by the parties that the claimant was off work for the period April 9, 1982 until August 16, 1982. The record is also clear that the claimant was working under a written employment contract with the defendant. While it is true that the claimant was not actively engaged for the balance of his contract after April 9, 1982, it is also true that claimant was paid wages under the terms of the contract. The testimony on the record is that the contract ended by its terms on June 30. The claimant also testified he normally took a month off during the summer.

There is some disagreement in the briefs of the parties as to whether the claimant should receive workers' compensation benefits in addition to his salary under the contract. It is the opinion of the undersigned, and based upon the facts in the record, that the claimant received his salary, and under the aforecited rule of the commissioner this salary was received in lieu of workers' compensation benefits.

An examination of medical records does not lead the undersigned to believe that the condition from which the claimant suffered was anything other than the temporary situation. While it is true he may have re-occurrences of the situation, depending upon the factual setting in which he finds himself, this also appears to be speculative in nature. If, while in the course of his employment with the new employer, a situation should arise which would cause a relapse of the condition, clearly a new claim could be generated against the new employer.

Based upon the record as a whole and taking into consideration all of the record and the appropriate case law, it is the opinion of the undersigned that the claimant was temporarily totally disabled for the period April 9, 1982 until August 16, 1982 when he returned to work for Blakesburg Community School District.

FINDINGS OF FACT

That on April 9, 1982 the claimant was an employee of the defendant.

That for the period January 1, 1982 through April 9, 1982 the claimant was experiencing an abnormally stressful situation due specifically and exclusively to his work.

That on April 9, 1982 the claimant sustained a temporary schizo-affective episode which both arose out and in the course of his employment.

That the claimant was temporarily totally disabled for the period April 9, 1982 through August 16, 1982.

That the claimant discontinued his employment relationship with this defendant but was paid his full salary under contract through June 30, 1982.

That the claimant entered into a new contract with the Blakesburg Community School District as of August 15, 1982.

That the claimant is getting along well in his present position.

CONCLUSIONS OF LAW

That the claimant sustained his burden of proof and has established that he sustained a personal injury which both arose out and in the course of his employment with this defendant.

That the claimant has sustained his burden of proof and has established a causal relationship between the temporary total disability and the work-related incident.

ORDER

THEREFORE, IT IS ORDERED:

That the defendant shall pay unto claimant temporary total disability benefits for the period April 9, 1982 through August 16, 1982 at the stipulated rate of two hundred forty-nine and 22/100 dollars ($249.22) per week.

That the defendants shall pay unto claimant the mileage expenses of eight hundred four and 16/100 dollars ($804.16) (as outlined on claimant's exhibit 9).

That the claimant shall pay unto claimant the following medical expenses:

McFarland Clinic	$ 15.00
Snyder Drug	124.57
St. Joseph Mercy Hospital	1,459.97
R. M. Larsen, M.D.	430.00
"	30.00
"	30.00
"	35.00
Methodist Hospital	115.00
"	345.00
McFarland Clinic:	
Dr. Olson	32.00
"	97.00
Radiologists of Mason City	10.00
Snyder Drug	13.86
"	56.37
"	19.82
"	34.52
"	18.48
Easter's Drug	29.70
"	29.70
Lutheran Social Service	30.00
"	30.00
Easter's Drug	29.70
"	31.00
	3,046.69

That the defendants shall pay unto claimant the amount of two hundred seventy-six dollars ($276.00), representing his total expenses for twenty-three (23) days in Omaha while receiving treatment.

That the defendants shall be given credit for salary paid in lieu of compensation under Commissioner's Rule 500-8.4 for the period of temporary total disability.

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

Signed and filed this 24th day of June, 1983.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH ROBERT HOLLES, Claimant, vs. ROSENBOOM MACHINE & TOOL, Employer, and AID INSURANCE SERVICE, Insurance Carrier, Defendants.	File Nos. 684111 633700 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

Two proceedings in arbitration were brought by Keith Robert Holles, the claimant, against his employer, Rosenboom Machine & Tool, and the insurance carrier, Aid Insurance Service, to recover benefits under the Iowa Workers' Compensation Act on account of injuries allegedly sustained on July 10, 1979 and November 6, 1979. This matter came on for hearing before the undersigned at the Woodbury County Courthouse in Sioux City, Iowa on September 14, 1982. The record was considered fully submitted on that date.

On April 23, 1980 defendants filed a first report of injury concerning a July 1979 injury. On May 13, 1980 defendants filed a denial regarding such injury. Defendants have made no filings regarding a November 1979 injury.

The record consists of the testimony of the claimant, of the claimant's wife and of Larry Rosenboom; claimant's exhibits 1 through 3, varied medical reports with attached notices of service; claimant's exhibit 4, emergency room record; claimant's exhibit 5, itemization of mileage incurred in seeking treatment on various dates; claimant's exhibits 6 and 7, medical bills; claimant's exhibits 8 and 9, proof of costs incurred for medical reports; claimant's exhibit 10, surgeon's final report and statement; claimant's exhibit 11, hospital bill; defendants' exhibit B, office notes of various doctors who treated the claimant; and defendants' exhibit C, check issued by defendant carrier in payment of expense shown on claimant's exhibit 10. Defendants' exhibit A was not offered in that it was a duplicate of the first report contained in claimant's exhibit 1. With the exception of claimant's exhibit 10 and the first report in claimant's exhibit 1, defendants objected to claimant's medical reports on the grounds of irrelevancy, lack of proper foundation and failure to comply with Industrial Commissioner Rule 500-4.18 and to claimant's medical bills on the grounds of irrelevancy and lack of proper foundation. Claimant objected to defendants' exhibit B on the ground of immateriality and pointed out that defendants' exhibit C did not reflect payment of claimant's exhibit 9. At the time of the hearing, objections to claimant's exhibits 8 and 9 were overruled insofar as such exhibits were admissible as proofs of cost under Industrial Commissioner Rule 500-4.33. Defendants' objections to claimant's medical reports are overruled. Such reports are material and relevant to a determination of the issues and, when read as a whole, otherwise comply with the agency rule concerning medical reports. The disposition of the medical bills is discussed below. Claimant's objection to defendants' exhibit B is sustained as to entries dated August 6, 1977, November 14, 1977, February 9, 1979, June 20, 1979, undated entry (third) on page 2 and undated entry (last) on page 4. The last half of page 3 and first third of page 4 are contained in claimant's exhibit 1.

ISSUES

According to the pre-hearing order, the issues to be determined include whether claimant received injuries which arose out of and in the course of employment; whether there is a causal relationship between the alleged injuries and the disability; the nature and extent of the disability; and whether the claimant is entitled to benefits pursuant to Code section 85.27. Upon inquiry by the undersigned at the time of the hearing, defendants indicated that the matter of notice with respect to the second injury (which had been raised in the answer) was still in issue. The parties stipulated that the applicable rate of compensation for both injuries should be based on a gross weekly wage of $200.00 and on the claimant being single with no dependents at the time of the injuries. According to the benefit schedule for injuries occurring after July 1, 1979, the applicable rate is $120.54.

RECITATION OF THE EVIDENCE

Claimant testified that he began working for defendant employer in early March of 1979 as a machinist. Approximately ten minutes before quitting time on July 10, 1979, claimant slipped on some coolant on the floor. In attempting to catch himself, claimant cut the middle portion of his palm on a steel tray protruding from a computered lathe. Claimant reported the injury to his foreman, Tony Loutsch, who apparently washed the hand with Hydrogen Peroxide and bandaged it.

Although claimant testified he went to the hospital and was treated by Dr. Daniel O'Toole after work on July 10, 1979, Dr. O'Toole's notes reflect that he treated the claimant on July 11, 1979 for an injury to the right hand occurring the night before. He observed that claimant had lifted up a flap of skin in the right hypothenar area. The flap was whitish and the surrounding area was tender. Dr. O'Toole advised the claimant to soak the wound three times a day, to cover it with an antibiotic treatment and to keep it clean at work. Apparently Jack Myers, P.A. (associated with Ronald L. Zoutendam, M.D., who, according to testimony given at the hearing, was associated with Dr. O'Toole) saw the claimant on July 16, 1979 and noted that claimant's hand was not very puffy but had a minimal amount of redness and the wound was boggy. A small amount of tissue was debrided and claimant was advised to increase soaking the hand (claimant had been soaking it only once a day). Office notes for August 21, 1979 indicate that claimant complained of decreased strength in his right hand of two weeks duration. The laceration appeared to be fairly well healed. X-ray revealed no fracture. Range of motion and strength in the right hand appeared good but dexterity was a little decreased. The assessment was "[p]erhaps some inflammation f rom [sic] the previous injury or another type of trauma." (Defendants' exhibit B, p. 3.)

Claimant testified that he continued to work after injuring his hand in July of 1979 but ran a number of machines different from that on which he had been working on the date of injury. Claimant reported that he noticed difficulty using his hand and experienced pain in the mid palm down his fingers and up through his arm to a point just past his elbow. The frequency and amount of pain were related to the type of activity he performed with his right upper extremity.

Claimant insisted that he saw Bruce Butler, M.D., a hand surgery consultant who practices in Sioux City in association with Drs. Mumford, Keane, and Paulsrud only part of the year, on August 31, 1979. No documentary evidence corroborates claimant's

memory. Initial notes from Dr. Butler appear to be dated September 19, 1979. (Claimant's exhibit 1, p. 4; defendants' exhibit B, p.p. 3 and 4.) Introductory information describes claimant as a referral from Dr. Zoutendam; the subsequent notes state that claimant's attorney assisted the claimant in obtaining the appointment. (Claimant twice testified that he did not consult with defendant employer prior to seeking Dr. Butler's care but added that his foreman knew he was seeing Dr. Butler for his hand injury.) The history of the July 1979 injury received by Dr. Butler was essentially consistent with the record. Claimant complained of cramps, pain and loss of grip in the right hand. Examination revealed "[t]his was not a sutured wound. This was a laceration which subsequently healed without incident. He has full flexion of the fingers, full extension, full wrist function, full thumb function. There is some discomfort over the hook of the hamate area." (Claimant's exhibit 1, p. 4; defendants' exhibit B, p. 4.) Without specifically describing the findings of multiple x-rays taken in rotation views at that time, Dr. Butler reported his suspicion that claimant had a minor hairline fracture of the hook of the hamate base. He estimated that time and use would resolve the hand complaints.

Claimant testified that in the mid afternoon of November 6, 1979, a piece of aluminum weighing 250 pounds fell on his right hand as he was setting up an assignment at work. According to the claimant, he reported the matter to Tony Loutsch who told him to go to the hospital. Claimant testified that he saw Dr. O'Toole at the doctor's office and then received physical therapy from a Mark Hulst before returning to work the same day. (Claimant thought he received physical therapy treatment for ten days after the November 1979 injury and alleged that defendants paid for such treatment.) Claimant recalled that Tony Loutsch arranged for another employee to assist him with any lifting.

Claimant estimated that he saw Dr. O'Toole once or twice after the alleged November injury. According to the claimant, the second injury resulted in total loss of control of his right hand. He experienced constant pain and numbness in the hand and arm, just past the elbow. He continued to work but found it difficult to lift and to turn objects. Claimant stated that he transferred to different jobs because he was unable to do various assignments. Claimant recalled that he could not use a pencil or hold a coffee cup with his right hand.

The medical records contain no reference to a November 6, 1979 injury. Claimant was treated at Dr. Zoutendam's office on October 25, 1979 for an injury occurring three weeks earlier when the claimant dropped some metal on the little finger of his right hand. Examination on that date revealed swelling and tenderness of the PIP joint of the right middle finger. X-ray demonstrated a fracture of the distal aspect of the proximal phalanx with good position. The assessment was fracture of the middle phalanx. Warm soaks and active exercises were recommended. (Defendants' exhibit B, p. 4.) Claimant was seen in one followup visit by Dr. O'Toole in 1979.(Defendants' exhibit B, p. 4; month and day are illegible). Claimant still had pain in the right middle finger and swelling was noted at the PIP joint. Claimant was unable to squeeze that finger shut. X-ray at that time did not reveal a fracture. Dr. O'Toole's assessment was contusion of the right middle finger. He recommended physical therapy and rest.

A Physical/Respiratory Therapy report prepared pursuant to Dr. O'Toole's order of November 6, 1979 and signed by Dr. O'Toole and Mark Hulst states:

> THERAPIST'S CONSULTATION: Problem List: Right middle finger. PIP joint sprain with resultant impaired function and range of motion.
>
> S: Patient relates that six weeks ago, was injured on the job. States that the doctor thought he may have a fracture at that time. Had the finger immobilized for a while and now six weeks after it he still has pain in the finger upon bending it and also has trouble with swelling of IP [sic] joint as well, and wants to get over this problem as soon as possible, due to the fact that it does affect his work capabilities.
>
> O: Upon examination it is noted that he does have swelling of the superior aspect of the PIP joint of the right middle finger. Also has some mild swelling of the PIP joint of the ring finger as well, but not nearly so great. Range of motion of this area, shows him to have active range of motion, normal range in all joints, except this middle finger, PIP joint, where he only has approximately 90 degrees of active flexion at this time. Lacks full extension by only a few degrees, due to this swelling.
>
> A: Impaired range of motion, possibly due to joint adhesions.
>
> P: To treat this patient with some heat, and some exercises and possible mild mobilization of the joint, trying to help increase function. He will be seen from five times to seven times as needed.
>
> GOAL: Increase range of motion of the finger and decreased pain, and swelling. (Claimant's exhibit 4, p. 3.)

Apparently claimant received therapy from November 6 through November 12, 1979. (Claimant's exhibit 4, p. 4; claimant's exhibit 11.) As of the latter date, Mr. Hulst noted that claimant was able to move the right middle finger without pain but complained of weakness of hand grip. Examination revealed that swelling was down in the PIP joint, range of motion and sensation were within normal limits and strength was "O.K." (Claimant's exhibit 4, p. 4.)

Claimant testified that he quit working for defendant employer in late February or early March of 1980 on his volition. Claimant cited his inability to do the work and difficulty with his foreman as the reasons for his leaving such employment.

Claimant returned to Dr. Butler on December 3, 1980 with complaints of being unable to fully close or extend the fingers of his right hand, numbness in the little and ring fingers and ulnar nerve discomfort and numbness. Dr. Butler commented that claimant "does not recall any unusual soreness about the elbow, but the area of discomfort he had a year ago in the high palmar with the hamate is gone." ([Claimant's exhibit 1, p. 5.] Claimant disputed that his complaints were unchanged from the prior year.) Examination revealed tenderness at the elbow, decreased dorsal sensation in the ulnar distribution, decreased palmar sensation, positive Kleinert's test for irritation of the ulnar nerve at the elbow and numbness upon full flexion. X-ray of the wrist indicated that the hairline fracture was gone and x-ray of the elbow was negative. It was Dr. Butler's impression that claimant had some peripheral neuropathy involving the ulnar nerve. He recommended an elbow pad and instructed the claimant in use of the arm. On January 14, 1981 Dr. Butler advised claimant's counsel that claimant had not reached maximum recovery. (Claimant's exhibit 1, p. 3.)

On February 2, 1981 Dr. Butler related claimant's inability to close his fingers easily to "some block or discomfort in and about the ulnar nerve or artery system in the high palm, wrist or around the hook of the hamate which is the high palm area." (Claimant's exhibit 1, p. 8.) The ulnar nerve sensitivity had decreased from use of the elbow pad. Dr. Butler speculated exploratory surgery might be necessary. He recommended that the claimant continue working. (Claimant told Dr. Butler on December 3, 1980 that he had been laid off. On February 2, 1981 claimant reported to Dr. Butler that he had been working full-time. During direct examination, claimant stated that after leaving defendant employer's in early 1980, the only work he performed was driving a truck for five weeks sometime after surgery in April of 1981. During cross-examination, he agreed that Dr. Butler's reference to working meant the truck driving position.)

Dr. Butler examined the claimant again on April 6, 1981 and found a mass with swelling in the hypothenar eminence in the area of the original wound. He noted that neither the mass nor the degree of swelling was present on earlier examinations. At that point Dr. Butler recommended surgery. Accordingly, claimant was hospitalized from April 8 to April 9, 1981 during which time he underwent the following procedure:

> After satisfactory anesthesia was obtained with sterile dye an incision was sketched from the base of the little finger to the thenar line up to the wrist and zigzagged across the wrist two times to give access to the carpel canal of Guyon's canal. Skin and subcutaneous tissues were divided downward throughout the length of the incision. The transverse carpal ligament first incised and the median nerve externally lysed from above the wrist to mid palm until the superficial volaris was encountered. The Guyon's canal was then approached and with extremely careful sharp dissection to avoid damage to the branch of the ulnar artery and nerve, Guyon's canal was completely released down to the palm following the hook of the hamate on its ulnar aspect. The hamate, which was previously damaged, was partially excised, the periosteum of the hook being allowed to lay back over the ulnar nerve and artery at the completion of this partial excision of the bone. In the mid palm and distal palm the ulnar nerve was noted to be trapped in scar and there was scar tissue with dirt from the original wound in the hypothenar eminence over the short flexor muscle. This scar tissue was excised. The sensory branches completely lysed from takeoff of the main nerve to the distal palm. Once this was accomplished forearm fasciotomy was accomplished. It was felt that there was sufficient entrapment of the ulnar nerve to explain all of the patient's symptoms. Accordingly the wound was irrigated and closed with 5-0 Nylon over a #8 French catheter for drainage. With a bulky compression dressing in place the tourniquet was deflated and the patient was sent to the recovery ward in good condition. (Claimant's exhibit 1, p. 9.)

Postoperative diagnosis was "[E]ntrapment, ulnar nerve, Guyon's canal and hook of the hamate with scar entrapment area of injury, mid palm, right hand." (Claimant's exhibit 1, p. 9.)

The medical records indicate that Mark Wheeler, M.D., saw the claimant for a followup visit on April 13, 1981. The wound was healing well without infection. He instructed the claimant in active range of motion for the fingers. (Claimant's exhibit 1, p. 8.) Dr. Wheeler conferred with the claimant on three occasions after April 13, 1981 and before August 31, 1981. (The dates are illgible on claimant's exhibit 2, p. 2 and claimant's exhibit 3, p. 2). On the first such entry, he noted that the claimant called to report that he had split his hand open where the stitches were present on the prior evening and went to the hospital for treatment. On the second occasion, Dr. Wheeler removed the remaining sutures. On the third date, Dr. Wheeler noted that claimant's hand had healed completely and that claimant had good range of motion of the fingers. Regarding claimant's disability he stated: ". . . I would rate him as a complete disability from the time of surgery until May 4, 1981. From that time for one month, he should have partial disability, with restrictions on no heavy lifting, or prolonged use of his right hand." (Claimant's exhibit 2, p. 2; claimant's exhibit 3, p. 2.)

> Dr. Butler saw the claimant on August 31, 1981: Keith is in today with minimal complaints referrable to his operated hand. He sustained on-the-job trauma resulting in a painful, hypothenar eminence and ulnar nerve symptoms, and in April of this year exploration of the wrist, ulnar nerve,

> Guyon's canal and hook of the hamate was accomplished with complete lysis of the ulnar nerve, partial resection of the hook of the hamate. He has none [sic] nicely, has minimal complaints today, and this final disability rating is accordingly prepared.
>
> FINAL DISABILITY RATING: He has a well-healed scar on the volar aspect of the right wrist and hypothenar eminence of the hand. He has normal radial deviation, normal ulnar deviation. He has 70 degrees of palmar flexion which is normal. He has 45 degrees of wrist dorsiflexion which is a slight lag in motion and is considered a 3% impairmant of his extremity. His ulnar sensation is intact. His peripheral pulses are good. Maximum benefit of medical and surgical treatment has been obtained.
>
> Duty Status: He is fit for full duty. (is working)
>
> Disability: The patient has a 3% impairment of his upper extremity secondary to his old on-the-job trauma and the surgery. (Claimant's exhibit 2, p. 2; claimant's exhibit 3, p. 2.)

and on December 9, 1981:

> Keith is in with apparently a confusing situation in that he sustained additional trauma to his hand before I did the disability rating and he has been referred back to see if there is any change in the disability rating because of this.
>
> Basically, on examination of his hand, there is no difference now than when I did the disability rating and if the trauma was before I did the rating, it would have no influence on the rating in that anything that was caused by the second trauma was picked up at the time of the rating. Both occurred for the same employer on the same job so that the final rating done after both injuries covers both injuries, and I see no reason to change it at this time. (Diagnosis: Ulnar nerve entrapment, rt hand.) (Claimant's exhibit 3, p. 2.)

In a letter dated January 19, 1981 and addressed to claimant's attorney, Dr. Zoutendam made the following remark regarding the causal connection between the July 10, 1979 injury and claimant's disability: "This whole thing is complicated by the fact that he broke the distal aspect of proximal phalanx of his right little finger in October of that same year." (Claimant's exhibit 1, item 1.)

Claimant indicated that at present he has difficulty doing everyday work and explained that his right hand goes numb when he grasps a hammer and that he is unable to lift 60-70 pounds using the upper right extremity. Claimant acknowledged that he had not attempted to do any other work besides the truck driving. He stated that he experiences pain, numbness and cramping from his fingertips up through his arm.

Upon direct examination, claimant denied having any prior problems with or injuries to his right hand. During cross-examination, claimant denied any specific recollection of an injury to his right wrist in September of 1977. Yet, Dr. Zoutendam's notes indicate that he saw claimant on September 17, 1977 for right wrist swelling referrable to an incident wherein claimant had dropped some boards on his wrist. Claimant complained of some degree of numbness in the tip of the thumb and in all but his little finger. Claimant was treated with a splint. He received followup treatment on Septemer 24, 1977 and September 30, 1977. Assessment of the latter date was "[c]ontusion of wrist." (Defendants' exhibit B, p. 1.)

Claimant further denied that he ever hurt his hand in any type of altercation. However, Dr. Zoutendam noted on October 4, 1977 that claimant's wrist inflammation was improving but that claimant had struck someone with his fist three days earlier and x-rays revealed an impacted fracture of the distal end of the second right metacarpal. (Defendants' exhibit B, p. 1.) Claimant acknowledged that he had a confrontation with the Kline brothers at his apartment after he returned from a hospitalization in January 1979 following a car accident. He denied striking his hand against a door jam on that occasion. (In undated office notes for a visit between February 9, 1979 and June 20, 1979, Dr. O'Toole recorded that claimant had received scrapes and sores on his right hand in an altercation the previous night. [Defendants' exhibit B, p. 2.]) Claimant agreed that he had gotten into a fight around the Iowa Lakes in August of 1979 when he pulled someone off of his car. (His wife, Laurie, testified that she saw him after such incident and noticied nothing wrong with his right hand.) Claimant confirmed that he was known to hit things with his hand but negated that he actually did so. He subsequently admitted that he sometimes hits lockers in the maintenance room of his guard unit as a way of venting himself.

Larry Rosenboom, 34 year old manager and owner of Rosenboom Machine and Tool, testified that his machine shop contains 15-20 basic types of machines or about 30 in all. He employs approximately 12-14 workers, each of whom is trained on most, if not all, of the mechanical devices. His wife acts as the personnel manager.

Mr. Rosenboom testified that when he picked the claimant up for claimant's first day of work, he observed that claimant's right hand was injured and his face was cut. Claimant related that the Kline brothers had broken into his apartment the night before and that he had struck the door jam when he missed hitting one of them. Mr. Rosenboom recalled that claimant's hand was later bandaged at the shop. He did not notice claimant having any difficulty performing the work.

Mr. Rosenboom testified he had no knowledge of any hand injury occurring to the claimant on his premises but then stated claimant did report a July 1979 injury and he remembered a bandage being on claimant's hand. He had some recollection of the foreman advising him that the claimant was seeking treatment from Dr. O'Toole and Dr. Zoutendam. Mr. Rosenboom indicated that claimant never received authorization from him to see Dr. Butler, and that he was first aware of the fact that claimant had been under Dr. Butler's care when he received the original notice and petition after claimant had left his employ. However, Mr. Rosenboom also testified that his wife handles the insurance and workers' compensation paperwork and knew who were the employee family doctors.

With regard to the circumstances of claimant's termination, Mr. Rosenboom indicated that he sent the claimant a certified letter asking him to come back to work. In his opinion, claimant was a good worker when he actually showed up for work. He never saw or received reports that claimant had difficulty performing his job. Mr. Rosenboom recalled that the Spencer, Iowa incident occurred in late August of 1979 but he had no recollection of claimant having any bruises or scratches. He was in the same guard unit as the claimant and had a very general recollection of claimant's fits of rage.

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 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., 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 10, 1979 and November 6, 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).

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, 154 N.W.2d 128 (1967).

ANALYSIS

The record viewed as a whole supports finding that the claimant sustained a cut to the right hypothenar area in the course of and arising out of his employment on July 10, 1979. The medical records of Drs. O'Toole and Zoutendam corroborate claimant's testimony regarding the first injury.

The record viewed as a whole does not support finding that the claimant sustained a crushing injury to the right hand in the course of and arising out of his employment on November 6, 1979. No medical evidence corroborates claimant's testimony with regard to such date of injury. The medical records of Drs. O'Toole and Zoutendam and the physical therapy records indicate that claimant suffered a fracture of the distal aspect of the proximal phalanx of the right middle finger at work in early October of 1979. However, claimant did not request leave to amend his pleading to conform to the proof (presumably because of the date upon which his petition in arbitration was filed).

Claimant has failed to sustain his burden of proving that his alleged scheduled disability is causally related to the July 10, 1979 injury. Dr. Zoutendam's opinion that the October 1979 injury complicates the issue of causal connection is not mitigated by Dr. Butler's summary dismissal of the matter by noting that both injuries occurred at work and that his rating (given prior to knowledge of both injuries but subsequent to the occurrence of both injuries) naturally covered both incidents. Perhaps, if consideration of both the July 10, 1979 injury and of the October 1979 injury were under consideration, Dr. Butler's incomplete history would not be so crucial. However, under the present set of facts, his generalized opinion on causation cannot be given any weight. The second injury, according to the claimant's testimony and the medical evidence, was more severe than the July 1979 incident. Dr. Butler expressed no awareness of when the second episode occurred or what it entailed. (He likewise demonstrated no knowledge of the September 1977 wrist injury, of the October 1977 impacted fracture of the distal end of the second metacarpal on the right hand or of the early 1979 altercation resulting in scrapes and sores on the right hand.) Indeed, after he saw the claimant in September of 1979, after the first injury bur prior to the second, he anticipated claimant would have no disability as a result of the incident.

With regard to the medical expenses in issue claimant is entitled to payment of expenses incurred only for the July 10, 1979 injury. The causal connection problem discussed above obviates awarding any expenses for treatment rendered after what the medical records indicate to be the second injury--it is impossible to discern whether the claimant would have necessitated

further treatment but for the October 1979 injury. Since the defendant employer allowed the claimant to go to Drs. O'Toole and Zoutendam, who in turn referred the claimant to Dr. Butler, the $49.00 incurred for examination by Dr. Butler and x-ray on September 19, 1979 will be awarded. Defendants have paid Dr. Zoutendam's bill. (Claimant's exhibit 10; defendants' exhibit C.) Mileage referrable to treatment for the first injury will be allowed.

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 slipped on some coolant at work approximately ten minutes before quitting time on July 10, 1979. In attempting to catch himself, claimant cut the right hypothenar area of his right hand.

FINDING 2. The medical evidence corroborated claimant's testimony.

CONCLUSION A. Claimant sustained an injury arising out of and in the course of his employment on July 10, 1979.

FINDING 3. Claimant alleged that a 250 pound piece of aluminum fell on his right hand at work on November 6, 1979.

FINDING 4. The medical evidence indicated that claimant suffered a fracture of the distal aspect of the proximal phalanx of the right middle finger at work in early October of 1979. There was no mention of a November 6, 1979 crushing injury.

CONCLUSION B. Claimant did not sustain an injury in the course of and arising out of his employment on November 6, 1979.

FINDING 5. Claimant suffered an injury to his right wrist in September of 1977, an impacted fracture of the distal end of the second metacarpal on the right hand in October of 1977 and scrapes and sores on his right hand as a result of an altercation in early 1979.

FINDING 6. Claimant's treating physician for the July 10, 1979 and October 1979 injuries stated that the latter injury complicated any assessment of disability referrable to the first injury.

FINDING 7. Another medical expert concluded that claimant had sustained 3 percent impairment of the upper extremity as a result of the two injuries and the surgery he performed upon claimant's right hand. His opinion was given no weight because it was based upon an incomplete, inaccurate and vague history. He was unaware of any specifics regarding the second injury and of claimant's earlier right hand injuries.

FINDING 8. Claimant lost no time off work following the July 10, 1979 injury.

CONCLUSION C. Claimant has failed to sustain his burden of proving that he suffered any disability as a result of the July 10, 1979 injury.

FINDING 9. Employer-authorized doctor referred the claimant to a specialist without the specific knowledge of defendant employer.

CONCLUSION D. Pursuant to Code section 85.27, claimant is entitled to expenses incurred from treatment received by the specialist for the July 10, 1979 injury, not for treatment received subsequent to the October 1979 injury.

ORDER

THEREFORE, it is ordered that claimant take nothing in weekly benefits from the present combined proceeding.

Defendants are ordered to pay the claimant the following medical expenses:

Dr. Butler, September 19, 1979	$49.00
134.5 miles x $.18	24.21

Costs of the proceeding (including twenty-five dollars ($25.00) for medical reports - exhibits 8 and 9) are taxed to the defendants. See Industrial Commissioner's Rule 500-4.33.

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

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

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT IRVING, Claimant, vs. ARMSTRONG RUBBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 636014/658365 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Both claimant and defendants appeal from a deputy industrial commissioner's proposed arbitration decision. At arbitration the claimant alleged two separate work related aggravations of a preexisting post-laminectomy condition. Claimant declared the first aggravation occurred between December 26, 1979 and February 18, 1980 as a result of janitorial mopping and use of a scrubbing machine. The date of the second alleged episode is January 8, 1981 at which time claimant was performing lighter janitorial functions.

The deputy found claimant's work between December 26, 1979 to February 18, 1980 caused a material aggravation and determined a 50 percent reduction of earning capacity as a result of this aggravation. The deputy found further that claimant did not sustain a material aggravation of his preexisting condition on January 8, 1981; thus claimant's loss of earning capacity was not increased. However, claimant was awarded weekly compensation for recovery from this temporary aggravation.

The record on appeal consists of the record of the arbitration proceeding which includes the transcript of the arbitration hearing with claimant's exhibits 1, 2, 3, 4, and 5; defendants' exhibits C and D; deposition of Kenneth Beem; and deposition of Sinesio Misol, M.D., which includes one exhibit. Both parties filed appeal briefs and claimant filed a reply brief.

ISSUES

Defendants' appeal brief raises the issue of whether there is substantial evidence to support the deputy's conclusions that:

(1) Claimant sustained a material aggravation of his preexisting condition arising out of the janitorial work he performed in the course of his employment from December 26, 1979 to February 18, 1980.

(2) Claimant's work from December 26, 1979 through February 18, 1980 caused a permanent aggravation of claimant's preexisting back condition, thus entitling him to an award for permanent partial disability benefits.

(3) Claimant has sustained a 50 percent loss of earning capacity as a result of the material aggravation of his back condition.

(4) Claimant is entitled to healing period benefits from March 27, 1980 to May 23, 1980 and from January 8, 1981 to August 11, 1981.

Claimant's only stated issue on appeal is whether he sustained a permanent total disability. The claimant agrees with all other findings and conclusions of the deputy's decision.

REVIEW OF THE EVIDENCE

Claimant, at the time of the hearing, was a 50-year-old married man with three children. He received a general equivalency high school degree in 1972 at the approximate age of 41 years. The record shows the claimant withdrawing from regular school after the eighth grade in 1948 and going to work as a welder until 1961. In 1961 he started work as a laborer within the defendant employer's tire manufacturing plant. He worked for over 20 years with the defendant employer in non-skilled positions. He has not been employed by the defendant or any employer since January 8, 1981, the date of the second alleged aggravation. (Transcript, pp. 6-8)

Claimant's preexisting low back condition arises from a 1971 laminectomy, performed by the now-deceased Sidney H. Robinow, M.D. The laminectomy resulted in removal of a herniated disc at the interspace between lumbar vertebra five and sacral vertebra one. (Misol deposition, pp. 4-8)

Claimant was placed under specified weight-lifting restrictions

when he returned to work in 1972 after the laminectomy. He was first assigned to light duty work, at a ten pound weight restrictions, cutting up tire scraps. (Tr., pp. 9-28) For a short time in 1973 he operated a floor sweeper which Dr. Robinow noted had "jarred him into alot [sic] of pain;" thus Dr. Robinow advised the claimant to wear the lumbosacral support which he received after the laminectomy and to continue the ten-pound restriction. (Tr., p. 71; Claimant exhibit 1, p. 11) The record contains an April 1973 letter from Dr. Robinow to defendant employer which increased the restriction to 35 pounds at a time which claimant testified he applied to become a fabric jeep driver. (Tr., pp. 29, 71; Cl. ex. 3, p. 5) Claimant said his restriction was increased to 55 pounds when he became a "spiral wrap operator" in late 1973. (Tr., p. 29) Although Dr. Robinow's office notes indicate the claimant made a request for the weight restriction to be increased to 55 pounds, an approval of such request is not indicated in the record. (Cl. ex. 1, p. 1)

Defendant employer's safety engineer, Jim Schwinn, testified the claimant's employment records do not show an increase beyond 35 pounds. (Tr., p. 72) Nevertheless, on cross-examination the safety manager stated there was no indication of claimant having difficulty in the spiral wrap job. (Tr., p. 77) Furthermore, the testimony of claimant's 1976 to 1978 supervisor, Dennis Parson, substantiated claimant's testimony that the spiral wrap job necessitated repetitious lifting of "bundles" of beads weighing, at times, over 50 pounds. (Tr., pp. 81-82)

Claimant functioned in the spiral wrap job until its phase-out in April 1979 at which time he became a janitor. (Tr., p. 71) Apparently, he held this initial janitorial job until he started a seven month personal leave for recovery from a non-work related hand injury sustained in May 1979. (Tr., p. 12)

On his return to work on December 26, 1979, claimant was assigned to a different janitorial position than otherwise held before his personal leave. After two days he was assigned as a janitor in the "main locker room." Claimant asserts the "main locker room" job necessitated mopping and use of a hand-controlled, electric floor scrubber. (Tr., p. 14) Claimant further asserts that this position, as well as additional janitorial work, contributed to his intermittent claudication (defined below).

Claimant cleaned the main locker room until February 18, 1980 at which time he secured a job transfer to lighter janitorial duties in the employer's break area. This change of jobs was made through the assistance of his union president. He complained to the union president that the job placement in the main locker room was beyond his medical work restrictions. He testified the main locker room is over 100 feet long and contains about 500 lockers. He said his legs and back became progressively sore from mopping, bending and pulling the scrubbing machine. (Tr., pp. 14-16)

Kenneth Beem, Claimant's supervisor while he worked as a main locker room janitor, testified by deposition on behalf of the defendants. (Beem dep., p. 6) Beem said the claimant never used a scrubbing machine and only started mopping the last week he worked in the main locker room. (Beem dep., pp. 7, 11) Beem also stated that he talked with the plant nurse regarding a 35 pound weight-lifting restriction for the claimant and he regarded claimant's position to have been light duty. (Beem dep. pp. 6, 9) Under direct-examination regarding claimant's physical condition when he "first" started working in the main locker room, Beem testified the claimant "walked a little bit sideways," (Beem dep., p. 6, l. 23) and he seemed to be throwing the left hip "to try to relief [sic] the pain." (Beem dep., p. 12, ll. 21-22) Beem also testified he once noticed the claimant wearing a back brace in early January 1980. (Beem dep., p. 7)

Despite claimant's new position as a light duty janitor in the break area, his condition allegedly became progressively worse. (Tr., p. 17) On March 27, 1980 the plant nurse advised the claimant to contact a doctor. (Tr., p. 18) Within two days Dr. Robinow hospitalized him for physical therapy and traction. Dr. Robinow received a history of developing low back pain at work. (Cl. ex. 1, p. 16) Dr. Robinow's examination notes of March 28, 1980 state:

> Clinically he appeared to be in distress in getting on and off the examining table and his low back motion was extremely limited and he had great difficulty in walking on heels and toes. Straight leg raising was positive bilaterally at about 30 to 40 deg. The left ankle reflexes diminished. No definite motor or sensory deficits. (Cl. ex. 1, p. 16)

Upon claimant's discharge from the hospital two weeks later, Dr. Robinow diagnosed claimant's condition on April 13, 1980 as "residual back pain, status post laminectomy" which "[i]mproved with TENS and corset such that he does not require pain medication on discharge." (Cl. ex. 1, p 16) On examination approximately three weeks later, Dr. Robinow noted that "[c]linically his gait was good. He walked on his heels and toes adequately. Straight leg raising was negative bilaterally. Deep tendon reflexes bilaterally active and equal." (Cl. ex. 1, p. 17)

Claimant returned to work on May 23, 1980. He was assigned to different light janitorial duty in the third floor locker room and truck drivers' department. The scope of his job included sweeping, picking up refuse around the machines, and cleaning the third floor locker room. (Tr., pp. 19-20)

Claimant testified he had to sit and rest for certain periods of time to perform these limited duties. He stated his legs became too weak to continue his hobbies of gardening and mechanics. (Tr., p. 20) Claimant continued working in this position for approximately eight months at which time the second alleged work related aggravation took place. Claimant testified he reached down to the floor to pick up a smashed juice can. (Tr., p. 21) He described the alleged painful episode which apparently occurred on January 8, 1981:

> I just reached down to pick it up, and that was it. My back went, my legs went just like somebody jabbed a knife in me, and it hurt too bad. I couldn't hardly get up, but I got my shoulders against the wall and raised myself to where I was--wasn't on the floor, and I stayed there for a while. (Tr., p. 21)

Claimant made his way into the locker room and then into the break room. He was then helped to the plant nurse's office. His immediate foreman, a Mr. Robituso, gathered claimant's clothes and with the help of the plant nurse, the claimant was assisted into his automobile. He apparently drove himself home. (Tr., pp. 21-22)

Claimant's foreman, Mr. Robituso, did not testify. Dennis Parson, a fellow employee, who testified on behalf of the defendants, stated he was present when the claimant had this difficulty. But no testimony was presented by the defendants regarding any observation by Dennis Parson of the claimant's alleged fall.

Two days before the alleged episode on January 8, 1981, the claimant sought treatment from Sinesio Misol, M.D., a medical associate of the now-deceased Dr. Robinow. (Misol dep., p. 11) Dr. Misol testified the claimant said on January 6, 1981 that his main problem was that he could no longer "trust" his legs, and that all of a sudden they would "give away" and he would fall. (Misol dep., pp. 10-11)

Dr. Misol's January 6, 1981 examination findings were "[r]estriction of motion lumbosacral spine of about 40%. No neurological deficits. No muscle atrophy. Straight leg raising positive only at 90 deg." (Cl. ex. 1, p. 18) X-rays taken during the examination showed a narrowing of the interspace between the vertebrae where claimant's herniated intervertebral disc was removed during the 1971 laminectomy. (Misol dep., p. 11; Cl. ex. 1, p. 18) Dr. Misol's diagnosis on January 6, 1980 was "[r]adiculopathy, nonspecific, probably due to constriction by scar of operative site." (Cl. ex. 1, p. 18)

A subsequent examination on January 27, 1981 showed very weakened low back muscles prominent and scar tissue from the previous laminectomy surgery; a significant degree of hesitation or shaking on trying to move the spine back and forth; ability to bend forward about 50 degrees as compared to normal which is around 80 degrees or 90 degrees; ability to bend to the left about 5 degrees, while the normal is in the range of 20 degrees; ability to bend to the right 10 degrees; no ability to extend or hyperextend the spine; complaints of pain in his low back when Dr. Misol pulled on his legs up to about 50 degrees to 60 degrees of elevation; good knee and ankle reflexes; and no atrophy or paralysis in muscles of the legs. (Misol dep., pp. 14-15)

Based upon the examination findings on January 27, 1981, x-rays taken January 6, 1981, and the history presented by the claimant, Dr. Misol diagnosed claimant's condition on January 27, 1981 as "[n]onspecific radiculopathy with symptoms of intermittent claudication of the spinal cord, probably due to previous surgery with aggravation from problem sustained 1/8/81." (Cl. ex. 1, p. 20)

Dr. Misol stated "intermittent claudication" is a medical term that describes episodes which occur when the legs suddenly no longer support a person after walking. (Misol dep., p. 15) Dr. Misol said the normal process of a post-laminectomy operation is a progressive slow narrowing of the space between the two vertebrae where the disc had been surgically eliminated. He stated the existance of intermittent claudication depends upon the degree of collapse of the space available for the nerves following a laminectomy as well as the amount of scar tissue the individual produces after surgery. (Misol dep., pp. 21-22)

On deposition, Dr. Misol discribed the cause of intermittent spinal claudication in persons with post-laminectomy conditions as follows:

> A. [T]hese people had normal arteries, but they all had the history of narrowing of the canal inside in which the nerves proceed down the spine before they get to the legs. And this was called spinal claudication as opposed to the other one called arterial or vascular claudication. In the last paper I read about what really causes the claudication, it was a few days ago, and it says exactly that it appears that the little tiny blood vessels that feed the nerve roots as the nerve roots exit or leave the spine going into the legs, because of the scar tissue around or the build-up of bone that is pressing into that, those little blood vessels are being strangled. If the person is sitting, the amount of blood flow that goes into the nerve makes it happy. So sitting down the nerves are happy. But as soon as you start to work, there is more need for blood supply that the constriction or strangulation is such that it is almost like cutting the blood flow to the nerve, so this is why it starts to hurt. (Misol dep., p. 20)

With respect to the relationship between the prior condition and the claimant's present condition, Dr. Misol testified:

> Q. ...In your opinion referring both to Doctor Robinow's previous records and your own knowledge,

based upon your care and treatment of Mr. Irving, do you have an opinion of whether the work that you have mentioned that Mr. Irving was doing, that being the mopping and scrubbing and that sort of thing, would have aggravated his previous condition?

A. Yes, I have an opinion.

Q. What is your opinion?

A. My opinion is based on the information that we have, which is, of course, given to us by Mr. Irving which says he was apparently doing well with the job that he had before he got to engage in this mopping and waxing and so forth, so to prove it otherwise, it does sound like this did aggravate his condition. Could I prove it? No. With the other explanation that we have, I'm not aware of any automobile accident or any episode of anything that happened otherwise. (Misol dep., p. 12, l. 1-19)

Dr. Misol's opinion is also based, in part, upon the fact that claimant did not seek any medical treatment during 1973 to 1979 from his deceased associate, Dr. Robinow. Regarding causal connection of an injury to work conditions, Dr. Misol testified on direct-examination:

Q. Doctor, you've told us that you felt that this intermittent claudication was aggravated by the incident in January of 1981. Do you have an opinion of whether or not there was an aggravation of the condition that ended now in some disability in 1980 as well, specifically because of the mopping and waxing, the work scrubbing, I believe you said, that he was doing at that time?

A. I have an opinion, and my opinion is that following both episodes he seemed to be worse. As to what exactly did change inside his spine, I do not know, and I would like to state that we have seen -- I have seen this claudication develop in other people without any specific precipitating factor, but in his case he seemed to be doing very good for a number of years until he got himself into this janitorial work in January of 1980. So I would think that that had something to do with it. (Misol dep., p. 15, l. 24 - p. 16 l. 16)

On cross-examination:

Q. And it was your statement earlier that you feel that Mr. Irving's work aggravated his condition and contributed to this condition?

A. No, it was my opinion that going through the records he seemed to be doing pretty good between 1973 and 1980. That's seven years. So for seven years he was able to do what he was supposed to be, apparently. And then he says -- because I was not there -- he says that all of a sudden this other job just -- he couldn't do it, that there was different work. And then he came back to see Doctor Robinow; that's all I'm saying. What happens in there? Well, if you want to elucidate, I can give you a very good explanation. You see, the spine is not normal. He's an individual that trys to avoid twisting and bending and this and that. So here are two verterbrae [sic] over the years have come down to a point, the nerve is coming out between them. It is a little tight, but not bad. All of a sudden you go back and forth and start to flex and extend and rotate it more and you have trouble.

Q. According to what you are saying, just about any kind of movement caused that?

A. Correct, but repetitious movement is more likely to do such. I'm just giving you this explanation to understand the history that he gave. But God knows I was not inside his back to know whether this was the exact mechanism, you see. Maybe it was going to happen anyhow without the change in the jobs.

Q. This could have been a normal course of development?

A. But we'll never know because it happened when he moved jobs. But to prove it otherwise, that's what it did. (Misol dep. p. 23, l. 4 - p. 24, l. 14)

Dr. Misol admitted that he did not know whether the claimant was wearing a back brace or was taking medication during 1973 to 1979. He stated that claimant's back was probably not normal during these years due to claimant's previous laminectomy. (Misol dep., p. 27) Dr. Misol also agreed with defendants' counsel that claimant's back problem could be the result of a natural deterioration with the back of a 50 year old person who had undergone a laminectomy. (Misol dep., p. 29)

Dr. Misol estimated that claimant has a permanent partial physical impairment of 30 percent to the body as a whole. (Misol dep., p. 18) He stated that this impairment was caused by post-laminectomy changes, age and the inappropriate type of work claimant was performing. (Misol dep., p. 30) On recross-examination, Dr. Misol agreed to equate the work "component" with a temporary aggravation of claimant's condition. (Misol dep., pp. 28-29) On further redirect-examination Dr. Misol seemed to clarify his opinion:

Q. Doctor, I think we need to get something cleared up here. We have a thirty percent impairment that you have mentioned. Can you say with a reasonable degree of medical certainty that that thirty percent all came from the laminectomy back in '71, or can you say that that thirty percent all came from an incident in March of 1980, or can you say that any part of it is attributable to any one incident?

A. No. I think I put it very nicely earlier by saying that there's three different factors that probably play a percentage of the total, and that I'd like to say again, if you want me to be more specific as to the percentage, I'll do that for you later on, and I will look in the guides and see if it comes to thirty percent or twenty-some or wherever it is.

Q. I think, Doctor, that the problem we may be having is the impression that it's possible that these incidents that happened in January of 1981 and March or February of 1980 resulted in no part of that impairment.

A. At this time I believe they are part of that impairment. But I never said and I will never say that the constriction of the nerve was caused by two days of a twisting or bending, because I don't believe that is true. (Misol dep., p. 40, l. 6 - p. 41, l. 7)

Earlier in the deposition Dr. Misol stated that intermittent claudication may arise in the absence of a precipitating factor. (Misol dep., p. 16)

Dr. Misol is of the opinion that claimant is not a good candidate for additional surgery since his post-laminectomy condition makes the results of further surgery very unpredictable as to claimant's future leg mobility. (Misol dep., pp. 16-17)

Dr. Misol is familiar with tire production plants (Misol dep., p. 17), and stated claimant should not return to work at defendant employer's factory unless it is an office or supervisory position. (Misol dep., p. 33) He suggested the claimant find a sedentary job. (Misol dep., p. 17)

G. Charles Roland, M.D., an orthopaedic specialist, examined the claimant on one occasion and reported his findings to the defendant insurance carrier on April 6, 1981. Dr. Roland recited a history that is not consistent with the record on appeal in terms of date of surgery, onset of recent physical problems and work history. After setting forth his examination findings which includes "fairly severe motor loss at both lower extremities" and "early evidence of axial spine arthrosis," Dr. Roland suggests the claimant "had an aggravation of his pre-existing problem which sounds very much like a disc disorder." Dr. Roland did not discuss causal connection. Dr. Roland would consider an exploration of claimant's lumbosacral spine. Dr. Roland stated the claimant is unable "to return to work of any type" and needs further medical management and treatment. (Cl. ex. 2)

Claimant testified he received chiropractic consultations and treatments for his back for over 20 years from a Dr. Woods. He specifically stated he probably saw Dr. Woods in 1977. (Tr., pp. 36-37) The record on appeal does not contain any records or reports from Dr. Woods.

Claimant described his average day after his alleged work aggravations as taking one hour to get out of bed, sitting most of the day, and doing light housework. Apparently the claimant now uses a cane. He said he is unable to walk up a flight of stairs and has trouble sleeping. He said he receives pain whenever he tries to straighten himself. (Tr., p. 24) Claimant said that prior to January 8, 1981 he had weakness in the legs, but not any pain. (Tr., pp. 22-25)

Frances Irving, claimant's spouse of 27 years, testified that after the claimant's hospitalization in 1980, he began to retire to bed earlier at night and he requires more help after the alleged 1981 episode. (Tr., pp. 61-62)

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).

A claimant is not entitled to compensation for the results of a preexisting injury or disease. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760 (1956). However, if the claimant has a preexisting condition that is aggravated, accelerated, worsened, or lighted up by work activities so it results in a disability, the claimant is entitled to compensation to the extent of the disability found to exist. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962). Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In Ziegler v. U.S. Gypsum Co., 252 Iowa 613, 106 N.W.2d 591, the Iowa Supreme Court stated:

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

In Yeager, the court quoted with approval from 100 C.J.S. Workmen's Compensation, §555(17)a: "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." 253 Iowa 369, 375, 112 N.W.2d 299.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury of December 26, 1979 to February 18, 1980 is causally related to 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). The work related activity does not need to be the only cause of the disability, it only needs to be one cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980) [citing Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667, 670 (Iowa 1971)]

A possibility of work activities causing the disability is insufficient proof of causal connection; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). Medical expert testimony which goes no further than to show a possibility of causal connection, does not defeat claimant's case because this tribunal must consider all lay testimony in light of the surrounding circumstances for determining whether a probability of causal connection exists. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946); Burt, 247 Iowa 691, 73 N.W.2d 732.

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

A 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 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.

ANALYSIS

I

The first issue is whether claimant satisfied his burden of showing by a preponderance of the evidence that he sustained an injury which arose out of his employment. Thus, the inquiry is whether there is a relationship between claimant's work activities and an aggravation of his preexisting post-laminectomy condition.

The deputy who heard the case found that claimant did sustain a compensable injury, and that finding appears correct. Defendants raise certain arguments, however, which should be discussed.

The defendants attempt to formulate the impression that the record shows the claimant had continual failing problems with his lower back due to his 1971 laminectomy which eventually led to the problems claimant experienced causing his hospitalization by Dr. Robinow in March 1980. In support of their argument, the defendants contend that after his 1971 laminectomy, the claimant wore a back brace, restricted his feedlot lifting activity, was aware of his back limitations, and sought chiropractic treatment for his lower back. The defendants extensively argue that the deputy's finding of no lower back problems during 1973 to 1979 is contrary to the record. In connection with this argument, the defendants also assert that Dr. Misol's opinion is without sufficient foundation because it is based, in part, upon claimant's stated history of an ability to perform work before his job assignment to janitorial functions. Defendants claim this history given to Dr. Misol is also contrary to the record.

As hereafter explained, the preponderance of the testimony and other evidence necessitates a finding of an injury arising out of claimant's employment.

Claimant does not dispute that he had a problematic lower back as a result of the 1971 laminectomy. He admitted that he altered his feedlot lifting activities by delegating such work to his family members. Claimant has also been aware of his back limitations for employment subsequent to the 1971 laminectomy, for example he stated he would have fallen over if he placed a 40 pound sack over his shoulder. The frequency of claimant's use of a back brace, however, is not well developed within the record. Dr. Robinow advised the claimant in 1973 to wear the corset whenever feasible. The defendants' witness, Kenneth Beem, once noticed the claimant wearing a back brace during his job as the main locker room janitor. The record seems to indicate that claimant was not constantly required to wear his corset. Regardless, the mere use of a corset does not establish a failing problem.

Claimant's statement that he has visited a chiropractor for the past 20 years and probably made such a visit in 1977 is given slight evidentiary weight, because the full probative value of claimant's statement cannot be measured without corroborating or explanatory records or reports on such chiropractic treatment.

After the 1971 laminectomy claimant experienced weight lifting problems when he returned to work in 1972; however, at least by March 1979 he had established a significant degree of industrial disability. This is evidenced by his performance as a spiral wrap operator from 1973 until the phase out of such job in March 1979. The spiral wrap job necessitated repetitious lifting of weights reaching, at times, approximately 50 pounds. The testimony of defendants' witness, Dennis Parson, claimant's supervisor of the spiral wrap job during 1976-1978 substantiated the claimant's testimony regarding the lifting requirements of this position. Although there is no corroborating evidence regarding claimant's work during 1979, this fact is given slight weight in consideration of the whole case under review. For instance, defendant employer's safety engineer admitted the claimant's employment records did not contain any indication of an inability to perform the seemingly heavy lifting requirements of the spiral wrap job.

Claimant's evidence shows he made a request to Dr. Robinow to increase his weight lifting restriction to 55 pounds. Despite the lack of evidence showing an approval of an increased weight limit, the finding of an industrial capacity during 1973 to 1979 is justified on the basis of the evidence as a whole because it is evident that the claimant is no longer able to do work which he once performed.

The focus of the next level of inquiry is whether claimant's decreased industrial capacity arose from his employment from December 26, 1979 to February 18, 1980. A review of Dr. Robinow's notes in March and April of 1980, when he hospitalized the claimant, show a diagnosis of "residual back pain, status post laminectomy." Nevertheless, claimant returned to work in May 1980, thus it can be presumed that at this time he sustained at least a temporary decrease in his ability due to an aggravation of some origin to his laminectomy condition. Claimant testified that despite returning back to work, he had continual problems which eventually led to the January 8, 1981 episode.

Dr. Misol is of the opinion that claimant's work activities during December 26, 1979 to February 18, 1980 and on January 8, 1981 aggravated his post-laminectomy condition. As detailed above, Dr. Misol bases this opinion on the fact that claimant did not seek treatments from Dr. Robinow during 1973 to 1979. His opinion is also based upon the assumption that claimant was able to work until he started to perform the janitorial work.

Defendants seem to suggest that claimant's functional problems which resulted in hospitalization in March 1980 may be causally connected to activities during claimant's seven month personal leave for recuperation from a non-work related hand injury. The personal leave ended December 26, 1979 and claimant was placed as a janitor in the main locker room two days later. In support of their assertion, defendants rely upon the testimony of Kenneth Beem, claimant's supervisor within the main locker room. Beem's testimony is extremely vague. Beem testified that he noticed the claimant "walked a little bit sideways" and seemed to be "throwing the left hip" to try to relieve pain when the claimant first came to work in the main locker room. It is not clear whether this witness observed the claimant in such a state before he started his janitorial work or after claimant had already used the alleged flow scrubbing machine or performed some mopping work. Due to vagueness problems, which cannot be resolved by other evidence, this testimony is given little weight.

The difference between the testimony of the claimant and Beem regarding the alleged scrubbing machine is not determinative. Defendants admit the claimant performed at least one week of mopping before reassignment to lighter duty. Claimant's testimony of janitorial bending is unrebutted. Either repetitious bending or mopping motions, which claimant probably performed, would have caused an aggravation of his post-laminectomy condition as suggested by Dr. Misol.

The foundation of Dr. Misol's opinion has sufficient basis in the record. There are no other reports of any medical or other type of treatment during 1973-1979 besides the findings of Dr. Robinow. As discussed above, claimant established an industrial capacity at least as of March 1979. It would be surmise to presume claimant aggravated his condition during his seven month leave on the basis of the present record regarding his activities during this period of time. Thus, it is found that claimant probably did not experience a decrease in functional impairment until he was assigned to work in the main locker room.

In brief, claimant was able to work during 1973 to 1979 despite the presence of a post-laminectomy condition. His laminectomy condition was aggravated when he undertook janitorial work within the main locker room.

II

The second issue on appeal is whether claimant showed by a preponderance of the evidence a causal connection between a work related activity and the disability upon which he now bases his claim. Thus, the inquiry is whether claimant's work has a

direct causal relation to aggravation or acceleration of his permanent intermittent claudication, or whether this permanent condition would have occurred simultaneously independent of the employment injury.

Again, the deputy found that claimant had established the necessary causal relationship.

Defendants argue, however, the intermittent claudication is the natural result of claimant's post-laminectomy degenerative condition. Alternatively, defendants argue that any work related aggravation was only temporary.

A careful review of the credible evidence shows a direct causal relation between claimant's work related aggravation and his permanent intermittent claudication.

Although Dr. Misol was cautious in his assessment of causal connection as pointed out by the deputy, his testimony indicates that claimant's janitorial assignment contributed to the appearance of the intermittent claudication. On cross-examination, Dr. Misol stated that the claudication originated with the combination of post-laminectomy scar tissue constriction upon nerves and the progressive narrowing of the intervertebral space caused by removal of a protruded disc in 1971. Then, according to Dr. Misol, over the years of 1973 to 1979, two vertebrae presumably L-5 and S-1, were closing together and claimant's nerve was "coming out" between these vertebrae; then claimant's new janitorial movements, as required by his main locker room position, aggravated the above described preexisting condition to a state of disability.

Thus, the record indicates the claimant's intermittent claudication, although not directly caused by claimant's work activities, does have a causal connection to his permanent condition because the janitorial work performed by claimant accelerated and worsened his preexisting condition which gave rise to the symptoms of the permanent disorder. There is no indication in the record of symptoms of a permanent disability until the claimant worked in the main locker room. The status of his preexisting condition before assignment to the main floor locker room, as indicated above, can be described as nondisabling because at this time he had established an industrial capacity. In other words, he had worked some eight years after his 1971 laminectomy, even though his work had been at least moderately heavy and vigorous. Thus, the acceleration of his preexisting condition is determined to have "more than slightly" aggravated his nondisabling preexisting condition. Therefore, the claimant is entitled to compensation to the extent of the disability found to exist. Nicks, 254 Iowa 130, 115 N.W.2d 812; Yeager, 253 Iowa 369, 112 N.W.2d 299; and Ziegler, 252 Iowa 613, 106 N.W.2d 591.

Defendants argue first that claimant sustained only a temporary aggravation because Dr. Misol testified that the "work component" of the estimated 30 percent permanent partial impairment was temporary in nature. Defendants argue second that since Dr. Misol's deposition was taken only one month after the 1981 aggravation, the rating itself could only be temporary because claimant was still recovering from that aggravation.

This position ignores other parts of Dr. Misol's testimony, especially the last portion, (Misol dep., pp. 40-41) quoted above, that the 1979-1980 injury was a part of that impairment. (That he included the 1981 injury in the "work component" part of the permanent partial impairment is another question.) Also, Dr. Misol had said earlier in his deposition that the repetitious movement of the 1979-1980 janitorial work was "more likely" to cause a problem (see portions quoted above from pp. 23-24). Taken as a whole, Dr. Misol's testimony shows his opinion clearly to be that the claudication originated in the post operative scarring and was aggravated by the janitorial work.

The sequence of events, therefore, shows that claimant had a laminectomy in 1971 followed by some problems. Despite his post-laminectomy status, he was over the years (beginning in 1973) able to do the work of a spiral wrap operator, which required at least moderately heavy lifting. Upon return to work in December 1979, after a hand injury not related to the present question, he began to experience pain in his low back because of the repetitious nature of his work. He was unable to continue this work after February 1980 and was able only to try it in January 1981.

III

The final issue on appeal is the extent of claimant's industrial disability.

Claimant's functional problems arise out of his lumbar and sacral spine area and the extent of his injury affects the trunk of his body. Thus, claimant's disability must be determined in terms of industrial disability to the body as a whole.

The claimant argues the deputy was conservative in the legal determination that he only sustained a 50 percent loss of earning capacity. The claimant contends he is permanently totally disabled.

The deputy determined the claimant's industrial disability in the following manner:

> With regard to the extent of claimant's industrial disability, the undersigned must express some concern that more has not been done from a medical and vocational standpoint. Claimant is relatively young by today's standards and, without some further attempt at physical treatment (be it further surgery or pain center care) or vocational rehabilitation, should not be written off as useless to society - and to himself. Hence, at this time 50 percent industrial disability is deemed appropriate based on the various industrial disability factors set forth in the recitation of the evidence. Defendants are admonished to provide the claimant treatment and training necessary to prevent him from being permanently and totally disabled. (Arbitration decision, pp. 12-13)

The claimant, argues that the deputy considered him to be totally disabled but held out the possibility that he may not remain in such condition pending defendants' provision of vocational rehalibitation and further medical treatment. He argues the deputy is instructing him to await provision of such services and to file a review-reopening claim for permanent total disability if his condition does not improve. Claimant contends he should be declared 100 percent industrially disabled at this point in time, thereby leaving the defendants the option to file a review-reopening procedure should his condition improve.

Regarding the potential prospects for further medical treatment, Dr. Misol is of the opinion that claimant's post-laminectomy condition prohibits any surgical intervention due to a high degree of risk to future leg mobility. Dr. Misol did not express an opinion in regards to other available types of medical treatment. Dr. Roland would consider an exploration of claimant's lumbosacral spine, however, his medical evaluation does not indicate whether he had knowledge of the prior laminectomy when he formulated this opinion, thus his opinion is rejected.

Claimant has apparently reached his maximum healing point from the second episode as indicated by Dr. Misol in a letter to the defendant insurance carrier dated August 11, 1981. (Cl. ex. 1, unnumbered page following p. 21) Thus, at this time it is medically indicated that further significant improvement is not anticipated. Since intermittent claudication is a permanent disability and surgical intervention is not advisable, it is found that the claimant's medical condition has stabilized to the point of no further improvement.

Next, claimant's permanent partial physical impairment of 30 percent to the body as a whole, as estimated by Dr. Misol, must be considered in relation to claimant's work experience and other industrial disability factors. Claimant is obviously not medically capable of returning to his employment as a janitor, nor to one of his previous tire building positions he held for approximately 19 years. He can not undertake any former general labor skills, even though in light of his education and work experience he is intellectually best qualified for these types of skills. In brief, he can no longer perform his accustomed general labor skills due to his disability found to exist.

Claimant is not readily qualified for any supervisory placement in light of his education and low level of general labor experience as a welder, tire builder and janitor. He may be able to locate a menial sedentary job; however, in view of the other industrial disability factors, this possibility is of little consequence. The situs and severity of his disease, in relation to his history of employment activities, shows he will always suffer a significant amount of intractable pain whenever he undertakes performance of previously trained activities.

Claimant's description of his average day, in connection with his spouse's testimony indicates that he is unable to do routine tasks such as walking up a flight of stairs because of his functional impairment.

Vocational rehabilitation may or may not improve the claimant's condition. Hopefully, it will be explored and willingly offered and accepted. If conditions later warrant, this matter could then be reviewed upon proper application.

Viewing the industrial disability factors collectively, it is determined that the claimant is permanently totally disabled. Defendants, of course, are at liberty to file a review-reopening petition at a later date in order to assert the claimant's condition has subsequently been improved, however, in the meantime, the claimant must receive his entitled weekly compensation for his present loss of earning capacity.

FINDINGS OF FACT

1. Claimant had a laminectomy for a lower back condition between the L4-5 and L5-S1 vertebrae areas in 1971. A herniated disc was removed at that time at the L5-S1 area.

2. Claimant restricted his non-work lifting activities and was placed under medical work restrictions upon return to work in a tire production plant after the 1971 laminectomy.

3. Claimant worked at a position within the plant from 1973 to March 1979 which involved heavy lifting up to 52 pounds. He performed this work without any apparent difficulty.

4. Claimant established a significant degree of industrial capacity despite existence of a post-laminectomy condition before he took a personal leave from work in May 1979 for recovery from a non-work related hand injury.

5. Claimant's post-laminectomy condition became aggravated between December 26, 1979 and February 18, 1980 during assigned work activities as a janitor after his return to work from his personal leave.

6. That no new injury was sustained on January 8, 1981.

7. Claimant's condition has been rated as a 30 percent permanent partial physical impairment.

8. At the time of the hearing, claimant was a 50 year old man with a general equivalency degree. Claimant worked in the defendant employer's production plant for 20 years in various skilled and unskilled labor positions. Previously, the claimant was employed as a welder for thirteen years.

9. Claimant is currently permanently and totally disabled from gainful employment. This determination is made pursuant to consideration of claimant's functional impairment, employment experience, potential for vocational rehabilitation, education, and other industrial disability factors as evaluated at this point in time.

CONCLUSIONS OF LAW

1. Claimant sustained an injury arising out of his employment when janitorial functions during December 26, 1979 to February 18, 1980 aggravated his preexisting post-laminectomy condition.

2. Claimant proved by a preponderance of the evidence a probability of a causal connection between his work related injury of December 26, 1979 to February 18, 1980 and his permanent intermittent claudication condition because it was shown that work activities "more than slightly aggravated," Ziegler, 252 Iowa 613, 670, 106 N.W.2d 591, or "materially aggravated," Yeager, 253 Iowa 369, 112 N.W.2d 299, his relatively nondisabling post-laminectomy condition.

3. Claimant is permanently totally industrially disabled as a result of the work related aggravation of his preexisting condition.

ORDER

THEREFORE, it is ordered that the defendants pay the claimant permanent total benefits during the period of his disability as provided in Code of Iowa, section 85.34(3), as in effect at the time of the injury at the stipulated rate of two hundred twenty-one and 88/100 dollars ($221.88) per week.

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

Credit is to be given to defendants for the amount of voluntary benefits paid by them in this matter. Section 86.20, Code of Iowa.

Costs of the proceedings are taxed to the defendants pursuant to Industrial Commissioner Rule 500-4.33.

Interest shall run in accordance with section 85.30, Code of Iowa, as amended by enrolled Senate File 539, section 8 (1982).

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

Signed and filed this 27th day of October, 1982.

Appealed to District Court;
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOAN B. JACOBS,	:	
Claimant,	:	
vs.	:	
	:	File No. 488795
IOWA STATE UNIVERSITY,	:	
Employer,	:	R E V I E W -
	:	R E O P E N I N G
and	:	
	:	D E C I S I O N
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Joan B. Jacobs, claimant, against Iowa State University, employer, and the State of Iowa, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of her employment on September 30, 1977. It came on for hearing on January 7, 1983 at the Office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered submitted with the filing of briefs on January 21, 1983.

The industrial commissioner's file shows a first report of injury received on October 20, 1977. A memorandum of agreement was received on the same date. A letter offered in evidence at the time of hearing indicates that claimant was paid healing period benefits until July 24, 1980 at which time one hundred seventy-five weeks of permanent partial disability payments were commenced.

The parties stipulated that the proper rate is $146.42; that claimant has never returned to work; and that all medical benefits have been paid.

The record in this matter consists of the testimony of claimant, claimant's spouse, Russell D. Jacobs, and Clifford E. Smith, Ph.D.; claimant's exhibit 1, a report by John A. Caffrey, M.D., dated February 9, 1978; claimant's exhibit 2, a report from William P. Cooney, M.D., dated November 12, 1981; claimant's exhibit 3, a report from Harry A. Swedlund, M.D., dated March 19, 1982; claimant's exhibit 4, a report from R. G. Van Dellen, M.D., dated March 23, 1982; claimant's exhibit 5, answers to interrogatories; claimant's exhibit 6, the deposition of W. James Metzger, M.D., with accompanying exhibits; claimant's exhibit 7, the deposition of Thomas D. Gartin, M.D., with accompanying exhibits; claimant's exhibit 8, the vita of Clifford E. Smith; defendants' exhibit A which was offered by both parties, a letter from Richard L. Andrews dated December 4, 1980; defendants' exhibit B, a letter from Dr. Cooney dated September 14, 1978; defendants' exhibit C, a letter from Myrtle Engstrom dated September 27, 1982; defendants' exhibit D, a first report of injury for an injury on April 25, 1974; defendants' exhibit E, a first report of injury for an injury of September 30, 1977; defendants' exhibit F, a letter from Dr. Cooney dated December 20, 1978; defendants' exhibit G, a letter from Dr. Cooney dated July 22, 1980; defendants' exhibit H, a letter from Dr. Cooney dated June 3, 1980; defendants' exhibit I, a letter from Dr. Caffrey dated February 25, 1982. The parties filed briefs.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury of September 30, 1977 and her present disability and whether or not claimant is entitled to permanent partial disability benefits.

STATEMENT OF THE CASE

Fifty-four year old, married claimant testified to a high school education, two years of college and graduation as a medical technologist. After her graduation she worked in hospital laboratories. Following some time off for raising her children she worked as a part-time coordinator for children's church activities doing such things as arranging creative activities for the children, writing songs and meeting with the board of christian education. She spent nine months at a job at a figure salon introducing persons to the facility, weighing them in and encouraging the members.

In 1974 she became a Lab Tech II with defendant employer doing veterinary medical research. At first she worked with ascaris suum, a nematod, which is found in the intestines of swine. She recalled the situation which ensued thusly: She had no problems until she began performing hysterectomies on the adult females to remove eggs so they could be cultured in the lab. The work was done in another building under a hood with a scrub down procedure and special clothing. She noted her eyes became irritated. She got a lightheaded feeling. Her face turned bluish. Other persons she worked with observed her condition when she returned to the main building. On the last day she worked with the ascaris, she felt "quite ill." She left work and went home for awhile and then went back. That evening her eyes were sore. The following day she saw the doctor who told her she had asthma and started her on Prednisone. She returned to work and avoided the adult females. Eventually she was restricted from the lab. She developed diarrhea.

She moved to the immunogenics lab in the poultry science department where she worked in a government project involving genetic resistance to disease. She had colitis and some trouble from her mastectomies.

In the fall of 1975 her right wrist was penetrated on the ulnar side by a wire. Pain and swelling developed. Flare-ups would come and go and claimant would return to work.

In February 1976 she had the first of many surgeries. A second followed in the summer of that year. She began to notice a tightness in her throat and to be bothered by the dust in the animal pens and the chemicals she was using. When she did skin grafting with baby chicks, she got tiny scratches which welted. In August 1977 she was spurred by a rooster. In spite of careful and repeated scrubbing, her arm swelled.

Eventually her wrist became weak, her pain worsened and her finger function decreased. Surgery was done in February 1978 to remove a part of the carpal bone.

More surgery was done later in that year and finally her wrist was fused. As her finger motion was not good, a tendon release was performed in December.

Her scar began to drain. A bone scan was positive and an attempt was made to culture the organism. Skin grafts were undertaken. A z-plasty was followed by five stage surgery including a pedicle flap.

Claimant, who is right-handed, testified that she has had no recurrence of abscesses or drainage in this wrist. She said that because the ulna is loose and not fused, she can rotate her wrist, but she is not able to flex it. She expressed the opinion that her right wrist is not as strong as it was, but that she can lift and use it. She has experienced some loss of tissue. She no longer plays the piano or the guitar. She reported that she is not seeing any doctor at present for her wrist, although she did see one subsequent to her release because she thought she had arthritis in her hand.

Regarding her allergy problems, claimant remembered a severe drug reaction from Carbenicillin which took the form of purple spots, loss of voice, swelling around the mouth and a closed throat. She had an episode of anaphalactic shock when an attempt was being made to desensitize her. Food reactions start with respiratory trouble, then abdominal cramping and finally diarrhea. She listed sensitivity to turkey, milk products, mushrooms, feathers and library dust. She is cautious about being around animals, libraries, places with pets, certain foods and going out of doors under some circumstances. She asserted that she must constantly be aware of the possibility of her allergies getting her into trouble. She is bothered by cold air, and uses a mask to do her housework and to jog. An air cleaner has been attached to the furnace in her home. The family had pets and kept a cat until early 1978.

Claimant was of the opinion that she is reacting to more things. She believed her doctor attributed her colitis to food allergies and stress. She continues to smoke approximately fifteen cigarettes per day although she admitted the internists at Mayo and Dr. Metzger had said it would be better if she did not. She does not notice an exacerbation of her asthma by eating, smoking or stress. She agreed that she is smoking more because of family problems.

Claimant listed her medications as aminophylline, a bronchodilator used four times a day; Alupent, a bronchodilator which she uses as needed; Vanceril; Chlorpheniramine; Pred Mild, for sore eyes; Drixoral; epinephrine for emergency; and Librax, an antispasmodic. Because of the nature of her medication, she is fearful of driving long distances.

Claimant assessed herself as "fairly healthy" prior to 1974. In 1952 she had an exploratory laparotomy which resulted in the correction of some difficulties she had been having. In the mid 1960's she had hemorrhoid surgery. In 1972 she was referred to Mayo Clinic for an electrolyte problem and for cystic fiber disease in both breasts. After breast implants were tried, surgery was done in 1972 and then repeated in 1975. She recalled that following her first operation, she had some psychological trouble. She was treated at Mayo in psychiatry for six weeks and her difficulties resolved. Claimant acknowledged some constipation through the years, but no serious gastointestinal problems. She denied broken bones, diseases, allergies and trouble with her right arm or wrist before 1974. She claimed that none of her activities were limited by her health.

Claimant was asked whether she could work in a normal atmosphere. She answered that she would have to be very careful and that she would prefer to work with an air cleaner. She asserted that from four to six weeks each summer she is unable to go out. She has no clerical training other than a semester of typing in high school. She reported spending her time at home reading, following the stock market and investing, studying geneology and entertaining friends. In addition to workers' compensation, claimant gets $826 per month in long-term disability payments. Her interrogatories state:

> After my discharge from Mayo Clinic, I went to the Personnel Department at Iowa State University. I talked with Mr. Melvin Abbey of that department in May, 1980, and discussed the possibility of employment. Mr. Abbey expressed concern over my problem with allergies and emphasized how dangerous they can be.
>
> He stated that Dr. T. D. Gartin, Family Practice Clinic, Ames, Iowa, was my primary physician and that any consideration of my working would depend on Dr. Gartin's judgment. When I talked with Dr. Gartin, he was opposed to my working and informed Mr. Abbey.

Claimant's spouse of thirty-three years, Russell D. Jacobs, a safety design technician for the department of transportation, described claimant's health prior to 1974 as excellent and claimant able to participate in a wide variety of activities. He recalled no trouble with foods, breathing, anxieties, dust or asthma. Claimant was able to do yard and garden work. Jacobs claimed that claimant now no longer can do things they used to enjoy together and that she must use care in such things as visiting her daughter's farm, being out of doors, traveling and selecting restaurants. Particular care must be exercised when the trees are leafing in the spring and when the corn is tasseling.

He said that his wife has not sought employment since she stopped working.

Clifford E. Smith, who has a Ph.D. in engineering valuation and who is a university professor, consultant and an arbitrator, testified that he interviewed claimant on March 2, 1981 to determine her employability. In making such an evaluation he divides work into functioning with data, people and things. Claimant's job as a medical technologist was found to be working with data sixty percent of the time, with people twenty-five percent; and with things fifteen percent. The breakdown for the job of laboratory technician was judged to be the same.

In evaluating claimant Smith conducted a personal interview and reviewed some of the medical evidence as well. He saw claimant as affected by two disabilities--"little effective use of her right hand...[and allergy] to numerous particles in the air." These were the only impairments he considered.

On the positive side Smith observed that claimant has demonstrated an ability to work on her own and to learn new techniques. However, he concluded that claimant would have only a fifteen percent possibility of finding employment. He made that assessment using a comparison that a person with no disability would have a one hundred percent probability of finding work. Although he thought claimant might have a number of possibilities based on her wrist alone, he saw the allergies as responsible for the major restriction. He also believed claimant's age would be a factor. He did not give consideration to the unemployment rate.

Thomas D. Gartin, M.D., board certified family practitioner, first saw claimant in April 1974 for an allergic reaction including wheezing in her lungs and rashes over the face and eyes. Prednisone was prescribed and claimant was advised to avoid contact with ascaris.

In October 1975 claimant scratched her wrist on a cage and developed an abscess. When her recovery was not satisfactory, claimant was hospitalized and started on "high doses" of antibiotics. Infection and reaction at claimant's wrist continued in January 1976 and claimant was referred to Dr. Grant who drained the pus from the wound the following month.

On July 28, 1976 claimant was admitted to the hospital for reoccurrence. The diagnosis at that time was septic wrist joint possibly osteomyelitis or an infection of the bone itself.

Dr. Gartin noted that in September 1977 claimant reported that she had a tight sensation in her throat, shortness of breath and difficulty in swallowing. Eventually she got to the point where eating chicken would result in an allergic reaction.

Dr. Gartin observed that as time went on claimant became more sensitive to more things. He said claimant is sensitive to Chloramphenicol, carbenicillin, Cephalosporins, Erythromycin, Sulfa drugs, morphine sulfate and penicillin.

The physician was of the opinion that claimant should avoid working around poultry as he would expect her to have a severe allergic response. Later he testified:

> Her background or training and her talents are in the field of immunology. She is unable to perform that field because in immunology you are dealing with sensitizing proteins, sensitizing substances. That's the way they study immunology.
>
> They take an organism and they take the protein that that organism is composed of and they inject it perhaps into a chicken and they later study the blood from that chicken and measure the response the chicken has had by producing antibodies to this which is an attempt to protect itself.
>
> You are developing a sensitivity, if you will. These products are highly sensitizing. I don't see how she can deal with it just from an allergic point of view.

He concluded that claimant is unemployable in the field in which she was trained.

Dr. Gartin stated that claimant has been placed on a maintenance program for her allergies. She is to carry epinephrine. He reported that "rather severe" arthritis is developing in her wrist and she has been treated with antiinflammatories. He last saw claimant on October 21, 1981. He expected that the arthritis and discomfort in her wrists would increase and that she would develop further environmental allergies.

Regarding causation the doctor was questioned and testified as follows:

> Q. Do you have an opinion, Doctor, based upon a reasonable degree of medical certainty as to whether or not her allergic reactions as they started in '74 and as they increased were in any manner caused by or aggravated by her employment? You can answer that yes or not if you have an opinion.
>
> A. Yes, I have an opinion.
>
> Q. And what is that opinion?
>
> A. I think without question they certainly were. As far as my history is concerned, this initial insult and allergy response to ascaris was the first significant allergic problem she had.
>
> And it has progressed since that time including other aspects of her work environment and now into the home itself. And I think it's definitely related to that exposure.
>
> Q. You also indicated that she, I think, hurt her wrist you indicated, I think, in '75. Do you have an opinion whether or not this would have been a situation that would have aggravated her allergic reactions?
>
> A. Yes, it would have aggravated it, yes.
>
> Q. Do you feel it did aggravate her allergic reactions?

A. I think that was the onset of her allergic problem to poultry.

Q. Let me ask you this. Do you think there are any aspects of her allergies that you related to us here today, Doctor, that was not either caused by or aggravated by her employment?

A. Any aspect is pretty broad, but it seems to be that certainly her employment aggravated the allergic condition that did probably start at work. And I think, yes, directly related as the causative agent.

People develop--once they start developing allergies, they tend to be more apt to develop sensitivities to new allergens as they come along or to even old ones that they have been dealing with for years. So you get a snowball effect sometimes and I think this started with the ascaris problem.

Dr. Gartin reported that he had been aware of claimant's gastrointestinal problem since June 1974. He referred to her condition as irritable bowel syndrome and said that: "[p]robably we don't know [the cause]." He continued:

I think that her wrist and her allergies and the disability that these cause are definitely work related. The gastrointestinal problem was and is only aggravated by the other stresses of her allergies and her disability and so forth.

But that was not caused by her work. It's certainly maybe aggravated by the stresses that have developed and in that way it's work related.

When he was asked about permanent partial disability, he stated:

It seems to me in a right-handed person who does 85 percent of their endeavors with their right hand and arm, that if they have a stiff wrist and an inability to use their thumb and fingers with ease and with more importantly coordination, if they have that inability, then they have a minimum of 75 to 80 percent disability of that extremity.

He wrote on November 25, 1980:

The stress of many, many surgeries, and the many hospitalizations has aggravated her gastrointestinal tract to where she is even further disabled with this problem. She can't type accurately, she developed her injury to her wrist while on the job. She has had thirteen operations on that wrist. She has had no end to the pain and to the hospitalizations. It has aggravated her irritable bowel syndrome, which has now flared to where it keeps her home bound.

John A. Caffrey, M.D., first saw claimant January 26, 1978 and performed skin tests. He recorded reactions to dust, aspergillus, hormodendrum, penicillin, candida, timothy, trees, cockroaches, turkey, celery, cucumbers, sweet potatoes, white potatoes, string beans, corn grain, coconut, honeydew, bananas, prunes, raspberries, almond, salmon, mustard, mushrooms, cottonseed, casein and malt. Claimant's aminophylline level was below normal.

Initially immunotherapy was recommended, but after claimant had systemic reaction to an injection it was decided claimant should use bronchodilators and avoid foods to which she is sensitive. Dr. Caffrey described claimant's condition as chronic in nature with a seventy-five percent probability that the condition would flare-up intermittently. He related claimant's symptoms to her occupation.

W. P. Cooney, M.D., of the Mayo Clinic, reported claimant's referral with septic arthritis of the right wrist. On July 25, 1978 debridement and irrigation were instituted. Claimant had radiological and bone scan evidence of septic arthritis with localized osteomyelitis.

On August 30, 1978 arthrodesis of the right wrist with graft from the hip bone was undertaken. Claimant was evaluated by the psychiatry service and found to have a mild personality disorder with hysterical and hypochondriacal traits. The allergist made adjustments in claimant's medication and was reported to feel that claimant was overreacting, but that she did have a bona fide reaction to chloramphenicol.

Claimant returned to the clinic in late 1978. After physical therapy with no improvement, an extensor tenolysis was conducted in February 1979. The following month a synovectomy and debridement were done with a rational flap late in the month. A Z-plasty was done in May.

Claimant's symptoms abated until July 1979 when additional drainage occurred. Further debridement was undertaken and claimant had a pedicle flap.

In December 1979 claimant had drainage over the dorsal ulnar aspect of the wrist. Tetracycline was prescribed for local application.

Claimant was seen in April 1980. Her hand and wrist were healed and there was good retention of flexion. Claimant continued to have other complaints.

In June 1980 Dr. Cooney wrote that after the arthrodesis claimant had a soft tissue infection which required treatment. He expressed the feeling that claimant was capable of returning to work with unrestricted use of the right hand and wrist.

In a letter dated July 22, 1980 Dr. Cooney rated claimant's impairment at thirty percent of the upper extremity. A letter of November 12, 1981 extended the impairment to forty percent.

R. G. Van Dellen, M.D., saw claimant on July 14 and November 30, 1978. He listed drug allergies to penicillin, Carbenicillin and Chloromycetin. It was the doctor's opinion that claimant's wrist problem was not an allergy problem.

Harry A. Swedlund, M.D., first saw claimant on March 17, 1980. His letter of March 19, 1982 refers primarily to treatment by the consultants. A pustular eruption was viewed by the dermatologist as a dry folliculitis. A gastroenterologist was reported to feel claimant had irritable bowel syndrome.

W. James Metzger, M.D., assistant professor at the University of Iowa Medical School who specializes in internal medicine with a subspecialty in allergy and clinical immunology and who is a fellow in the American Academy of Allergy and Immunology, testified that he first saw claimant March 16, 1982 with diagnoses of "1) extrinsic asthma; 2) history of Keflin, Carbenicillin and Erythromycin allergey; 3) irritable bowel syndrome; 4) fibrocystic breast disease; 5) status post chronic osteomyelitis, right wrist; and 6) history of idiopathic edema."

Claimant returned on April 1, 1982 for a Methacholine aerosol challenge which the doctor described as:

a test designed to show hyperreactive airways in asthmatic patients or other patients that have hyperreactive airways. Methacholine is an analogue of acetylcholine, which is a neuro transmitter and can trigger airways which are hyperresponsive to respond with bronchospasm.

And a certain segment of the population seems to be very responsive to small doses, whereas those that we call normal respond either not at all or to very high doses of Methacholine drug.

Claimant underwent this test on two occasions because she had taken theophylline the first time and there was concern that the test results were invalid. The test was positive the second time in that claimant's lungs were hyperresponsive. She had complete reversibility of her induced airways obstruction after two inhalations of Albuterol. The physician said that such a result is not necessarily diagnostic of asthma. Other testing evidenced an atophy or allergic predisposition. Atophy was defined by Dr. Metzger "as those people [sic] that respond to skin testing to multiple inhalant allergens or environmental allergens, and in most cases would have an elevated serum IgE level along with it and in most cases would also have a family history for allergy." He stated that claimant had no family history of allergy. On testing claimant had positive reactions to house dust; house dust mites; dog, cat and horse epithelium; and feathers. A minor reaction was produced to cow epithelium. Other substances tested were listed as:

grass mix, alternaria...ragweed, horse, corn meal, early tree mix, aspergillus, cat, Russian thistle, hog epithelium, tobacco, late tree mix, hormodendrum.

Then we have helminthosporium, Penicillium, mite, and pullularia. And then as controls, we use codiene, histamine, and diluant, diluant [sic] being a negative control. And then in addition to that, we also added skin tests to turkey, banana, and cow's milk.

The doctor agreed that food skin tests are unreliable in adults. He was asked:

Q. If it has been discovered that Mrs. Jacobs in eating either chicken or turkey or fowl has become very ill doing so, would your tests that you've been able to take disprove that she has this type of reaction or she is not allergic?

A. Not absolutely.

Q. So you just use the best test that you could under the circumstances?

A. That's right.

Q. All right. So if another doctor would say that, 'We've done this type of testing and she does show an allergic response,' you're not here to argue with him about that?

A. I would say that assuming the tests were done under controlled conditions, that would be a reliable test.

Dr. Metzger recalled claimant's allergy history as beginning in 1974 when she was working as a lab assistant. He said that in most instances atopy would appear early in life. He testified:

Well, I think we usually assume that atopy or allergy is in the classical situation, typical situation, is related to at least the family predisposition, and that predisposition is such that when one encounters environmental allergens, the person will easily form IgE antibody and that IgE antibody then in large amounts directed at specific allergens will make the person susceptible to allergic reactions.

He believed the condition could be improved with medication and under adequate treatment should not worsen to significant degree. A part of the treatment is avoidance of known allergens and also nonspecific irritants such as dust, aerosol or fumes which can trigger the development of bronchospasm. He thought it unlikely claimant could develop further allergies assuming there was no

change in her exposure or no unusual exposure to allergens in large degree.

Dr. Metzger believed claimant's medication had helped her in a general way. He characterized claimant's condition as between mild and moderate.

Dr. Metzger expressed the opinion that claimant's asthma is for the most part allergic asthma.

The doctor believed that the gastroenterology department had concluded claimant had an idiopathic hyperreactive bowel; i.e., a bowel "hyperresponsive to anxiety or stress, probably sometimes ingestants." He did not think the bowel condition is related to allergies or asthma.

As to whether or not allergies might be related to stress, Dr. Metzger said that while generally allergies are not thought of as caused by stress, bronchospasm might be worsened by stressful situations. More specifically, he did not believe stress was a factor in claimant's allergies. Such things as pets might cause claimant problems and smoking might act as a nonspecific irritant which would increase airway activity. The physician thought that a clean office would be an appropriate place for claimant to work or any job "where there was not a great deal of exercise or significant amount of exposure to non-specific irritants or specific allergens." More specifically he identified such things as cigarette smoke, heavy dust, powders or aerosols. The doctor believed claimant should permanently avoid dusty environments and animal and irritant exposure.

> As to causation the allergist wrote:
> It is impossible to determine with certainty the relationship of Mrs. Jacobs [sic] allergies to her work. However, it should be noted that she had no trouble until she developed severe diarrhea at work while working with ascaris. It is possible that her damaged intestinal mucosa allowed her to become sensitized to the allergens she was exposed to at that time. However, this is only conjecture on our part. We can not associate her asthma with her wrist injury, although her drug reactions occurred when she was given medication to treat this problems [sic].

He was questioned:

> Do you still agree with that statement in your report?
>
> A. I agree in the sense that any attempt to suggest a cause and effect relationship between the certain parts of her work initially, referring specifically to ascaris infection, and any resultant allergies or asthma would be highly conjectural.

Later he stated: "I think that the heavy exposure to animal danders and protein mite does seem to be related in a time sequence to the onset of her symptoms." He attributed no disability to drug reactions. Regarding her gastrointestinal problems he testified: "I think her overall syndrome fits the diagnosis of irritable bowel more than it does the allergic picture because by history, she suggested to us that elimination diets, for example, had not changed her symptomatology."

APPLICABLE LAW AND ANALYSIS

The first issue to be decided is whether or not there is a causal relationship between claimant's injury of September 30, 1977 and her present disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 30, 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. "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. Id at 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, 257 Iowa 516, 133 N.W.2d 867. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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.
>
> 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.

On October 20, 1977 defendants filed a memorandum of agreement which lists claimant's injury as a severe immune response and indicates that claimant's disability commenced on October 1, 1977.

As the case law above reflects, the matter of causal relationship is one for expert medical testimony. It is well to keep in mind that claimant first had trouble when she was working with ascaris in 1974. She had additional problems when her wrist was penetrated and she was spurred by a rooster. Claimant ceased working in September 1977. Claimant has gastrointestinal symptoms.

Dr. Gartin, claimant's family and treating physician, views claimant's allergy problems as commencing with her response to ascaris and being aggravated by her wrist injury in 1975. Later he wrote, "I think it is a matter of conjecture whether or not the septic wrist, which has been operated repeatedly, was purely bacterial or if indeed an antigen antibody reaction was also involved." He stated that "certainly her employment aggravated the allergic condition that did probably start at work." Dr. Gartin was unable to separate out what aspects of the gastrointestinal problem were related to the allergic reaction and what weren't related; however, he thought stress "produced by all of this" could aggravate the gastrointestinal problems.

Dr. Cooney, hand surgeon at the Mayo Clinic, and Dr. Van Dellen of the allergy service, did not believe claimant's wrist problems were allergic in origin.

Dr. Caffrey related claimant's symptoms to her occupation.

Dr. Metzger, who noted that claimant had drug reactions to medications used in treating her wrists, did not think there was a causal connection between the ascaris infection and claimant's allergies. He said that he had no direct experience that ascaris could lead to such problems, but he testified that he had been told by others it would be highly unlikely. He did not believe stress a factor in claimant's allergies and her testimony was that neither did she.

He did not believe claimant's gastrointestinal trouble was related, but he said allergies to food could affect the gastrointestinal tract. Interpreting what was done in the gastroenterology department, Dr. Metzger traced claimant's gastrointestinal problems to anxiety or stress and sometimes to ingestants. Dr. Metzger thought claimant's symptoms were more compatible with an irritable bowel syndrome than with allergy as elimination diets did not change her symptoms.

Dr. Gartin seemed unsure about claimant's gastrointestinal problems. To some degree he attributed them to stress. Claimant herself testified that stress does not affect her allergies.

Dr. Metzger, a board certified allergist and immunologist, testified convincingly that claimant's gastrointestinal troubles were related to irritable bowel syndrome. Any disability which claimant has that comes from her gastrointestinal system is not related to the incidents in her employment.

Claimant's injury is a severe immune response. The record viewed as a whole establishes that claimant has disability related to a severe immune response.

The remaining issue is the extent of claimant's 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. 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."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, ___, cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered....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 industrial commissioner frequently has stated:
>
> 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 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.

Functional impairment of claimant's upper extremity ranges between seventy-five to eighty percent assigned by Dr. Gartin who gives consideration to things other than range of motion, and forty percent by Dr. Cooney. According to the AMA Guides, a forty percent impairment of the upper extremity translates to twenty-four percent of the body as a whole. As Dr. Cooney is a specialist in hand surgery, greater weight will be given to his opinion. Dr. Cooney also stated that "[t]here are no limitations as to the amount of weight that can be lifted with the wrist nor are there any specific limitations related to active motion of the fingers and overall use of the hand."

Dr. Metzger assigned no impairment rating to claimant's allergies, but he believed claimant should permanently avoid dust and animal or irritant exposure.

Claimant is an older worker, but she has a good education. As Dr. Smith points out, she has both an ability to learn new techniques and to work on her own. Most of her job experience has been in the laboratory, but she has done work with people in both the church and in the figure salon. Claimant presented herself at the hearing as both pleasant and well-spoken.

Claimant was evaluated by Dr. Smith who considered her disabilities to be in her hand and her allergies and who did not consider her motivation. He conducted an interview and took information from claimant regarding her medical treatment. His evaluation was directed to lab work and did not give consideration to claimant's work experiences in other areas. Dr. Smith's testimony is not very helpful in that it does not tell the undersigned what claimant might be able to do in a lab. Obviously laboratory work is varied and can range from performing hysterectomies on worms to doing blood typing. The work can be performed in dusty animal pens or in the sterile environment of an isolation cell.

Dr. Gartin expressed his belief that claimant should not work in sensitizing and concludes that claimant cannot work in the field in which she was trained. The only specific reference he makes is to sensitizing. Dr. Gartin seems the sort of physician who would cater to claimant's doctor dependency. He gives her a poor prognosis. Lesser weight is given to his opinion in that the specialists claimant has seen are more experienced in dealing with claimant's particular problems. Dr. Gartin may to some degree be responsible for claimant's failure to try to work in light of his negative perspective in this case. Dr. Metzger thought a "clean office" an appropriate place for claimant to work. Claimant continues to smoke. Her smoking places an irritant in the environment which apparently she is able to withstand. Claimant uses her mask as she does some of her housework and to jog. Conceivably she could use a mask to travel to and from work. Dr. Van Dellen viewed claimant's allergies as under good control within her maintenance program. Claimant last saw Dr. Gartin in 1981. Claimant can avoid her asthma problem by avoiding irritants.

Claimant's motivation to return to work is questionable. She did go to her former employer who deferred to Dr. Gartin's judgment. Claimant appears to be a person with much to offer others. It is a shame for her talents to go unused. Heavy consideration is given to claimant's failure to seek work. Had she attempted to work and experienced increased symptomatology, her industrial disability might be greater.

After reviewing the Iowa case law cited herein, the findings of fact listed below and considering the analysis set out in this section, the undersigned concludes that claimant has a permanent partial industrial disability of fifty percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is fifty-four years of age.

That claimant has a high school education and two years of college.

That claimant is a graduate medical technologist.

That claimant worked a number of years ago in hospital laboratories.

That claimant also has had work experience as a director of children's activities and as an assistant in a figure salon.

That claimant had instances of eye irritation, lightheadedness and diarrhea when she was working with ascaris.

That claimant's wrist was penetrated by a wire in 1975.

That in 1976 claimant began to be bothered by dust in the animal pens and by chemicals.

That in August 1977 claimant was spurred by a rooster.

That claimant had a number of wrist surgeries related to her wrist injury including debridements, arthrodesis with graft, an extensor tenolysis, synovectomy, a Z-plasty and a pedicle flap.

That claimant has had reactions to both foods and drugs.

That claimant ceased working in September 1977 because of a severe immune response.

That claimant's injury is a severe immune reponse.

That claimant has an irritable bowel syndrome which is not related to her injury.

That claimant is cautious being around animals, libraries, places with pets and outdoors under some circumstances.

That claimant has an air cleaner in her home and sometimes uses a mask.

That claimant continues to smoke.

That claimant's present medications are aminophylline, Alupent, Vanceril, Chlorpheniramine, Pred Mild, Drixoral, epinephrine and Librax.

That claimant's treatment program for her allergies is maintenance in nature.

That claimant has loss of strength and loss of motion in her right wrist.

That claimant discussed the possibility of employment with a member of the personnel department at Iowa State.

That prior to claimant's problems with allergies and her wrist, she had an unrelated exploratory laparotomy, hemorrhoid surgery, dilation and curettage and mastectomies with related psychological problems.

That claimant has idiopathic cyclic edema, a diaphragmatic hernia and a hiatal hernia which are unrelated to her injury.

That claimant had no trouble with her right arm or wrist before 1974.

That claimant should avoid known allergens and nonspecific irritants.

That claimant has disability related to her severe immune response.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

That claimant's injury of September 30, 1977 is the cause of the disability on which she now bases her claim.

That claimant has a permanent partial industrial disability of fifty (50) percent.

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant two hundred fifty (250) weeks of permanent partial disability at a rate of one hundred forty-six and 42/dollars ($146.42) beginning July 24, 1980.

That defendants receive credit for the payment of benefits previously made.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 11th day of February, 1983.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

IN RE DECLARATORY RULING OF JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Petitioner.	:	D E C L A R A T O R Y R U L I N G

On January 19, 1983, John Deere Dubuque Works of Deere & Company petitioned for a declaratory ruling as follows:

(1) The Petitioner is Deere & Company, doing business as John Deere Dubuque Works, P.O. Box 538, Highway 386, Dubuque, Iowa.

(2) The factual situation involved in this request for declaratory ruling is as follows:

In 1980, the Iowa legislature passed Chapter 85B, Code of Iowa, known as the "Iowa Occupational Hearing Loss Act". Section 85B.8 of that Chapter purposts to provide "events" which constitute the "date of occurrence" within the meaning of Section 85.26(1) of the Code. It attempts to define these "events" for claims arising both before and after the effective date of the Act.

The Petitioner has employees who have experienced more than one of the "events" described in Section 85B.8. For example, an employee worked in an excessive noise level area for ten years, from 1965 to 1974, and is still an employee. Another employee worked in an excessive noise level area from 1965 to 1975 and retired or was terminated in 1981. In each case, the employee's work subsequent to 1975 did not involve excessive noise levels.

(3) The rules, statutes or orders applicable to the questions presented are Chapter 85B, specifically Section 85B.8, and Chapter 85, specifically Section 85.26(1), Code of Iowa (1981), as amended.

(4) The questions to be answered by the declaratory ruling are as follows:

(a) Assume that an employee prior to January 1, 1981, sustained an occupational hearing loss due to work in excessive noise level areas; assume that said employee was transferred from the excessive noise level more than two years prior to January 1, 1981; and assume further that he is still an employee with the employer. When is the "date of the occurrence of the injury" for purposes of the statute of limitations on his claim?

(b) Assume an employee suffers an occupational hearing loss after January 1, 1981, and is transferred from an excessive noise level area; assume further the employee retires or is terminated from employment or is laid off more than two years after his transfer from the excessive noise level area. When is the "date of the occurrence of the injury" for purposes of the statute of limitations on this claim?

(5) The Petitioner suggests that the Commissioner find that the date of injury in each of the questions above would be the date the employee was transferred from excessive noise level employment rather than the employee's retirement, termination or date of layoff.

Petitioner believes the legislature intended to provide that the date of injury would be the earlier of the specified events for occupational hearing losses sustained both before and after the effective date of the Act. Any other interpretation makes the inclusion of the "transfer" event meaningless. In other words, if an employee has two years from the date of his retirement or termination, or from six months after a layoff which lasts longer than a year, within which to bring a claim for occupational hearing loss, why include the date of transfer from an excessively noisy area, which necessarily occurs during employment, as a "date of injury"? This event must occur prior to retirement, termination or layoff.

WHEREFORE, the Petitioner respectfully requests a declaratory ruling from the Iowa Industrial Commissioner pursuant to Section 17A.9 of the Iowa Code and Chapter 500-5.1 of the Iowa Administrative Code.

Section 85B.8 states in full:

> A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:
>
> 1. Transfer from excessive noise level employment by an employer.
>
> 2. Retirement.
>
> 3. Termination of the employer-employee relationship.
>
> The date of injury for a layoff which continues for a period longer than one year shall be six months after the date of the layoff. However, the date of the injury for any loss of hearing incurred prior to January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

The petition construes §85B.8 to mean that the earlier of the three listed events determines the date of occurrence for the purpose of beginning the statute of limitations under §85.26(1).

The plain meaning interpretation of the statute would agree with petitioner's construction. Thus if a worker who has been exposed to permanent sensorineural hearing loss as defined under Chapter 85B is transferred from the area of exposure to another, non-exposure area, the statute of limitations under §85.26(1) would begin to run at the occurrence of such a transfer. That is, the worker could later retire or otherwise terminate the employment, but the statute of limitations would begin at the time of his transfer rather than at either the retirement or termination date. Likewise, if the employee was never transferred and if the employee was exposed to excessive noise levels as defined in Chapter 85B, he or she could work several years in that occupation and the statute of limitations would not begin to run until the employee's retirement or termination of the employment relationship because one or the other was the first event to trigger the statute of limitations.

The construction that "any" means "first" also agrees with Webster's New World Dictionary of the American Language, College Edition, which defines "any" as "one (no matter which) of more than two: As, any boy may go ...." Thus, "no matter which" of the three events occurs first, it is that event which starts the statute of limitations.

WHEREFORE, it is hereby ruled that under §85B.8, Code of Iowa, "any of the following events" means the first of those events which occur in time.

Signed and filed at Des Moines, Iowa this 17th day of February, 1983.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARJORIE M. JOHNSTON, Claimant, vs. DES MOINES GENERAL HOSPITAL, Employer, and BITUMINOUS INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 540245 A P P E A L D E C I S I O N

On March 28, 1983 the defendants' appeal of a ruling overruling defendants' motion to reopen the record came on for determination.

On January 18, 1983 a deputy industrial commissioner, before whom this matter is pending for determination on the merits, entered a ruling denying defendants' request to reopen the record to gather and submit additional evidence in the main action. Defendants appealed from this ruling on January 21, 1983. On January 28, 1983 defendants filed a request for taking additional evidence on appeal. On February 4, 1982 claimant filed a resistance to the request for taking additional evidence. On March 1, 1983 the undersigned entered a ruling denying defendants' request to take additional evidence from which defendants petitioned for judicial review.

As the ruling on the request for taking additional evidence is not dispositive of the entire appeal of the denial of the motion to reopen, although the effect may be the same, a telephonic hearing was conducted on this day with attorneys for the claimant, defendant and the undersigned to determine if the matters on appeal to the agency could be concluded so that it was clear that all action by the agency regarding the appeal from the ruling of the deputy denying the motion to reopen the record was final.

Review of the record regarding this matter on appeal reveals that the recitation of the sequence and substance of events as disclosed in the ruling of the deputy entered January 18, 1983 is appropriate.

WHEREFORE, the ruling of January 18, 1983 denying defendants' request to reopen the record should be affirmed.

THEREFORE, the relief requested by defendants on appeal of the ruling is denied.

Signed and filed this 28th day of March, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARROLL C. KALVIG, Claimant, vs. MANLY FARM STORE, DIVISION OF KENSETT STEEL, INC., Employer, Defendant.	:	File No. 686209 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from a proposed arbitration decision filed April 12, 1982 wherein claimant was awarded healing period benefits plus related medical expenses for an alleged industrial injury occurring on October 21, 1981.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Alexander Heagel, Evelyn Heagel, Adam Heagel, Jeff Abben, and Steve Heagel; claimant's exhibits 1 through 10 inclusive; defendant's exhibits A, C, D, E, and F; and the briefs and exceptions of both parties on appeal.

ISSUES

The issues on appeal are whether an employer-employee relationship existed, and if so whether claimant sustained an injury arising out of and in the course of employment, and if so the proper rate of compensation.

REVIEW OF THE EVIDENCE

Review of the record on appeal reveals claimant was an employee of one of defendant's suppliers prior to working for defendant. Claimant earned his livelihood in sales previously and entered into a contract with Alexander Heagel whereby he would sell farm products and grain bins for defendant. Inasmuch as claimant was inexperienced in the sale of farm goods, he was to receive $300.00 per week as an advance on draw against future commissions. (Transcript, p. 70) Claimant was also provided with a leased vehicle and gasoline by defendant. (Tr., pp. 12-13) Claimant requested that taxes and social security not be withheld by defendant. (Tr., p. 234)

Claimant began working as a sales person for defendant on August 30, 1981. Defendant expected claimant to work regular hours throughout the week although he frequently worked additional hours on his own. (Tr., p. 214) Claimant testified on direct examination:

> Q. Did you have any fixed hours of employment, sir?
>
> A. Yes, I sure did.
>
> Q. Can you tell us what those hours were?
>
> A. I was told I had to show up in the morning and work out of the office. My hours started out at nine in the morning until five, and then nine till twelve, but I changed the hours to eight to five, and everybody started comin' at eight to five when I started comin' at eight. (Tr., p. 11)

Claimant would often be given a list of names and would be told to use the phone on the premises to get leads on sales. Claimant maintained no place of business himself. Claimant also helped in the construction of grain bins to familiarize himself with defendant's business so he would be able to give accurate materials and construction price estimates to prospective customers. When claimant participated in construction jobs, he did not supply his own tools. Claimant also picked up supplies for a construction job on one occasion. On many occasions, claimant was left alone at defendant's place of business conducting over the counter sales.

Claimant did not employ any assistants. (Tr., p. 52) Defendant had the right to terminate claimant's employment at will. (Tr., pp. 52, 115-116) Claimant also considered Alexander Heagel his supervisor with the right to control how work was performed. (Tr., pp. 13-14) This control was substantiated by Jeff Abben another individual defendant regarded as an independent contractor. (Tr., p. 181)

The extent of defendant's control over the claimant is further illustrated by claimant's testimony as to his activities on October 21, 1981, the date of his alleged injury. Claimant testified:

> A. I showed up for work in the morning, and I was told I had to go out and help put up this auger. I don't know whether it's originally called an auger. But it's an auger on top of a bin. We went out there. I believe I took Jeff and Alex took Adam. I don't remember. Both the Volkswagen trucks went out there. And we were told we had to put up this auger. We waited for a crane to come out to lift the auger up over the bins, because it was like thirty some feet in the air. I don't know exactly how high it was.
>
> * * *
>
> Q. Had you had any contact with the owner of this particular farm before?
>
> A. I never have had any contact with the owner.
>
> Q. Who gave you some indication that you were to go to this particular location?
>
> A. Alex Heagel.
>
> Q. And what was your understanding of your task once you arrived there?
>
> A. Well, I was told to get up on top of the bin,

> and there was one of us at each end of the bin, I believe, and I think maybe one in the middle at some particular time, and we were puttin' nuts and bolts . . . (Tr., pp. 29-30)

At all times material hereto, claimant was enthusiastic, willing to work, and repeatedly volunteered for many assignments in order to "learn the ropes." Although claimant worked only a short time for defendant before his injury, there is no indication that claimant worked for anyone else but the defendant.

On October 21, 1981, claimant was assisting in the construction of a grain bin at the direction of his employer. Claimant was assisting in the installation of an auger which stretched between three bins. (Def. ex. D) Claimant was physically located on the center bin when he allegedly caught his foot in a safety ring near the top of the bin and twisted his right knee. There is some dispute as to the existence of a safety ring on this bin but this dispute is immaterial to the resolution of the issue at hand as it is clear that claimant twisted his knee while atop the bin. Claimant descended to the ground and made a comment with regard to a catch in his knee. (Tr., pp. 32-33, 91, 171) Co-workers Adam Heagel and Jeff Abben also noticed claimant limping on that day. (Tr., p. 191) It is noted that emergency room records prepared by S. J. Laaveg, M.D., reflect a different type of employment injury on October 21, 1981. (Cl. exs. 2, 5) While there is no explanation for these varying accounts the physical findings and lay testimony all point to the occurrence of an injury while atop the bin. (Tr., p. 105)

Claimant went to the emergency room at the St. Joseph Mercy Hospital in Mason City on October 22, 1981. He was complaining of pain in his right knee upon extension. X-rays taken at that time failed to reveal any evidence of fracture or bone injury to the right knee. Dr. Laaveg examined claimant and minimal effusion of the knee was present. Claimant lacked the last 10 degrees of full extension and could flex his right knee to approximately 120 degrees. Dr. Laaveg's initial impression was that claimant had sprained his knee and had a possible internal derangement of that knee. Claimant was instructed to use crutches and given a prescription for pain medication. Elevation of the knee was also prescribed. On October 25, 1981 claimant returned to Dr. Laaveg. Claimant had a mild effusion and was unable to completely extend his knee without a great deal of pain and discomfort. He thought claimant had sustained a medial meniscal tear and made arrangements for claimant to be admitted to the hospital on October 30, 1981. (Cl. ex. 3)

On October 30, 1981 a partial medial meniscectomy was performed on the right knee. Claimant was released from the hospital on October 31, 1981. Dr. Laaveg told claimant to maintain elevation of his leg, then to increase his mobility and weight bearing accordingly. Dr. Laaveg saw claimant again on November 23, 1981 and claimant still complained of pain when he fully extended his knee. Claimant was told to gradually increase his activity and was admonished to perform exercises because he had not been doing them. Claimant returned to see Dr. Laaveg on December 22, 1981, when claimant reported "catching" and swelling of his knee. He had patellofemoral crepitus and chondromalacia of the patella. Claimant was released to return to work on January 4, 1982.

Dr. Laaveg, in a November 25, 1981 report stated that the injury is work related and is permanent. (Cl. ex. 3) The record indicates that claimant last worked on October 29, 1981, the day before he was admitted to the hospital. The medical evidence indicated that claimant could return to work on January 4, 1982 to the same or similar employment. Claimant was disabled from acts of gainful employment from October 31, 1981 through January 3, 1982.

Claimant, at all times material hereto, was married and had two minor children. He was not residing with them at the time of the injury.

The record indicates that claimant was paid a gross cash wage in addition to a vehicle and fuel. Claimant was only employed about two months prior to his injury, receiving $300.00 per week in addition to the use of a vehicle and fuel. (Def. ex. A) The deputy found the gross weekly wage to be $425.00 per week when adding the value of the lease of the vehicle and fuel. This was not disputed on appeal.

Claimant testified that he was to be paid wages only during a training period of three months. After that time, he would acquire additional independence and would be paid on a strict commission basis. (Tr., pp. 9, 25) According to the testimony of Steven Heagel, Alex Heagel's son and part-owner of defendant, claimant could have expected his yearly commission sales to approximate $50,000.00 per year. The record does not disclose whether claimant's earnings should have been expected to increase to this amount during the period of disability. (Tr., pp. 206-207, 224)

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. Iowa Code section 85.3(1).

Iowa Code section 85.61(2) and section 85.61(3)(b) states:

> 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 any employer, every executive officer elected or appointed and empowered under and in accordance with the chapter 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.
>
> "Workman" or "employee" shall include an inmate as defined in section 85.59.
>
> 3. The following persons shall not be deemed "workers" or "employees":
>
> * * *
>
> b. An independent contractor.

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

> This court has consistently held it is a claimant's duty to prove by a preponderance of the evidence he or his decedent was a workman or employee within the meaning of the law, and he or his decedent received an injury which arose out of and in the course of employment. See section 85.61, Code, 1962.
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

Given the above, the court set forth its latest standard for determining an employer-employee relationship in Caterpiller Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). The court stated in part:

> I. The employer-employee relationship. As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contact of service ... for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. McClure v. Union, et al., Counties, 188 N.W.2d 283, 285 (Iowa 1971). (Emphasis added.)

If a claimant has established a prima facie case for an employer-employee relationship, the defendant may assert the affirmative defense that claimant's decedent was an independent contractor. The test for meeting the burden of proof on this affirmative defense goes back to Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254 (1931), wherein the court states:

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

It is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship of independent contractor. Hassebroch v. Weaver Construction Co., 246 Iowa 622, 628; 67 N.W.2d 549, 553 (1955).

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on October 19, 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, 188 N.W.2d 283; Crowe, 246 Iowa 402, 68 N.W.2d 63.

"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, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

Iowa Code section 85.34(1) provides:

> Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer

shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first. (Emphasis added.)

Iowa Industrial Commissioner Rule 500-8.3 provides:

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. (Emphasis added.)

Iowa Code section 85.36 provides:

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:

1. In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings.

....

10. 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. (Emphasis supplied.)

ANALYSIS

The pleadings and hearing transcript in this matter reveal that the defendant chose not to assert an affirmative defense of "independent contractor." It is apparent from the record that the defendant could not prove such a relationship within the test of Nelson. On the date of his injury, claimant did not and could not employ assistants; he did not have his own tools or office; he did not have the right to control his own work; he was hired for an indefinite period and did not work elsewhere during the period; and sales tasks he performed were an intergral part of defendant's business.

The fact that claimant was in a "training period" at the time of his injury and would have greater independence after that period is noted. That fact, however, does not change the circumstances of claimant's relationship with the defendant on October 21, 1981.

Claimant has met his burden that he was defendant's employee on October 21, 1981. Defendant had the right to terminate claimant at will; the responsibility to pay claimant on a weekly basis; and the right to control what claimant did or sold for him. At all times, claimant was known as a worker and salesperson for the defendant alone. The intent of the parties is an overriding factor but not a controlling factor. Nor are labels which the parties choose to apply to their relationships.

Although the relationship of the parties may have changed at the completion of the training period and although the intent may have been that claimant act as an independent contractor after the training period, the relationship during the training period and at the time of the injury was that of employer-employee.

Claimant has also met his burden that his injuries arose out of and in the course of his employment. Testimony at the hearing overwhelmingly supports claimant's assertion that his injury occurred on October 21, 1981 while atop a grain bin. Dr. Laaveg's entrance of a different account into hospital records appears to have been done inadvertently. Dr. Laaveg's statement that claimant's injuries were caused by his employment remains unrebutted.

In his proposed decision, the deputy found claimant's weekly rate of compensation to be $255.57 based upon a gross weekly wage of $425.00. Neither party takes exception to that finding. The deputy properly refused to find a gross weekly earnings under Iowa Code section 85.36(10)(b). The period of disability proven thus far is insufficient to conclude that he would have been entitled to an increase in compensation after the end of the training period. Further, any increase in compensation would be based upon the ability of the claimant to generate sales which would be the sole source of his income. Nothing in the nature of this injury indicates that his ability to receive that income from sales would be diminished by the injury, thus the permissable increase in compensation is not applicable to this case. In that claimant's wages were based upon a fixed minimum prior to his injury and estimates of future earning capacity are purely speculative, the deputy's finding was proper.

Finally, the deputy awarded a healing period of nine and two-sevenths weeks. This was based upon the claimant's time off work before Dr. Laaveg's release and Dr. Laaveg's statement that claimant's disability was permanent although the extent of this disability was not determined. Neither party disputes the deputy's finding as to the date claimant was released for work.

Even though the medical evidence is undisputed that claimant's disability will be permanent, a finding of permanent partial disability cannot be found until there is evidence of permanent functional impairment. This is mandated by Iowa Code section 85.34. Until evidence as to the extent of permanency is offered, the nature of claimant's disability has only been proven to be temporary. It is noted that an award of temporary total disability may later be converted to healing period when an award of permanent partial disability is made. The future rights of the parties are therefore unaffected by a conclusion of temporary total disability.

FINDINGS OF FACT

1. That claimant was hired to sell farm products for the benefit of the defendant and was to be paid by the defendant on a commission basis.

2. That claimant was to be paid $300.00 per week as an advance on draw against future commissions in addition to the use of a vehicle and fuel during a three month training period.

3. That claimant did not provide his own transportation or tools.

4. That claimant was obligated to work during the regular hours of defendant's business and did not work elsewhere.

5. That claimant performed a variety of general tasks for the benefit of the defendant in addition to sales.

6. That the defendant could control the progress of claimant's work and had the right to terminate claimant's employment at will.

7. That claimant injured his right knee on October 21, 1981 while performing work atop a grain bin which work was for the benefit of the defendant.

8. That because of the aforementioned injury, claimant was unable to return to work again until January 4, 1982.

9. That the extent of claimant's permanent functional disability, if any, is unknown at this time.

10. That claimant's gross weekly earnings were $425.00 with four exemptions.

CONCLUSIONS OF LAW

That claimant has met his burden of proof that he was an employee of the defendant on October 21, 1981.

That claimant was not an independent contractor.

That claimant sustained an injury arising out of and in the course of his employment on October 21, 1981.

That claimant is entitled to temporary total disability benefits from October 21, 1981 through January 3, 1982.

That the proper rate of claimant's compensation is $255.57 per week.

WHEREFORE, the findings of fact and conclusions of law in the proposed decision of April 12, 1982 are proper as modified.

THEREFORE, it is ordered:

That defendants pay the claimant nine and two-sevenths (9 2/7) weeks of temporary total disability benefits at the rate of two hundred fifty-five and 57/100 dollars ($255.57) per week.

IT IS FURTHER ORDERED that defendant pay unto the claimant the following approved medical expenses:

St. Joseph Mercy Hospital (October 22, 1981)	-	$ 126.75
St. Joseph Mercy Hospital (October 30 to 31, 1981)	-	1,011.83
Radiologists of Mason City, P.C. (October 22, 1981)	-	10.00
Radiologists of Mason City, P.C. (October 30, 1981)	-	10.00
North Iowa Medical Center (November 23, 1981, reimbursed to claimant)	-	32.85
Surgical Associates (Dr. Laaveg)	-	840.00
Mileage	-	10.56
Reports	-	27.50

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.

Costs of these proceedings are charged to the defendant pursuant to Iowa Industrial Commissioner Rule 500-4.33.

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

Appealed to District Court; Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL KAUSALIK,

Claimant,

vs.

PAUL TWEDT AND PATTY TWEDT d/b/a ARROW DRUG,

Employer,

and

EMPLOYERS MUTUAL COMPANIES,

Insurance Carrier, Defendants.

File No. 625692

A P P E A L

D E C I S I O N

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STATEMENT OF THE CASE

Claimant appeals from a proposed arbitration decision filed May 21, 1982 wherein claimant was denied compensation benefits for an injury occurring on January 29, 1980.

On May 17, 1982 the above entitled matter was submitted to the hearing deputy by way of joint stipulation for the determination of whether claimant was an employee of Paul Twedt and Patty Twedt doing business as Arrow Drug on January 29, 1980 as contemplated by the Iowa Workers' Compensation Law.

On June 29, 1982, claimant's application for permission to submit additional evidence, filed June 23, 1982, was denied for failure to explain why the additional evidence sought to be submitted could not have been discovered and produced at hearing.

The record on appeal consists of the brief of the claimant on appeal and the joint stipulation filed May 17, 1982. That stipulation reads as follows:

COME NOW the parties and stipulate:

1. Paul Kausalik is a resident of Albia, Monroe County, Iowa.

2. Paul Twedt and Patty J. Twedt are husband and wife, reside in Albia, Iowa and operate a business in the City of Albia, Iowa known as Arrow Drug.

3. As part of their business, Paul Twedt and Patty J. Twedt sell wood-burning stoves.

4. Roadway Express, Inc. is a corporation and on January 29, 1980 delivered 15 wood-burning stoves in cartons to the Arrow Drug Store in Albia, Iowa.

5. The unloading of the wood-burning stoves in cartons from the truck was related to the business of Arrow Drug Store in Albia, Iowa in that Arrow Drug sold wood-burning stoves.

6. If Paul Kausalik was called as a witness, he would testify as follows:

a. On January 29, 1980 he was employed by the Monroe County Hospital at the pay rate of $5.50 per hour for 2000 hours per year, plus $56.00 every two weeks for being on call.

b. On January 29, 1980, Paul Twedt asked him if he would help unload 15 wood-burning stove cartons at the Arrow Drug Stores in Albia, Iowa from a truck owned and operated by Roadway Express, Inc. and driven by Carl Brown, an employee of Roadway Express, Inc.

c. On January 29, 1980, there was no employment or compensation agreement between Paul Twedt and Patty J. Twedt and him.

d. He has never received any wages, salaries or any other form of compensation from the Arrow Drug Store in Albia, Iowa.

e. He was not to receive any salary, wages, or compensation from Arrow Drug Store in Albia, Iowa for unloading the wood-burning stoves in cartons from the truck owned and operated by Roadway Express, Inc.

f. Roadway Express, Inc. and its driver, Carl Brown, did not request any assistance from Paul Kausalik.

g. The cartons were unloaded from the truck by placing one carton at a time on a hoist located at the rear of the truck.

h. The hydraulic hoist was owned by Paul Twedt and Patty J. Twedt.

i. Fourteen cartons were unloaded without incident.

j. The fifteenth and last carton "hung up" on the truck and flipped off the lift and landed upon Paul Kausalik.

7. The purpose of this Stipulation is to determine whether or not Paul Kausalik was an employee of Paul Twedt and Patty J. Twedt d/b/a Arrow Drug on January 29, 1980 and, if he was an employee, whether or not he was exempt from coverage under the Iowa Worker's [sic] Compensation Law.

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(2) defined the terms "worker" or "employee" as "a person who has entered into the employment of or works under contract of service, express or implied, or apprenticeship, for an employer . . ."

Claimant has the burden of showing an employer-employee relationship.

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.., 259 Iowa 1209, 146 N.W.2d 261 (1967).

McClure v. Union, 188 N.W.2d 283 (Iowa 1971).

> The word "hire" connotes payment of some kind. By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the compensation decisions uniformly exclude from the definition of "employee" workers who neither receive nor expect to receive any kind of pay for their services. Larson, Law of Workmen's Compensation, §47.41 at p. 8-255.

ANALYSIS

In his brief on appeal, claimant states:

> The Appellant does not question the Iowa courts adherence to those factors as set out in Nelson v. Cities Service Oil Company. A number of authorities support this position. However, a number of policy considerations strongly suggest that the law in Iowa should be expanded to include those in Kausalik's position.

While Iowa Workers' Compensation Law is, by its very purpose, to be interpreted liberally, claimant seeks to impose vicarious liability upon any business that benefits from the good intentions of passers-by. While it is unfortunate that claimant received any injury in return for his neighborly assistance, the legislature did not intend that Iowa Workers' Compensation Law provide a remedy in such circumstances. Iowa Code section 85.61(2) clearly intends that contract of employment be present. No such contract, express or implied, existed in the facts before us. Claimant was a mere passer-by who offered his assistance. By stipulation, no employment or compensation agreement ever existed; nor would it appear that one was ever expected. The admission of the stipulation itself seems to place claimant's acts outside the test of Nelson, supra.

Claimant asserts that the inclusion of Iowa Code section 85.36(10) is evidence that the lack of a compensation agreement is not determinative as to whether claimant was an employee of Arrow Drug. While this may be so there is still the necessity of a contract of service, express or implied, before section 85.36 may be applied.

An employment contract must exist for Iowa Workers' Compensation Law to provide a remedy. No such contract existed in the facts at hand. If claimant has a remedy, it must lie elsewhere. Legislative intent is clear.

FINDINGS OF FACT

1. On January 29, 1980, Paul Twedt asked claimant to help unload some wood-burning stoves at his drug store.

2. There was no employment or compensation agreement between claimant and defendants.

3. Claimant was not to receive any wages or compensation for unloading the wood-burning stoves.

4. While unloading the wood-burning stoves claimant was injured.

CONCLUSIONS OF LAW

That there was no contract of service, express or implied,

between claimant and defendant Arrow Drug.

That claimant has failed in his burden to prove that he was defendants' employee when injured.

That claimant is not entitled to compensation benefits as a result of an injury on January 29, 1980.

WHEREFORE, the findings of fact and conclusions of law contained in the deputy's proposed decision are proper.

THEREFORE, it is ordered that claimant is to take nothing as a result of this action.

Costs of this action are taxed to the defendants pursuant to Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 28th day of July, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD R. KEENER, Claimant, vs. DEN TAL EZ MANUFACTURING CO. Employer, and EMPLOYERS INSURANCE OF WAUSAU, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 620882/665192 R U L I N G O N M O T I O N F O R S U M M A R Y J U D G M E N T

Now on this day the matter of defendant Second Injury Fund's motion for summary judgment comes on for consideration. No resistance has been filed by claimant. A conference call was established for the hearing of this matter on May 4, 1983. The motion was considered fully submitted at that time.

Industrial Commissioner 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 with the commissioner's rules.

Iowa Rule of Civil Procedure 237 deals with summary judgments. The purpose of summary judgment is, of course, to provide for the prompt disposition of cases in which no genuine issue of fact exists and to avoid the time and expense of a trial. Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

The opinion of the Iowa Supreme Court in Drainage District No. 119 v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978) states:

> When a trial court is confronted with such motion ... it is required to 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 a material fact is generated thereby....

The burden is on the moving party to show the absence of any issue of fact and the court must see the circumstances of the case in the light most favorable to the party opposing the motion. Sand Seed Service, Inc. v. Poeckes, 249 N.W.2d 663 (Iowa 1977).

Iowa Rule of Civil Procedure 237(e) provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Claimant's petition filed October 4, 1982 alleges in the paragraph referring to the Second Injury Fund benefits a date[s] of first loss of December 17, 1979 and February 25, 1981; member[s] affected (first loss) hand, wrist and back.

Defendant Second Injury Fund (hereinafter SIF) filed a motion for summary judgment on April 15, 1983. Defendant SIF asserts that "the Second Injury Fund Act anticipates some degree of permanent disability sustained as a result of a prior--not simultaneous--injury to a specified member or organ followed by some degree of permanent disability to another specified member;" that "an injury to the back is not a specified or scheduled member or organ pursuant to section 85.64, The Code, and accordingly, is not a prior injury pursuant to said section," that "Claimant sustained no permanent disability of his back as a result of the December 17, 1979, injury;" that claimant's wrist injuries occurred simultaneously; and that no permanent disability exists in either wrist.

A memorandum of agreement received January 9, 1980 regarding the injury of December 18, 1979 shows claimant was paid two weeks and one day of benefits.

William F. Blair, M.D., examined claimant on March 9, 1982. He recorded a general job description of work requiring repetitive heavy lifting. The doctor learned at the time of deposition that an x-ray machine had fallen on claimant's hand in December of 1979.

The doctor said that when claimant was seen in March of 1982 he had complaints consistent with carpal tunnel syndrome which existed to the time of claimant's carpal tunnel release or "an incision in the palm which releases soft tissue structures which can compress the media [sic] nerve" on October 26, 1982. According to the doctor's recollection, claimant's symptoms got intermittently better then worse and persisted without development of objective evidence of carpal tunnel syndrome. EMG's and nerve conduction velocity tests were normal. The doctor thought claimant had complaints in both hands at the time of his initial visit, but that his right hand complaint dominated. As the doctor recalled, claimant had experienced some abnormal sensation in January 1981 when an injury to his right upper extremity occurred. The physician stated that claimant followed the general guidelines for recovery which are sutures and dressing for two weeks, commencement of light household activities at three weeks and full unlimited use of the hand at six to eight weeks. He considered claimant fully recovered after his surgery as of January 11, 1983. The doctor's notes from that date make mention of mild persistent tingling in the fingers of the left hand. He agreed that claimant's left hand would need to be watched. Dr. Blair had not seen claimant since January 11, 1983 nor did he anticipate seeing him.

Dr. Blair indicated that if claimant were to return to the same or similar work he could possibly experience returned symptomatology. In the event symptoms came back, job modification, splint or neuromodulation would be used as further surgery would not be appropriate. The doctor said that if claimant returned to repetitious work it would be possible for him to develop the same problem but not probable. However, he placed no limitation on claimant's use of his hand. He extrapolated from his notes that claimant has no permanent impairment of either the right or left hand. Dr. Blair testified that in his experience "[i]t's been more the rule than the exception that those males who are involved in relatively heavy activities who develop carpal tunnel syndrome in my experience have developed them bilaterally rather than one hand or the other."

Iowa Code section 85.64 has three requirements to bring it into play. The first is an employee who has either lost or lost use of a hand, arm, foot, leg or eye. The second is that the employee sustains the loss or loss of use of another such member organ through a compensable injury. The third is that there be permanent disability.

The evidence provided herein is that claimant had complaints in both hands at the time of his initial visit to the doctor, but complaints of his right hand dominated. The industrial commissioner has held that "[t]he commonly understood meaning of 'another member' does not include an injury to a portion of the trunk." Anderson v. Villas Feed Mills, 33 Biennial Report of the Industrial Commissioner 288, 289 (Review Decision 1978). The commissioner's decision was appealed to the supreme court, but the injuries to the trunk were not discussed. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). There was not a prior loss.

The third requirement is also not present. Dr. Blair says there is not permanent impairment.

Much evidence has been submitted in support of defendant Second Injury Fund's motion. The opinion in Jacobs v. Stover, 243 N.W.2d 642 (Iowa 1976) sites Goodwin v. City of Bloomfield, 203 N.W.2d 582 (Iowa 1973) for the proposition that entry of summary judgment is proper where the conflict concerns the legal consequences flowing from undisputed facts. That appears to the undersigned to be the situation here presented. Claimant does not resist defendant SIF motion and has offered no evidence which conflicts with that offered by defendant SIF's.

After reviewing all the material presented herein, this deputy industrial commissioner concludes the motion of defendant Second Injury Fund should be granted.

WHEREFORE, IT IS FOUND:

That no issue of material fact exists which would entitle the claimant to recover against the Second Injury Fund of Iowa.

That defendant Second Injury Fund of Iowa is entitled to a summary judgment as a matter of law.

THEREFORE, IT IS ORDERED:

That defendant Second Injury Fund of Iowa's motion for summary judgment is hereby granted.

Signed and filed this ____ day of May, 1983.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOUGLAS RAY KIEFER,	:	
Claimant,	:	
vs.	:	File No. 539861
A.B.C. CARTAGE,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
AID INSURANCE,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision wherein claimant was found to have sustained an industrial disability of 35 percent to the body as a whole.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Clark Borland, Patrick Weigel, and Dale Kaldenberg; claimant's exhibits 1 - 7 and 12 - 15; defendants' exhibits A and B; and the briefs and filings of all parties on appeal.

ISSUES

(1) Whether the evidence established an industrial disability range of 55 percent to 75 percent.

(2) Whether a spinal disc injury at L-5, S-1 is causally related to the truck wreck in which claimant was involved.

(3) Whether the injury to claimant's hip is a progressive deteriorating aseptic necrosis which will require a hip joint replacement.

(4) Whether medical expenses incurred for an EMG at Des Moines General Hospital on July 27, 1982, in the amount of $229 should be paid by the employer.

REVIEW OF THE EVIDENCE

The record establishes that at the time of the review-reopening hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $244 per week. It was also stipulated that the time off work had been agreed upon and previously paid, and that all previously accrued medical bills had been paid to the best of the parties' knowledge. (Transcript, pp. 3-4)

Claimant, who was 36 years old at the time of the hearing, is a graduate of Des Moines Technical High School where he ranked 579th out of 587 students in his class. The only additional training or education received by claimant was some classwork in auto mechanics at Lincoln Technical Institute, but he did not receive a certificate of completion.

Claimant was employed by defendant employer from 1969 until 1981. He worked primarily as a straight truck driver making deliveries to smaller Iowa communities, but was occasionally required to drive a semi truck. Claimant was involved in a motor vehicle accident on April 23, 1979 while driving for his employer, and was admitted at Des Moines General Hospital for injuries that he sustained. (Tr., pp. 5-8, 33-34) Claimant underwent surgery on April 23, 1979, and was released from the hospital on May 5, 1979. Final progress notes recorded by claimant's attending physician, Orville Jacobs, D.O., summed up the diagnosis of claimant's injuries:

ADMITTING DIAGNOSIS:	Posterior dislocation, left hip, with fracture dislocation of acetabulum.
FINAL DIAGNOSES:	Posterior dislocation proximal left hip. Fracture dislocation of acetabulum. 1. Multiple abrasions and contusions. 2. Full thickness laceration of left knee. (4 cm.). 3. Sciatic nerve injury secondary to posterior dislocation left femur and acetabulum. 4. Aseptic cellulitis from interstitial hemorrhage, calf of left leg. 5. Thrombophlebitis left calf.
OPERATION:	Reduction of posterior dislocation of left hip, 4-23-79
CONSULTATION:	Dr. McClain, Dr. Stein and Dr. LeMar.

SUMMARY: This 32-year-old white male was seen in the Emergency Room on 4-23-79 at 8:45 a.m. after being ariving [sic] by Rescue, after stating he was in a truck accident on Southeast 14th and Glenwood at 8:30 a.m. this date. He complained of pain in the left hip and knee. There was noted a full thickness laceration of the left knee. An abrasion over the left knee. The left foot was inverted. Abrasion was also noted on the right wrist.

Examination in the Emergency Room revealed an apparent posterior dislocation of the left hip and fracture dislocation of the acetabulum. The patient was seen in the Emergency Room by Dr. Rosenfeld who did accomplish the reduction of the posterior dislocation. The patient was admitted to the hospital for evaluation and definitive treatment.

....

After admission to the hospital, consultation was obtained with Doctor McClain and Rosenfeld in regard to the fracture dislocation.

Examination by Dr. Rosenfeld in the Emergency Room revealed the patient to have paraplegias in the left foot as well as inability to extend the toes. There was noted to be a foot drop present, prior to and after the reduction of the posterior dislocation.

After admission to the hospital, consultation was also had with Dr. Michael Stein, Department of Neurology with his impression being that the patient had a sciatic nerve injury secondary to his fracture dislocation of the left femur and hip. He

> felt that the patient was progressively coming along and starting to show some recovery at this point. He felt that he would recommend EMG studies in the next seven to ten days.
>
> Consultation was also obtained with Doctor LeMar of the Department of Surgery, with his impression being 1) aseptic cellulitis, from interstitial hemorrhage, 2) probable deep vein phlebitis, 3) no arterial insufficiency noted. (Claimant's Exhibit 13)

Claimant returned to work in November of 1979, however he was restricted to working on the loading dock where he used a forklift, two-wheeler, and hand jack to sort and load freight. He was unable to drive trucks due to the pain in the left hip and his inability to extend his left foot. Claimant testified that he was able to work on the loading dock regularly for a number of months, but in early 1981 the amount of freight handled by defendant employer began to decrease. In May of 1981 claimant was forced to leave his employment when all dock worker positions were eliminated due to the severe decline of the freight business. (Tr., pp. 8-9, 36-41)

Claimant continued to experience pain in his left hip and weakness of the lower left extremity. He was admitted to the hospital on May 31, 1981 under the care of David McClain, D.O. An EMG taken on June 1, 1981 revealed denervation of the left sciatic nerve. A lumbar myelography conducted on June 2, 1981 showed a filling defect at the L5 level, indicative of a herniated lumbar disc. Claimant was released from the hospital on June 4, 1981, and instructed not to return to work and to use crutches. (Cl. Ex. 13) An August 3, 1981 followup examination of claimant by Dr. McClain prompted the orthopaedist to write the following in a letter to claimant's counsel:

> It is my opinion he has sustained a herniated 5th lumbar disc as well as aspectic [sic] necrosis of the left hip.
>
> Doug has been advised to Vocational Rehabilitation re-training into a field other than manual labor. He should avoid lifting in excess of twenty-five pounds. His activity should be gauged to his tolerance. Although surgery is not advisable, at this time, a total joint replacement of the left hip may be a necessity at some future time.
>
> It is my opinion he has sustained a permanent partial impairment to the body as a whole in the amount of twenty-five percent. This could be further broken down as follows, per AMA rating book: lumbar spine, fifteen percent; lower left extremity, twenty-five percent. (Cl. Ex. 1)

Claimant was examined by several medical and vocational specialists at the Medical Occupational Evaluation Center at Mercy Hospital in Des Moines from March 8-11, 1982. Dr. Charles Roland, M.D., examined claimant on March 10, 1982, and reported:

> Physical examination of the lumbosacral spine: On standing, there is no kyphoscoliosis. Forward flexion is 85 degrees, extension 15, left lateral bend is 20 degrees, right lateral bend is 20 degrees. There is no tenderness on palpation in the low back region. The neurologic evaluation in the left and right lower extremity is as follows; motor examination is graded 5/5, sensory examination reveals slight numbness to light touch in the anterior lateral calf and the dorsal plantar lateral foot region in the region of the 3rd to the 4th toe. The deep tendon reflexes are 2+/2+ at the knees and 1-1+/0 at the ankles. He stands on his toes and heels without difficulty in a standing position. Straight leg raising test is noted at 0/0, bilateral, however, he does complain of hamstring tightness at 90 degrees. The lengths are equal.
>
> ....
>
> X-rays of the lumbosacral spine: This patient does have early lipping in the upper lumbar spine with a hint of L1 slight wedging. The interspace between L5 and S1 is poorly seen on the lateral, however, it does give evidence of some degree of narrowing. L4-5 is slightly narrow as compared to L3-4.
>
> At the left hip, he has early aseptic necrosis at the lateral aspect of the femoral head, however, there is no evidence of collapse.
>
> Discussion: I think this patient presently has reached a state of maximum recuperation in terms of healing of his neurologic deficit in the left lower extremity. He does have a problem in regards to his left hip which symptomatically may worsen in the future. I do not recommend any further treatment at this time. He does not demonstrate any neurologic deficit of any significance to suggest surgery in the lumbosacral region. I do believe, the patient can return to gainful employment, however, I do not think he can return to his former job such as driving a truck due to, not so much the driving, but moreso to the unloading and loading the trucks. I would restrict his lifting to less than 25 pounds.

Dr. Roland estimated claimant's disability to be eleven percent of the body as a whole, taking into account the left hip and back ranges of motion. (Defendants' Ex. A at II-2,3)

Dr. Alfredo Socarras, M.D., a neurologist who also examined claimant on March 8, 1982 reported that claimant complained of numbness and weakness in the left lower extremity, but denied any back pain. Motions of the lumbar spine were found to be within normal limits. Dr. Socarras estimated that from the neurological standpoint claimant's functional impairment to be five percent to the body as a whole. (Def. Ex. A at III-1,2)

Thomas W. Bower, LPT examined claimant on March 9, 1982. The physical therapist's report prepared by Bower included the following:

> Physical examination reveals a very flat lower back lumbar spine with minimal evidence of lordotic curve. Flexibility demonstrates forward flexion to 90 degrees, extension to 30 degrees, lateral flexion to the right of 15 degrees, and lateral flexion to the left of 20 degrees. The SI joint distraction test is negative. The patient demonstrates good abdominal muscle strength. He demonstrates level ASIS and PSIS joints, as well as greater trochanters. Straight leg raising is negative in the standing, sitting, and lying positions, with a negative Lasegue's maneuver. The patient does demonstrate some mildly tight hamstrings, bilaterally, with normal quads, hip flexors, and lumbar extensors. Reflexes of the patella are equal and symmetrical. The Achilles, bilaterally, appear to be sluggish as far as eliciting. Sensation is actually intact to light touch, with the questionable areas outlined above in the left leg from approximately knee level, and the fibular head down into the toes. Paresthesias are not a complaint. Muscle strength does not demonstrate and significant muscle strength loss. Quads, hamstrings, hip flexors, hip extensors, dorsi-flexors, plantar flexors, everters and inverters are all 5/5.
>
> ....
>
> As a result of the injury sustained, the patient has really not sustained any impairment as far as the back is concerned. He has only lost approximately 5 degrees of lateral side bend which would account for only a 1% impairment. The hip, however, should be and probably will be evaluated with the orthopedic guidelines by the orthopedist. I feel he can shed more light reviewing the x-rays, etc. (Def. Ex. A at VI-1,2)

In a July 8, 1982 letter to defendants' counsel, Paul From, M.D., medical director at the Mercy Medical Occupational Evaluation Center, revised the report's impairment rating by combining the eleven percent physical and five percent neurological disability ratings. According to the AMA Guides Combined Values Chart the resultant impairment rating of claimant was determined to be 15 percent to the body as a whole. (Def. Ex. B)

Claimant testified that had he continued to work for defendant employer his wages at the time of the hearing would have been $13.24 per hour. In July of 1981, following his hospitalization, claimant started working as a manager trainee at a Happy Joe's Pizza restaurant in Des Moines. Claimant's starting salary was $950 per month, but would have increased to $15,000 to $20,000 per year upon completion of the training program. He left the job at Happy Joe's after about one month, however, citing the erratic working hours and slick kitchen floor as reasons for quitting. On cross-examination claimant admitted that he had been under heavy stress during this period due to the premature birth of his first child on July 1, 1981 and its hospitalization. In October of 1981 claimant began working part-time as a sales clerk at Montgomery Wards. At the time of the hearing he was continuing to work at Wards thirty hours per week and was earning the minimum wage. (Tr., pp. 14-18, 26, 50-54)

Claimant was referred to RIDAC for psychological assessment and vocational evaluation in November of 1981. Ruth Lowe, who performed the twelve hour evaluation, concluded in her final report as follows:

> In conclusion, Mr. Kiefer's primary work experience in the past has been a truck driver....Based on evaluation results, plus the fact that client is presently working, apparently successfully in retail sales, suggest potential for such jobs as sales clerk,...or sales person, general merchandise,....If client wished to work at a higher level of sales such as sales representative, real estate, insurance, etc., he will need to improve his academics significantly. Certainly, Mr. Kiefer's verbal ability and personal appearance are appropriate for such jobs. As alternatives, dependent upon his physical tolerance, he might also be expected to perform successfully jobs related to his past experience, such as deliverer, car rental,...or escort vehicle driver....Another possibility might be crating and moving estimator,...but this job would require upgrading of present academic skills. (Cl. Ex. 2)

Two vocational experts testified at the hearing. Clark Borland, claimant's witness, testified that claimant could expect to earn between $3.35 and $6.00 per hour at the occupations suggested in the RIDAC evaluation. He calculated that claimant's income in the suggested range would be 55 percent to 75 percent less than if claimant had been able to continue to drive a truck at the union pay scale. (Tr., pp. 83-87) Borland further testified that claimant does not have the qualifications for managing a restaurant such as Happy Joe's due to his basic skills level, intellectual level, and the possibility of worsening of his physical condition. (Tr., p. 96) Patrick Weigel, defendants' witness, testified that claimant's basic skills were lacking in some respects, but that remedial courses taught at the community college could improve claimant's abilities within six weeks. Weigel stated that he believed claimant has a greater potential for return to full-time gainful employment than was expressed by Clark Borland. He testified that claimant could become competent

in the areas of commission sales and restaurant management, both of which could be financially rewarding. (Tr., pp. 116-120)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 23, 1979 is causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id. at 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, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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), 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), we 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.

Iowa Industrial Commissioner Rule 500-4.17 provides:

> Service of doctors' and practitioners' reports. Each party to a contested case shall serve all reports of a doctor or practitioner relevant to the contested case proceeding in the possession of the party upon each opposing party. The service shall be received prior to the time for the prehearing conference. 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).

ANALYSIS

The first issue on appeal is whether the evidence established an industrial disability in the range of 55 percent to 75 percent as opposed to the 35 percent figure found by the deputy. Claimant argues that the typical wage which he can expect to earn at jobs which he is able and qualified to do ($3.35 to $6.00/hr) is 55 percent to 75 percent less than what he would currently be making as a union truck driver. We do not find the prospects for the future employment of claimant to be as bleak as has been portrayed. Claimant procured employment with the Happy Joe's Pizza restaurant chain and would have made between $15,000 and $20,000 during his first year as a manager had he completed his training program. It appears from the record that family concerns, and not his partial disability, were the major cause of claimant leaving his job at Happy Joe's (claimant's first child was born prematurely at about the same time as he began the job, and required extensive hospitalization. Claimant indicated that he spent most of his time juggling a schedule to accomodate his work and visiting hours at the hospital). Claimant's fears about slipping on the floor at the restaurant would seem easily remedied by a more appropriate selection of shoes. Had claimant completed the training program his earning capacity would have decreased far less than 35 percent. In addition, claimant was able to perform as a dock worker for 19 months following having suffered his injuries without apparent problem. Even taking into consideration the fact that claimant could rest as he needed to, his working on the loading dock detracts considerably from the medical experts' opinions that claimant cannot handle similar jobs elsewhere. For the foregoing reasons, the deputy's finding that claimant is industrially disabled to the extent of 35 percent to the body as a whole is affirmed.

The second issue on appeal is whether claimant's spinal disc injury at L-5, S-1 is causally related to his truck accident. While the deputy failed to make any specific finding as to whether claimant's back problems are causally related to the truck accident, both Dr. McClain and Dr. Roland appear to believe that they are so related. It is noted, however, that the impairment ratings from both doctors were determined by combining the impairment to the hip and the impairment to the back. As such, an increase in claimant's industrial disability rating is not merited by the additional finding that claimant's back problems are causally related to his accident.

The third issue on appeal is whether claimant's injury to his hip is a progressive deteriorating aseptic necrosis which will require a hip joint replacement. While both Dr. McClain and Dr. Roland have indicated that claimant's hip may deteriorate in time, no further treatment has been suggested at this time. Further deterioration of the hip and its eventual replacement appears to be a possibility rather than a certainty at this point in time. While a finding of fact will be made concerning the possibility of a future hip replacement, such finding will not at this time affect the extent of claimant's disability award.

The final issue on appeal is whether medical expenses incurred for an EMG should be paid by the employer. As defendants have succinctly pointed out, Industrial Commissioner Rule 500-4.17 requires that the EMG report should have been served by claimant upon defendants prior to the hearing, and notice that such service had been made must be filed with this office. Because defendants assert that they received no notice of the EMG and the record is void of any notice of service upon defendants of any report therefrom, claimant's request to receive payment for the EMG from defendants is denied.

FINDINGS OF FACT

1. Claimant was injured in an industrial accident on April 23, 1979.

2. Defendants filed a memorandum of agreement on June 19, 1979.

3. Claimant returned to work for A.B.C. Cartage in November of 1979 and continued to work on the loading docks until May of 1981.

4. Claimant was layed off due to lack of work in May of 1981.

5. Claimant worked for Happy Joe's Pizza restaurant as a manager trainee during July and August of 1981.

6. Claimant could have earned between $15,000 and $20,000 during the first year after completing the Happy Joe's manager trainee program.

7. As a result of his industrial accident claimant has a progressive deteriorating aseptic necrosis to the left hip.

8. Claimant's left hip joint may have to be replaced in the future.

9. As a result of his industrial accident claimant has suffered a spinal disc injury at the L-5, S-1 level.

CONCLUSIONS OF LAW

Claimant has met the burden of demonstrating a permanent impairment to his left hip and back which are causally related to his industrial accident of April 23, 1979.

Claimant has sustained an industrial disability of 35 percent to the body as a whole due to the injuries sustained on April 23, 1979.

WHEREFORE, the deputy's decision filed October 20, 1982 is affirmed and it is ordered that:

Defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of two hundred forty-four dollars ($244) per week.

Accrued amounts are to be paid in a lump sum together with statutory interest.

Costs, to include forty-five dollars ($45) for Dr. McClain's reports, are to be paid by defendants.

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

Signed and filed this _____ day of June, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY KJOS,

Claimant,

vs.

BRIDAL FAIR, INC.,

Employer,

and

UNITED FIRE & CASUALTY CO.,

Insurance Carrier,
Defendants.

File No. 669529

A P P E A L

D E C I S I O N

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STATEMENT OF CASE

Defendants appeal from a proposed arbitration decision filed March 15, 1982 wherein claimant was awarded permanent partial disability and healing period benefits plus related medical expenses for an admitted industrial injury occurring on May 17, 1979.

Claimant filed a petition in review-reopening. The deputy's decision of March 15, 1982 is captioned as in review-reopening. However, the deputy indicated at hearing that because no memorandum of agreement had been filed, claimant's petition was deemed amended and considered to be in arbitration.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Vincent Jochum, Bruce Thiebauth, Robert Otis and William Rivedal; claimant's exhibits A through R inclusive; defendants' exhibits 1 through 6 inclusive; medical reports of Werner P. Jensen, M.D. and Patrick W. Bowman, M.D. filed November 19, 1981; and the briefs of all parties on appeal.

ISSUES

The issues as set forth in defendants' brief on appeal are the extent and nature of claimant's industrial disability, if any, and the corresponding entitlement to healing period benefits as a result of the injury of May 17, 1979.

REVIEW OF THE EVIDENCE

Claimant, single and age 32 at hearing, began a sales position for defendant employer in October of 1978.

The claimant's job was to introduce a radio station to the "Bridal Fair concept" and assist the station in setting up its own program and shows. As a part of this, claimant was required to travel throughout the continental United States, mostly by flying. (Tr., p. 14)

On May 17, 1979 claimant was in Cedar Rapids, Iowa for the purpose of assisting a radio station in Cedar Rapids with its program. (Tr., p. 14) From Cedar Rapids, claimant was to travel to Sioux City, Iowa to visit another radio station and it was determined by her supervisors that she would drive on this particular trip. (Tr., p. 15)

On May 17, 1979 while claimant was driving back to Sioux City, Iowa she was involved in an automobile accident which occurred at about Dexter, Iowa on Interstate 80. (Tr., p. 18) She was injured in this accident and was taken by a friend to the Methodist Hospital in Omaha, Nebraska arriving during the morning hours of May 18th. (Tr., p. 20)

Claimant next sought medical attention on May 21, 1979. (Claimant's exhibit M) Claimant was seen on that date by David Filipi, M.D., an office collegue of Dennis V. Passer, M.D., claimant's family physician. Claimant testified that Dr. Filipi took x-rays and prescribed pain medication. (Tr., p. 21)

Claimant remained off work two weeks before returning to her regular duties. (Tr., p. 22)

Claimant first consulted Dr. Passer for her current complaints on June 4, 1979. Claimant complained of pain in her neck, shoulders and lower back. (Tr., p. 22) Dr. Passer saw claimant again on nine occasions through February 7, 1980. (Defendants' exhibit 2) The only treatment throughout the period was pain medication. (Tr., p. 24)

In a brief report of May 23, 1980, Dr. Passer writes: "Nancy Kjos has a permanent defect of cervical strain. She has reached her maximum healing point. There are no special medical problems that add to her healing time." (Defendants' exhibit 2)

In a To Whom It May Concern report dated June 9, 1980, Dr. Passer states simply: "This is to verify that Nancy Kjos has a permanent Chronic Cervical Strain defect. (10%)" (Defendants' exhibit 3)

Claimant testified that throughout the period she continued to experience pain. She also complained of feeling increasingly tired and run down.

Dr. Passer referred claimant to David Minard, M.D., an orthopedic surgeon. Dr. Minard, in a report dated October 2, 1980, writes:

> I have seen Nancy Kjos upon a few occasions as an orthopedic consultant for Dr. Dennis Passer, the first time being June 10, 1980, concerning her back problem from the accident which occurred in May 1979. She was treated basically with physical therapy and the last time she was seen by me on July 18, 1980, she was asked to get the physical therapy when she absolutely needed it, when she was having severe significant pain in the intrascapular and parascapular areas. She was asked to return only if necessary. At this time it was evident that she was planning on returning to work in the very near future. I do not have any further information on her since I have not seen nor heard from since this time. (Claimant's exhibit N)

Claimant testified that on September 26, 1980, she left her employment with defendant for another position. (Tr., p. 28) Claimant testified:

> At that time I reached the capacity as to what I could physically do anymore. And according to Dr. Minard's suggestions that I find something else to do, that physically I just couldn't continue doing what I was doing without irritating the problem. In other words, it wouldn't get better unless I did something else and that was change jobs. (Tr., p. 33)

Claimant stated later that she took a position with Admerica, an advertising agency, because she would not be required to travel. (Tr., p. 71)

Bruce Thiebauth, president for defendant employer, testified at hearing as to claimant's resignation. Mr. Thiebauth testified:

> A. She indicated to me that she felt that she was no longer able to travel because of her injuries that she sustained in her accident. And because of that she felt that she would have to find less demanding employment that did not require travel.
>
> Q. Were there other factors that entered into that decision which had occurred prior to her leaving?
>
> A. On the basis of retrospect, I think there was other things that entered into it. Some dissatisfaction of her progress, a promotion that had occurred to one of her co-workers who had not been there as long as she had--although he had prior experience. (Tr., pp. 53-54)

Claimant was paid at a rate of $20,000 per year plus expenses for both jobs. (Tr., pp. 34-35) Mr. Thiebauth further testified that he encouraged her to either accept a lighter schedule or apply for workers' compensation benefits. (Tr., pp. 55-56) Mr. Thiebauth noted, however, that employees are often hired away by other advertising and media concerns because of superior salary. (Tr., p. 59)

William Rivedal, sales manager for defendant employer, testified that claimant was a good worker and that he offered her more money to keep her from leaving but that she had another job. (Tr., p. 68)

Claimant's employment with Admerica did not prove successful. Claimant testified that increased pain medication she was taking in late 1980 and early 1981 made it difficult to function at her job full time. (Tr., p. 37)

Robert Otis, Vice President of Operations for Admerica testified that claimant was discharged on March 5, 1981. Mr. Otis testified on direct examination:

> Q. What was the reason that Nancy left?
>
> A. I fired her
>
> Q. Why did you fire her?
>
> A. It was primarily--it was not so much of her lack of performance, but her ability to be there on a regular basis. It's a full-time job. And it's like I explained to Nancy when we parted company, you know, she just couldn't basically devote enough time to working on clients and getting leads, etcetera.
>
> * * *
>
> Q. How much, yes. What percentage of the time that you would consider to be full-time was she actually devoting to her duties?
>
> A. Well, Nancy has had some problems in the past with her back and everything else. And that was probably the biggest negative time factor on her part, because she'd get a pain and go to the therapist and then she'd be under medication. It definitely was the contributing factor. I'd say if you put it in a percentage of time, maybe two days a week. (Tr., pp. 64-65)

At the request of Dr. Minard, claimant was seen on January

23, 1981 by Ronald A. Cooper, M.D., a neurologist. Dr. Cooper's findings on examination are detailed in a report dated January 26, 1981. Dr. Cooper states in part:

> NEUROLOGICAL EXAMINATION: The patient is an alert, cooperative, young woman in no distress. The head and neck examination was unremarkable without bruit. There was full range of motion of the neck. The back examination revealed no tenderness over the spinous processes. She was able to bend at the waist past 90 degrees without difficulty. There was no sacral notch tenderness present. Straight leg raising was negative bilaterally. Patrick's sign was negative bilaterally. The cranial nerves were intact including fundi and fields. The motor examination revealed a normal gait. There was no drift of the outstretched upper extremities and individual muscle testing was normal. The reflexes were present, brisk and symmetrical throughout and the toes were downgoing bilaterally to plantar stimulation. Tests of coordination and sensory function appeared to be completely intact. (Defendants' exhibit 4)

In his second report of May 18, 1981, Dr. Cooper writes:

> I last saw the patient on April 8, 1981 and at that time she was complaining of more discomfort in the lower extremities that was diffuse and was worse in the thigh region. She also continued to have the chronic low back pain and the interscapular pain. Again I could find no evidence on examination of any neurological abnormality. A CBC, sedimentation rate, and chemistry profile including muscle enzyme testing was completely normal.
>
> * * *
>
> As noted above, the patient has continued to complain of somewhat diffuse musculoskeletal pain for two years. There is no evidence from the three times that I examined her of any true neurologic dysfunction involving the spinal cord roots, peripheral nerve, or the muscles themselves. It is difficult to prognosticate for recovery in view of the fact that she has had such diffuse pain for so long. The exact relationship of this discomfort to her accident is unclear though she tells me that this all started after this occurrence in May, 1979. (Defendants' exhibit 5)

On June 1, 1981, claimant was referred to Robert Jones, M.D., for psychological evaluation. In a report dated July 15, 1981, Dr. Jones writes in part:

> The patient was seen initially on June 1, 1981. She was referred to me by Dr. Dennis Passer, her family physician, who had been treating her since her car accident some two years ago.
>
> The diagnosis was made that she had a rather severe anxiety tension state with psychomatic [sic] type muscle spasms in the neck and shoulder and back regions. Also that she was still suffering to some degree from a stress reaction related to the accident. The treatment recommended was that she come in for bio-feedback training to help her get some degree of control over the tension and the muscles involved in her symptoms and possibly to have some psychotherapy, if it became apparent that this would be necessary.
>
> At the present time she seems to me to be unable to do the type of work that she had been doing. I am not certain whether she is disabled from any type of occupation at this time. (Claimant's exhibit Q)

On May 7, 1981, Patrick W. Bowman, M.D., an orthopedic surgeon, examined claimant. His report of the same date finds, in part, as follows:

> The physical examination reveals a very pleasant lady who walks without a limp or a list. Her pelvis and shoulders are level. She has a full range of motion of both her dorsal and her lumbar spine. Straight leg raising is negative bilaterally. Deep tendon reflexes of the knees and ankles are normally active. The extensor hallucis strength is strong bilaterally. She has some tightness of her hamstrings.
>
> I am in agreement that the primary pathology here is musculoligamentous in nature. She seems to be able to carry on with a fairly active lifestyle without too much difficulty, so I am somewhat at a loss, as to what further to offer her in the way of treatment for this condition.

In a follow-up report dated November 9, 1981, Dr. Bowman writes:

> It is my feeling that Nancy Kjos has some permanent impairment as a result of the injury she sustained on the 17 May 1979. In view of the failure to completely resolve her symptomatology after all of the standard conservative modalities for the past few years, it is my opinion that she has a 5 percent permanent partial impairment of the total body as a result.
>
> As I have indicated in previous correspondence, I think, in view of her residual, significant symptomatology that it might be a good idea to carry on with a Bone Scan and a myelogram. However, in that she has no evidence of nerve root compression per se on physical examination, I think these further studies would certainly be optional, aimed primarily at laying her and my mind to rest that nothing more serious than a chronic muscle-ligament strain is the underlying pathology.

On September 14, 1981, claimant started at a sales position for an Omaha radio station, a position claimant held at the time of hearing. (Tr., p. 41) Claimant testified that her salary was $1,200 per month plus commissions. (Tr., p. 42)

In a report dated September 3, 1981, Dr. Passer writes: "I received your letter of September 1, 1981 regarding Nancy. I do believe that she has reached maximum improvement following her accident. I believe she does have a permanent injury. I would estimate this at 10% permanent disability." (Claimant's exhibit M)

In a follow-up letter of October 30, 1981, Dr. Passer writes: "This is to verify that Nancy Kjos, a patient of mine was unable to work the period of time, extending from March 5, to September 1, 1981." (Claimant's exhibit M)

Werner P. Jensen, M.D., an orthopedic surgeon, examined claimant on November 2, 1981. Dr. Jensen notes claimant's history as to the present injury and another neck injury of 1962. Dr. Jensen also makes note of the reports of Drs. Passer, Minard, Jones and Bowman. (Defendants' exhibit 1) In his report of November 3, 1981, Dr. Jensen concludes:

> Examination of patient is negative for any objective evidence of residuals from the accident of May 17, 1979. On an organic basis, she has had a good recovery from the soft tissue injury sustained in the accident of 1979. I would not be qualified to give an opinion regards impairment she might have regards neurotic disorders such an anxiety depression, etc. [sic] I would not feel there is indication for further active orthopedic or neurological testing or treatment.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 17, 1979 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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 17, 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., supra.

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 had been accomplished, whichever comes first. (Emphasis added.)

Iowa Industrial Commissioner Rule 500-8.3(85) 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. (Emphasis added.)

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, 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 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. See Birmingham v. Firestone Tire & Rubber Co., Appeal Decision (1981).

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 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.

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. McSpadden v. Big Ben Coal Co., supra.

ANALYSIS

In the proposed decision of March 15, 1982, the deputy places the greater weight on the opinions of Dr. Passer because he was claimant's family physician. Dr. Passer, a general practitioner, was claimant's only physician until the referral to Dr. Minard in June of 1980. There is no evidence of treatment by Dr. Passer other than pain medication or even of any examination after February 7, 1980.

Dr. Passer states that claimant's permanent disability is 10 percent. He does not specify what the cause of the disability is, what the disability is limited to, or how such a rating was arrived at.

The November 9, 1981 report of Dr. Bowman, an orthopedic surgeon, (submitted by claimant after the hearing date) rates claimant's permanent functional impairment of 5 percent of the body as a whole. Dr. Bowman indicates that such a rating is based upon subjective complaints rather than upon objective findings.

Dr. Bowman's findings are confirmed by those of Dr. Jensen, also an orthopedic surgeon. Like Dr. Bowman, Dr. Jensen fails to locate any objective source of claimant's difficulties. His examination is the latest, and is based upon, according to the record at hand, a more complete history. His report also gives consideration to all other available opinions.

Likewise, the findings of Drs. Bowman and Jensen are substantiated by those of Drs. Cooper and Jones. The opinions of Dr. Passer apparently stand alone.

Pain, whether real or imagined, limits one's ability to engage in gainful employment. Moreover, claimant's discharge by Admerica points out that she has more difficulty in maintaining a full time schedule.

However, despite her complaints, claimant was able to return to full time employment two weeks after her injury and performed to the satisfaction of her supervisors. During this period, she was even able to secure a position with another firm. While she was off work from March 5, 1981 to September 14, 1981, she has apparently been able to work full time since without significant difficulty.

Claimant now does the same type of work that she performed for defendant employer and Admerica. While she may have lost her job with Admerica because of her injury, it is not altogether clear that her present lower salary is indicative of decreased earning capacity. Claimant is young, has a year of college, has a wide range of work experience, suffers little or no functional impairment, and is apparently capable of performing the same type job as before her injury. Given the foregoing, it is determined claimant suffers 10 percent permanent industrial disability as the result of the admitted injury occurring on May 17, 1979.

In the decision of March 15, 1982, the deputy awarded claimant healing period benefits from March 5, 1981 until September 14, 1981. This is the period from her termination at Admerica until she started with the radio station. Claimant testified that pain during the period made work impossible. The October 30, 1981 report of Dr. Passer states only that she was unable to work. Yet, Dr. Passer reports on September 3, 1981 that claimant has attained maximum medical recuperation. Dr. Passer had made such a conclusion earlier on May 23, 1980.

The fact that one continues to receive ongoing medical treatment or continues to experience pain which makes work difficult does not necessarily indicate that healing period continues. Again, claimant returned to work two weeks after her injury and continued working full time until March 5, 1981, more than 21 months after the injury. Iowa Code section 85.34(1) states that healing period terminates with the claimant's return to work. Application of this plain statute dictates that claimant's healing period must therefore terminate two weeks after her injury.

FINDINGS OF FACT

1. That claimant sustained an admitted industrial injury on May 17, 1979.

2. That as a result of the above injury, claimant was unable to engage in acts of gainful employment for two weeks at which time she returned to full time work.

3. That claimant left her job with defendant employer on September 26, 1980 to accept another position with Admerica at the same salary.

4. That claimant was discharged by Admerica on March 5, 1981 because of absenteeism caused by her pain.

5. That claimant did not work again until September 14, 1981 when she started a new job doing similar tasks at a salary of $1,200 per month.

6. That claimant suffers a permanent functional impairment of 5 percent of the body as a whole.

7. That claimant's complaints are wholly subjective arising out of the injury of May 17, 1979.

8. That claimant was 32 years old at hearing with one year of college and varied work experience.

9. That claimant suffers a permanent industrial disability of 10 percent.

CONCLUSIONS OF LAW

That claimant has sustained her burden that the disabilites alleged are causally related to an injury arising out of and in the course of her employment.

That claimant is entitled to two weeks healing period benefits at the stipulated weekly rate of $173.41.

That claimant is entitled to fifty weeks permanent partial disability benefits at the stipulated weekly rate of $173.41.

WHEREFORE, the above findings of fact and conclusions of law having been made.

THEREFORE, it is ordered:

That defendants pay claimant healing period benefits of a two (2.0) week duration at the rate of one hundred seventy-three and 41/100 dollars ($173.41) per week beginning May 17, 1979.

That defendants pay claimant a fifty (50) week period of permanent partial disability benefits at the rate of one hundred seventy-three and 41/100 dollars ($173.41) per week together with statutory interest pursuant to Iowa Code section 85.30.

That defendants shall pay the following medical expenses:

Dr. Patrick W. Bowman	$125.00
Physicians Laboratory Services	27.50
Dr. Robert Dale Jones	422.50
Walgreens Pharmacy	42.37
Physicians Pharmacy	75.58

That defendants are entitled to a credit against benefits previously paid.

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

That a final report shall be filed within twenty (20) days of the final payment.

Signed and filed this 27th day of July, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HELEN KLEIN,	:	
Claimant,	:	
vs.	:	File No. 506048
PURNAS ELECTRIC COMPANY,	:	A P P E A L
Employer,	:	R U L I N G
and	:	
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

On December 31, 1980 a combined decision in arbitration and review-reopening was filed by the hearing deputy. That decision also dealt with the disposition of certain medical expenses pursuant to Iowa Code section 85.27.

The relevant portion of that decision provided, in part:

> That defendants shall pay unto claimant the following medical expenses under the terms of Section 85.27 as it appears they acquiesced in the treatment offered:
>
> | | |
> |---|---|
> | Des Moines General Hospital | $3,007.19 |
> | Dr. McClain's charges for the last surgery | |
> | Prescriptions and related expenses | $34.00 |

The deputy's decision was not appealed by any party thereto and as a result became a final agency decision pursuant to Iowa Code section 17A.15(3).

On June 25, 1982 defendants filed a petition seeking a declaratory ruling. The substance of defendants' petition is concisely stated in their brief of July 30, 1982:

> The Claimant should submit evidence concerning the amount of the first hospital bill as well as which insurance carriers paid these bills. The Defendant Insurance Carrier does not object to paying the hospital bills to whomever they are owed; however, the Defendant Insurance Carrier objects to reimbursing the Claimant directly for bills she herself did not pay. Defendants should not have to do Claimant's work for her in order to ascertain which insurance carriers to include as co-payees with the Claimant in order to comply with Deputy Kelly's Order contained in his Decision filed December 30, 1980 [sic].

On July 7, 1982 the hearing deputy ruled that his decision of December 31, 1980 was res judicata as to the issues disposed of therein including medical expenses ordered. Defendants now appeal the deputy's denial of relief.

A review of the record indicates that the defendants were given notice that the claimant's medical bills had been paid by a non-party insurer. If there were questions as to these bills, the parties should have resolved those questions before hearing or the proper objections made during hearing. No objections were made to the medical bills in question, however, until after the deputy's decision of December 31, 1980 had become final. The defendants, by remaining silent, waived any objections to the medical expenses awarded.

Further, the deputy's order filed December 31, 1980 directs the defendants to pay unto the claimant medical expenses at issue. The fact that claimant's non-party medical insurer has paid the bills in question does not relieve the defendants of the obligation to pay the claimant as ordered in the final agency decision. While the legislature has seen fit to provide for subrogation in specified instances, this agency knows of no authority for directing a defendant to pay an award of medical expenses to any party other than the claimant. Nor does the fact that the claimant no longer owes the paid expenses allow the defendants to pay other than to the claimant. That another party fulfills its contractual obligations under a paid medical insurance policy does not alter the defendants' obligation to provide medical care for injuries arising out of and in the course of the claimant's employment. If the non-party insurer is entitled to reimbursement for overpayment in its contract with the claimant, it is the claimant's obligation to reimburse that non-party insurer.

THEREFORE, IT IS ORDERED:

That defendants' petition for declaratory ruling is hereby overruled.

That the defendants pay unto the claimant the medical expenses as set out and ordered in the decision of December 31, 1980.

Signed and filed this 27th day of September, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD L. KOOPMANS,	:	
Claimant,	:	File No. 694831
vs.	:	RULING ON MOTION FOR
IOWA ELECTRIC LIGHT AND POWER COMPANY,	:	SUMMARY JUDGMENT
Employer, Defendant.	:	

On February 16, 1982, defendant filed a motion for summary judgment with attached affidavits and a memorandum in support of the motion. On March 8, 1982, claimant filed a resistance to motion for summary judgment and demand for oral hearing. On June 28, 1982, the parties presented oral arguments by phone to the undersigned.

Pursuant to Industrial Commissioner's Rule 500-4.35, the rules of civil procedure govern contested case proceedings before this agency unless in conflict with workers' compensation law, administrative law or agency rules. There being no conflict between the rules of civil procedure pertaining to a summary judgment and the law and rules applying to this agency, the present matter is properly before the undersigned.

Iowa Rule 237(b) of Civil Procedure indicates that "[a] party against whom a claim...is asserted...may, at any time, move with or without supporting affidavits for a summary judgment in favor as to all or any part thereof."

In order to be entitled to a summary judgment, defendant must show there is no genuine issue of material fact involved in the case and that summary judgment should be entered in their favor as a matter of law. Iowa Dept. of Transp. v. Read, 262 N.W.2d 533 (Iowa 1978); Schulte v. Mauer, 219N.W.2d 496 (Iowa 1974). In determining whether a genuine issue of material fact exists which would preclude granting the motion for summary judgment the court must view all material before it in a light most favorable to the opposing party. Steinbach v. Continental Western Insurance Co., 237 N.W.2d 780 (Iowa 1976); Schulte v. Mauer, supra. In resistance to a motion for summary judgment, the resisting party must set forth specific facts showing there is a genuine issue for trial. Graham v. Kuker, 246 N.W.2d 290 (Iowa 1976); Iowa Civil Rights Commission v. Massey-Fergusen Inc., 207 N.W.2d 5 (Iowa 1973). A party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of a genuine issue of material fact. Prior v. Rathjen, 199 N.W.2d 327 (Iowa 1972). Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of trial. Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974).

In the motion for summary judgment, defendant argues that it first received notice of claimant's claim for death benefits when served with claimant's petition which was filed on February 2,

1982; that, as indicated by the affidavits and certificate of death, it was aware the cause of death was cardiac arrest due to or the consequence of arteriosclerotic cariovascular disease; and that, as indicated by the affidavits and certificate of death, it had no actual knowledge based upon information available to it to believe that death was somehow related to claimant's decedent's employment with defendant. The affidavits of defendant's claim representative and of decedent's immediate supervisor and the certificate of death were consistent with such allegations. Defense counsel's oral argument emphasized the theory set forth in the motion--that defendant did not have actual knowledge or timely notice within 90 days of the date of death as required by Code section 85.23, and therefore claimant's action is barred and defendant is entitled to summary judgment as a matter of law.

In her resistance, claimant denied or admitted various allegations of defendant's motion and stated that Code section 85.26 was applicable in that she commenced the present action within two years from the date of the occurrence of the injury. In summary, claimant's counsel orally argued that a material question of fact existed as to when the claimant first became aware of the compensable nature of the claim and alleged circumstances and cited case law in support of such contention.

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 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). 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).

While it is true that Iowa Rule 237 of Civil Procedure contemplates that a party opposing the motion will set forth, by affidavit or other means provided by the rule, facts showing there is a genuine issue for trial, nevertheless, the rule likewise provides that a summary judgment shall be entered if appropriate. Ruling in favor of the affirmative defense of notice entails finding not merely that the defendant did not receive notice nor have actual knowledge of the occurrence of the injury, but that the claimant knew or should have known of the compensable nature of the claim at a certain point in time and failed to give notice within 90 days of such occurrence. Such latter fact was not established by the pleadings, motion or resistance. Oral argument indicated a need to conduct a hearing on the merits of the affirmative defense.

Since a determination of the notice issue in favor of the defendant would be conclusive of the case and in light of the fact that the medical development of the rest of the case may be costly for both parties, this case will be bifurcated for determination of the notice issue pursuant to Industrial Commissioner Rule 500-4.2.

WHEREFORE, it is hereby found that defendant has failed to demonstrate there is no genuine issue of material fact with regard to the affirmative defense of notice.

THEREFORE, defendant's motion for summary judgment is hereby overruled.

It is further ordered that this case be included in the Cedar Rapids pre-hearings scheduled for the week of October 4, 1982.

Signed and filed this 7th day of July, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOSEPH H. KOPPEN,	:	
Claimant,	:	
vs.	:	
LUNDA CONSTRUCTION COMPANY,	:	
Employer,	:	File No. 624712
and	:	A P P E A L
LIBERTY MUTUAL INSURANCE CO.,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

Mr. Thomas W. McKay
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Dubuque, Iowa 52001-0066 For Claimant

Mr. Brendan T. Quann
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INTRODUCTION

By order of the industrial commissioner filed June 23, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, The Code, to issue the final agency decision on appeal in this matter. Claimant appeals from an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 13; defendants' exhibits A, B, C, D, E and F, of which exhibit E is also the deposition of Anthony J. Piasecki, M.D.; finally, the file of the Industrial Commissioner of Illinois, which is in the Iowa Industrial Commissioner's file, was made a part of the record.

The result of this final agency decision will be the same as that reached by the hearing deputy.

STATEMENT OF THE CASE

The facts basically are not in dispute, except for some difference in expert opinion of permanent partial impairment. Claimant, who had his left thumb amputated in 1969 as a result of an accident not related to this case, suffered disability to his left index, middle and ring fingers, caused by frostbite incurred in his work.

ISSUES

Upon the evidence presented, the hearing deputy awarded permanent partial disability on account of the impairment to the fingers. Claimant states in his appeal brief:

> The Deputy Commissioner erred in failing to find a permanent partial disability to the claimant's left hand.
>
> The other issues at the hearing, to-wit: §85.27 expenses, §85.70 vocational rehabilitation supplement, and healing period benefits are not issues on appeal. Defendant Insurer has paid the Claimant pursuant to the Deputy Industrial Commissioner's decision.
>
> For the purposes of this appeal, Claimant concedes that there was a 40% left hand impairment arising out of the loss of the thumb at the MCP joint in a prior industrial accident.
>
> * * *
>
> Claimant asks the Commissioner to re-evaluate the record and the medical evidence and find that Claimant suffered a 25% impairment of the left hand arising out of the frostbite injury of January 10, 1980; being the 65% impairment of the left hand found by Dr. Rao, less the 40% impairment of hand in the thumb.
>
> Claimant requests the award be modified to award him permanent partial disability of 47.5 weeks at $285.30 per week, giving the Defendants credit for the 24.475 weeks of permanent partial disability already paid.

The expert opinion as to functional impairment was provided by Anthony J. Piasecki, M.D., a qualified orthopedic surgeon, and by S. Noel Rao, M.D., an assistant professor in the department of rehabilitation medicine at the University of Wisconsin, Madison. The hearing deputy based his decision upon the opinion of Dr. Rao which gave a higher permanent partial impairment rating than that of Dr. Piasecki. Defendants do not argue with this result, so the undersigned will also follow Dr. Rao's opinion. In point of fact, both physicians are highly qualified.

APPLICABLE LAW

Section 85.34(2)(b)(c) and (d) provide compensation of 30, 35, and 25 weeks respectively for the entire loss of the index, middle and ring fingers. The last unnumbered paragraph of §85.34(2) provides for a pro rata determination for partial disablities.

In Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d

399 (1942), where the employee's foot was amputated on account of a work injury and later surgery was performed between the stump and the knee, the court held claimant was not entitled to additional compensation because the operation was referable to the foot. In Morrison v. Wilson Food, 1 Iowa Industrial Commissioner Report 244 (1980), the industrial commissioner held that a claimant cannot recover for disability to the hand when the impairment is to a finger. The Nebraska Supreme Court reached the same result in Herold v. Constructors, Inc., 271 N.W.2d 542 (Nebraska 1978).

The Iowa Court has ruled many times that an injury to a scheduled member restricts recovery to the limits of the schedule. Barton v. Nevada Poultry Co., 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). Rule 500-4.2 provides that the Guides to the Evaluation of Permanent Impairment by the AMA "are adopted as a guide for determining permanent partial disabilities under §85.34(2) 'a' - 'r' of the Code." The rule is not one of evidence and use of the guides is not mandatory.

ANALYSIS

Table 10 on p. 9 of the AMA Guides correlates impairments to the fingers to those of the hand. For example, a permanent partial impairment rating to the left index finger of between 22 and 25% equals an equivalent rating of 6% of the hand. In this case, Dr. Rao rated claimant as follows:

> Impairment rating revealed that there was a 40% impairment of hand in the thumb and 6% impairment of hand in the index finger. This was based on the amputation and impairment based on range of motion in the middle finger and the ring finger in the distal interphalangeal joint were as follows: 6% in his hand due to the middle finger, and 2% in his hand due to the ring finger. This impairment also included the sensory deficits in the middle and the ring finger.
>
> Impairment of the hand based on the loss of function was 16% of the hand. This gave a total of 70% imparment (sic) of hand, 5% was subtracted from this because the patient was right handed and the left hand being nondominate. So the patient had a 65% impairment of the hand which equaled 59% impairment of the upper extremity and 35% of the whole man.
>
> An EMG study that was done after the patient's evaluation in Amputee Clinic in July revealed an abnormal study. The study was compatible with left median and ulnar sensory neuropathy and left motor median chronic neuropathy. This EMG was done on 7/10/81 by Dr. Rao.
>
> Conclusion:
>
> 1. The patient is a 43 year old man with amputation of the right (sic) thumb at the MCP joint and the distal portion of the distal phalanx of the left index finger.
>
> 2. EMG evidence of left median and ulnar sensory neuropathy and left motor median chronic neuropathy.

Using the Guides, the hearing deputy worked backwards, more or less, and reasoned that a 6% permanent partial impairment to the hand was a 22-25% permanent partial impairment to the index finger, and likewise that a second 6% permanent partial impairment to the hand equated to a 28-32% permanent partial impairment of the middle finger and that a 2% permanent partial impairment to the hand equated to a 15-24% permanent partial impairment to the ring finger.

Contrariwise, claimant says the total impairment to the digits should be rated as impairment to the hand (65%) and then deduct 40% of the non-compensable missing thumb, giving an entitlement of 25% of 190 weeks for 47.5 weeks of compensation as opposed to 24.475 weeks according to the hearing deputy's method.

Considering the statutes precedents and rules cited above and considering that the permanent partial impairment is restricted to the individual fingers, the permanent partial disability should likewise be restricted to the individual fingers. Finally, considering the evidence he had to work with, the hearing deputy's method of computation was satisfactory. That is, since he had no individual impairment ratings to the fingers, his method of making the correlation between the hand rating and the finger rating was a good one. (Likewise the hearing deputy's method of splitting the difference in the range of disability as 23 1/2% representing the average of 22-25% is also all right.)

FINDINGS OF FACT

1. On January 10, 1980, claimant was working for the employer on a bridge construction project and suffered frostbite to the index, middle and ring fingers of his left hand. (Tr. 20-29)

2. Claimant's January 10, 1980 injury was restricted to the index, middle and ring fingers of his left hand. (Claimant's exhibit 3)

3. Claimant has a permanent partial impairment to the left index finger of 22-25% (6% of the hand). (Claimant's exhibit 3)

4. Claimant has a permanent partial impairment to his left middle finger of 28-32% (6% of the hand). (Claimant's exhibit 3)

5. Claimant has a permanent partial impairment to the left ring finger of 15-24% (2% of the hand). (Claimant's exhibit 3)

6. S. Noel Rao, M.D., is an assistant professor in the department of rehabilitative medicine, University of Wisconsin Hospitals and Clinics, Madison, Wisconsin. (Claimant's exhibit 3)

7. On June 17, 1969, while working for West Central Electric Company, claimant received an electrical shock and as a result had surgery on his left hand and right arm. (Tr. 16; Claimant's exhibit 1, Claimant's exhibit 3)

8. In the 1969 surgery, claimant had his left thumb amputated at the metacarpal phalangeal joint. (Claimant's exhibit 1)

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on January 10, 1980 and which resulted in permanent partial disability to the index finger of twenty three and one-half percent (23 1/2%) to the middle finger of thirty percent (30%) and to the ring finger at twenty-nine percent (29%), entitling him to compensation respectively for eight point two two five (8.225) weeks, nine (9) weeks, and seven point two five (7.25) weeks for a total of twenty-four point four seven five (24.475) weeks.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant twenty-four point four hundred seventy-five (24.475) weeks of permanent partial disability compensation at the rate of two hundred eighty-five and 20/100 dollars ($285.20) per week. Defendants are to recive credit for permanent partial disability already paid.

IT IS FURTHER ORDERED that defendants pay unto claimant twenty and 00/100 dollars ($20.00) per week for twenty-six (26) weeks for vocational rehabilitation.

IT IS FURTHER ORDERED that defendants pay unto claimant the following medical and associated costs:

Grant Community Clinic	$ 45.00
University Hospital and Clinic	104.92
Day's Rexall Drugs	236.47
Dr. S. Noel Rao of University Physicians	205.00
TOTAL CLAIM	$591.39

IT IS FURTHER ORDERED that defendants pay unto claimant one hundred thirty-three and 20/100 dollars ($133.20) for lodging and two hundred eight and 88/100 ($208.88) for mileage expenses.

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 at Des Moines, Iowa this 13th day of August, 1982.

No Appeal

BARRY MOPANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN KOSTOHRYZ, Claimant,	:	
vs.	:	File No. 648794
LAKE CENTER INDUSTRIES/ DECO PRODUCTS COMPANY, Employer,	:	R E V I E W - R E O P E N I N G D E C I S I O N
and	:	
FIREMAN'S FUND INSURANCE, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by John Kostohryz, claimant, against Lake Center Industries/Deco Products Company, employer, and Fireman's Fund 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 September 26, 1980. It came on for hearing on October 21, 1982 at the Dubuque County Courthouse in Dubuque, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury was received October 2, 1980. A memorandum of agreement was received on October 23, 1980. An interim final report shows the payment of nine weeks and one day of temporary total or healing period benefits and the payment of medical expenses.

The record in this matter consists of the testimony of claimant and of Lewellyn Storlie; claimant's exhibit 1, a series of medical reports; claimant's exhibit 4, glasses worn by the claimant at the time of his injury; defendants' exhibit 2, a listing of hours worked by the claimant; and defendants' exhibit 3, a letter to the industrial commissioner dated April 2, 1981.

ISSUES

The issues in this matter are whether or not claimant is entitled to permanent partial disability; whether or not defendants are entitled to credit for an overpayment; and the date from which interest will run in the event of an award.

STATEMENT OF THE CASE

Twenty-seven year old married claimant, father of one child, testified that he has worked for defendant employer for three and one-half years. He recalled the events of September 26, 1980 as follows: He was operating six automatic machines in the dye cast room. Zinc bars were placed in the machines and melted down to make window parts. As he worked on one machine, zinc, which was under pressure, blew in his right eye area and into his face. He was wearing his personal glasses as no safety glasses were provided. He removed his glove and tried to wipe off the zinc. He was taken to the hospital by a maintenance man where he was seen by Dr. Knutson who treated him with cold packs and gave him a tetanus shot. He was transferred to the Mayo Clinic where his eye was checked for zinc and he was seen by a skin graft specialist. He went home for a period, but he eventually returned to have scar tissue removed and skin grafting performed around his eye socket and on his cheek.

His current complaints include a numb feeling under his eye, continuous tearing every fifteen to twenty minutes and some blurring of vision which he attributed to tears. He claimed that his work and his driving have been affected by the necessity of wiping tears. He admitted no change in his driver's license, but he had not renewed his license since the injury.

He acknowledged the possibility of surgical repair to ease the tearing; however, he had decided against an operation as there is no guarantee such surgery would help and as he does not want to go through the pain and suffering.

Claimant testified that he returned to the same work he was doing at the time of his injury, but that he only did that job for about one week. He was subsequently contacted by the foreman regarding a transfer. Claimant indicated that he changed jobs because he thought a different position would be safer. The job change also brought a shift change. Claimant's switch to days included a ten cent per hour wage reduction. Claimant's present job is operating a water vibrator to wash parts. Claimant agreed that he has had increases in his wages since his return to work.

Claimant admitted that at one time he told his attorney he was going to have surgery. He asserted that he informed his attorney when he elected not to have an operation. He did not know why the insurance carrier was not told of his change of heart prior to March 1982.

Lewellyn Storlie, plant manager for defendant employer, testified that claimant's change in earnings post-injury was due to shift differential. He believed claimant is working the same hours now as before the injury. He assessed claimant's performance as excellent and recalled claimant's only complaint to be of tearing. He did not view the tearing as limiting claimant's future with the company.

Storlie responded not to his knowledge when he was asked whether the company required claimant to change work.

Records from defendant show claimant has worked consistently.

A letter to the industrial commissioner from claimant's counsel, dated April 2, 1981, requests that the case be continued "until at least September of 1981."

An emergency room record shows claimant was seen in the early evening of September 26, 1980 with a second degree burn on his right eyelid and burns on his right cheek and nose. Claimant's vision was slightly blurred. The doctor's diagnosis was full thickness burns of the right eyelid and superficial corneal burns. He was sent to the Mayo Clinic.

A more complete description of claimant's injuries was provided by Phillip G. Arnold, M.D., of the Department of Plastic and Reconstructive Surgery at the Mayo Clinic. According to Dr. Arnold's letter of October 20, 1980, the areas involved were "upper and lower lids of the right eye on the medial aspect, an area about 1 x 2 cm. on the right cheek, and an area just above his mustache on the right just below the nasolabial fold." An ophthalmologist found no injury to the globe itself.

On October 6, 1980 debridement was done. On October 8, 1980 split thickness grafts were done to the upper and lower lids and in an area over the cheek bone. At the time of surgery, Dr. Arnold was unable to determine whether or not further surgery on the lacrimal drainage apparatus would be necessary.

Claimant was considered disabled through December 1, 1980.

When claimant was seen on March 25, 1981, he had epiphora and tightness of the lower lid. Malfunction of the lacrimal drainage apparatus was noted.

Thomas J. Liesegang, M.D., ophthalmologist, evaluated claimant's eye problem and found a punctal stenosis with eversion of the lid and an inability to properly drain tears into the nose. The doctor thought it well to wait until all healing had taken place to determine if the skin would stretch and go back into position. If it did not, the ophthalmologist anticipated drainage repair.

On March 12, 1982 Dr. Liesegang wrote to claimant that the first step in the repair procedure would be a skin graft to the lower lid to be performed under local anesthetic. The doctor assessed the problem as difficult and wrote: "I hope you realize the scarring in this area will be difficult to reconstruct. Even after all is said and done, you may still have a tearing problem. I think there is a significant chance of success to warrant the surgery if you want it."

Dr. Liesegang explained claimant's difficulty more thoroughly in a letter to claimant's counsel dated June 16, 1982 as a nasolacrimal obstruction which causes a welling-up of tears and a blurring of vision related to the tearing.

In a letter to defendants' attorney dated July 9, 1982, Dr. Liesegang reported claimant's vision as 20/20. He stated claimant's functional impairment is a constant watering of the eye.

APPLICABLE LAW AND CONCLUSIONS OF LAW

The first issue to be considered is whether or not claimant is entitled to permanent partial disability.

Where the result of an injury causes the loss of a foot, or eye, etc., the loss, together with its ensuing natural results upon the body, is a permanent partial disability and is entitled only to the prescribed compensation. Barton v. Nevada Poultry Co., 253 Iowa 285, 290, 110 N.W.2d 660, (1961). The schedule fixed by the legislature includes compensation for resulting reduced capacity to labor and earning power. Schell v. Central Engineering Co., 232 Iowa 421, 425, 4 N.W.2d 399, (1942). The claimant has the burden of showing that his ailment extends beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964).

Larson in 2 Workmen's Compensation §58 at 10-28 (Desk ed. 1976) 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 related to loss of earning capacity and not to physical injury as such." The theory, according to Larson, is unchanged with the only difference being that "the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience."

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 Company, 218 Iowa 1094 (1934) at 1104 states:

> 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 an indefinite and undeterminable period. Its meaning must be construed according to its nature and its relation to the subject-matter of the contract in which it appears. [Citations omitted.]

See also, Wallace v. Brotherhood of Locomotive Firemen and Engineers, 230 Iowa 1127 (1941).

Claimant testified to continuous tearing occurring every fifteen to twenty minutes. At the time the tear wells in his eye, he has blurring of vision. The report from Dr. Liesegang states clearly that claimant's functional impairment is a constant watering of his eye caused by a nasal lacrimal obstruction and he confirms blurred vision. He relates the impairment of the lacrimal drainage appartus to the burn. No medical expert has assigned a specific impairment rating to claimant's eye problem.

Iowa Code section 85.34(2)(p) provides for one hundred forty weeks of compensation for the loss of an eye. Claimant will be awarded fourteen weeks of permanent partial disability based on a ten percent functional impairment of his eye.

Iowa Code section 85.34(2)(t) provides:

> For permanent disfigurement of the face or head which shall impair the future usefulness and earnings of the employee in his occupation at the time of receiving the injury, weekly compensation, for such period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks.

This deputy industrial commissioner had an opportunity to observe claimant's injury. He has had plastic surgery and he has some decrease in pigmentation in his cheek and eye area. The scarring which has resulted is well camouflaged by claimant's glasses. On a whole, claimant seems to have a good result from his plastic surgery. The permanent disfigurement which he has will not impair his future usefulness and earning in an occupation such as the one in which he was engaged at the time of his injury.

The second issue to be considered is whether or not defendants are entitled to credit for overpayment of healing period. Iowa Code 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.

A letter from the Mayo Clinic dated January 6, 1981 reports claimant disabled from September 26, 1980 through December 1, 1980. No overpayment of healing period has occurred.

The final issue to be considered is the date from which interest should run in this matter.

Iowa Code section 85.30 provides:

> Maturity date and interest. Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which compensation is payable, and if not paid when due, there shall be added to the weekly compensation payments, interest at the rate provided in section 535.3 for court judgments and decrees.

There are two major Iowa cases dealing with interest. The first was Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957; the second was Farmers Elevator Co. v. Manning, 286 N.W.2d 124 (Iowa 1979).

The claimant is Bousfield, 249 Iowa 64, 86 N.W.2d 109, was injured on August 5, 1950. She never went back to work. She had surgery in October 1951. She was examined and some permanency was assigned. There were subsequent and recurrent episodes. Claimant was paid 80 weeks of permanent partial disability. Substantial evidence was present in the record to substantiate a worsening of claimant's condition not contemplated at the time of the first award. The court recognized at 70, ___:

> In the matter before us the claim is not from temporary disability to permanent partial, but for a greater degree of percentage of permanent partial disability from that for which she was compensated. There is no material distinction. Degree as well as type is contemplated in the statute. Proof as to the subsequent condition is the important factor.

Claimant was found entitled to an additional five percent permanent partial disability. Regarding interest, the opinion said at 72, ___:

> The date of maturity for the additional 20 weeks could not be determined until claimant had applied for same, or a determination made thereof. In this case interest can only be allowed from October 5, 1955, when the commissioner found her entitled to the increased compensation.

Claimant, in Farmers Elevator Co., 286 N.W.2d 124, was involved in an accident on June 26, 1975. He filed a petition in arbitration. A hearing was held on that petition on February 24, 1978, and claimant was found entitled to benefits. Defendants argued interest should begin to run at the earliest from the time of the decision by the district court. The opinion at page 180 analyzes the legislative intent of Iowa Code section 85.30, thusly:

> Section 85.30 expresses legislative intent that interest on unpaid compensation be computed from the date each payment comes due, starting with the eleventh day after the injury. To adopt the Elevator's method of computing interest on unpaid compensation would defeat the apparent purpose of section 85.30, as well as jeopardize the goal of other sections which evidence legislative desire to secure compensation for injured employees and their dependents at the earliest time. E. g., § 86.20 (encouraging payment during investigation stage of disability claim). The need for an incentive to pay compensation when due is particularly acute in view of the delays which sometimes regrettably occur between the time of an employee's injury and final resolution of the claim. [Citation omitted.]

The conclusion was:

> The first compensation installment in this case became due on July 6, 1975, eleven days after the injuries occurred. Interest is therefore payable on such installment from that due date, and similarly with the following weekly payments.

The Farmers Elevator Co. case was an arbitration proceeding where the defendants had denied liability and paid no benefits. The defendants had the alternative of paying the claimant benefits or denying the claim and having the matter adjudicated. Defendants controlled payment of those benefits.

This case is a review-reopening. A memorandum of agreement was received by this office on October 23, 1980. Claimant's petition in arbitration [sic] was filed January 19, 1981. As this is a proceeding in review-reopening, following the dictates of Bousfield, 249 Iowa 64, 86 N.W.2d 109, interest can be assessed from the time claimant applied or from the time a determination of the permanency was made. A careful review of the evidence shows the first mention of a malfunction with the lacrimal drainage apparatus is found in a letter from Dr. Arnold dated April 14, 1981. Dr. Liesegang's letter the following month states that it will be necessary to wait to see what position the skin takes to assess the need for repair of the drainage function. On March 12, 1982 Dr. Liesegang wrote to claimant to describe the reconstructive operation which might ease his tearing. It is not until July 9, 1982 that Dr. Liesegang makes specific reference to a functional impairment.

In Farmers Elevator Co. 286 N.W.2d 174, defendants controlled payment of benefits. In the case sub judice, defendants exercised the option of paying or not paying only after Dr. Liesegang stated claimant had a permanent impairment. Defendants might have paid some weekly benefits at that point; however, this case is somewhat atypical in that no specific impairment percentage was assigned. The extent of claimant's disability was the source of conflict in this matter.

This deputy, of course, agrees with the encouraging of prompt payments of benefits to which an employee is entitled, but a distinction must be drawn between the law for those cases where liability has not been admitted by the carrier, such as Farmers Elevator Co. and those such as Bousfield, a proceeding in review-reopening. Since Bousfield was not overruled, it stands for the proposition that interest may not always begin on a certain date; interest should commence in a review-reopening action on that date which defendant knew claimant was entitled to permanent partial disability or had clear notice that claimant was making a claim for permanent partial disability. Obviously, in a review-reopening proceeding, there is some flexibility in the determination of interest, and the facts and circumstances of the case must be examined. The circumstances in this case dictate that interest should run from the date of the determination in this decision at a rate of ten percent. See Sloan v. Great Plains Bag Corp. (Appeal Decision filed September 21, 1982).

Claimant expressed concern over the payment of future medical benefits. Iowa Code section 85.26(2) provides:

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

Iowa law, at the time of claimant's injury, provided for the payment of medical benefits where a causal connection can be shown between the injury and the necessity for medical treatment.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-seven years of age.

That on September 26, 1980, as claimant operated a series of machines at his employer's place of business, he was hit in the face with hot zinc.

That claimant was hospitalized and had plastic surgery to the area of his eye and cheek.

That claimant had second degree burns to his right eyelid and burns on the right cheek and nose.

That claimant was hospitalized and had plastic surgery to the area of his eye and cheek.

That as a result of the injury, claimant has been paid healing period and medical benefits.

That claimant has continuous tearing and some blurring of vision attributable to an impaired lacrimal drainage apparatus.

That claimant complained to the plant manager of tearing.

That claimant has changed jobs and has had increases in his salary since his injury.

That claimant elected not to have surgery which might repair his lacrimal drainage apparatus.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has a functional impairment to his right eye of ten (10) percent.

That claimant does not have disfigurement which will impair his future usefulness and earnings in an occupation such as the one in which he was engaged at the time of injury.

That defendants are not entitled to a credit for the overpayment of healing period benefits.

That interest at ten (10) percent shall run from the date of this decision.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant fourteen (14) weeks of permanent partial disability benefits at a rate of one hundred one and 81/100 ($101.81) per week.

That defendants pay interest at ten (10) percent from the date of this award.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 10th day of November, 1982.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARLEY L. LAIDIG, Claimant, vs. ANDERSON & SCHENCK COMPANY, Employer, and U.S.F. & G. COMPANY, Insurance Carrier, Defendants.	:	File No. 506351 R E V I E W - R E O P E N I N G D E C I S I O N

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INTRODUCTION

This is a proceeding in review-reopening brought by Harley L. Laidig, the claimant, against his employer, Anderson & Schenck Company, and the insurance carrier, U.S.F.& G., their insurance carrier, to recover addtional benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on June 8, 1978.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Buena Vista County Courthouse in Storm Lake, Iowa on April 28, 1982. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file reveals that a first report of injury was filed August 18, 1978. Subsequently, a memorandum of agreement was filed on September 22, 1978. A form 5 filed October 30, 1978 reflects that medical expenses in the amount of $187 have been paid. Additionally, nine and four-sevenths weeks of temporary total disability benefits have been paid. This payment covers the period June 9, 1978 through and including August 14, 1978.

The record in this case consists of the testimony of the claimant, the claimant's son, Robbin Seifert, Shirley Laidig, Richard Carrico, Irwin Bando and Ronald Schenck; the deposition of Harrison Paul Moreau, D.C.; the deposition of Jerry D. Dawson, M.D.; the deposition of Jonn S. Koch, M.D.; the deposition of Jim Eldon Crouse, M.D.; claimant's exhibits 1 through 5 inclusive which also cover some of the aforementioned depositions; ad defendants' exhibits T, U, V and X. All of defendants' objections to claimant's exhibits 1 through 5 are overruled and those exhibits will be considered for whatever probative value they may contain.

ISSUES

The issues which are to be resolved in this decision are whether there exists a causal relationship between the work injury of June 8, 1978 and the claimant's present disability as well as the nature and extent of that disability.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated and agreed that the applicable rate in the event of an award is $183.01. There was no stipulation concerning the length of time off work. The parties stipulated that the medical bills contained in this record are fair and reasonable; however, there was no stipulation that they are in any way causally related to the injury sustained on June 8, 1978.

The claimant, Harley L. Laidig, testified that he is 44 years old and lives in Estherville, Iowa. He has an eighth grade education and no other formal training in any area. He has worked at a variety of jobs and began his employment relationship with the defendant initially in 1958. He left the defendant's employ in approximately 1966 or 1967 and subsequently returned to work for them in 1977 and has remained continuously employed since that date. The defendant, Anderson & Schenck Company, is in the glass business, replacing auto glass store fronts and various other windows. The claimant's primary duties while employed by the defendant included installing windshields, side and back windows and removing and installing store front windows. The job function required the claimant to lift windows weighing as much as 100 pounds. The position also required extensive use of his hands.

The record indicates that in June 1975 the claimant sustained a knee injury while working for another employer and received a lump sum workers' compensation settlement. Medical testimony indicates that in 1971 the claimant had a nervous breakdown and was hospitalized for a period of time as a result. Other than these two incidents, it appears that the claimant has been in relatively good health. The record does not reveal that the claimant had any preexisting neck or arm difficulties prior to June 8, 1978.

On the date of injury, June 8, 1978, Mr. Laidig was admittedly an employee of the defendant. Additionally, on that date he sustained a personal injury which arose out of and in the course of his employment with this defendant. These elements of claimant's case have been admitted by the employer through the memorandum of agreement. Factually, the claimant was replacing a window in a new bank building when he struck the front and top portion of his head against a scaffolding.

Claimant was, on the date of injury, examined by Jerry D. Dawson, M.D. The claimant's complaint to Dr. Dawson at that time was dizziness and headaches. Dr. Dawson's examination revealed bruising and a small hematoma over the left frontal region. His impression at this time was "closed head injury." His records do not indicate that the wound was bleeding or that it was open as the claimant alleges in his direct testimony. Claimant continued to be treated by Dr. Dawson and on August 28 he was released to return to light duty work. Temporary total disability benefits were paid to claimant for this period of time.

On March 19, 1979 claimant returned to Dr. Dawson with complaints of intermittent problems with his neck. Dr. Dawson's impression at that time was that the claimant "had suffered a cervical spine strain of moderate severity." Dr. Dawson expressed the opinion that claimant should not have had the numerous difficulties that he experienced post 1979. Dr. Dawson was aware that the claimant was under the care of an orthopedic specialist and indicated that he would defer to the orthopedist's opinion with respect to the claimant's present condition and a cervical spine injury.

There is evidence in this record that on February 10, 1979 the claimant was involved in a snowmobile accident. The emergency room record, marked Dawson deposition exhibit 5, contains the following information relevant to that incident:

> Middle aged gentleman riding a snowmobile approximately 2:00 o'clock today went over a snowbank, flew up in the air, apparently traveling about 45 miles an hour, doing several somersaults fell off snowmobile landing on side of the neck. Snowmobile hitting him in the left side of the chest and abdomen. Has felt fairly well and has frontal headache throbbing in nature. Achiness in the sternocleidomastoids and the chest sterno muscles bilaterally. Mild ache in the left side of the chest, increase with deep breathing. PHYSICAL EXAM: Alert, oriented, cranial nerves, DTR's intact. Disc and fundi benign, NECK: Tenderness in the sternocleidomastoids and para spinous muscles, none over the C spine area. HEART AND LUNGS: Clear. ABDOMEN: Good bowel sounds. Soft, non tender without masses or organomegaly. Tenderness over the distal 12th and 13th rib with no tenderness in the left upper quadrant. IMPRESSION: (1) Neck sprain. (2) Bruising of the left ribs. PLAN: Home, bedrest, call me in the morning.

On cross-examination, Dr. Dawson admitted that he was not aware of the snowmobiling incident and had never been advised of it by claimant. He admitted that the recitation in the emergency room records has a bearing upon any condition of the claimant's neck following February 10, 1979.

Collateral to Dr. Dawson's involvement, the claimant was also being treated by Harrison Paul Moreau, a chiropractor. Dr. Moreau testified that he treated the claimant between June 21, 1978 and August 2, 1978. There was then a hiatus in his involvement until January 10, 1979 when the claimant returned to Dr. Moreau complaining of headaches. Mr. Laidig indicated to this practitioner that he was symptom-free from August 1978 until January 10, 1979. Dr. Moreau indicated that the claimant, in his opinion, could have returned to work July 31, 1978. Dr. Moreau does not address the issue of causation or the extent of disability caused by the work injury.

Mr. Laidig stated that in the summer of 1978 he voluntarily left the employment of the defendant because he could not lift, stoop or do heavy work. Since that time claimant has spent his days basically drinking coffee, playing games with his children and sitting around the house. Claimant admitted that during the period August 1978 through January 1979 he did not seek any medical treatment. In October 1979 claimant moved to Waterloo from Estherville to be near his children. At the suggestion of his eldest daughter, the claimant then came under the care of Dr. Jim Eldon Crouse. The initial examination, according to Dr. Crouse's testimony, was December 18, 1979. After examination and x-ray, Dr. Crouse reached a diagnosis of cervical strain which he claimed are consistent with the history recited by the claimant. This physician is of the opinion that a cervical fusion should be performed. He further expressed the opinion that claimant has sustained a permanent functional impairment of 15 percent of the body as a whole due to the injury in question. He should also refrain from doing any manual labor for an indefinite period.

On cross-examination Dr. Crouse acknowledged that he was not aware that the claimant had been pain-free from August 1978 through January 1979. With respect to this issue, he testified:

> Q. And if it was that he was free of pain for a period of time of approximately six months post incident of injury and before you saw him on December 18 of 1979, wouldn't you as an orthopedic surgeon, and in the light of a reasonable degree of medical certainty, question any association of the symptoms

that you found on December 18, 1979, to the incident of injury which he gave you on history as occurring on June 8 of 1978?

A. Yes.

He further testified:

Q. Now, isn't Dr. Moreau recording there and reporting that Mr. Laidig stated to him that he was free of symptoms from July, 1978 until January 10, 1979?

A. Yes.

Q. And in view of the additional findings that Dr. Moreau reports, and based on your education, experience, training, and when measured by a reasonable degree of medical certainty, and now having this information before you, isn't it probable that the symptoms which Mr. Laidig presented on December 18, 1979, when you examined him for the first time, are unrelated to the incident of injury on June 8 of 1978?

A. I don't know that you can say that it's probable that they are not related, but certainly it would -- if for six months he was indeed free of all symptoms, it would indicate that -- it would certainly throw some question onto what was the exact etiology of his present severe problem.

Q. And doesn't that indicate, now, that you have this information before you, as recorded by another practitioner, that you have reservations about your earlier indications that his symptoms on December 18, 1979 were definitely related to the incident of injury of June 8, 1978?

A. Let me simply say that Mr. Laidig only indicated one injury, and one injury could certainly alter the mechanics of the neck so that it was more vulnerable to developing problems later on. However, because of the six month interval, there would be a question if there was some other possible factors that occurred that caused the resumption of the neck discomfort.

Q. Something unrelated to the incident on June 8 of 1979, or 1978, excuse me.

A. Well, this would be one consideration, yes.

The testimony is not clear that Dr. Crouse was aware of the intervening snowmobile accident and its effect on claimant's medical situation. He thus had no incomplete medical history and background concerning all events.

The claimant continued to testify on direct examination that today he only fishes and remains very quiet. He plays cards and various other games with his children and goes to an occasional football game.

On cross-examination the claimant indicated that he forgot about the snowmobile accident of 1979. He acknowledged he did not provide this information in his answers to interrogatories or in his July 1981 deposition. Claimant also acknowledged that he did not tell any of the physicians involved in his case about the incident. He acknowledges that he did not have the sensation of tingling in his fingers and arms until after the snowmobile accident.

The claimant was examined by John S. Koch, M.D., an orthopedic specialist. This examination was conducted at the request of the defendants. This physician had an opportunity to review an extensive amount of medical data as well as x-rays prior to formulating an opinion in this case. He also conducted an examination of the claimant. Dr. Koch acknowledged that all of the medical data provided indicate that no physician or practitioner was able to secure any objective findings of physical abnormality.

Dr. Koch then testified:

Q. I also place before you what has been marked Defendants' Exhibit C. It's a narrative report by H. P. Moreau, D.C., dated July 1, 1980, and did you receive a copy of that report along with the medical records on Harley Laidig?

A. Yes.

Q. I draw your attention to the second -- or correction, the third full paragraph which begins January 10, 1979, and that paragraph has this as a part of its statement, he stated there has been a gradual increase in cervical pain and headache for the past month. He also stated that he had been free of symptoms from July, 1978, until this date -- apparently meaning January 10, 1979. Does the fact that Mr. Laidig was stating to Dr. Moreau that he had been free of symptoms from July, 1978, until January 10, 1979, have any significance to his physical condition, especially in reference to his neck and back?

A. Yes.

Q. And what would be the significance?

A. Well, based on the previous material, that he had apparently sustained an injury in July of 1978 -- or correction, June of 1978, for which he had recovered as noted by Dr. Moreau and Dr. Dawson's records, and that he was apparently symptom free and then had complained of discomfort at some six months later, for which he saw Dr. Moreau again, and it would support the contentions of Drs. Dawson and Moreau in July of 1978 that he had recovered from any effects of injury in June and that he was capable of work and doing things well, and apparently had been able to do well until January of 1979 when he had another complaint relative to his neck, which was a new and separate disease episode or incident.

Q. Does that finding as reported by Dr. Moreau on January 10 of 1979 confirm his prior reports, A and B, that Laidig is without any permanent impairment and was as of July, 1978, insofar as the neck injury is concerned?

A. It would tend to support those reports.

. . .

Q. Based on your examination and what was revealed by x rays do you have an opinion with a reasonable degree of medical certainty as to whether or not Mr. Laidig has a musculoskeletal disorder referable to the injury incident in June of 1978?

A. Yes.

Q. And what is that opinion?

A. I do not feel he has a musculoskeletal disorder related to an injury in June of 1978.

Q. And what is the basis or support for that opinion, Dr. Koch?

A. The basis of my opinion is the failure of physical findings to demonstrate derangement that would be consistent with the difficulty, the history as provided by the patient and by the medical records failing to support a basis for his complaint or to justify the relation of his complaint in terms of an accident occurring in June of 1978.

With respect to the claimant's inability to be active and work, Dr. Koch testified:

Q. Did Mr. Laidig describe to you his level of activity within the recent period preceding your examination and evaluation of him?

A. He indicated to me that he was not able to do any gainful activity and any activities tended to aggravate or produce discomfort for him, so he did not describe what he had been doing.

Q. Was that description consistent with the findings that you made on examination?

A. His description of his difficulty or his activity was not consistent with my findings on physical examination.

Q. And what findings on physical examination caused you to conclude that there was an inconsistency between the physical findings and his description of his activity level?

A. The physical findings I did not note that he was in significant distress or evident distress. He had callousing of his hands, the thickness of the skin of the hands was consistent with activities greater than just sitting around or doing nothing. That the development of the muscles of the shoulders and arms and hands was consistent with a normal person engaged in normal physical activities.

With respect to the extent of disability, Dr. Koch testified:

Q. In this workmen's compensation proceeding Mr. Laidig claims that he has a total permanent disability. From the medical records that you have reviewed on Mr. Laidig that were created before October 19, 1981, and submitted to you for review, from the x rays that were taken of Mr. Laidig before October 19, 1981, from the history that you obtained from Mr. Laidig, from your examination of Mr. Laidig and from the x rays that you had made and you interpreted of Mr. Laidig, including the laminographic studies, do you have an opinion based upon a reasonable degree of medical certainty whether or not Mr. Laidig has a total permanent disability of the body as a whole?

A. I have an opinion.

Q. And what is that opinion, Dr. Koch?

A. I do not feel he has a total permanent body disability at the time of my examination, nor do I find any disability that I relate to an accident of June of 1978.

Q. In your last statement, do you include even a permanent partial disability?

A. Correct.

Q. You would not relate any permanent partial disability that Mr. Laidig has as being caused or produced by the injury incident in June of 1978, is that your opinion?

A. Yes.

This physician later expressed the opinion that he does not

believe any surgery is necessary on the claimant's neck.

The claimant's son, Harley J. P. Laidig, age 15, testified on his behalf. He was present and heard all of the testimony of the claimant. He was with the claimant on the date of the snowmobile accident and witnessed the incident. He denied that the claimant landed on his neck in connection with the incident and further denied that the machine was traveling at 45 miles per hour. He acknowledged that his father did not indicate that he had been hurt in any fashion in connection with this incident. He speculated that perhaps the machine was traveling 25 miles per hour.

Robbin Siefert, claimant's daughter, testified on his behalf. She was present in the courtroom during her brother's testmony and her father's testimony. She was present when her father was in the emergency room after the snowmobile incident and does not recall any comments being made about his doing somersaults or flying through the air as a result of the incident. Nor does she recall any comments that the machine was going 45 miles per hour.

Shirley Laidig, claimant's spouse, testified on his behalf. She and the claimant were married in 1954 and have seven children. She confirmed that the claimant went to Dr. Dawson on the date of injury and confirmed the balance of claimant's testimony concerning difficulties that he is presently having. She indicated that the entire family forgot about the snowmobile incident and that Mr. Laidig had no residual problems as a result.

Richard Carrico testified on behalf of the defense. He is 46 years of age and lives in Estherville, Iowa. He was working on the Emmet County State Bank building on the date claimant was injured in that structure. He indicated that there was no indication that the claimant had sustained any form of injury on this date. It wasn't until the next day that the claimant returned to the job site and indicated he had been injured.

Irwin Bando, age 55, testified on behalf of the defense. He also was working on the Emmet County State Bank building on June 8, 1978. He was not aware that the claimant was even on the premises on the date of injury. He learned of the incident the next day.

Ronald Schenck, age 62, testified on behalf of the defense. He is a former partner in the Anderson Schenck Company. He confirmed that on June 8, 1978 the claimant was an employee of his and he acknowledged he became aware that the claimant had been injured, but the claimant only indicated that he had bumped his head. He confirmed that the claimant had a lump on his head immediately after the incident. He acknowledged that claimant was a good worker.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 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. Fischer Inc., supra. See also Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

ANALYSIS

From the memorandum of agreement filed, the defendants have acknowledged that on June 8, 1978 the claimant was their employee. They further acknowledge that on that date he sustained an injury which both arose out of and in the course of his employment. The record appears clear that the claimant was temporarily totally disabled from June 9, 1978 through mid August 1978. Both the chiropractor, Dr. Moreau, and Dr. Dawson, an M.D., indicate that claimant was released to return to some form of light duty work by mid August 1978. The record is clear that the claimant was not actively seeking any medical care from approximately August 1978 through February 1979. It was not until after January 10, 1979, which is the date of the snowmobile accident, that additional medical supervision was required culminating in the recommendation of Dr. Crouse that a cervical fusion be performed.

A thorough analysis of the impartial emergency room record of January 10, 1979 leads the undersigned to believe that that snowmobile accident was more significant than the claimant or his family acknowledge. The undersigned finds it difficult to believe that an individual can have a snowmobile accident of the magnitude outlined in the emergency room record, subsequently visit a hospital as a result and then forget the incident entirely. If the snowmobile incident involved another area of the claimant's body which was not directly involved in this litigation, it might be rationalized that he would overlook the incident. However, the basis of this litigation is a neck injury and clearly from the medical records from February 19, 1979 the claimant reinjured his neck. Failure to disclose this information severely affects the claimant's credibility in the mind of the undersigned deputy.

Both Dr. Koch and Dr. Crouse are equally qualified orthopedic specialists. Dr. Crouse appeared to be less familiar with the facts predating January 10, 1979 and thus his opinion will be given less weight in the final determination of this case. Dr. Crouse, on the other hand, finds that there was in substance a total recovery from the June 8, 1978 work incident. Any problems which the claimant is now experiencing he attributes to some intervening cause of some type.

Based upon the record as a whole and taking into consideration all of the testimony, it is determined that claimant has failed to sustain his burden of proof and has not established a causal relationship between his present complaints and alleged disability and the work related injury of June 8, 1978.

FINDINGS OF FACT

That on June 8, 1978 the claimant was an employee of defendant.

That on June 8, 1978 the claimant sustained an injury which both arose out of and in the course of his employment with the defendant.

That the claimant was temporarily totally disabled from June 9, 1978 through and including August 14, 1978 and received benefits for this period of time.

That the claimant was relatively symptom-free from August 14, 1978 through January 1979.

That on or about February 10, 1979 the claimant was involved in a snowmobile accident as a consequence of which he reinjured his neck.

That from February 10, 1979 the claimant has required continuous medical treatment of one form or another.

That the greater weight will be placed upon the opinion of Dr. Koch.

That the claimant fully recovered from his June 8, 1978 injury and has suffered no permanent partial impairment as a result of that incident.

CONCLUSIONS OF LAW

That the claimant failed to sustain his burden of proof and has not established a causal relationship between his present complaints and alleged disability and the June 8, 1978 work injury.

THEREFORE, IT IS ORDERED:

That defendants shall pay unto claimant the medical bill of Dr. Jerry D. Dawson, M.D., in the amount of fifty-four dollars ($54).

That the claimant shall take nothing further from these proceedings.

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

Signed and filed this 30th day of August, 1982.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARLEY L. LAIDIG,
Claimant,
vs.
ANDERSON & SCHENCK COMPANY,
Employer,
and
U.S.F. & G. COMPANY,
Insurance Carrier,
Defendants.

File No. 506351
N U N C
P R O
T U N C
O R D E R

Mr. Michael Bovee
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Spencer, IA 51301 — For Claimant

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NOW on this 9th day of September, 1982 the undersigned deputy industrial commissioner after examining the decision filed in the above-captioned case filed August 30, 1982 notes the following clerical errors which should be and are hereby corrected via this nunc pro tunc order.

That the last portion of the initial introductory paragraph shall read: "to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on June 8, 1978."

That the last sentence in the initial paragraph of the analysis section shall be modified as follows: "It was not until after February 10, 1979, which is the date of the snowmobile accident, that additional medical supervision was required culminating in the recommendation of Dr. Crouse that a cervical fusion be performed."

That the second full paragraph in the analysis section shall be modified as follows: "A thorough analysis of the impartial emergency room record of February 10, 1979 leads the undersigned to believe that that snowmobile accident was more significant than the claimant or his family acknowledge." That the second paragraph in the analysis section shall also be modified as follows: "However, the basis of this litigation is a neck injury and clearly from the medical records from February 10, 1979 the claimant reinjured his neck."

That the third paragraph in the analysis section shall be modified as follows: "Dr. Crouse appeared to be less familiar with the facts predating February 10, 1979 and thus his opinion will be given less weight in the final determination of this case."

That the bill of Dr. Jerry D. Dawson in the amount of fifty-six dollars ($56) has previously been paid by the defendants.

That the balance of the decision of August 30, 1982 remains unchanged.

Signed and filed this 9th day of September, 1982.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN LEFFLER,
Claimant,
vs.
WILSON AND COMPANY,
Employer,
Self-Insured,
Defendant.

File No. 439794
A P P E A L
D E C I S I O N
O N
R E M A N D

STATEMENT OF THE CASE

Claimant was awarded payment of medical expenses, healing period benefits, 125 weeks of permanent partial disability benefits, and further treatment from his choice of a tender of psychiatrists and pain centers in a review-reopening decision filed August 3, 1978. Claimant appealed the deputy's proposed decision on the basis that the evidence showed claimant to be permanently totally disabled (the deputy had found claimant to be 25 percent industrially disabled). An appeal decision filed January 9, 1980 adopted the review-reopening decision as the final decision of this agency. Upon appeal by claimant to the Polk County District Court it was ruled that the deputy had imposed upon claimant a higher burden of proof than required, and further, that the weight given to expert medical testimony had been improperly minimized. The case was ordered remanded to this agency for a redetermination of disability in accordance with the district court decision. Appeal was then taken by defendant from the district court's ruling, whereupon the Iowa Court of Appeals affirmed and remanded the case to this agency for a determination of the extent of claimant's disability under the record made in the hearing on claimant's petition.

The record on appeal consists of the hearing transcript which contains the testimony of claimant; the depositions of claimant, Ruby Leffler, Albert Libby, Marshall Flapan, M.D., Sidney Frederick Yugend, M.D., and Roger D. Shafer, M.D.; defendant's exhibits A through F; three photographs of claimant number 3, 4, and 10 respectively; documentary evidence consisting of the attachments identified on a document marked stipulation filed April 12, 1978 and an amended and supplemental stipulation filed July 10, 1978; the contents of a file from the department of Public Instruction, Rehabilitation Education and Services Branch, referred to in the deposition of Albert Libby; the briefs and filings of all parties on appeal; and the rulings issued on this matter by the Polk County District Court and the Iowa Court of Appeals. The admission of a document marked claimant's exhibit 1, a list of medicines, was deferred at the direction of the deputy commissioner to a later stipulation.

At the time of the review-reopening hearing it was stipulated by the parties that notice of the suit had been properly carried out, and that the disability upon which claimant's action is based arose out of and in the course of employment.

ISSUE

The sole issue on appeal is the extent to which claimant is industrially disabled as a result of his injury of September 9, 1975.

REVIEW OF THE EVIDENCE

Claimant was injured during a September 9, 1975 altercation with his plant foreman, Al Quintero. As a result of the altercation, claimant received a knife cut to his little finger and blows to his lower back. (Transcript, pp. 47-54) Claimant has not returned to work.

Marshall Flapan, M.D., had treated claimant on numerous occasions for a variety of orthopedic injuries prior to September 9, 1975. Following the September 9, 1975 injury to claimant's finger and back, Dr. Flapan was unable to find any permanent physical impairment despite continuing complaints of back pain. It was Dr. Flapan's opinion that claimant's problems were primarily emotional, and were expressed in terms of physical complaints. He noted that claimant had a history of complaining of injuries in excess of what was merited by medical examination. Dr. Flapan arranged for claimant to receive counseling from a psychiatrist.

Roger D. Shafer, M.D., the only psychiatrist to testify in this matter, first saw claimant at the request of Dr. Flapan on December 16, 1975. He continued to see claimant at least until November 1977. A brief history of claimant taken by Dr. Shafer included information with regard to the September 9, 1975 altercation and a back injury caused by a falling hog in 1973. (Shafer Deposition, pp. 5-9) When questioned as to claimant's ability to return to work after the September 1975 altercation, Dr. Shafer stated:

> In terms of that, it was apparent that he was quite frightened of returning to work. In other words, unwilling to at that time because of his fears. He admitted to me that he was quite frightened of returning to work and the reasons that he gave at that time were that he was concerned that he might lose his job if he returned and that he also more so than that was quite concerned that he might lose

his job, that he could have either another accident on the job or he could get into another fight with his foreman, and just the suggestion of his returning to work at that time led him to become visibly more anxious in the office.
(Shafer Dep., p. 9, l. 19 - p. 10, l. 5)

Dr. Shafer's primary diagnosis of claimant was a mild mental deficiency, a post-traumatic neurosis, and a depression reaction which was secondary to the length of the time period that he had been off work. (Shafer Dep., p. 31) It was his opinion that the altercation which had taken place between claimant and his foreman represented not only a physical attack upon his body, but also a psychological assault. He labeled claimant's condition as a post-traumatic neurosis which is caused by a precipitating accident or injury, and is a sub-type of anxiety neurosis which is a condition brought about by the culminated effect of many events both past and present. (Shafer Dep., pp. 19-23) Dr. Shafer testified that claimant's condition was causally connected to the altercation with his foreman on September 9, 1975, and that his condition was permanent:

Q. Now, Doctor, based upon your knowledge and training and experience in the area and based upon the history provided to you by John Leffler, based upon the various medical reports and information that you have received in diagnosing and treating John Leffler's condition, do you or do you not have an opinion based upon a reasonable degree of medical certainty as to whether or not there is a causal connection between the incident which John described, an altercation between himself and his foreman, and the condition for which you diagnosed, treated from your original visit to and through the visit that you had with him today?

A. Yes, I believe there is a direct connection.

Q. And again briefly, what do you base this opinion on?

A. Based on the onset of his severe anxiety following the incident where he had this altercation and his inability then to return to work because of his marked fears that he reported to me then in that first visit.

Q. Did the then feeling of pain that he decribed play a role in that as well?

A. Certainly, the continuation of feeling of pain kept him from being able to feel that he could go on and accomplish anything in terms of his own work life and very much of his personal life.

Q. Doctor, based upon your knowledge and training and experience in the field and the history and observations and examinations and means and manner of your treatment of John Leffler from the first day you saw him to the present time, including the various reports that you receive to assist you in diagnosing and treating John Leffler, do you have an opinion based upon a reasonable degree of medical certainty whether or not the contidion in which you found and find John Leffler is permanent or not?

A. At this time I believe the condition is permanent.

Q. What is that opinion based on?

A. Based on my evaluation and continued visits with Mr. Leffler over this period of time.

Q. Are there other factors that you consider other than the lapse of time?

A. The continuation of the symptoms in a rather unchanging fashion over this period of time.
(Shafer Dep., pp. 44-46)

Under cross-examination by defendant's counsel, Dr. Shafer responded to questioning as follows:

Q. Doctor Shafer, did Mr. Leffler ever relate to you an incident in early 1973 where he had a similar pseudo heart attack?

A. No.

Q. Has anyone ever told you about that?

A. No.

Q. If I would hypothesize or tell you that there was a similar incident in early 1973 which he was, in fact, admitted to the hospital complaining of chest pain and, in fact, in intensive care and the cardiac unit for almost over a week, I believe, and again discharged without any diagnosis of a physical disability or physical ailment, would that information have any effect on your evaluation and diagnosis and prognosis of Mr. Leffler? I realize that I'm springing this on you.

A. It certainly would make me even more suspicious of anxiety neurosis than I would have been before, Yes.

Q. Anxiety neurosis?

A. Yes.

Q. Not necessarily post-traumatic neurosis?

A. No.

Q. In fact, there is some evidence that Mr. Leffler after this heart attack incident in 1973 told our plant personnel that he had had a nervous breakdown. Did he ever relate that incident to you?

A. No, he didn't.
(Shafer Dep., pp. 71-72)

He also testified on cross-examination as to the difference in the symptoms of anxiety neurosis and post-traumatic neurosis, and manner in which he perceived claimant's symptoms in determining his disgnosis of post-trauma neurosis:

Q. Are the symptoms of post-traumatic anxiety also similar to anxiety that could have been produced over a period of time?

A. The anxiety symptoms could look very much like anxiety over a period of time, yes.

Q. How can you tell the difference then?

A. The difference is primarily determined by the degree of anxiety that a person presents with, how much they seem to be experiencing and whether or not there were previous events in a person's life where they had similar anxiety. Often it doesn't become full blown or full feldged until after some kind of traumatic event in the person's life.

Q. In other words, if there have been or had been prior incidents where Mr. Leffler had reacted as you saw him react, if there had been such reactions prior to your seeing him, would that tend to confirm or tend to rebut a diagnosis of post-traumatic neuroses?

A. It would tend to confirm a diagnosis of post-traumatic neurosis because the person already had an anxiety neurosis out of his childhood experience. The stress in his current life, that is some kind of traumatic event, then set it off to make it more visible.

Q. But what I'm saying is assuming that Mr. Leffler would have reacted as he reacted when you observed him prior to September of 1975, would that have changed your opinion in any way?

A. I think the only difference that I would say is that he had an anxiety neurosis, and as I mentioned previously, post-traumatic is a subtype of anxiety neurosis.

....

Q. Assuming that Mr. Leffler's psychological problems were related to the incident in 1975, and obviously, we aren't admitting that they were, but for purposes of asking you this question, do you think that the incident that he described to you brought about the condition in such a way that the factors were solely related to that particular incident?

A. I saw that only as -- what I call the straw that broke the camel's back, a precipitating stress. In other words, that's the event that unroofed the neurosis. The neurosis was already there. It took something to uncork it. Somehow that experience, I think, was that.

Q. Then was his disability to return to that particular job environment related, in your opinion, to that particular job environment?

A. He connected that environment with the possibility of attack, either a personal emotional attack or a physical attack. And in that sense, then it was that environment that he was concerned about.

Q. Namely, Wilson Foods?

A. Yes.
(Shafer Dep., pp. 55-56, 59)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 9, 1975 is causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id. at 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, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

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, 252 Iowa 613, 620, 106 N.W.2d 591, and cases cited.

The Iowa Supreme Court has on several occasions discussed the requirement of showing proximate cause of a disability under the Iowa Workers' Compensation Law. The court in Langford v. Keller Excavating and Grading, Inc., 191 N.W.2d 667, 670 (Iowa 1971) states:

> We agree with the trial court that this resulted from requiring claimant to prove the accident of 1967 was the sole proximate cause of his present disability. We hold this is a greater burden than the law casts upon him.
>
> [4] Taking into account all of Dr. Hayne's testimony and giving full effect to it all, we hold the conclusion is inescapable as a matter of law that claimant's disability is directly traceable to the injury of April 1967, without which it would not now exist.
>
> This is all claimant need prove.

In accord with Langford is Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) which holds that, for purposes of workers' compensation "[a] cause is proximate if it is a substantial factor in bringing about the result...it only needs to be one cause; it does not have to be the only cause."

ANALYSIS

Claimant contends that deputy's finding that claimant was 25 percent permanently partially disabled is in error in light of the evidence presented at the review-reopening hearing. This tribunal, on remand of this matter and pursuant to the directions of the appellate courts hereby concludes that claimant's assertions are correct and finds claimant to be permanently totally disabled.

The only psychiatrist to testify at the review-reopening hearing opined that claimant was permanently and totally disabled due to psychological problems resulting from the altercation of September 9, 1975. The fight between claimant and his foreman was described by Dr. Shafer as the "straw which broke the camel's back -- a precipitating stress." It was the conclusion of Dr. Shafer that claimant suffered from post-traumatic neurosis, and causally related the September 9, 1975 incident to claimant's inability to return to work.

The finding by the deputy that claimant had been industrially disabled to the extent of 25 percent of the whole man, and not totally disabled, as the result of the psychological effects of the fight with his foreman was based upon two factors. First, the deputy noted that claimant had had previous injuries which may have indicated that claimant did not suffer from post-traumatic neurosis, rather he could just as likely have been diagnosed as suffering from anxiety neurosis. Secondly, the deputy noted that claimant's anxiety level prior to September 9, 1975 was more severe than was envisioned by Dr. Shafer, and that such preexisting condition was not itself compensable.

As indicated by the court the factors set forth by the deputy do not detract from Dr. Shafer's conclusions. At no time, including after having been informed of previous injuries, did Dr. Shafer retract from the position that the September 9, 1975 fight was the preciptiating cause of claimant's psychological condition. As in Langford, taking the doctor's testimony and giving it full effect, it is apparent that claimant's disability is directly traceable to the injury of September 9, 1975, without which it would not now exist. As regards the issue of preexisting anxiety, an employer takes an employee as he finds him. This maxim applies to physical and psychological injuries alike. Had it not been for the aggravation of the preexisting neurosis, disability would not now exist. Accepting that the psychiatric condition is all to be considered causally related to the injury along with the other factors of claimant's age, education, prior work experience and inability because of the injury to carry on gainful employment for which he is fitted, claimant's industrial disability is presently permanent and total.

WHEREFORE, based upon the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

FINDINGS OF FACT

1. Claimant received a knife cut to his finger and blows to the lower back in a fight with his foreman on September 9, 1975.

2. Claimant has not returned to work.

3. Claimant has sustained no permanent physical injury.

4. Claimant has sustained psychological injury as a result of the September 9, 1975 fight.

5. Claimant suffers from post-traumatic neurosis.

6. Claimant's psychological condition is permanent.

7. Claimant has worked various unskilled jobs, many of which require heavy labor.

8. Claimant is trained to perform automobile body work in which he has engaged with limited success.

9. Claimant is illiterate with mild mental deficiency.

10. Claimant was, at the time of hearing, in his mid 40's.

11. Claimant has on this record a permanent total industrial disability.

CONCLUSIONS OF LAW

Claimant has met the burden of demonstrating a permanent impairment which is causally related to the injury received September 9, 1975.

Claimant is entitled to benefits pursuant to section 85.34(3), Code of Iowa, 1975, as a result of the injury received September 9, 1975.

THEREFORE, it is ordered:

That the review-reopening decision filed August 3, 1978 be modified to the extent that claimant is found to be permanently totally disabled.

Signed and filed this 29th day of April, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EARL LEMON,

Claimant,

vs.

FIRESTONE TIRE & RUBBER CO.,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 621989

A P P E A L

D E C I S I O N

Mr. Robert W. Pratt
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Mr. Dennis L. Hanssen
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STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision filed April 16, 1982 wherein claimant was denied further compensation benefits for an admitted industrial injury occurring on October 10, 1979.

As of the hearing date, the parties had stipulated as to causal relationship, healing period, the rate of weekly compensation, and the payment of medical expenses. The parties further stipulated that as of the hearing date, claimant has been paid the equivalent of 22 1/2 percent permanent industrial disability.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant and Robert V. Bianchi; claimant's exhibit 1; defendants' exhibit 1; and the briefs of all parties on appeal.

ISSUE

As at hearing, the sole issue on appeal is the extent of claimant's permanent industrial disability.

REVIEW OF THE EVIDENCE

Claimant, age 47 at hearing, sustained an admitted industrial injury on October 10, 1979 while employed as a tire builder. Claimant testified that on that date, he was yanking on a tread stuck to a tray when he "felt something pop" in his neck. (Tr., p. 8) Claimant kept working until October 22, 1979 when his vacation was scheduled to begin. (Tr., p. 10) With his return to Iowa on October 25, 1979, claimant went immediately to Mercy Hospital in Des Moines. (Tr., p. 11) Claimant was seen there by his family physician, Carlton W. Van Natta, M.D., who immediately referred him to John T. Bakody, M.D., and admitted claimant for hospitalization. Claimant underwent cervical fusion surgery on November 9, 1979 and was released to return to work on March 16, 1980. (Tr., pp. 12-13)

Claimant testified that prior to returning to work, he was examined by defendant employer's plant physician, Richard C. Porter, M.D. Claimant stated that Dr. Porter wrote in his notes that claimant was not to bend, twist, or lift over 20 pounds. (Tr., p. 13)

Claimant testified further that upon his return to work he went to "green tire repair," which is a light duty position, for 4 to 6 weeks. (Tr., p. 14) Claimant returned to tire building on a limited pace for approximately 6 weeks before returning to his regular pace. (Tr., p. 16) Claimant was regularly seen by the plant physician throughout the period. Claimant worked at his regular pace for 1 or 2 weeks before bidding and transferring to a job driving a forklift in the receiving department. (Tr., p. 16)

Claimant testified that he bid for the forklift job because upper body movement required in the tire building caused him pain. (Tr., p. 16) Claimant also stated that he would like to return to tire building because the pay is better, (Tr., p. 24) but declined such an opportunity. (Tr., p. 26)

On cross-examination, claimant disclosed that the last time he was seen for treatment of his neck was March of 1980. (Tr., p. 20) Claimant also revealed that he is on an unlimited medical classification which means that he was free to bid on any job commensurate with seniority. (Tr., p. 21) Claimant also indicated that he likes his forklift driving job and finds the tasks easier to perform. (Tr., p. 17)

Robert V. Bianchi testified that he is the pension insurance representative for claimant's union. Mr. Bianchi testified that if claimant were still building tires under optimal circumstances, he would earn $105.00 a day. (Tr., p. 28) In a tire building job, claimant is paid an hourly base rate plus an additional $2.05 to $4.42 an hour depending upon output. (Tr., p. 28) Apparently, no overtime is worked. In claimant's present forklift driving job, he is paid an hourly basis and is eligible for overtime. Claimant testified that his basic daily wage at the time of hearing was $88 or $440 per week. (Tr., p. 25) Claimant's wage on October 10, 1979 was $411.05. (Tr., p. 25)

Dr. Bakody, a neurosurgeon, treated claimant from October 25, 1979 until March 11, 1980 and performed a cervical fusion procedure on November 9, 1979. In a report of November 19, 1979, Dr. Bakody discloses a history of pain starting on October 20, 1979. Dr. Bakody also reported that a myelogram showed claimant had had a filling defect on the left at the C6-7 level. In a December 10, 1979 report, Dr. Bakody states that claimant will suffer some permanent functional impairment as a result of his injury but does not state the degree of that impairment.

In a final report of March 11, 1980, Dr. Bakody writes:

> Following his discharge from MErcy [sic] Hospital Medical Center I have had occasion to see your patient, Mr. Lemon, in my office for progress examinations on the dates of December 18, 1979, January 29 and March 11, 1980. Progress x-rays of the cervical spine were obrained [sic] at the December visit and showed satisfactory alignment at the C 6-7 level and some anterior protrusion of the C 5-6 plug. He did report relief of his original discomfort. At his January visit he reported some occasional upper dorsal spine discomfort but otherwise he was "pretty good." I did place him upon a Codman exercise program for the right shoulder and at the time of his March visit he reported he was more like himself. He states that he is about "85 % better." He continues to have some discomfort with the right shoulder and the neurologic findings are essentially normal. I did provide him with a work return as of March 17, 1980 and suggested that he continue under your guidance.

Claimant is now able to work without restriction and plans to work for defendant employer until retirement. (Tr., p. 19) He has recovered fully from his surgery and is able to bid for any job with defendant employer. Claimant complains of neck and shoulder pain but has no functional impairment rating by any physician. Claimant requested his present job and makes approximately 19 percent less on the present job without overtime than he would be making if he had chosen to remain on the former job.

Additionally, claimant has a long and varied employment history holding jobs from a typing clerk, to assembly line worker, to produce manager. At hearing, claimant testified that he had worked for defendant employer 14 years and has a good work record.

APPLICABLE LAW

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."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, ___, cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, supra. 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 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. See Birmingham v. Firestone Tire & Rubber Co., Appeal Decision (1981). Enstrom v. Iowa Public Service Co., Appeal Decision (1981).

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 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.

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).

ANALYSIS

As noted above, claimant has already been voluntarily paid compensation benefits equaling 22 1/2 percent permanent industrial disability. Claimant now asserts, and has the burden of proof, that his permanent industrial disability exceeds 22 1/2 percent. Claimant seeks an industrial disability rating of 45 percent on the basis of an alleged 15 percent functional impairment rating and a 19 percent reduction in wages allegedly related to his injury.

Dr. Bakody's report of March 11, 1980 does not even come close to saying claimant has a 15 percent functional disability. While Dr. Bakody makes it clear that claimant does suffer some permanent functional disability, he does not assess the extent of that disability. Moreover, Dr. Bakody finds claimant's condition unremarkable and places no restrictions upon claimant's work. Claimant provides no medical evidence from any other source that would provide a basis for determining claimant's functional impairment.

Claimant has further failed to show that the reduction in his earnings is the result of any employment related injury. Claimant is not restricted from doing any type work, either by any physician or by defendant employer. He competed for his present job and voluntarily left his old job. Apparently, his forklift driving job requires less effort and claimant does not wish to work elsewhere.

As the above case law indicates, industrial disability is a measure of the reduction of a claimant's earning capacity. It is the loss of earnings caused by a job transfer relating to an industrial injury that justifies a finding of industrial disability. Claimant was not required to move to a different job by defendant employer. Just as he bid for his present job, claimant has the ability to bid for any other job. Claimant is therefore the master of his earning capacity and his current reduction in pay is, at least in part, if not wholly, a voluntary act.

In his decision, the deputy finds:

> Claimant is 47 years old and is a high school graduate. Claimant has done factory work, worked as a laborer in construction and has worked in the produce department of a grocery store. Claimant started working for defendant employer in August of 1965 and until his accident worked as a tire builder. Although claimant states he is unable to continue his work as a tire builder, there is no medical evidence to support such a conclusion. The record discloses that claimant has had no working restrictions since June 2, 1980. Claimant has had a reduction in his income since his injury but that appears to be his voluntary act. As disclosed by claimant in his cross-examination, he has not been seen for treatment since March of 1980. It is determined that claimant has failed to show he has over a 22 1/2 percent permanent partial disability as a result of his injury on October 10, 1979.

Review of the record on appeal bolsters the findings of the deputy. Claimant objects that the deputy failed to assess the degree of industrial disability of the claimant as a result of the injury but gives little evidentiary assistance upon which such determination can be made. It is claimant's burden to prove the degree of disability. Based upon this record the proof is minimal. Given the factors set forth in Parr, supra, Birmingham, supra, and Enstrom, supra, claimant is found to have sustained a permanent industrial disability of 10 percent as a result of the injury of October 10, 1979.

FINDINGS OF FACT

1. That claimant was 47 years old at hearing with a high school education.

2. That claimant sustained an admitted injury to his cervical area on October 10, 1979.

3. That as a result of the forementioned injury, claimant underwent a cervical fusion.

4. That as a result of this surgery, claimant has a limited permanent functional impairment.

5. That claimant has not been placed under any restrictions as a result of the injury of October 10, 1979.

6. That no medical evidence supports claimant's statement that he cannot now perform the job he held on October 10, 1979.

7. That claimant voluntarily left his job as a tire builder to take a lower paying job as a forklift driver.

8. That as a result of the injury of October 10, 1979, claimant sustained a permanent industrial disability of 10 percent.

CONCLUSIONS OF LAW

That claimant is entitled to fifty weeks of permanent partial industrial disability benefits.

That claimant is not entitled to further benefits over and above the 22 1/2 percent already paid.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision of April 16, 1982 are proper.

THEREFORE, it is ordered:

That defendants pay claimant fifty (50) weeks of permanent partial disability benefits at a rate of two hundred forty-nine and 49/100 dollars ($249.49) per week.

That defendants are entitled to a credit for benefits previously paid.

That costs of this action are taxed to claimant pursuant to Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 29th day of July, 1982.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH LEIGHTY,	:	
Claimant,	:	
vs.	:	File Nos. 628613 631001
MULTECH CORPORATION,	:	
Employer,	:	R E H E A R I N G
and	:	D E C I S I O N
CNA INSURANCE COMPANY and HAWKEYE INSURANCE,	:	
Insurance Carrier, Defendants.	:	

This is a rehearing proceeding in review-reopening pursuant to an order entered by the undersigned on September 21, 1982 as follows:

1. That the claimant be reexamined by H. R. Crowley, M.D., the original physician chosen by the defendants to treat the claimant.

2. That said examination take place within forty-five (45) days of the date below.

3. That said examination shall include the doctor's opinion as to the future treatment of the otitis externa still present.

4. That said examination include the doctor's opinion as to the reasonable expectation of providing ear protective alternatives.

5. That the parties shall agree within ten (10) days following the examination as to the evidentiary method to be used to make the results of the examination a part of the proceedings, i.e., by medical report or medical deposition.

6. That said evidence shall be filed with this agency within sixty (60) days from the date below.

The evidentiary deposition was filed and made a part of these proceedings on November 15, 1982.

A summary of the pertinent portions of Dr. Crowley's deposition in respect to hearing impairments are set forth below:

Q. All right. And you can say, or with reasonable medical certainty, that the various injuries that the Claimant has had to each ear has not hastened his loss of hearing?

A. Can I say that they have not?

Q. Yes.

A. Based on the most recent audiogram we have, I would say that he has no evidence of hearing loss from his injuries, since there's no conductive component to the audiogram loss.

Can we go off the record for a minute?

Q. No. No.

A. Okay.

Q. No, that's all right.

Are you saying, Doctor, that if he hadn't had any trauma at all, that his hearing loss would be what it is now?

A. I would have to say that that's very likely. I would say that because his hearing loss is bilateral, symmetrical, and neurosensory in type.

And if the injuries were a factor, I would expect a conductive component to the hearing loss, which essentially there is none.

Q. And is your testimony that this infection that he has in his ear, this externa--

A. No.

Q. --has nothing to do with hearing?

A. I think it's absolutely due to his injuries, but I don't think that the infection is causing any hearing loss. About that, I don't think there would be any argument or discussion among any knowledgeable group. Otitis externa is simply not a reason for hearing problems.

Q. Is it your testimony then, Doctor, that after each one of his operations, that you restored his hearing to what it would have been now?

A. What middle ear, ear drum, middle ear surgery tries to achieve is to eliminate the conductive components to hearing. And that would--would seem to have been achieved with his hearing--with his surgeries rather.

Q. And there's no weakening process that goes on because of the trauma, that when you have these successive injuries to the ear?

A. I don't think that I have the knowledge to answer that. It's certainly attractive supposition, but I really can't give you any evidence to say that I know that to be so.

Q. All right. Doctor, let me ask you this. If his loss at the present time is normal, he certainly doesn't have the hearing of a normal person, does he, of his age?

A. His hearing is probably worse than what you would expect for a man--he's what, 50 now? I think his hearing is probably worse than most 50 year olds.

Q. All right. But, again, you don't attribute that at all to the fact that he had three or four injuries, serious injuries, to his ear?

A. But no injuries to the neuromechanism, to the inner ear, so that I would have to say that I couldn't ascribe his current, present hearing loss to his injuries. The injuries he had, if there were a residual problems, should leave a conductive hearing loss, which he does not appear to have.

Q. Okay. But it is your opinion with reasonable medical certainty that this infection of the ear will be chronic and be permanent in nature?

A. It is my opinion. (Transcript, pp. 40 through 43.)

In light of the foregoing, it is apparent that the claimant has failed to produce medical testimony that supports his claim of a hearing loss, and it is so found.

This still leaves the claimant's chronic otitis externa (Tr., p. 6, l. 2) which Dr. Crowley described as follows (Tr., p. 7, l. 3):

A. Usually we see a swollen, inflamed, reddened, ear canal, with an element of purulent drainage associated with it.

Q. And what was your observation in this particular case?

A. Basically that.

Claimant sustained his last left ear injury on July 15, 1979 and at a time when Hawkeye Insurance Company was the carrier.

Dr. Crowley concluded that claimant's otitis externa is caused by claimant's industrial accident. (Tr., p. 41, l. 22.)

It follows that the claimant is entitled to that necessary medical care to treat this chronic condition, and that the defendants should consider appointing an otolaryngologist in the Sioux City area to provide the continuing treatment suggested by Dr. Crowley and provided for in §85.27, The Code.

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 the pertinent portions of the undersigned's previous decision of August 20, 1982 are adopted and made a part of this rehearing decision.

2. That the claimant sustained a left ear injury due to hot slag on November 4, 1976.

3. That the claimant sustained a left ear injury due to hot slag on May 12, 1978 for which claimant was paid a thirty (30) percent functional hearing impairment by CNA Insurance Company.

4. That the claimant sustained a left ear injury due to hot slag on July 15, 1979 which now results in a chronic condition known as otitis externa.

5. That said condition involves the external ear and does not affect claimant's ability to hear.

6. That as a result of the 1979 left ear injury, claimant has not suffered an additional hearing loss of the affected left ear.

7. That the claimant sustained a right ear injury on February 6, 1980 for which he has been paid twenty-five (25) percent permanent partial disability.

8. That the claimant's right ear loss is found to be unchanged.

9. That certain of claimant's medical expenses remain unpaid.

THEREFORE, IT IS ORDERED that claimant taking nothing further as a result of these proceedings except as it relates to the following unpaid medical expenses which are to be paid to the claimant as reasonable and necessary medical expenses he has incurred as necessary to treat the injury:

Walgreen Drugs	$37.60
H. R. Crowley, M.D.	$105.50

Defendants are further ordered to file with this office within thirty (30) days from the date below the name of the local treating physician that has been agreed upon to treat

claimant's otitis externa.

Costs, in accordance with Iowa Industrial Commissioner Rule 500-4.33, shall be paid by the defendants Multech Corporation and Hawkeye Security, who are to file a final report within thirty (30) days from the date that the terms of this order become final.

Signed and filed this 10th day of February, 1983.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM D. LINCOLN, Claimant,	:	
vs.	:	File No. 677304
CENTRAL SOYA COMPANY INC., Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
ZURICH-AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

This is a proceeding in arbitration brought by William D. Lincoln, the claimant, against his employer, Central Soya Company, Inc., and the insurance carrier, Zurich-American Insurance Company, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on October 20, 1980. This matter came on for hearing before the undersigned at the Woodbury County Courthouse in Sioux City, Iowa on September 16, 1982. The record was considered fully submitted on that date.

The record consists of the testimony of the claimant; the testimony of Terry Myers; claimant's exhibit 1, office notes of Robert C. Larimer, M.D.; claimant's exhibit 2, a December 11, 1980 report from Ahmad Akbari, M.D.; claimant's exhibit 3, a March 13, 1981 report from Dr. Larimer; claimant's exhibit 4, a March 16, 1981 report from Dr. Akbari; October 9, 1981 and December 4, 1980 reports with attached notes from R. L. Morgan, M.D.; and defendants' exhibit E, certified copies of a first report of injury and compensation and expense report filed before the compensation court of Nebraska.

It should be noted that a motion for summary judgment based on Iowa Code section 85.71 and a resistance thereto, with a request for hearing, triggered the assignment for pre-hearing. At the parties' request, the case was assigned for hearing on all the issues.

ISSUES

According to the pre-hearing order, the issues to be determined include whether claimant received an injury in the course of and arising out of his employment; the nature and extent of the injury; and jurisdiction. At the time of the hearing the parties agreed that the claimant's injury arose out of and in the course of employment on October 20, 1980. Defendants indicated that in addition to the two remaining issues they were pursuing the full faith and credit argument and the request for mitigation of damages (based on claimant's refusal to have surgery) as raised in their answer. The parties stipulated that the applicable rate of weekly compensation was $160.50.

REVIEW OF THE EVIDENCE

Claimant testified that in the 22 years he worked for defendant employer as a warehouse technician, the company had "changed hands" three times and, but for approximately a month preceding his injury, had been located in Sioux City, Iowa. He recalled that defendant employer relocated to South Sioux City, Nebraska in September of 1980. Claimant acknowledged that thereafter he worked principally in Nebraska although he was sent occasionally to Iowa to retrieve materials at the former site of operation.

Claimant testified that on Monday, October 20, 1980, he fell 1 1/2 feet with a 500 pound cart of feed he had been pushing up a teetering loading plate into a truck. Claimant stated that he experienced immediate pain in his right groin but completed his shift. The medical records indicate that claimant suffered a small inguinal hernia on the left. R. C. Larimer, M.D., and A. Akbari, M.D., recommended surgical repair. (Claimant's exhibits 2-4.) Dr. Larimer recommended that claimant avoid heavy lifting. (Claimant's exhibit 3; claimant testified that all the doctors he saw for the work injury told him lifting would aggravate his condition.) R. L. Morgan, M. D., the company doctor, advised the claimant as of December 1, 1980, the last date of examination, that he should return to work. (Claimant testified that Dr. Morgan indicated "light" work.) It was his opinion that claimant did not have a definite hernia and surgery was optional. However, he noted that if claimant pursued surgery, permanent disability would not be anticipated, and if claimant did not undergo surgery, development of an inguinal hernia was more likely. (Claimant's exhibit 5.) Claimant was adamant about not electing surgery except in a "life-death" situation. Claimant has not returned to work since the date of injury. He received 4 6/7 weeks of temporary total disability benefits under the Nebraska compensation law. (Defendants' exhibit E.)

Terry Myers, who has been employed with defendant employer for 13 years and who presently is the manager at the South Sioux City site, testified that defendant employer moved its Sioux City, Iowa operation to Nebraska on September 22, 1980. Although defendant employer retained ownership of the South Sioux City location for another year, no routine work was performed there. He explained that the defendant employer's business was the manufacturing of feed. Mr. Myers acknowledged that switching remaining materials, such as ingredients, from one site to the other took place occasionally after September 22, 1980 and it was possible the claimant could have been assigned to do such work on a particular day. Mr. Myers also testified that defendant employer's corporate offices are (and were on September 22, 1980) located in Fort Wayne, Indiana. He noted that defendant employer has no plants in operation in Iowa at present. (In his March 3, 1982 affidavit in support of the motion for summary judgment, Mr. Myers stated that defendant employer had five other plant locations in Nebraska, in addition to plants in at least twenty other states including two in Iowa--at Des Moines and at Belmond.)

Since the issue of jurisdiction is determinative of the case, the remainder of the record need not be reviewed.

APPLICABLE LAW

Code section 85.71 provides in relevant part:

> If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:
>
> 1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or
>
> 2. He is working under a contract of hire made in this state in employment not principally localized in any state, or
>
> 3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or
>
> * * *

The Iowa Supreme Court assessed the legislative intent behind Code section 85.71 in Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 533-34 (Iowa 1981):

> The express overall purpose of section 85.71 is to specify employees who are entitled to Iowa workers' compensation benefits for injuries sustained during employment outside the territorial limits of this state. The enacting clause of subsection (1) provides benefits for an employee whose "employment is principally localized in this state." (Emphasis added). The enacting clause is followed by an explanatory or definitional clause containing two requirements: "his employer has a place of business

in this or some other state and he regularly works in this state, or if he is domiciled in this state."

An isolated, literal reading of the definitional clause would provide coverage based upon domicile alone, if the employer has a business in any state. We have often said that the legislature may be its own lexicographer, and that we are bound to follow its definitions, State v. Di Paglia, 247 Iowa 79, 84, 71 N.W.2d 601, 604 (1955), and may not add words or change terms under the guise of judicial construction. State v. Hesford, 242 N.W.2d 256, 258 (Iowa 1976). "If, however, the definitions are arbitrary and result in unreasonable classifications or are uncertain, then the court is not bound by the definitions." 1A C. Sands, Statutes and Statutory Construction §20.08, at 59 (4th ed. 1972). Defining employment that "is principally localized in this state" to allow benefits to be based exclusively upon the domicile of the employee, with no part of the employment relationship either originating or performed in Iowa would, in our opinion, be arbitrary.

The principles of statutory construction discussed previously require us to consider all parts of a statute together. Thus, the definitional clause "or if he is domiciled in this state" must be construed with reference to the enacting clause's language of "employment [that] is principally localized in this state." The plain meaning of the enacting clause indicates that the employee must perform the primary portion of his services for the employer within the territorial boundries of the State of Iowa or that such services be attributable to the employer's business in this state. "Domicile" means a person's permanent place of residence. Black's Law Dictionary 435 (5th ed. 1975). Domicile alone is inapposite to whether an employee's "employment is principally localized in this state."

The model act upon which section 85.71 was patterned, see Dahl, supra, at 351-52, defines principally localized employment:

> A person's employment is principally localized in this or another state when (1) his employer has a place of business in this or such other state and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state;

Council of State Governments Model Act, Comprehensive Workmen's Compensation and Rehabilitation Law § 7(d)(4) (1963). Thus, under the model act employment is localized in a particular state when the employee regularly works in the state or is domiciled in the state and a substantial portion of the employee's working time is spent serving the employer in the state. Mere domicile alone does not confer coverage.

If the legislature, in patterning section 85.71 upon the model act, intended to provide Iowa workers' compensation benefits to employees who sustain injuries outside the state exclusively on the basis of domicile in this state, we do not believe it would have utilized the "employment is principally localized in this state" language in the enacting clause. Iowa domicile cannot rationally be equated with employment principally localized in Iowa. As previously mentioned, our rules of statutory interpretation require us to avoid absurd and impractical results. Accordingly, we hold that domicile in Iowa alone is not sufficient to entitle an employee who has sustained an injury outside the state to benefits provided by the Iowa Workers' Compensation Act. There must be some meaningful connection between domicile and the employer-employee relationship. Cf. Bashford v. Slater, 252 Iowa 726, 731, 108 N.W.2d 474, 476 (1961) (Workers' Compensation Act dependent upon existence of employer-employee relationship).

Our holding is consistent with workers' compensation law throughout the United States: "The place of the employee's residence, although having a very real interest as a community which might have to support a disabled and uncompensated workman, has never either by judicial decision or statute been held entitled to apply its statute on the strength of the resident factor alone." 4 A. Larson, The Law of Workmen's Compensation §87.60 (1979). Other courts have held their state workers' compensation legislation inapplicable when the employment contract was entered into, the employment performed, and the accident occurred outside the state. See Ryan v. Industrial Commission, 127 Ariz. 607, 623 P.2d 37 (Ct. App. 1981); Jerry v. Young's Well Service, 375 So.2d 186 (La. Ct. App. 1979); Crenshaw v. Chrysler Corp., 394 Mich. 513, 232 N.W. 2d 166 (1975); Wenzel v. Zantop Air Transport, Inc., 94 N.J. Super. 326, 228, A.2d 104 (Union County Ct.), aff'd. 97 N.J. Super. 264, 235 A.2d 29 (1967); Ray v. Aetna Casualty & Surety Co., 517 S.W.2d 194 (Tenn. 1974).

In the present case there is no meaningful link between Miller's domicile in Iowa and her employment relationship with IBP. The fact that Miller responded to an employment advertisement in an Iowa newspaper does not materially relate to her employment and is therefore insufficient to supply the necessary connection. See Ryan, 127 Ariz. at 609, 623 P.2d at 39 (no jurisdiction under Arizona compensation statute when Arizona resident responded to advertisement in Arizona newspaper and visited employer's Arizona terminal, but was hired in Oklahoma and injured in California).

The question of how substantial the connection between domicile and the employment relationship must be to entitle an employee injured in another state to benefits under the Iowa Workers' Compensation Act need not be addressed in this appeal. However, the legislative intent underlying the enactment of section 85.71(1) requires an interpretation that is consistent with the model act.

ANALYSIS

While claimant was domiciled in Iowa on the date of injury, he did not regularly work in Iowa nor did he spend a substantial portion of his working time in serving defendant employer in Iowa after September 22, 1980. The sporadic transport trips between the Sioux City and South Sioux City sites do not satisfy the requirements of Code section 85.71. Parenthetically, it is noted that although the record is not specific regarding whether the Des Moines and Belmond plants were operational on the date of injury (it will be assumed that they were for the purpose of analyzing jurisdiction in the light most favorable to the claimant), there is no evidence that such cleanup work had any connection with the other Iowa plants. Finally, the fact that claimant was working under a contract of hire made in this state does not mandate a finding of substantial connection between the employment relationship and the Iowa domicile sufficient to satisfy the intent of Code section 85.71(1). It may be unfortunate for the claimant that his injury did not occur prior to September 22, 1980; however, to allow a claimant living in Iowa the right to pursue benefits under the Iowa law simply because he contracted for work in this state and so worked for a period of time, despite his employer's relocation to another jurisdiction and regardless of the fact that the claimant was not performing regular work for the benefit of the employer in this state at the time of injury, would result in an unreasonable and arbitrary category.

Clearly, claimant does not qualify under subsection 2 because his employment was principally localized in Nebraska. Likewise he does not qualify under subsection 3 because the Nebraska compensation law was applicable to defendant employer.

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 small inguinal hernia on the left in the course of and arising out of his employment as a warehouse technician on October 20, 1980 at defendant employer's plant in South Sioux City, Nebraska.

FINDING 2. At or about the time of the injury, defendant employer's corporate offices were located in Indiana and defendant employer had operating plants in twenty states, including two in Iowa (Des Moines and Belmond).

FINDING 3. Except for approximately the last month before the injury, claimant worked for defendant employer at a Sioux City, Iowa site.

FINDING 4. Defendant employer relocated its Sioux City, Iowa operation to South Sioux City, Nebraska on September 22, 1980. All employees were transferred to Nebraska where the business of manufacturing feed was then conducted. Only transfer of remaining materials from the Iowa location necessitated claimant's presence in Iowa on a few occasions following the physical move to Nebraska. Claimant worked principally in Nebraska as of September 22, 1980.

FINDING 5. Claimant was domiciled in Iowa on the date of injury.

FINDING 6. Claimant received workers' compensation under Nebraska law.

FINDING 7. Based on findings 2-5, claimant's employment was not principally localized in Iowa on October 20, 1980.

FINDING 8. Based on findings 2-4, claimant was working under a contract of hire made in this state in employment principally localized in Nebraska on the date of injury.

FINDING 9. Based on findings 2-4 and 6, claimant was working under a contract of hire made in this state in employment principally localized in Nebraska, whose workers' compensation law was applicable to defendant employer on the date of injury.

CONCLUSION. This agency does not have jurisdiction over the October 20, 1980 Nebraska injury.

ORDER

WHEREFORE, it is hereby ordered that claimant take nothing from the present proceeding.

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

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

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD LEE MARANELL,	:	
Claimant,	:	FILE NO. 677322
vs.	:	
WILSON FOODS,	:	A R B I T R A T I O N
Employer, Self-Insured, Defendant.	:	D E C I S I O N

Mr. Harry H. Smith
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Sioux City, IA 51101 For Claimant

Mr. David Sayre
Attorney at Law
223 Pine Street
Cherokee, IA 51012 For Defendant

INTRODUCTION

This is a proceeding in arbitration brought by Ronald Lee Maranell, against Wilson Foods, employer, self-insured, for benefits as a result of an injury on May 27, 1981. On June 28, 1982, this case was heard by the undersigned. This case was considered fully submitted upon receipt of a partial transcript on July 1, 1982.

The record consists of the testimony of claimant, Dennis J. Harrington, and Keith Garner, M.D.; claimant's exhibits 1, 2 and 3; and defendant's exhibits A, B, C, D, E and F.

ISSUES

The issues presented by the parties at the time of the hearing are whether claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim; and the extent of temporary total benefits he is entitled to. At the beginning of the hearing, claimant's attorney stated they had no evidence to present on permanent partial disability.

FACTS PRESENTED

Claimant testified he started working for defendant in July of 1972 and three or four years ago, injured his back while running a splitting saw. Claimant revealed that he received 2-3 weeks of workers' compensation benefits as a result of this injury (not the injury on which claimant bases his present claim). Claimant testified he recieved an injury on May 27, 1981, when, after taking a shower, he stepped out on defendant's greasy floor and landed flat on his back (the injury which is the basis for this action). Claimant stated he had a sharp aching pain and saw the defendant's physician, Keith Garner, M.D., the following day. Claimant indicated that Dr. Garner gave him some pain pills, gave him one day off work and sent him for some physical therapy. Claimant stated that he continued to have physical therapy for approximately two weeks and continued to work. Claimant testified his back pain would come and go.

Claimant revealed that while on lay-off, he rolled over in bed and his back again gave him problems. Claimant indicated he again saw Dr. Garner and was given pain pills. Claimant disclosed that he left defendant's employment on August 14, 1981, and continues to have back problems. Claimant indicated that since leaving defendant's employment, he has had to see a doctor every week or two. Claimant testified that he did not have any records of when he missed work because of his back problems, but he knew he missed more than the single day following the fall.

Dennis J. Harrington testified that he works for defendant as Assistant Personnel and Labor Director. Mr. Harrington stated that the defendant's records do not show that claimant missed more than one day as a result of this injury and that he did not miss any work because of sickness after this injury. Mr. Harrington stated claimant came to him on May 29 and stated he had fallen that morning. Mr. Harrington revealed that claimant saw Dr. Garner that morning and reported back to work the following Monday. Mr. Harrington stated claimant made no further complaints to him about his condition after May 29 and did not realize claimant was making any further claim until the filing of his petition. Claimant received sick pay for the one day he missed.

Keith Garner, M.D., testified that he is defendant's physician and saw claimant on May 29, 1981, regarding his fall in the shower. Dr. Garner stated that although there were were no contusions and no evidence of injury, he prescribed muscle relaxants for claimant and ordered physical therapy. Dr. Garner stated he next saw claimant on July 22, 1981, when he complained of back pain as a result of rolling over in bed. Dr. Garner stated that claimant indicated some additional symptoms as a result of this incident in bed. Dr. Garner opined claimant has a normal spine and indicated claimant's back is O.K.

The notes of D. Hauswald, L.P.T., indicate that on June 6, 1981, claimant had no complaint of pain or discomfort.

In a report to claimant's attorney dated February 9, 1982, Daniel Sitzman, D.C., opined that it was possible that claimant's injuries were caused by an accident on May 27, 1981.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 27, 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 claimant has the burden of proving by a preponderance of the evidence that the injury of May 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).

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).

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 increase in cases to which section 85.32 applies."

ANALYSIS

Claimant's testimony regarding his injury at work in the latter part of May 1981 stands uncontradicted and is supported by other evidence. However, the greater weight of evidence indicates claimant missed under four days of work as a result of his fall. As disclosed by claimant's attorney at the beginning of the hearing, claimant was unable to present any evidence that he has any permanent impairment as a result of the injury. So if any disability resulted, it had to be temporary total disability.

It would appear that claimant had another injury while in bed. Claimant did not show that he had any further disability proximately caused by his injury in May of 1981 or that his injury in bed was proximately caused by his injury at defendant's. The greater weight of evidence would indicate that he totally recovered as of June 2, 1981.

Although claimant had medical testimony which indicated his complaints in 1982 may possibly be caused by an accident on May 27, 1981, the fact that claimant stopped medical treatment and did not complain to defendant would indicate that such a causal connection does not exist. Furthermore, it must be noted that the report of Dr. Sitzman does not even reveal that he knows what kind of accident occurred.

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 29, 1981, claimant fell while coming out of defendant's shower.

FINDING 2: As a result of his fall, claimant had back pain.

CONCLUSION A: Claimant received an injury arising out of and in the course of his employment with defendant on May 29, 1981.

FINDING 3: Claimant missed under four (4) days of work as a result of his injury.

FINDING 4: The greater weight of evidence indicates claimant had no further problems as a result of his injury after returning to work on the Monday following his injury.

FINDING 5: Claimant has not shown any permanent impairment.

FINDING 6: Claimant's pain, as a result of rolling over in bed, is unrelated to his fall on May 29, 1981.

CONCLUSION B: Claimant is not entitled to any temporary total disability benefits because he did not miss four (4) days of work.

CONCLUSION C: Claimant is not entitled to any healing period benefits because there is no showing of permanent partial disability.

THEREFORE, claimant is to take nothing as a result of this hearing.

Defendants are to pay the costs of this action.

Defendants are to file a first report of injury.

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

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DINO G. MASOLINI, Claimant, vs. ARMSTRONG TIRE AND RUBBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 688575 A P P E A L D E C I S I O N

By order of the industrial commissioner filed September 30, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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 hearing; claimant's exhibits 1-8, inclusive; and defendants' exhibits A, B and C, all of which evidence was considered in reaching this final agency decision.

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

SUMMARY

The arbitration decision contains a sufficient presentation of the evidence. Basically, claimant asserted that he strained himself at work while reaching for a tire, which caused or aggravated an umbilical hernia. Defendants' evidence showed that claimant would have little occasion to strain and that, when he reported the pain in his navel, he did not know its cause.

ISSUE

Claimant states the issue on appeal: "There is substantial evidence in the record that claimant sustained an injury arising out of and in the course of employment."

APPLICABLE LAW

Claimant has the burden of proof to show that he sustained an injury which arose out of and in the course of his employment. Lindahl v. L. O. Boggs Co., 236 Iowa 296, 18 N.W.2d 607 (1945) and Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). A personal injury is an impairment of health which resulted from the employee's work. Jacques v. Farmers Lbr. & Sup. Co., 242 Iowa 548, 47 N.W.2d 236 (1951); Lindahl, 236 Iowa 296, 18 N.W.2d 607 and Almquist, 218 Iowa 724, 254 N.W. 35. Claimant must show that the health impairment was probably caused by his work; possible cause is not sufficient. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955); Ford v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949); Almquist, 218 Iowa 724, 254 N.W. 35. 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). An expert's opinion which is 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

Claimant's brief argues and one agrees that a claimant may recover workers' compensation benefits for a work-connected aggravation of a preexisting condition. Indeed, defendants' exhibit A, a nurse's report of May 9, 1980, a year and a half before the alleged work injury, shows claimant had a problem that could be construed to be a preexisting condition. Whether or not claimant had a preexisting condition, he must show a connection between his employment and the umbilical hernia.

Claimant's own evidence is clear and unequivocal in favor of an injury, but that of Robert B. Bannister, M.D., contains an incomplete history, a mere reference to a correlation between the work and the hernia:

> Mr. Masolini had an umbilical hernia repair on November 12, 1981. He states that he felt pain in the area while straining at work. It is impossible to tell for certain whether the hernia had been present before or that it was caused while carrying out his duties at work. Since there is significant correlation between his history and the development of the hernia, one would assume that the hernia was a result of the straining while on the job. (Claimant's exhibit 1, August 24, 1982 report of Dr. Bannister)

Dr. Bannister's uncertainty of the corollary between the work and the condition plus his lack of detail in giving the history make it difficult to conclude that claimant's umbilical hernia was related to the work.

Finally, claimant cites the following from the hearing deputy's decision: "Claimant's testimony that some incident occurred on September 28 or September 29 is unsupported by any eye witnesses." (p. 3) In his brief, claimant states that he "cannot imagine if he was doing his job why it would be supported by eye witnesses. The fact is the people who should have known of the incident did know if (sic) the incident and so testified." (p. 4) It is true, of course, that the law does not require claimant to include eye witness testimony as a part of proving his case, only that he prove his case by a preponderance of the evidence.

Here it is the problem with the medical proof that defeats the case. Additionally, the evidence of Nancy Wray, the plant nurse, that claimant, when he reported the pain adjacent to his navel on September 28, 1981, did not know the cause of the pain tends to minimize the impact that the work had upon the condition. (Tr. 26-27)

FINDINGS OF FACT

1. On September 28, 1981, while working for the employer, claimant reached for a tire and felt a pain around the area of his navel.

2. Claimant's condition was diagnosed as an umbilical hernia, and he had it repaired surgically.

3. The evidence did not establish a causal relationship between the work at the employer's plant and the umbilical hernia.

CONCLUSION OF LAW

Claimant failed to prove by a preponderance of the evidence that he sustained an injury which arose out of and in the course of the employment on September 28, 1981.

ORDER

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

Costs of this action are taxed against defendants except that the parties are to pay the costs of producing their own witnesses.

Signed and filed at Des Moines, Iowa this 16th day of December, 1982.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES A. MAYNE,

Claimant,

vs.

FARMERS COOPERATIVE ELEVATOR COMPANY,

Employer,

and

FARMERS ELEVATOR MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 441926

A P P E A L

D E C I S I O N

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STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from a proposed review-reopening decision filed March 25, 1982 wherein claimant was awarded permanent partial disability plus related medical expenses as a result of an injury on July 25, 1975.

The record on appeal consists of the hearing transcript which contains the testimony of claimant and Elnora Mayne; claimant's exhibits 1 through 4; defendants' exhibits 1; the depositions of Claire Lindholm, M.D. and Wayne E. Janda, M.D.; Lindholm deposition exhibits 1 and 2; and the briefs of all parties on appeal.

ISSUES

1. Whether the disability which claimant complains of is causally related to injuries arising out of and in the course of his employment.

2. The nature and extent of claimant's industrial disability.

3. Whether the hearing deputy erred in not making a finding as to a date on which claimant's healing period terminated.

REVIEW OF THE EVIDENCE

Claimant testified at hearing that he was 60 years old and married with no dependent children. He stated that he was a high school graduate and had farmed up until 1968 when he began work at a local grain elevator. (Tr., pp. 5-6)

Claimant indicated that he began working for defendant employer in 1969. He became manager of a newly constructed mill facility in 1974 and worked with one other individual. Claimant stated that his duties consisted of general labor tasks such as scooping grain, cleaning bins, and handling bags of feed and chemicals. Claimant further testified that he regularly handled 50 and 100 pound bags by lifting them or by use of a two wheel cart. He further testified that he would move as much as 500 pounds at one time using the hand cart. (Tr., pp. 8-11)

On July 22, 1975 claimant received an injury arising out of and in the course of his employment with defendant employer. While unloading a truckload of feed coming down an incline, the load shifted and he twisted his back. (Tr., p. 18) Claimant stated he sat down for a while and then finished unloading the truck. The following day claimant was seen by Claire Lindholm, M.D. On July 24, 1975 claimant went to the hospital where he stayed 10 or 11 days. (Tr., p. 21) Claimant indicated that while at the hospital he was treated with heat and electrical stimulant. Claimant testified that after missing approximately three weeks of work he returned to defendant employer even though he was still sore. (Tr., p. 21)

Claimant stated his condition continued to worsen until November 1976 when Dr. Lindholm sent claimant to Elmer W. Lippmann, Jr., M.D., who gave claimant a myelogram and performed a laminectomy. (Tr., p. 22) Claimant was also seen by William B. Wood, M.D., who injected claimant's back and gave claimant a stimulator to wear. (Tr., p. 23) Claimant disclosed that the stimulator did not help him. In June of 1978 claimant was seen by a Dr. Cavanaugh at the Mayo Clinic. Claimant revealed that Dr. Cavanaugh did not treat him but prescribed a back brace for him which he wears when he is going to travel, stand or sit for a long period of time. (Tr., p. 24)

Claimant indicated he drove a tractor eight miles but was down in bed for a week following that drive. Claimant also tried to unload some shelled corn with an auger but because of cold weather was laid up for 3 to 4 weeks. (Tr., p. 27) Claimant revealed that in the fall of 1979 he was hospitalized for 9 or 10 days and was treated with hot packs, a stimulator and radiant heat. (Tr., p. 28)

Claimant indicated that he asked defendant employer for lighter work but was told there was nothing he could do. (Tr., p. 31) Claimant does receive some rental income in the form of shares in the grain which is grown on his farm. (Tr., pp. 44-45)

Claimant further testified that he receives social security disability benefits as well as retirement benefits from a private fund. (Tr., pp. 60-61)

Claimant indicated that he is no longer able to carry out many activities that he did before his injury and that much of his present activity is devoted to pain relief. (Tr., pp. 50-51) Finally, claimant indicated that he has not had any type of employment since 1976. (Tr., p. 59) On cross-examination, claimant revealed that a Mrs. Baldwin, a counselor for International Rehabilitation Associates saw claimant several times.

Elnora Mayne testified she is claimant's wife and indicated that after his first surgery claimant did everything he did previously. Mrs. Mayne indicated that after his injury with defendant employer he has always had problems. Mrs. Mayne disclosed that claimant will sleep on his back with a pillow under his knees. On cross-examination, Mrs. Mayne disclosed that they were living on the farm when claimant's injury with defendant employer occurred.

Dr. Lindholm testified that he had been claimant's family physician since 1952. Dr. Lindholm testified that claimant underwent a laminectomy in the lower lumbar region in 1957. (Lindholm depo., p. 4) This surgery was performed by the late Dr. Zee in Mankato, Minnesota. (Tr., p. 16) Dr. Lindholm opined that claimant made a full recovery from that surgery enabling him to work without restriction. (Lindholm depo., p. 5)

Dr. Lindholm testified that he saw claimant in July of 1975 for a lumbar injury sustained at work. (Lindholm depo., p. 5) Dr. Lindholm diagnosed claimant's condition at that time as a disc syndrome of the right side and hospitalized him approximately a week for conservative treatment. (Lindholm depo., p. 7) Dr. Lindholm stated that he released claimant for work about two weeks after the injury. This was dispite continuing discomfort. (Lindholm depo., p. 7; tr., p. 21)

Dr. Lindholm did not see claimant again until May of 1976. At that time, claimant reported reinjuring his lower back while lifting at work. (Lindholm depo., p. 7-8) Dr. Lindholm opined that this was a reoccurrence of the July 1975 disc syndrome. (Lindholm depo., p. 8) Dr. Lindholm treated claimant with medication until October of 1976 without success. At that point, Dr. Lindholm referred claimant to Dr. Lippmann, at Mankato, Minnesota.

Dr. Lippmann performed surgery on December 7, 1976 at the L-4, L-5 disc space. (Lindholm depo., p. 12) Dr. Lindholm did not know whether this was the same disc space operated on in 1957 but he did note that Dr. Lippmann removed scar tissue at the L-4, L-5 space. (Lindholm depo, pp. 13, 38) The December 1976 surgery failed to provide claimant any relief.

Claimant was hospitalized for two days in October of 1979 for traction. (Lindholm depo., p. 16) Apparently, Dr. Lindholm did not see claimant again until February 2, 1981. (Lindholm depo., pp. 33-34) Dr. Lindholm saw claimant again on May 4, 1981, May 20, 1981, July 23, 1981, and for the last time on August 7, 1981. (Lindholm depo., pp. 33-34)

In a report of August 17, 1981, Dr. Lindholm wrote:

> The present examination on 8-7-1981 showed pain of the lower back on lifting 10-15 lbs. which makes him unable to drive tractor because of the pain on reaching and any activity sends pain down the right side of leg into the last 2nd. and 3rd. toes and the left side into the calf. It is necessary for him to either take Talwin or Tylenol with codeine at night which lasts 4-5 hrs. He has his knees elevated in bed at all times.
>
> There was positive leg raising of 20% [sic] of the right and 30% [sic] of the left. There was no change in the size of the muscle of the thigh or calf. Knee reflex was equal. He has a scar from L-1 into the sacro area and has spasms in the paravertebral area bilaterally. He has slight positive Patrick's on the right due to secondary stiffness of the back.
>
> The diagnosis is chronic low back disc syndrome. I would give the patient 100% physical disability. If you have any other questions please feel free to contact me. (Lindholm depo. exh. 1)

Dr. Lindholm opined on direct-examination that claimant's condition was permanent and that he was unable to return to his former employment or lift any heavy weights. (Lindholm depo., p. 18) Dr. Lindholm testified in his deposition:

> A. His condition is unchanged. He still has his pain, he still cannot raise his legs, he cannot lift anything over ten pounds. Driving the tractor or walking a block or so causes severe pain. He continues to sleep with his knees elevated which is the prescribed position. He continues to take pain pills which will last perhaps three-four hours and give him a slight amount of relief. (Lindholm depo., p. 16)

However, Dr. Lindholm testified on cross-examination:

> Q. In your last paragraph you give us a diagnosis chronic low back syndrome and you say, and I quote, I would give the patient 100 percent physical disability.
>
> A. Yes sir.
>
> Q. Now my understanding of what you were saying, and correct me if I am wrong, is that you consider this man 100 percent unable to perform the kind of job he had before?

A. Yes sir.

Q. You are not telling us, and correct me if I am misinterpreting you, that he is 100 percent physically disabled and unable to do anything?

A. If he had a desk job, if he could sit, keep his knees up high, not do any stretching or bending, if he could lift a pencil, he could perform that with about the same amount of discomfort that he has now. (Lindholm depo., p. 35-36)

Dr. Lippmann treated claimant from November 18, 1976 through the surgery of December 7, 1976 and until May 18, 1977. (Defendants' exh. 1) In a report to Dr. Lindholm dated March 17, 1977, Dr. Lippmann writes:

> Examination demonstrated tenderness in the lumbosacral spine with guarding on forward flexion and side bending. He could walk on his toes and on his heels and had good strength in the great toe dorsiflexors. Sensation was reduced generalized over the left lower extremity. There was positive straight leg raising on the left at 75 degrees, on the right at 85 degrees, negative Peyton sign with the patient sitting and 45 degrees bilaterally with the patient supine, negative Peyton sign.
>
> It is recommended the patient again be seen by Doctors Wood and Lucier at the pain clinic at St. Joseph's Hospital. It is also my recommendation the patient receive some form of vocational retraining so that he would be placed in a form of employment without heavy bending and lifting as formerly he did for the Swea Cith [sic] Cooperative Elevator. (Defendants' exh. 1)

In another report dated March 25, 1977, Dr. Lippmann writes:

> In reference to your letter of 23 March, 1977 I am aware that you have received recent correspondence relative to this patient's care through this office. Inasmuch as he is still under active care, I do not believe that he has attained maximum recovery. I further would urge you that arrangements be made for him to receive some form of vocational retraining inasmuch as I do not think that he should return to his former occupation at the Farmers Cooperative Elevator. (Defendants' exh. 1)

In reports of February 15, 1977; March 22, 1977; and July 13, 1977 Dr. Lippmann again recommends claimant for vocational rehabilitation. (Defendants' exh. 1)

Wayne Janda, M.D., an orthopedic surgeon, examined claimant on March 6, 1980 for an evaluation at the request of defendants. Dr. Janda's assistant, Mark Moyer took claimant's history. In his office notes on this examination, Dr. Janda states:

> IMPRESSION: Post operative back pain. Degenerative lumbar 4,5 disc disease. Degenerative arthritis of the lumbar spine.
>
> Mr. Mayne has had lumbar laminectomies in 1957 for a lumbar disc and again in 1976 for another ruptured lumbar disc. He has residual restriction of lumbar motion. In my opinion his impairment is 20% whole person. I would apportion this 50/50; namely 10% whole person as a result of pre-existing lumbar disc condition and 10% whole person as a result of his industrial injury of 22/July/1975.
>
> I detect an unconscious elaboration and magnification of complaints. I would recommend psychologic [sic] evaluation and testing. Would encourage him to get back to work using his hands; would restrict lifting to no greater then 50 lbs. (Defendants' exh. 1)

Dr. Janda disputed Dr. Lindholm's contention that claimant suffered no residual limiting effects as the result of the 1957 laminectomy. Dr. Janda was asked:

> Q. There has been other medical testimony, Doctor, and you may assume this to be true for the purpose of my question, but the lumbar laminectomy in 1957 produced no residual impairment in this patient. What is your experience with respect to whether the patient who has undergone a lumbar laminectomy comes out with no appreciable impairment?
>
> A. In my opinion and experience, patients may have a good result and have no complaints. Some may have complaints early, some may have complaints later. However, most people that have had lumbar disc surgery have residual, either restriction of motion, or limitation in their ability to lift. And I would say this is probably in hundred percent of people with this sort of surgery. Therefore, when I've seen and treated people for lumbar disc disease, even if they haven't had surgery, if they had a documented lumbar disc which is ruptured, I give them a permanent partial impairment rating of usually in the neighborhood of ten percent. (Janda depo., pp. 18-19)

As to possible psychogenic factors in claimant's condition, Dr. Janda stated:

> A. When I asked Mr. Mayne to perform active motions, it appeared to me that he was not producing full effort. And when I helped him with passive effort, his motion did improve. This was noted both in his back and his hips and his knees. And he seemed to resist some of these attempts at passive motion testing.
>
> Q. (Mr. Hoffmann continued) How did you determine that, Doctor? What led you to believe that he was resisting passive motion?
>
> A. When I would ease up, he would ease off. And when I increased strength, he would try to increase his--or it would appear to me that he would be increasing his voluntary resistance. I had to distract him and get him off guard to go ahead with the maneuvers. (Janda depo., p. 13)

Dr. Janda opined that claimant was magnifying his complaints unconsciously and recommended psychological evaluation. (Janda depo., p. 17)

Given a functional limitation rating of 20 percent of the body as a whole, Dr. Janda felt that claimant could work in occupations involving some walking, standing, and even some light lifting. (Janda depo., p. 20) Dr. Janda went on to state that claimant could lift 50 pounds about 30 times every hour. He admitted, however, that this was only an estimate which had not been verified by testing. (Janda depo., p. 23)

Miguel E. Cabanela, M.D., an orthopedic surgeon at the Mayo Clinic in Rochester, Minnesota, examined claimant on June 1, 1978. In a report dated June 12, 1978 Dr. Cabanela writes:

> On examination he walked with a limp favoring the right leg. There was decreased range of motion of the lumbar spine in all planes. There was moderate lumbar spasm. He was tender over both buttocks. The straight leg raising was positive at 80° sitting with low back pain, and was positive at 30° when lying down. His left ankle jerk was absent. X-rays showed narrowed L3,4 and L4,5 interspaces with associated miled hypertrophic changes.
>
> My impression was that he had degenerative disc disease with low back pain syndrome. He had some functional overlay. I advised no further orthopedic surgery. I did not think he should work in any job that would require lifting, bending, scooping, etc. I feel a corset might be of help to him as long as he uses it accompanied by an exercise program. (Lindholm depo. exh. 2)

Claimant was also seen by Dr. Wood on a number of occasions. In his report dated May 27, 1977, Dr. Wood states:

> We have had some degree of success at differant [sic] times with epidural injections of cortisone type preparation and local anesthetic. However, Mr. Mayne's relief has never been permanent or of long duration. Recently we have recommended the use of a Dorsal Column Stimulator device which is designed to alleviate the types of pain that Mr. Mayne has frequently had. This device along with some improvement resulting from the epidural injections of steroids and local anethetics has had a net effect of over all improvement. However, Mr. Mayne is by no means rehabilitated or would we expect him to ever return to his former type of work.
>
> Currently he's getting some relief while using the Dorsal Column Stimulator device and consequently is able to at least consider being retrained for other type of employment, as of our last meeting with him. (Defendants' exh. 1)

Finally, claimant was seen by Donald W. Blair, M.D., an orthopedic surgeon, on February 8, 1979. In his report of February 12, 1979, Dr. Blair indicates that claimant's difficulties are related to the industrial injury of July 25, 1975. Dr. Blair writes:

> At the present time, this appears to be a problem of continuing pain. He has not had a myelogram following his last surgery and it may be that if further investigation is considered, that a myelogram should be repeated.
>
> This man did apparently make good recovery from his first laminectomy and did remain improved in the interval until his injury in July of 1975 which precipitated the present problem.
>
> It would appear very definitely that this man will need to make change of work to something lighter if he is to be again employed. He does indicate he has not had any work experience of a lighter nature. (Defendants' exh. 1)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 22, 1975 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 facts. 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 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 ommitted.] 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.

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).

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.

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).

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, 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 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. See Birmingham v. Firestone Tire & Rubber Co., Appeal Decision (1981).

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.

ANALYSIS

Claimant asserts that he is permanently and totally disabled as a result of the admitted industrial injury of July 25, 1975. Claimant's brief on appeal places heavy reliance upon the opinions of Dr. Lindholm to support that assertion. While Dr. Lindholm was claimant's family physician, medical evidence contained in the record points out Dr. Lindholm referred claimant elsewhere for much of the treatment.

In his decision of March 25, 1982, the hearing deputy wrote:

> Claimant wants the undersigned to believe that claimant had no disability as a result of his laminectomy in 1957. Some medical testimony and some facts pointed out by claimant tend to support his position. However, the testimony of Dr. Janda, as well as the experience of this agency, indicates that a person cannot have a laminectomy without some functional disability as well as some industrial disability. The fact that a person has been able to continue in the position he has been working or even change positions without any complaints does not necessarily mean no functional or industrial disability resulted.

Dr. Lindholm assessed claimant's disability as total. He does not specify the criteria for this impairment rating and admits that claimant is capable of performing some sedentary tasks. Careful reading of Dr. Lindholm's testimony indicates that the physician feels claimant cannot return to the heavy manual labor tasks demanded by his former jobs. Dr. Lindholm does not say that claimant is incapable of any type of gainful employment.

The record is absent of any other functional impairment rating except that of Dr. Janda, an orthopedic surgeon. Dr. Janda opines that claimant suffers a permanent functional impairment of 20 percent of the body as a whole.

Despite the deputy's finding that Dr. Janda's impairment rating should be given the greater weight, claimant's permanent industrial disability was found to be 60 percent. The deputy reasons accordingly:

> Functional disability is only one of the factors in considering a person's industrial disability. Claimant is 60 years old and a high school graduate. Claimant has had limited areas of work experience in that he has either worked as a farmer or for grain elevators. The greater weight of evidence reveals that the claimant should not return to the areas of his former employment. If claimant were younger he may be able to be retrained but vocational rehabilitation in some areas of endeavor is not feasible considering claimant's age. This does not mean claimant is totally incapacitated from working. The greater weight of evidence indicates that claimant can do sedentary type jobs. Some sedentary jobs do not require a great deal of retraining or have on-the-job training. It is determined that as a result of his injury on July 22, 1975, claimant has an industrial disability of 60 percent of the body as a whole.

Other portions of the record further dispute claimant's assertion of permanent and total disability. Unlike Dr. Lindholm, Drs. Lippmann, Janda, Cabanela, Wood and Blair decline to classify claimant's disability as total. While it is undisputed that claimant cannot return to his former employment or other heavy manual labor tasks, these physicians indicate that claimant is capable of some types of employment as does Dr. Lindholm. Drs. Lippmann, Janda and Wood all urge vocational rehabilitation and retraining.

Of further importance is the mental state of claimant. Dr. Janda's testimony indicates that not all of claimant's functional limitation is objective. While pain always limits function, whether real or imagined, Dr. Janda's findings place claimant's motivation in question. The testimony of claimant and his wife indicates that he has grown accustomed to an early retirement after making half hearted attempts to overcome disability and return to gainful employment. Claimant's steady stream of income has apparently diminished his motivation.

Claimant has met his burden that his present disability is caused in part by an admitted injury of July 25, 1975. The greater weight of medical evidence also indicates that the injury of July 25, 1975 aggravated a preexisting lumbar condition caused by a laminectomy in 1957. Finally, claimant again aggravated his back condition with an industrial injury in May of 1976 necessitating a repeat laminectomy which has contributed to his current disability. While claimant's condition was asymptomatic prior to July 25, 1975, these injuries have caused disability which permanently restricts claimant's ability now to engage in acts of gainful employment. Claimant suffers a permanent industrial disability of 60 percent.

An issue remains, however, that has not existed in this matter prior. Defendants contend that the hearing deputy failed to make a finding as to the termination of claimant's healing period. The prehearing order of July 21, 1981 clearly indicates that the parties eliminated healing period as an issue at the hearing. Furthermore, the hearing transcript shows that the deputy understood the issues at dispute to be only causal relationship between the injury and disability and the entitlement to permanent disability benefits. Defendants confirmed the deputy's understanding at hearing.

Moreover, the medical evidence in the record gives no basis for a finding terminating healing period. No physician finds that claimant has reached maximum recuperation. It does not appear that any physician was ever asked to make such a finding. The only hint on the subject comes from Dr. Lippmann's report of March 25, 1977 wherein he states: "I do not believe that he has attained maximum recovery."

Defendants would have claimant's healing period terminate shortly after the second laminectomy surgery. Defendants' wishes cannot take the place of medical evidence. The requirements of Iowa Code section 85.34(1) have not been met. Nor was the hearing deputy required to determine an issue not before him. Had the parties been unable to arrive at an agreement for termination of the healing period, they would have been free to make the matter an issue for hearing in a review-reopening proceeding.

FINDINGS OF FACT

1. That claimant was 60 years old at hearing, married with no dependent children, and has a twelfth grade education.

2. That claimant has worked on a farm and at several grain elevators performing tasks requiring heavy lifting.

3. That claimant underwent a laminectomy in the lumbar region in 1957.

4. That despite claimant's ability to perform heavy lifting after the 1957 laminectomy, some functional and industrial disability remained as a result thereof.

5. That claimant sustained an admitted industrial injury to his lumbar spine on July 25, 1975.

6. That claimant aggravated a preexisting lumbar condition but was able to return to work.

7. That claimant sustained another injury arising out of and in the course of his employment in May of 1976.

8. That as a result of the last two injuries, claimant suffers a permanent functional impairment of 20 percent of the body as a whole.

9. That as a result of this functional impairment, claimant is not able to perform any of the jobs he has previously held.

10. That claimant is capable of performing some sedentary work.

11. That claimant has not actively tried to find employment suitable to his limitations and is not well motivated to do so.

12. That claimant suffers a permanent industrial disability of 60 percent.

13. That the record is insufficient to disclose a date on which claimant's healing period terminated.

CONCLUSIONS OF LAW

That claimant has met his burden that the disabilities which he alleges are causally related to injuries arising out of and in the course of his employment.

That claimant is entitled to 300 weeks of permanent partial disability benefits at a weekly rate of $113.71.

That claimant is not entitled to an award of healing period benefits until such time that it may be determined when the healing period terminated.

That defendants are entitled to a credit for benefits previously paid.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision of March 25, 1982 are proper.

THEREFORE, it is ordered that:

Defendants are to pay unto claimant three hundred (300) weeks of permanent partial disability benefits at a rate of one hundred thirteen and 71/100 dollars ($113.71) per week.

Defendants are to be given credit for any permanent partial disability previously paid.

Defendants are to reimburse claimant for the following medical expenses:

Claire Lindholm, M.D.	- $237.00
St. Josephs Hospital	- 15.00
William B. Wood, M.D.	- 30.00
Van Norman Pharmacy	- 355.50

Defendants are also to reimburse claimant for mileage in the amount of one thousand forty-eight and 98/100 dollars ($1,048.98).

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

Defendants shall pay the costs of the proceeding.

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

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

Appealed to District Court;
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TED M. McINTOSH, Claimant, vs. LAUHOFF GRAIN COMPANY, Employer, and AETNA INSURANCE COMPANY, Insurance Carriers, Defendants.	File No. 500982 A P P E A L R U L I N G

STATEMENT OF THE FACTS AND ISSUE

Defendants have appealed from a review-reopening decision filed February 11, 1983 wherein the only issue ruled upon was whether claimant's injury is to the body as a whole or is limited to a scheduled member. Upon finding that the injury extended to the body as a whole, the case was placed back into the assignment for hearing on the issue of the extent of claimant's permanent partial disability. A motion to dismiss the appeal was filed by claimant on March 30, 1983 on the grounds that a final decision on the case has not been rendered, and that appeal is precluded until a dispositive decision is issued. Defendants filed a resistance to the motion to dismiss on April 5, 1983. The sole issue to be ruled upon here is whether or not the motion to dismiss the appeal should be granted.

APPLICABLE LAW

Iowa Code section 86.24 provides, in part:

> 1. Any party aggrieved by a decision, order, ruling, finding or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter 85 or 85A may appeal to the industrial commissioner in the time and manner provided by rule. The hearing on an appeal shall be in Polk county unless the industrial commissioner shall direct the hearing to be held elsewhere.

2. In addition to the provisions of section 17A.15, the industrial commissioner may affirm, modify, or reverse the decision of a deputy commissioner or he may remand the decision to the deputy commissioner for further proceedings.

3. In addition to the provisions of section 17A.15, the industrial commissioner, on appeal may limit the presentation of evidence as provided by rule.

Rule 4.2 of the industrial commissioner provides, in part:

If the order on the separate issue does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal.

When any contested case proceeding shall be filed prior to or subsequent to the filing of an arbitration or review-reopening proceeding and is of such a nature that it is an integral part of the arbitration or review-reopening proceeding, it shall be deemed merged with the arbitration or review-reopening proceeding. No appeal to the commissioner of a deputy commissioner's order in such a merged proceeding shall be had separately from the decision in arbitration or review-reopening unless appeal to the commissioner from the arbitration or review-reopening decision would not provide an adequate remedy.

This rule is intended to implement sections 86.18 and 86.24, The Code.

The general rule regarding appeals which has been propounded by the Iowa Supreme Court on many occasions is found in Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 66 N.W.2d 859 (1954). The court pointed out that an appeal is proper only after a final judgment has been granted and held that "[a] final judgment or decision is one that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions." Id. at 40. In a more recent decision, Citizens State Bank of Corydon v. Central Savings Association, 267 N.W.2d 33 (Iowa 1978), the court considered the matter of an appeal of a special appearance. The opinion suggested "[g]reat harm would result to litigants under a system which tolerated indiscriminate appeals from each and every adverse ruling." Id. at 34. Reasoning that regulation of interlocutory appeals contributes to the orderly litigation and to the peace of mind of the parties in that they "have at least the comfort of knowing they will not be put to the expense, or threat of the expense, of repeated, permissive appeals," the court dismissed the appeal. Id. at 34.

ANALYSIS AND CONCLUSION

Claimant moves for dismissal of defendants' appeal on the grounds that a decision determining the rights to the parties as to all of the issues to be decided in this case has not yet been issued. In resistance, it is asserted by defendants that the issue of whether an injury is to a scheduled member or the body as a whole is severable from issues concerning the extent of disability, and therefore subject to immediate interlocutory appeal.

In determining a party's ability to bring an interlocutory appeal, this administrative body has generally conformed to the philosophy propounded by the Iowa Supreme Court in Crowe and Citizens State Bank of Corydon. In those case decisions, the court noted the potential harms to litigants where indiscriminate and repeated appeals from any adverse ruling is permitted. Further justification for limiting interlocutory appeals, we believe, is the potential for stagnancy in this administrative body by permitting any decision, ruling, or order to be subject to immediate appeal. Deputy commissioners published 396 decisions and 1,185 orders or rulings in 1981, and 371 decisions and 1,638 orders or rulings in 1982. As the volume of deputy decisions, orders and rulings continues to grow, there is a proportional increase in the potential number of appeals. By requiring issues which are integral parts of a proceeding to be appealed only after a final and dispositive adjudication of the parties' rights is completed, greater administrative efficiency of this body is achieved.

It is concluded that the determination that the injury to claimant is to the body as a whole is an integral part of the total review-reopening procedure in this case, and is an issue open to appeal only after a determination of the extent of claimant's permanent partial disability.

WHEREFORE, claimant's motion to dismiss defendants' appeal is hereby sustained, and defendants' appeal is dismissed and this matter is returned to be assigned for hearing on the issue of the extent of claimant's permanent partial disability.

Signed and filed this 26th day of May, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEROY B. MCKEE,	:	
Claimant,	:	
vs.	:	File Nos. 627574/521760
	:	416152
WILSON FOODS CORPORATION,	:	
Employer,	:	A P P E A L
Self-Insured,	:	D E C I S I O N
and	:	
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

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Des Moines, IA 50314 — For Claimant

Mr. John A. Templer
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Mr. Thomas A. Evans, Jr.
Assistant Attorney General
Hoover State Office Building
LOCAL — For Second Injury Fund

STATEMENT OF THE CASE

The Second Injury Fund of Iowa appeals and Wilson Foods Corporation cross-appeals from a proposed arbitration and review-reopening decision filed December 31, 1981 wherein claimant was awarded permanent total disability plus healing period benefits. The decision of December 31, 1981 as amended by a decision on rehearing filed February 18, 1982 awarded benefits for admitted industrial injuries on March 23, 1974, October 23, 1978 and for injuries claimed to be the result of repeated traumas. The three separate actions in this above entitled matter were consolidated for hearing and are decided as a whole on appeal.

The record on appeal consists of the transcript of the hearing which contains the testimony of the claimant; claimant's exhibits 1 through 16 inclusive; claimant's exhibit 17 being the deposition of Marshall Flapan, M.D.,; defendant employer's exhibits 1 through 3 inclusive; Flapan deposition exhibit 1; hourly rate information of defendant employer marked exhibit "Z"; and the briefs of all parties on appeal.

At the time of the hearing, there was no stipulation as to the applicable weekly rate of compensation. In the proposed decision filed December 31, 1981, that rate was set at $181.41. This rate remains undisputed.

ISSUES

1. Whether claimant's disability is attributable to a second injury.

2. Whether claimant is permanently totally disabled as a result of two separate injuries.

3. Whether claimant is entitled to receive Second Injury Fund benefits.

All medical bills have been paid.

REVIEW OF THE EVIDENCE

Claimant, 60 years old at time of hearing, has a seventh grade education. (Tr., p. 10) Claimant began working at age 14 and has held jobs as a farm hand, a cook and chauffer, bus boy, janitor and finally as a meat cutter. Claimant was employed as a meat cutter for some 25 years with Iowa Pack and for 11 years with I.D. Pack and Wilson Foods Corporation.

Claimant was employed by defendant employer to trim neck bones. In order to perform the function of trimming neck bones, the claimant was required to stand on a concrete floor at an aluminum table and trim the meat off of neck bones and deposit it in an adjacent bucket. When the bucket was full, he would hoist the bucket to a conveyor. This work required extensive use of his hands and arms. He describes the work as an assembly line process indicating that there is only so much time to cut meat off the bones and then the individual must move on to the next one. Claimant testified that he would be required to stand a full eight hour shift at his station, except for periods of time when a break was permitted. During the period 1970 through 1980 he did the same job, that is, trimming neck bones for the defendant employer.

On March 23, 1974, claimant sustained an admitted industrial injury to his left knee while attempting to retrieve an electric knife from a chute leading to a grinding machine. (Tr., p. 38) Claimant indicated that he continued working several weeks until

pain and swelling in his left knee increased to the point that he went to the plant nurse. (Tr., p. 40) The plant nurse referred claimant to James Caterine, M.D., plant physician for defendant employer. Dr. Caterine in turn referred claimant to Marshall Flapan, M.D.

Claimant denies any problems with his knees prior to 1974. (Tr., p. 36) Claimant later stated that he injured his right knee in a 1943 automobile accident. Claimant insisted that the injury was minor and that he fully recovered.

Claimant first saw Dr. Flapan on May 29, 1974. Dr. Flapan obtained a history of a March 6, 1974 injury and on examination discovered fluid in his left knee. At that time, Dr. Flapan felt claimant had injured cartilage inside the knee when he twisted it. (Flapan depo., p. 7) Dr. Flapan saw claimant again on June 5, 1974. Arthrographic examination at that time showed improvement in the cartilage tear but revealed a cyst behind the left knee cap which predated the March 23, 1974 injury. (Flapan depo., p. 8)

Claimant was seen again June 19, 1974 at which time his left knee was found to be improving and have a full range of motion. (Flapan depo., p. 9) By July 12, 1974, however, claimant was experiencing increased pain due to redevelopment of water on the knee. (Flapan depo., p. 9) Claimant returned to Dr. Flapan again on August 9, 1974; September 13, 1974; October 11, 1974; and November 11, 1974 for continued problems with redevelopment of fluid on the knee. (Flapan depo., pp. 10-11)

Improvement was noted as of a January 3, 1975 visit. Dr. Flapan opined that claimant's improvement was due to time off the job and that work only aggravated claimant's left knee condition. (Flapan depo., p. 14)

Dr. Flapan saw claimant again on May 21, 1975 and June 25, 1975. At that time, Dr. Flapan opined that claimant's left knee pain may have been caused by bursitis or tendon inflammation. (Flapan depo., p. 15) Apparently, claimant did not see Dr. Flapan again until June 29, 1977. At that time, Dr. Flapan opined that work was aggravating claimant's condition and that claimant was becoming bow-legged. (Flapan depo., p. 17) Dr. Flapan further opined at this time that claimant was developing degenerative arthritis in the left knee as a continuation of the March 23, 1974 injury. (Flapan depo., p. 18) Claimant indicated that he was able to continue work dispite pain in his left knee by placing his weight upon his right knee while standing at his station.

During an examination on July 27, 1977, claimant first complained of pain in his right knee in addition to his left knee. (Flapan depo., p. 19) Claimant was seen again by Dr. Flapan on May 5, 1978; June 9, 1978; and July 5, 1978. During an examination of October 25, 1978 Dr. Flapan learned of pain in claimant's right wrist. (Flapan depo., p. 23) Apparently, claimant was consulting Dale Grunewald, M.D. for his wrist complaints.

Treatment records of November 16, 1978 indicated that claimant was healing from a right wrist fracture. No explanation as to cause or date of this fracture injury is provided. (Defendant employer's exhibit 2) Claimant denied knowledge of any such injury. (Tr., p. 54) Joshua Kimelman, D.O., an office colleague of Dr. Flapan, prescribed a wrist gauntlet for claimant to wear on the job. Dr. Kimelman described the fracture as an old injury. (Defendant employer's exhibit 2)

In a December 13, 1979 report, Dr. Grunewald stated that he was unable to locate an old fracture. Claimant further denied knowledge of any fracture injury to Dr. Grunewald. (Claimant's exhibit 10)

In examinations of January 10, 1979; May 18, 1979; and August 22, 1979, Dr. Flapan noted continued progression of claimant's degenerative joint disease. (Defendant employer's exhibit 2) Dr. Flapan testified claimant's knee condition was permanent and that the pain had become severe enough to discuss the possibility of surgery.

On October 3, 1979, claimant told Dr. Flapan that he was reinjuring his right wrist by the repetitive twisting movements required in operating an electric knife at work. Dr. Flapan prescribed Motrin for pain relief but claimant was unable to continue the medication because of stomach ulcers. (Defendant employer's exhibit 2) An examination of November 7, 1979 yielded similar results. Dr. Flapan testified that on January 4, 1980, claimant complained of pain in both wrists. (Flapan depo., p. 30) In progress notes for the examination of February 20, 1980, Dr. Flapan describes claimant's wrist pain radiating up both forearms to the shoulders. (Defendant employer's exhibit 2) Dr. Flapan testified that claimant suffered from degenerative joint disease of both wrists which was aggravated by his employment. (Flapan depo., p. 31)

Dr. Flapan last saw claimant on July 2, 1980. Dr. Flapan testified as to claimant's condition on that date:

> A. I felt that his job was making him worse.
>
> Q. Did you suggest that he discontinue it?
>
> A. Yes.
>
> Q. Permanently?
>
> A. I told him or I suggested that he apply for social security disability.
>
> Q. Did you feel he should return to that type of work?
>
> A. Well, I told him that I thought that type of work wasn't good for him. You know. Whether he returned or not would have to be his decision.
>
> Q. Did you have some further discussion with him later with respect to his returning to physical work, your note of May 7th?
>
> A. In May of 1980 when he was seen again at that time I felt that he should be disabled.
>
> Q. From physical work?
>
> A. Well, from work as a butcher.
>
> Q. And you felt he was no longer capable of doing that kind of work; is that what you are saying?
>
> A. Well, we investigated the alternatives. His knees were coming to the point where we would have to consider total knee arthroplasties. His wrists were coming to the point where the only thing that would serve him in any fashion for any period of time would have been a wrist fusion, or, in other words, making his wrist permanently stiff. With stiff wrists you can't bone a hog or cut beef as a butcher, so realistically at that time I felt it was best that he be disabled. (Flapan depo., pp. 35-36)

Claimant did not work again after March 26, 1980 on the advice of Dr. Flapan. (Tr., p. 58; Flapan deop., p. 34)

Dr. Flapan opined claimant suffered a 10 percent permanent functional impairment of each upper extremity. (Flapan depo., p. 39) Additionally, Dr. Flapan testified that claimant suffered a 20 to 25 percent permanent functional impairment of each lower extremity. (Flapan depo., p. 38) Dr. Flapan therefore dismissed claimant ever being able to perform heavy physical labor again. (Flapan depo., p. 44)

Dr. Flapan felt that claimant's degenerative joint disease did not predate the March 23, 1974 injury. Dr. Flapan testified:

> Q. Does your diagnosis of degenerative joint disease mean that it is impossible for Mr. McKee to have had degenerative joint disease in his knee, his left knee, prior to the March, 1974, injury that he described?
>
> A. Is it possible? No.
>
> Q. Does the fact that more than two years after this accident that he was still complaining of the same symptoms, at least, subjective symptoms, indicate to you that it is likely that he had a preexisting degenerative arthritic condition in his left knee, not necessarily symptomatic, but still present as of March, 1974?
>
> A. No.
>
> Q. It does not?
>
> A. If I understand you correctly, it does not.
>
> Q. What I am saying is, and maybe I am not being clear, but the fact that two years had elapsed, more than two years has elapsed, since the date of the injury?
>
> A. Yes.
>
> Q. And a determination that this, in fact, was degenerative joint disease, make it more likely that he had degenerative joint disease as of or even before March, 1974?
>
> A. No. (Flapan depo., pp. 55-56)

Dr. Flapan pointed out that claimant had no residual effects from the 1943 knee injury. (Flapan depo., p. 79) Further, Dr. Flapan indicated that overuse of joints caused by repetitive motions such as those in claimant's employment cause a degenerative joint disease to progress more rapidly than it would otherwise. (Flapan depo., p. 40)

Finally, Dr. Flapan concluded that claimant's disability is the result of degenerative joint disease which was brought about by and aggravated by specific employment traumas as well as day to day strains of his repetitive job tasks. (Flapan depo., p. 76)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on March 23, 1974 and October 23, 1978 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).

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 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.

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 ommitted.] 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 claimant has the burden of proving by a preponderance of the evidence that the injuries of March 23, 1974 and October 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).

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., 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. 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).

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. U. S. Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, ___ (1961).

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 299 (1961); 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, and cases cites.

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).

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).

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 not 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 when not a second injury. See Prusia v. Armstrong Rubber Co., Appeal Decision (1979).

Iowa Code section 85.64 states in part:

> 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.

The Iowa Supreme Court in Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369, concluded the phrase "loss of use" in the statute (Section 85.64) was not intended by the legislature to imply "total loss of use" of a member of the body, or the body as a whole.

Subsequent to Irish, supra, the court decided Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978) in which they pointed out that the purpose of the Second Injury Fund is to encourage employers to hire the handicapped.

The Second Injury Fund's liability arises when the total combined effect of a prior and subsequent injury to separate specified members is greater in terms of relative weeks of compensation than the sum of scheduled allowances for the parts. Irish, supra; Anderson, supra.

In Second Injury Fund v. Mich Coal Company, 274 N.W.2d 300, 302 (Iowa 1979) the court stated:

> When an injury to a scheduled member results in disability to the body as a whole, the claimant may be entitled to compensation for the total disability. Determination of whether compensation must be limited to that statutorily fixed for the scheduled member or may be computed on the basis of total disability is a legal issue subject to judicial review.

When impairment is 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, supra.

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 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. See Birmingham v. Firestone Tire & Rubber Company, Appeal Decision, July 10, 1981.

ANALYSIS

Claimant has met his burden that his injuries arose out of and in the course of his employment. In the decision of December 31, 1981 the deputy writes:

> It is undisputed that at all material times hereto, claimant was an employee of the defendant Wilson Foods Corporation. In March 1974 and again in October 1978 Mr. McKee sustained work related injuries. Memorandums of agreement were filed with respect to each of these incidents. By that filing the defendant admitted not only the employer, employee relationship, but also that each injury arose out of and in the course of his employment with them.

Claimant's uncontroverted testimony meets his burden of proof for purposes of the action in arbitration. The deputy's finding that claimant's injuries arose out of and in the course of his employment are undisputed on appeal and therefore considered proper.

The uncontroverted evidence also meets claimant's burden of proof that the disabilities which he alleges are causally related to his industrial injuries. Dr. Flapan states unequivocally that claimant's disability is caused by specific employment traumas as well as by constant strain of repetitive movements over a period of several years. Rather, the primary disputes on appeal center upon the extent of claimant's disability and who is liable for that disability.

In his decision of December 23, 1981, the deputy found that claimant was entitled to one hundred and ten weeks of compensation pursuant to Iowa Code section 85.34(2) for the injury of March 23, 1974 and continuing injuries since that time. This is based upon Dr. Flapan's permanent functional impairment rating of 25 percent of each lower extremity. These conclusions remain essentially uncontroverted on appeal. Review of medical evidence establishes that these findings of the deputy were proper.

In Mich Coal Co., supra, the court indiated that where a second injury takes place as to create the possibility of liability on the part of the Second Injury Fund, the hearing deputy is to set forth the industrial disability created by the second injury alone. This finding of industrial disability then allows determination of what liability, if any, attaches to the Second Injury Fund pursuant to Iowa Code section 85.64.

The uncontroverted testimony of Dr. Flapan establishes that claimant suffers a permanent functional impairment of 10 percent of each upper extremity as a result of continuing employment related aggravations. This condition was first noted in October of 1978 and continued to worsen thereafter as a result of repetitive employment tasks.

Pain in claimant's upper extremities reaches from his wrists to his shoulders. Dr. Flapan's testimony and reports point out that claimant experiences a great deal of pain from the use of his wrists and arms making it impossible for claimant to continue in his 36 year history as a meat cutter. These same restrictions also limit claimant's ability to perform most types of manual labor to which he has been accustomed. Claimant was 60 years old at the time of hearing with limited education and an employment history limited to manual labor jobs which require full upper extremity function.

In his decision of December 31, 1981, the deputy found that claimant had sustained a permanent industrial disability of 60 percent as a result of an injury occurring subsequently to the knee injuries. When a second injury occurs to a member covered under Iowa Code section 85.34(2)(a) through (t), disability must be computed on an industrial basis rather than upon functional basis according to the schedule. See Second Injury Fund v. Mich Coal Co., supra. Prusia, supra, does not apply to injuries where the Second Injury Compensation Act applies. A contrary interpretation would defeat the application of Code section 85.64.

Given claimant's industrial disability of 60 percent, he is entitled to 300 weeks of compensation benefits for the second injury.

In his decision of December 31, 1981, the deputy stated:

> The claimant, pursuant to his physician's recommendation, terminated his employment relationship with Wilson Foods Corporation. According to the uncontroverted medical testimony of Dr. Flapan, if the claimant remained in his employment position he ran a risk of requiring substantial medical and surgical procedures to correct the upper and lower extremity problems. The claimant's medical condition is permanent in nature. As a result, he is prohibited from pursuing a variety of employment positions including the job he performed at Wilson Foods. In the opinion of the undersigned and based upon the record, the extent of disability is total under the terms of Section 85.34(3), The Code.

Given claimant's 60 percent industrial disability attributable to the upper extremities, a 25 percent permanent functional impairment to each lower extremity, his age, education, and employment history, it would indeed appear that claimant is permanently and totally disabled.

As noted above, claimant is entitled to 110 weeks compensation for the injuries to the lower extremities and 300 weeks compensation for subsequent injuries to the upper extremities for a total of 410 weeks. Because, however, claimant is permanently and totally disabled as a result of the combined effects of the injuries, application of Code section 85.64 dictates that Wilson Foods is liable for 410 weeks of compensation with the Second Injury Fund liable thereafter.

FINDINGS OF FACT

1. That claimant was 60 years old at time of hearing with a seventh grade education.

2. That claimant has worked since age 14 doing manual labor including 36 years as a meat cutter.

3. That claimant's job with defendant employer over a period of 11 years required claimant stand at a permanent station and perform repetitive arm motions.

4. That on March 23, 1974 claimant injured his left extremity while in the course of his employment.

5. That as a result of his left knee injury, claimant placed additional stress on his right knee in the performance of his employment tasks.

6. That claimant first complained of a right knee pain on July 27, 1977.

7. That claimant was found to suffer from degenerative joint disease of the lower extremities subsequent to March 23, 1974.

8. That claimant has aggravated the forementioned degenerative disease by continuing injuries the result of repetitive employment tasks.

9. That as a result of the above, claimant suffers a 25 percent permanent functional limitation of each lower extremity.

10. That on October 28, 1978, claimant first complained of pain in his right wrist.

11. That claimant suffered a fracture of the right wrist prior to October 28, 1978 unbeknownst to claimant.

12. That claimant first complained of pain in his left wrist on January 4, 1980.

13. That as of February 20, 1980, claimant experienced pain in both upper extremities from his wrists to his shoulders.

14. That claimant suffers from degenerative joint disease of both upper extremities.

15. That claimant has continuously aggravated the forementioned degenerative disease as a result of performing repetitive employment tasks.

16. That as a result of the forementioned injuries, claimant suffers a 10 percent permanent functional limitation of each upper extremity.

17. That as a result of claimant's upper extremity limitation, he suffers a permanent industrial disability of 60 percent.

18. That claimant discontinued work on March 26, 1980 on his doctor's advice and has not since been gainfully employed.

19. That as a result of the limitation of both lower extremities and the industrial disability caused by a subsequent injury to both upper extremities, claimant is permanently and totally disabled.

CONCLUSIONS OF LAW

That claimant sustained injuries to his lower extremities and subsequent injuries to his upper extremities arising out of and in the course of his employment.

That claimant has sustained his burden of proof that he is permanently and totally disabled as the result of industrial injuries.

That claimant is entitled to healing period benefits for the period he was off work prior to March 26, 1980.

That as a result of industrial injuries to his lower extremities, claimant is entitled to 110 weeks of compensation benefits at the weekly rate of $181.41.

That as a result of industrial injuries to his upper extremities, claimant is entitled to 300 weeks of compensation benefits at the weekly rate of $181.41.

That claimant is entitled to compensation pursuant to Iowa Code sections 85.34(3) and 85.64 commencing after 410 weeks.

That defendant Wilson Foods Corporation is entitled to a credit for any benefits previously paid.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision filed December 31, 1981 and as amended February 18, 1982 are proper.

THEREFORE, it is ordered:

That the defendant Wilson Foods Corporation shall pay the claimant five and three-sevenths (5 3/7) weeks of healing period benefits at one hundred eighty-one and 41/100 dollars ($181.41).

That the defendant Wilson Foods Corporation shall pay the claimant one hundred ten (110) weeks of permanent partial disability benefits at the rate of ninety-one and 00/100 dollars ($91.00) per week.

That defendant Wilson Foods Corporation shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of one hundred eighty-one and 41/100 dollars ($181.41) per week commencing March 3, 1980.

That the defendant Wilson Foods Corporation shall receive credit for benefits previously paid.

That defendant Wilson Foods Corporation shall pay claimant all accrued benefits in a lump sum.

That interest shall accrue pursuant to Iowa Code section 85.30.

That the Second Injury Fund shall pay claimant weekly compensation benefits commencing four hundred ten (410) weeks after March 3, 1980 (January 10, 1988) at the rate of one hundred eighty-one and 41/100 dollars ($181.41) under the requirements of Code section 85.34(3).

That costs of this action shall be borne equally by defendant Wilson Foods Corporation and the Second Injury Fund of Iowa pursuant to Industrial Commissioner Rule 500-4.33.

That a final report shall be filed upon payment of this award.

Signed and filed this 19th day of July, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEWAYNE MCMURRIN,	:	
Claimant,	:	File No. 642921
vs.	:	R E V I E W -
LYSNE CONSTRUCTION,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
HOME INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

Mr. J. Richard Johnson
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P.O. Box 607
Cedar Rapids, Iowa 52406 For Claimant

Mr. W. C. Hoffmann
Attorney at Law
900 Des Moines Bldg.
Des Moines, Iowa 50309 For Defendants

This is a proceeding in review-reopening brought by DeWayne McMurrin, the claimant, against his employer, Lysne Construction, and the insurance carrier, Home Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on or about July 17, 1980. This matter came on for hearing before the undersigned at the Linn County Juvenile Court Facility in Cedar Rapids, Iowa on June 23, 1982. This record was considered fully submitted on that date.

On July 30, 1980, defendants filed a first report of injury concerning the July 17, 1980 injury. On August 6, 1980 defendants filed a memorandum of agreement(Form 2A) indicating that the weekly rate for compensation benefits was $144.83. No final report has been filed.

The record consists of the testimony of the claimant; claimant's exhibit 1, a June 4, 1981 letter from L. J. Flage, M.D. addressed to defendant carrier; claimant's exhibit 2, a February 24, 1981 To Whom It May Concern letter from Dr. Flage; claimant's exhibits 3-6, Outpatient and Emergency Records signed by Dr. Flage; claimant's exhibit 7, records regarding claimant's hospitalization from July 16, 1980 to July 22, 1980; claimant's exhibit 8, records regarding claimant's hospitalization from August 5, 1980 to August 8, 1980; claimant's exhibit 9, office notes and attached admission sheet dated August 5, 1980; claimant's exhibit 10, duplication of portions of claimant's exhibits 7 and 8 plus 2 x-ray reports regarding the right wrist and dated October 27, 1981 and February 27, 1981; claimant's exhibit 11, an August 27, 1980 report from Arnold E. Delbridge, M.D.; claimant's exhibit 12, a duplicate of claimant's exhibit 1; claimant's exhibit 13, a February 4, 1981 letter from W. J. Robb, M.D.; claimant's exhibits 14-17, letters from Dr. Delbridge and dated April 3, 1981, January 20, 1981, September 10, 1980 and October 10, 1980; and defendants' exhibit 18, a February 17, 1982 letter from Dr. Robb.

ISSUES

According to the pre-hearing order, the issues to be determined are whether there is a causal relationship between the alleged injury and the disability and whether the claimant is entitled to benefits for healing period and permanent partial disability. At the time of the hearing, claimant also requested that he be awarded vocational rehabilitation benefits.

RECITATION OF THE EVIDENCE

Claimant testified that as he was stripping forms for defendant employer on July 17, 1980, he was pushed from his scaffolding by a sheet of plywood that had been caught by the wind. He fell approximately 20 feet, landing on his right hand and right leg.

According to records for claimant's hositalization from July 16, 1980 to July 22, 1980, he received a cerebral concussion, an acute severe right frontal laceration 3 1/4 inches long and an acute fracture of the right wrist with marked comminution and angulation. X-rays of the chest, left knee and skull were negative. X-ray of the right wrist revealed "[a]cute comminuted transverse distal radial fracture, 1 cm. proximal to the wrist joint level, multiple fragments are impacted and angulated posteriorly about 40 degrees." Claimant's laceration was repaired with Xylocaine after thorough debridement and trimming and was sewed in layers. Closed reduction under general anesthesia was performed upon the right wrist and a short arm cast was applied. Claimant was discharged from the hospital with no restrictions or special instructions other than to keep his wound clean and dry and to resume daily activity as tolerable. (Claimant's exhibit 7.)

Records for claimant's August 5, 1980 through August 8, 1980 hospitalization indicate that for ten days claimant experienced very accurate anatomical positioning of his fracture until he lifted something with his fingers resulting in loss of 10-12 degrees of angulation and slippage of the fragmentation. Claimant underwent another closed reduction. A long arm cast incorporating the fingers was applied. Operative views revealed "Correction of the recent posterior distal radial fracture angulation occurring since the previous post-reduction views dated July 1, 1980" and that "[t]he main fragment is now near-anatomically reduced and the fragment representing the dorsal margin is only slightly displaced dorsally." The laceration of the scalp was found to be 100% improved and healing nicely. (Claimant's exhibit 8.)

On October 2, 1980 L. John Flage, M.D., claimant's family physician, who was also his treating physician for this injury, removed claimant's cast and applied a splint. (Claimant's exhibit 4.) According to what appear to be Dr. Flage's office notes, claimant was advised to go without the splint, to soak the wrist and to exercise it using a sponge rubber ball. (Claimant's exhibit 9.) In A To Whom It May Concern letter dated February 24, 1981, Dr. Flage advised that claimant had not been released to return to work as of that date and that he would be evaluating claimant's progress on February 28, 1981. (Claimant's exhibit 2.) An office note for February 27, 1981 indicates that claimant was advised to start using his wrist more to determine the extent of disability. On April 11, 1981, claimant was told to try to do some work with that wrist to see what difficulty he would experience. An estimate of 15% disability was recorded. The last office note, dated May 26, 1981, states in part: "...we are at a standstill, Has good range of motion of the wrist, states that he has pain all the time after he does any type of work with it. This may be true as there is a fracture line running in to [sic] the joint space." Claimant's exhibit 9.) On June 4,1981, Dr. Flage advised defendant carrier that claimant's wrist had reached maximum recovery and that there was "a 17% disability in the use of the wrist." (Claimant's exhibit 1.)

W. J. Robb, M.D., evaluated claimant's wrist on February 2, 1981 at the request of Dr. Flage. He received a history of the injury and course of treatment that essentially was consistent with the record. Dr. Robb set forth his objective findings and his impressions in a letter dated February 4, 1981 and addressed to Dr. Flage:

> On examination he has 30° of dorsiflexion, 20° of palmar flexion and relatively normal radial and ulnar deviation. There is a mild soreness to palpation over the fracture site. The strength of grip is only moderately impaired. Forced flexion-extension is moderately uncomfortable.
>
> A review of the x-rays accompanying the patient, those first of all of July 16, 1980, reveal a comminuted fracture of the distal radius with the

fragments, largely three, in malposition which following the manipulation and closed reduction, reduced nicely into good position and alignment. This was maintained thoughout his post-manipulative course on reviewing the x-rays.

On reviewing the x-rays of October 27, 1980, the fracture again has retained good position, shows excellent healing without any radial deformity. The fracture, however, was into the articular surface and as a result and the comminution of the fragments, a longer healing period is required to regain good strength.

Comment: I think the manipulation and closed reduction reduced the fragments into excellent position and could not have been better under any other circumstance than what was achieved.

There are substantial soft tissue residuals due to the period of immobilization and the period of time it takes to restore normal muscular power and strength in the wrist which I think he will achieve within the next six months. Therefore, he is still healing and will acquire better grip, better strength and better function.

Since the fracture was into the articular surface of the wrist, I anticipate that he may have some moderate residuals or permanent impairment of function of the right wrist compared to the normal wrist; however, I feel he should be given a period of four to six months of use and work before an assessment of this is made. I, therefore, suggested that he report back in about three or four months in followup for final x-ray and determine what his permanent impairment will be.

I have encouraged him to return to as normal activity as he can and use the wrist for all types of activity. It will not jeopardize his result. It might strengthen the wrist. (Claimant's Exhibit 13.)

Claimant did not recall whether Dr. Robb advised him to return to work.at that time. Claimant returned to Dr. Robb for evaluation at the request of the defendants. In a letter addressed to defense counsel and dated February 17, 1982, Dr. Robb states:

DeWayne McMurrin was rechecked in my office on February 16, 1982, for further evaluation of impairment of function of his right wrist as anticipated in the future.

Mr. McMurrin advises me that he has a little soreness along the side of the wrist periodically or if he pushes down hard. Basically, he is carrying out all activities or had been until he was laid off his construction job.

On examination today there is no swelling in the right wrist joint. He has a full range of motion without restriction. No particular tenderness elicited to palpation.

X-ray examination reveals a healed fracture of the radial styloid. There is an area of roughness or irregularity on the articular surface of the radius which relates to the old fracture. The joint space remains well preserved.

Diagnosis: HEALED FRACTURE, RIGHT RADIUS

Prognosis: I anticipate this patient may develop some traumatic arthritis of the right wrist in the years to come which would be accompanied by some restriction in his range of motion. He will carry a 10 percent permanent impairment of function of the right wrist as a result of the injury incurred. (Defendant's exhibit 18.)

Claimant was also seen by Arnold E. Delbridge, M.D. on August 27, 1980 for clicking in and giving out of the left knee. (Claimant's exhibit 11.) An arthrogram was conducted and revealed a torn meniscus. (Claimant's exhibit 16.) Claimant underwent an arthroscopy and medial meniscectomy on October 17, 1980. As of December 31, 1980, Dr. Delbridge estimated that the claimant would be able to return to work on February 1, 1981. (Claimant's exhibit 15.) Dr. Delbridge opined that claimant's knee problem was related to his July 17, 1980 work injury by history. (Claimant's exhibit 17.) Dr. Delbridge last examined the claimant on March 31, 1981, at which time he found that the claimant had good range of knee motion with pain on the medial side and a little clicking under the patella. He assessed claimant's impairment at 12% of the lower extremity which converts to 5% of the body as a whole. (Claimant's exhibit 14.)

Claimant testified that he began looking for work in the construction field a week or two weeks after Dr. Flage's May 26, 1981 examination. Claimant related that the applications he filled out asked for mention of prior injuries. While claimant implied that he was unsuccessful in securing employment because of the July 1980 injury, he acknowledged he was not so advised from any source and that he was not a qualified iron worker or member of either the masons' or carpenters' unions. He applied for unemployment benefits around that time period.

Claimant performed seasonal carpentry work on a part-time basis (20 hours per week) during the months of August and September in 1981. He reported that he found it difficult to use his right wrist on a steady basis, such as when hammering. He also found climbing to be a problem because his right knee was weaker. At the time of the hearing claimant had been winterizing homes for two weeks as part of "operation threshold," a job he had secured through the CETA program. Claimant reported that the work consisted of carpentry work inside and outside homes. He found the work to be easier than construction jobs. Claimant reported that his wrist had not bothered him too much except from using the caulking gun. He experienced no problem with his knee in doing such work other than noticing the right knee tires if he is on it all day. Claimant did not anticipate that the job was permanent.

It was claimant's belief that he would not be able to lift as required in jobs he performed prior to the July 1980 injury because his wrist aches too much. He expressed concern about being a safety hazard because his knee might give out if he were to attempt heavy work. He added that his wrist and knee problems have limited his participation in playing ball and hiking with his children.

Thirty-four year old claimant expressed a desire to obtain further training. He dropped out of high school before completing the ninth grade to seek employment. He thereafter acquired six months of mechanical training in the youth corp. He has not obtained a G.E.D. His employment history consists of working road construction, stock managing for a grocery store, running presses and lathes in a factory, assembling pre-fab homes, pouring concrete, cement finishing and other forms of general construction tasks. Claimant is an unskilled laborer.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury on or about July 17, 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. "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).

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).

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 totally 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.

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 permanant 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 (1963). 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 85.70 provides:

An employee who has sustained an injury resulting in permanent partial or permanent total disabilty, for which compensation is payable under this chapter, and who cannot return to gainful employment because of such disability, shall upon application to and approval by the industrial commissioner by entitled to a twenty-dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which he is actively participating in a vocational rehabilitation program recognized by the state board for vocational education. The industrial commissioner's approval of such application for payment may be given only after a careful evaluation of available facts, and after consultation with the employer or the employer's representative. Judicial review of the decision of the industrial commissioner may be obtained in accordance with the terms of the Iowa administrative procedure Act and in section 86.26 . Such additional benefit payment shall be paid for a period not to exceed thirteen consecutive weeks except that the industrial commissioner may extend

the period of payment not to exceed an additional thirteen weeks if the curcumstances indicate that a continuation of training will in fact accomplish rehabilitation.

Pursuant to I.C.R. 500 4.1(8) an application for vocational rehabilitation benefits is a contested case proceeding. I.C.R. 500-4.6 provides in relevant part:

> A petition or application must be delivered or filed with the original notice unless original notice Form 100 or Form 100A of the industrial commissioner's office is used.
>
> The original notice Form 100 or Form 100A shall provide for the data required in section 17A.12(2) and shall contain factors relevant to the contested case proceedings listed in 4.1. The Form 100 is to be used for all contested case proceedings except as indicated in this rule. The Form 100A is to be used for the contested case proceedings provided for in 4.1(8)...

ANALYSIS

With regard to the issue of causal connection, the record supports finding that claimant's alleged disability to his wrist and knee is causally related to his work injury in July of 1980. Dr. Delbridge's failure to specify the history upon which he was relying when he causally related claimant's knee problem to a July 1980 work injury is remedied by reading the record as a whole. Claimant's description of the injury at the time of admission to the hospital(that he fell on his right hand and leg) and the lack of evidence regarding any prior knee condition or subsequent knee injury justify finding causal connection between the work injury and the knee disability. There did not appear to be any dispute between the parties with regard to the causal relationship between the work injury and wrist disability. (The need for the second reduction and any enusing disability would fall within the analysis set forth in DeShaw vs. Energy Manufacturing Company, 192 N.W.2d 777 [Iowa 1971].)

The focus of direct examination appeared to be on establishing claimant's degree of industrial disability. However, claimant has not sustained an injury to the body as a whole, but rather to two scheduled members. Claimant's head injury did not result in any permanent impairment. Thus, claimant is entitled to compensation pursuant to Code section 85.34(2)(s). As indicated above, the industrial commissioner awards compensation pursuant to such section based on functional loss, not industrial disability. To date, agency decisions following such interpretation have converted the losses of both members to body as a whole impairment ratings which are then combined, using an appropriate guideline for a final functional body as a whole rating that, in turn, is multiplied by the 500 week schedule. Current agency thinking is that the average of the functional losses to the members should be multiplied by the 500 week schedule.

In the present case none of the doctors specify what guide or manual, if any, they are using in assessing the impairment ratings. Neither Dr. Plage nor Dr. Robb limit their impairment in terms of the hand or arm but rather address the wrist. The industrial commissioner has held that loss of use of a wrist is loss of use of a hand. Charles E. Elam v. Midland Manufacturing and Fireman's Fund Insurance Company, Appeal Decision filed December 28, 1981. However, claimant's fracture was to the distal radial, 1 cm. proximal to the wrist joint level. Under the circumstances of this case, claimant's loss will be assessed at 15% of the arm, taking into consideration the ratings of both Dr. Plage and Dr. Robb, the relatively good objective findings, claimant's present complaints and what he actually has been able to do since he recovered. Reference to the possibility that claimant will suffer arthritic changes in the future is not a proper factor to be considered in assessing his present disability.

Hence under the formula used to date, claimant would be entitled to seventy weeks of permanent partial disability. (15% impairment of the arm converts to 9% impairment of the body as a whole; 12% impairment of the knee converts to 5% impairment of the body as a whole; using the combined value chart of the AMA Guides, claimant's combined impairment to the body as a whole is 14%.) Under the formula being considered, claimant would be entitled to 67.5 weeks of permanent partial disability. (15% + 12% = 27%; 1/2 of 27% = 13.5%.) Existing agency case law will be applied in this case.

Claimant suffered no scarring as a result of the frontal laceration that would affect his work as an unskilled laborer. Accordingly, he is not entitled to benefits under Code section 85.34(2)(t).

With regard to the issue of healing period, claimant did not return to work until Dr. Plage indicated he should do so at the time of the May 26, 1981 office visit. It was on that date that Dr. Plage determined the claimant had reached maximum recovery and so informed defendant carrier. The fact that Dr. Robb recommended the claimant resume normal activity after he examined the claimant's wrist on February 2, 1981 is not controlling on the issue of the duration of healing period. In his letter to Dr. Plage following such evaluation, Dr. Robb acknowledged that claimant was still healing and probably would continue to do so for 4-6 months longer because of the nature of the fracture. (The recovery period for knee surgery on October 17, 1980 lasted until February 1, 1981.) Likewise, Dr. Plage's earlier recommendations that claimant use his wrist more do not amount to stating that claimant had reached maximum recovery or could return to work substantially similar to that performed on the date of injury.

While claimant's request for vocational rehabilitation benefits appears to have some merit at this juncture because he has sustained an injury resulting in permanent partial disability and has been experiencing difficulty returning to steady gainful employment, claimant did not comply with the intent of the statute or rule, cited above, by first adding such request as an issue at the beginning of the hearing. Claimant should file such request using the Form 100B. (The Form 100A was recently revised to exclude application for vocational rehabilitation benefits. The Form 100B is now the proper application for such benefits.) Defendants are encouraged to resolve this matter with the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

FINDING 1. Claimant fell from a scaffolding on or about July 17, 1980 in the course of performing his employment duties and landed on his right hand and right leg. Claimant sustained a cerebral concussion, an acute frontal laceration and an acute comminuted transverse distal radial fracture, 1 cm. proximal to the wrist joint level.

FINDING 2. Closed reduction upon the wrist was performed the day after the injury and repeated a couple weeks later when claimant suffered loss of angulation and slippage of fragmentation upon lifting something with his fingers.

FINDING 3. Claimant's treating physician for the wrist rated claimant's loss of use of the wrist at 17%; the evaluating physican rated such loss at 10%.

FINDING 4. As a result of the work injury, claimant suffered a torn right meniscus, for which he underwent an arthroscopy and medial meniscectomy on October 17, 1980.

FINDING 5. Claimant's treating physican for the knee rated claimant's loss of use of the lower extremity at 12%.

FINDING 6. Recent medical objective findings with regard to the wrist indicate claimant has full range of motion without restriction and no particular tenderness upon palpation.

FINDING 7. Claimant experiences difficulty using his wrist on a steady basis, such as when hammering, and notices that his right knee is weaker upon climbing or prolonged standing.

FINDING 8. Claimant's impairment to the upper extremity is rated at 15% which converts to a 9% body as a whole rating; claimant's impairment to the lower extremity is rated at 12% which converts to a 5% body as a whole rating; the combined value of both losses is assessed at 14% of the body as a whole.

FINDING 9. Claimant sustained no permanent partial disability as a result of the head injuries.

CONCLUSION A. Claimant sustained his burden of proving that as a result of the work injury he suffered 15% loss of use of his arm and 12% loss of use of his leg.

CONCLUSION B. Pursuant to Code section 85.34 (2)(s) claimant is entitled to 70 weeks of permanent partial disability.

FINDING 10. Claimant sustained no scarring that would affect his work as an unskilled laborer.

CONCLUSION C. Claimant is not entitled to benefits pursuant to Code section 85.34(2)(t).

FINDING 11. Claimant reached maximum recovery following knee surgery on February 1, 1981; claimant reached maximum recovery with respect to his wrist as of May 26, 1981.

FINDING 12. As of May 26, 1981, claimant had not returned to work nor was he medically capable of returning to employment substantially similar to the employment in which claimant was engaged at the time of injury.

CONCLUSION D. Pursuant to Code section 85.34(1), claimant is entitled to healing period benefits from the date of injury to May 26, 1981.

ORDER

THEREFORE, it is ordered that the defendants pay the claimant seventy weeks of permanent partial disability at the rate of one hundred fourty-four and 83/100 dollars ($144.83) per week. Pursuant to Code section 85.34(2), permanent partial disability benefits shall begin as of May 26, 1981.

Defendants are ordered to pay the claimant healing period benefits from the date of injury through May 25, 1981 at the rate of one hundred fourty-four and 83/100 dollars ($144.83) 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:

Dr. Robb (mileage - 80 miles round trip)
2-2-81 80 x $.20 = $16.00
2-16-82 80 x $.22 = $17.60

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 26th day of July, 1982.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW J. MOORE, Claimant, vs. CECO CORPORATION, Employer, and COMMERCIAL UNION ASSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 609316 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision filed May 24, 1982 wherein claimant was awarded temporary total disability benefits from July 12, 1979 until his return to work in December of 1979 and during his hospitalization in July of 1980. Claimant's notice of appeal was filed June 10, 1982.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Richard D. Smith, and Roberta Moore; claimant's exhibit 1 (medical reports); defendants' exhibits A through D (exhibit A being a letter from Michael Stein, M.D., to B. A. TePoorten, D.O., and exhibits B, C & D being films taken June 9 to June 12, 1980); claimant's answers to interrogatories; claimant's deposition taken November 6, 1980; the deposition of B. A. TePoorten, D.O.; the deposition of Joshua D. Kimelman, D.O.; the deposition of G. Charles Roland, M.D.; the deposition of David Engelbrecht; the deposition of Joe Skeens; and the briefs and filings of all parties on appeal. Claimant filed an appellate brief in this proceeding. Defendants' application for extension of time in which to file a reply brief, filed November 5, 1982, was denied in a November 8, 1982 ruling.

ISSUES

The issues on appeal are as follows:

1) Whether the deputy ignored the credible medical evidence as presented by Drs. TePoorten and McClain that claimant was permanently impaired by his work related injury.

2) Whether the deputy abused her discretion in her review of the film evidence presented.

3) Whether the deputy abused her discretion by overestimating claimant's inconsistencies and lack of candor during the review-reopening hearing.

REVIEW OF THE EVIDENCE

The record establishes that at the time of the review-reopening hearing the parties stipulated the applicable workers' compensation rate in the event of an award to be $247.42 per week. (Transcript, p. 3)

Claimant, who is married and the father of one child, was 31 years old at the time of the review-reopening hearing. He is a high school graduate and has had approximately a year and a half of liberal arts courses at Area 11 Community College. Claimant's work experience has been primarily in the area of carpentry, but also includes brief periods of janitorial work and welding. Claimant was a member of a local carpentry union during the four years preceeding his injury, and had been working on commercial construction projects which entailed substantial amounts of heavy work as well as some finish and trim work. He stated that he had worked out of his home as an antique furniture refinisher during the two year period preceeding the hearing. (Tr., pp. 4-7)

On July 11, 1979, while employed by Ceco Corporation, claimant suffered an injury to his back. He had been building a "beam bottom tower" which consisted of seventy-five pound rolled steel sections and four by sixes which were twenty feet in length and weighed from fifty to one hundred pounds apiece. Claimant estimated the total weight of the tower to be 700 pounds. Due to a mistake in the blueprint the tower had to be moved one and one-half feet. With the help of two co-workers, claimant attempted to slide the tower into its correct position. He testified that during this process he felt a snap in his back. Claimant then went to lunch, but upon returning to work began to suffer great pain in the lower and middle sections of his back causing him to be unable to walk. (Tr., pp. 7-9)

In the afternoon, on July 11, 1979, claimant was taken to see B. A. TePoorten, D.O., who is a professor of osteopathic manipulative medicine. Dr. TePoorten attempted to manipulate claimant's back, but when he was unable to successfully do so he had claimant hospitalized under the care of Drs. McClain and Rosenfeld. Claimant testified that he spent several weeks in Des Moines General Hospital, and was treated with traction and Demerol. (Tr., pp. 9-11)

In a May 4, 1981 letter to Clark Holmes (attorney for claimant) David B. McClain, D.O., discussed his July 1979 diagnosis of claimant and provided an opinion as to claimant's physical impairment:

> Orthopaedic evaluation was initially carried out on July 18, 1979, in Des Moines General Hospital, with chief complaints of low back pain.
>
> ....
>
> Orthopaedic examination of the low back revealed para spinal muscle spasms present, being greater on the left. Straight leg raising signs were positive, bilaterally. He had great difficulty in trying to perform the function of standing on the toes and heels, bilaterally. An E.M.G. obtained on July 19, 1979 was reported as being within normal limits. A lumbar myelogram of July 20, 1979 showed no evidence of gross filling defects. He was treated on a conservative supportive basis. He was released from Des Moines General Hospital on July 23 of 1979, with a final diagnosis of herniated lumbar disc.
>
> ....
>
> I do not feel he is a fusion candidate at this time. All other avenues of treatments should be exhausted before that being entertained. He is to return to my office in six weeks for re-examination.
>
> It is my opinion he has sustained a permanent partial impairment to the body as a whole in the amount of twenty-five percent, as a result of the trauma. (Claimant's Exhibit 1)

Following his release from Des Moines General Hospital in August of 1979 claimant continued to see Dr. TePoorten on a fairly frequent basis. Claimant was seen on July 25; August 1, 9, and 22; September 9 and 27; October 15; November 15; and December 6 and 20, 1979. Dr. TePoorten characterized claimant's symptoms as fluctuating during this period. The doctor understood that claimant was doing light work during this time and believed he was doing odd jobs in cement. In 1980 the physician saw claimant on January 7 and 23; February 18 and 29; and March 13 and 27. On this latter visit claimant complained of left periformis contracture and pain in the left low back. The next year he was seen on March 10, September 4, and October 14. (TePoorten Deposition, pp. 23-25)

In a March 16, 1981 letter to William Scherle (attorney for defendants) Dr. TePoorten wrote:

> On 10 March 1981 I requested Mr. Moore to come to my office for evaluation and examination for his present physical status.
>
> ....
>
> His chief complaints, as of today, are occipital and frontal type headaches and lumbosacral myositis with radiation of pain into the anterior aspect of the right lower extremity.
>
> ....
>
> Mr. Moore claims that he may lift a maximum weight of 25 to 30 pounds without complaint in the lumbosacral area. Cumbersome weights such as a 4 x 8 piece of plywood, weighing about 45 pounds would be sufficient to produce pain and strain to his low back.
>
> Mr. Moore was requested to bend forward from the waist while standing. His fingers could approximate the floor 4 or 5 inches short of reaching the floor

with the knees straight. This position produced headaches, a strain of the hamstrings and lumbosacral pain.

Mr. Moore claims that climbing up or down stairs aggravates his low back pain. Mr. Moore claims he can squat down on the backs of his heels without pain or distress but upon arising from the squatting position he complains of pain down the right leg and headaches.

The weight of his body, not under workload, produces low back pain and headaches.

Mr. Moore claims that a maximum of five hours, performing minor lifting duties, wastes his energy levels, requiring him to rest. Mr. Moore claims there is no pain while sitting down but frontal type headaches occur after motions mentioned above.

It is my professional opinion that Mr. Moore is not capable of performing the duties of a carpenter - neither finish or rough-out carpentry for which he has been trained. (Cl. Ex. 1)

Claimant testified that he saw Joshua Kimelman, M.D., in arch of 1980, and again on April 15, 1980 at which time he was lassified as disabled. Claimant was eventually hospitalized in ıly of 1980 in an effort to break a drug dependence which had een acquired during his initial stay in the hospital following is injury. At the time of his deposition, claimant had the ollowing exchange with defendants' counsel concerning the eriod between the April 15, 1980 visit with Dr. Kimelman and ıly of 1980:

Q. At the time he disabled you what did he tell you not to do or that you couldn't do?

A. He told me he didn't want me to do any lifting of any kind at all. That was basically it, just no lifting or pulling.

Q. At that time did you feel that you could do any?

A. No.

Q. You went back in the hospital then in July?

A. No, it was the last part of -- I think it was right around the first of August, to be real truthful with you.

Q. That you went in?

A. Yes.

Q. Between April and July what did you do?

A. Nothing except for sleep and be on my back quite a bit.

Q. During that period of time could you do any lifting?

A. No. If I am on my feet for a long period of time, it just wears me completely out. My legs start hurting and throbbing and my lower back just puffs way up.

Q. You couldn't have done any climbing at that time?

A. No.

Q. Any lifting?

A. No.

Q. Did you feel that you could lift anything during that period of time, say, for example, did you even go grocery shopping or anything like that, lift a bag of groceries?

A. No.

Q. So you certainly couldn't have lifted a sheet of plywood or anything?

A. No, no way.

Q. Again, I am talking about that period of time before you entered the hospital. I am just trying to establish what your condition was.

A. Yeah.

Q. Did the doctor set any weight limits on you during that period of time?

A. No.

Q. In your mind, even though you are not supposed to be lifting anything -- around the house you would pick up a book or some things like that -- do you have any idea in you own mind any weight limits you could have had at that time?

A. Twenty-five pounds.

Q. Could you do any bending or stooping?

A. No, I had to have my wife help me dress.

Q. You couldn't bend over and tie your shoes or anything?

A. I couldn't hardly ever get up out of bed period. It was pretty bad.

Q. Does that pretty much describe your condition then between April and August when you went into the hospital?

A. Yeah.

Q. Then can you tell me what happened just prior to going in the hospital that made your condition apparently worse?

A. My condition didn't get any better. It wasn't worse, it just didn't get any better. Like I said, I had become stagnant and Doctor Kimelman felt if I was to go through the pain clinic it would help me as far as my drugs because I was having psychological problems, stress problems and this type of thing that was going on; no money coming in or anything like that. I just went to Northwest Hospital and went through the pain clinic. At that time they took me off the codeine and put me on Motran, which is a nonaddictive drug. They gave me some exercises and gave me a limit then of what I should lift.

Q. What was that limit then?

A. It was 25 pounds. They told me at that time they didn't want me to do any lifting of any kind or any pulling of any kind. Of course, by that time my back was so weak I couldn't anyway.

Q. So before going in there you had abided by Doctor Kimelman's orders and pretty much stayed in the house?

A. Right.

Q. You hadn't done any work at all, whether it was paid or unpaid?

A. Nothing.

(Moore Dep., pp. 17-20)

During the same deposition, claimant was later again questioned as to his physical limitations, especially between April 1980 and August 1980:

A. Well, my condition was worse from April of '80 until August when I was in the hospital, then it got better once I got out of the hospital.

Q. You feel it was worse. Let's use that period of time.

A. From August until now?

Q. No, from April until August during what you considered to be the worst time that you had. Let's use that period of time. I will ask you some questions about some different things that you might do and you tell me whether you could have done that during that period of time, all right?

A. Okay.

Q. Let's start with could you walk stairs comfortably?

A. I still can't walk stairs comfortably.

Q. Its hurts you to lift one leg up?

A. And pull my weight up with the other, yeah.

Q. How about lifting one leg up and standing on one foot?

A. That is pretty hard.

Q. It causes you discomfort?

A. Yeah.

Q. I realize maybe you didn't do any of this, but do you feel you could have carried anything, say something in each hand? Would it be easier to carry it in one hand, or would you have to use two hands?

A. I definitely couldn't in one because that offsets me. As far as two, it is kind of hard because of the pain that I have.

Q. Anything that would cause you to bend over?

A. It would cause offset.

Q. And that causes problems?

A. Yeah.

Q. How about reaching, stretching with your arms over your head or reaching for something above you?

A. That is part of my therapy, to extend my arms and grip them to get the blood circulating in your arms.

Q. What about stretching above your head?

A. That's one thing I do. See, I lay on my back and lift my arm up like that and tense it up to where it is shaking.

Q. How about from a standing position? Do you think you could do that?

A. I could do it, but not to the extent when I was laying down.

Q. You couldn't hold that position as long? Is that what you are telling me?

A. Right.

Q. You mentioned you had trouble dressing and things. Could you bend at all from your waist with your legs straight? In other words, like a toe touch rather than bending down with your knees bent?

A. I couldn't touch my toes at all.

Q. How far can you come or could you come during that period of time?

A. When I got out of the hospital they measured it about three inches from my toe, and that was my best time because I had been on bed rest for two weeks. Now I would say that I can come within eight to six inches from them.

Q. Between April and August how close could you come?

A. I couldn't. Between April and August was pretty bad. It was just about as bad as before. I just couldn't get out of bed and bend over. My wife had to help me dress. (Moore Dep., pp. 28-30)

In a February 5, 1981 letter to Clark Holmes, Dr. Kimelman wrote: "In addition to the enclosed reports, I believe in view of the duration of Mr. Moore's symptoms, continued low back pain with continued loss of range of motion and spasms, and x-ray changes, that his permanent impairment, the loss of function to the whole body represents 10%." (Cl. Ex. 1)

Peter Wirtz, M.D., saw claimant on September 26, 1979 at which time he found no neurological involvement, but tight hamstrings. X-rays revealed an enlarged L5 transverse process and narrowing of the L5-S1 disc space. Dr. Wirtz made a diagnosis of chronic musculoskeletal strain secondary to disc degeneration. The doctor believed that claimant was unable to work prior to September 26, 1979; however, Dr. Wirtz thought claimant could do light duty. He wrote in the letter dated February 26, 1981:

> I have felt that the work related injury on July 11 had aggravated a pre-existing problem which would be the degeneration and the congenital anomaly of the L5 transverse process. It was my further feeling that he should return to light duty a short time after that examination to keep him physically active and near his work area. (Cl. Ex. 1)

Dr. Wirtz expressed the opinion that claimant had disc degeneration which when symptomatic would restrict claimant's lifting, standing, and walking ability. The surgeon, at the time of his last examination on November 1, 1979, found no herniation, no neurological involvement, and no permanent partial disability. (Cl. Ex. 1)

G. Charles Roland, M.D., board certified orthopedic surgeon, who had reviewed copies of previous medical records, saw claimant on December 23, 1981 with complaints of aching and stiffness worsened with coughing, sneezing, sitting in a straight chair, sitting in a soft chair, and bending forward. Claimant said he was able to do light duty but not his work as a carpenter. The doctor found claimant's symptoms and history consistent with his injury. On physical examination claimant's straight leg raising was "80 over 80," basically normal, as was his neurological evaluation. Reflexes were normal at the knees and hypoactive at the ankles. There was no decrease in sensation. Motion of the lumbar spine was eighty degrees flexion, twenty degrees forward extension, twenty degrees left lateral bending, and twenty-five degrees right lateral bending. Dr. Roland characterized claimant's condition as a strain or irritation of a disc in the low back. The surgeon rated claimant using the AMA Guides at two percent of the body as a whole. (Roland Dep., pp. 3-7)

At the review-reopening hearing claimant admitted to putting some siding on his garage and assisting a neighbor on a garage roofing job in July of 1980. He insisted, however, that he was merely participating in a supervisory capacity and that he was assisted in whatever light lifting he had to do. (Tr., pp. 36-39) Richard D. Smith, a friend of claimant who helped with the roofing job, testified that while he had no roofing skills, he did "all the work." (Tr., pp. 57-58)

Movies taken from June 9 through June 12, 1980 show claimant measuring, hammering, caulking or gluing, sawing, planing, lifting and turning plywood sheets, rolling up cable, catching equipment dropped to him, cutting shingles, and hoisting shingles. Claimant is shown bending, twisting, stepping up, reaching backward and overhead, lifting, stretching, pulling, applying pressure, and squatting. Claimant appeared to bend easily at the waist and at the knees and to have good mobility in his shoulders. He was able to raise slowly as he caulked. Some film shows a number of persons by claimant's garage. Although there seems to be plenty of help, claimant is shown taking an active part rather than directing others who provided minimal assistance. (Def. Ex. B, C & D)

Joe Skeens, who was a private investigator in June of 1980 testified to taking films of claimant. He responded "yes" to the question of whether or not they were a fair and accurate representation of claimant's activities. He recalled that on June 9, 1980 seven rolls of film or twenty-one minutes were taken during a surveillance period of one hour and forty-five minutes; on June 10, 1980 four rolls of film or twelve minutes were taken in a two hour and fifteen minute period; on June 11 five rolls or fifteen minutes of film were taken during less than one hour, and that on June 12 two rolls of film or six minutes were taken during one and one-quarter hours. Skeens denied seeing claimant act as if he had back pain, trouble walking, limp, appear to complain, stumble, or evidence limited motion. He acknowledged there were periods of time when claimant disappeared from view and the investigators did not know what he was doing which accounted for perhaps ten percent of the time of their observation. (Skeens Dep., pp. 2-7)

David Engelbrecht accompanied Skeens in the investigation of claimant. He testified that after reading a file on claimant, he went out to identify claimant so that he could be placed under surveillance which was done through ownership of a car. He said that he returned to claimant's house the following day and saw claimant and others working on claimant's garage installing plywood. Engelbrecht asserted that claimant was carrying and manipulating full sheets of plywood. The next day he recalled seeing claimant lifting shingles, stooping to install shingles, and jumping back and forth across an electrical wire. He observed no problems with claimant's gait; no difficulty stooping, bending, or lifting; and no indication of pain such as rubbing or grimacing. He claimed that claimant was doing the work rather than directing it. Deponent stated that the pictures taken of claimant were representative. (Engelbrecht Dep., pp. 2-11)

At the review-reopening hearing claimant asserted that inconsistencies between his answers at that time, and those given during his November 6, 1980 deposition was because his memory was being affected by codeine at the time of the deposition was taken.

Dr. TePoorten viewed films of claimant taken on June 9 and June 10. The doctor responded "no" when he was asked if he saw limitation on claimant's ability to stretch and to bend from the waist or to lift. He observed that while claimant can bend easily to the left, he bends less easily to the right because of the contracture on the left. He also noted that stapling was done with knees bent which he said was indicative of a lumbosacral strain pattern. The doctor said that the work claimant was doing in June of 1980 could cause an acute lumbosacral strain if it were continued. While he said it was possible that the work could aggravate claimant's condition, he stated that it did not look as though it had because after stapling claimant was able to stand without psoas spasm. Although the doctor said claimant could now do the type of work seen in the film, he was unable to say he could have done it since June of 1980 as it was his understanding claimant had three acute episodes for which he was treated by Dr. McClain. (TePoorten Dep., pp. 30-34)

Dr. Roland saw films of claimant and agreed there was nothing in the films to show limitation of motion; the symptoms of which claimant complained when he examined him; the disc injury; difficulty with gait; inability to bend, stoop or lift; and incompleteness of healing period. The doctor anticipated that if claimant had an abnormal back and was able to do the things shown in the film, he "would expect him to not be able to do much of anything the following day." The doctor expressed the feeling that claimant "had a completely normal back on those days that we had seen him at work and that his initial episode was more likely a strain type of problem." Dr. Roland said that "[i]f you have a patient with any type of even moderately symptomatic disc injury repetitive bending, working, bending over and using a staple gun on a roof with no apparent limitation of motion or apprehension would not go along with that problem, at least that problem with any degree of discomfort." (Roland Dep., pp. 13-17)

Dr. Kimelman also viewed the films of claimant and asked to withdraw his 10 percent impairment rating until he could re-examine claimant. (Kimelman Dep., p. 15)

In early December 1979 claimant was employed by Bestway Construction where he did light duty trim and finish work until he left his job in mid January 1980. Claimant stated that the pain in his back was too great and continued to get worse before he quit. At another point, claimant made reference to being "layed off" from Bestway. (Moore Dep., pp. 14-16)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 11, 1979 is causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id. at 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, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The weight to be given to motion picture evidence was discussed in Haws v. Esmark, Inc., 33 Biennial Report of the Industrial Commissioner 94 (1977). It was stated:

Professor Arthur Larson in 3 Workmen's Compensation, §79.74 (1976 ed.) points out that "[a]lthough on the surface it might appear that nothing could be more cogent and even dramatic refutation of a disability claim than motion pictures of claimant jacking up a car or playing tennis, the courts have rightly observed that such evidence must be used with great caution."

Some of the limitations of motion picture evidence were alluded to by the Pennsylvania Superior Court in De Battiste, supra, at 787 with the court noting that claimant's activities were shown for a restricted period and that movies could not accurately record "speed, energy and efficiency at work."

In following De Battiste, the Pennsylvania Commonwealth court in Kelly, supra, at 257 acknowledged another potential difficulty with motion pucture evidence cautioning that "pictures must be carefully scrutinized because of the ease with which true films can be altered and distorted into frames of damaging fabrications." See also Powell, supra.

The Louisiana Court of Appeals accurately pinpointed problems with filmed evidence in Lambert, supra, at 527, stating that "pictures show only very brief intervals of the activities of the subject, they do not show rest periods, they do not reflect whether the subject is suffering pain, and they do not show the after effects of his activities."

ANALYSIS

Claimant's first issue on appeal charges the deputy with wrongfully ignoring credible medical evidence that claimant was permanently impaired by his work injury. The second issue concerns the deputy's evaluation of the film evidence presented by defendants in this case. Because these issues are interrelated, they will be addressed together.

Review of the record indicates that four medical opinions were rendered purporting to evaluate the permanency of claimant's injury. Dr. TePoorten believed claimant to be 100 percent disabled from performing finish or rough-out carpentry work. Dr. McClain opined that claimant had sustained a 25 percent permanent impairment to the body as a whole. Doctors Kimelman and Roland set claimant's permanent impairment to the body at 10 percent and 2 percent respectively. At the outset, the extreme range of impairment ratings is noted. Three of the four doctors were later given an opportunity to view the films taken of claimant siding his garage and roofing a building in June 1980. Both Dr. Kimelman and Dr. Roland withdrew their impairment ratings after seeing the films. Dr. Roland stated that if claimant's back had been abnormal he would not be able to do much of anything on the following day. The films, however, depict claimant performing various carpentry duties over a period of four consecutive days. A viewing of the films showed them to be of good quality and to provide an unobstructed view of claimant's activities. Because the film evidence was gathered over a period of hours during consecutive days, we believe that claimant's speed, energy, and efficiency at his work have been accurately represented. Claimant appeared to have no problems with handling the strenuous activity of roofing, and appeared to have excellent mobility on the pitched work surface. Film segments depicting reaching down from a scaffold to receive full bundles of shingles were particularly enlightening as to claimant's ability to lift, bend, and stoop. Other segments showed claimant manipulating large (4x8) sheets of plywood, twisting, hammering, operating an air gun, and loading ladders onto a truck. At no time did claimant appear to be in pain, nor did his mobility and flexibility seem to be hampered. While other persons could be seen in the films, claimant appeared to be doing the majority of the actual laboring.

Dr. TePoorten, who had determined claimant to be 100 percent disabled from doing any type of carpentry work, declined to alter his opinion after viewing the films. It is noted by this tribunal that the film evidence was collected during the very time period that claimant had stated was his worst period of pain. In light of claimant's statement, the apparent reliability of the film evidence, and the films' portrayal of claimant doing carpentry work over a four day period, the opinion of Dr. TePoorten has been discredited and will carry no weight. The forth impairment rating, that of Dr. McClain who did not view the film evidence, must be discounted due to the absence of a basis for determining impairment. Dr. McClain's report first states that an E.M.G. was within normal limits and that a lumbar myelogram showed no evidence of gross filling defects. He then, however, diagnosed claimant to be suffering from a herniated lumbar disc and to be permanently impaired to the body as a whole in the amount of 25 percent. While a doctor's opinion need not be couched in unequivocal terms, at least some rationale or specific basis of determination must accompany an impairment rating. The record does not reflect a showing of any such basis upon which Dr. McClain has based his impairment rating of claimant.

Claimant's final issue on appeal concerns the weight given by the deputy to claimant's inconsistencies and lack of candor during the hearing. While this tribunal is unable to comment on the possible lack of candor on the part of claimant, we believe the deputy's decision not to have been wrongly influenced by inconsistencies in claimant's testimony. The major inconsistency in claimant's testimony concerned his condition and ability to do carpentry work between April 1980 and August 1980. During his deposition claimant stated that the April-August period of 1980 was his "worst" period, and denied having performed any type of physical labor during that time period. At the hearing, claimant admitted to helping a neighbor do roofing and to siding part of his garage, but stated that he mainly supervised others who were doing all of the work. The film evidence, as discussed above, shows claimant not only supervising, but actually performing most of the work himself. The credibility of a witness is always at issue, and inconsistent statements are an effective means of impeachment. We find, however, that the evidence presented in this case would be sufficient to affirm the deputy's decision even had there not be inconsistencies in claimant's testimony. Claimant's inconsistencies have not been used to deprive him of an award, rather the evidence presented does not show a further award to be merited. Claimant was clearly able to perform carpentry duties in June of 1980, and there has been no credible medical evidence to indicate that claimant is permanently disabled. Those factors alone support the decision of the deputy to deny claimant permanent disability benefits.

FINDINGS OF FACT

1. On July 11, 1979 claimant suffered an admitted industrial injury to his back.

2. Claimant spent two weeks in Des Moines General Hospital where he was treated with traction and Demerol.

3. Claimant began working for Bestway Construction in December of 1979 doing finish carpentry work.

4. Claimant left Bestway Construction in January 1980.

5. Claimant did roofing work with a neighbor and sided his garage during June 9 through June 12, 1980.

6. Defendants hired detectives to film claimant's activities from June 9 to June 12, 1980.

7. Claimant spent July 19-23, 1980 at the Northwest Pain Clinic to learn to handle pain and to kick a drug dependency which began during the initial treatment of his injury.

8. Dr. TePoorten believed claimant to be 100 percent disabled from doing finish or rough-out carpentry work.

9. Dr. McClain diagnosed claimant to have a herniated lumbar disc and to be permanently impaired to the extent of 25 percent of the whole man.

10. Dr. Kimelman first stated claimant to be permanently impaired to the extent of 10 percent of the whole man.

11. Dr. Kimelman withdrew his impairment rating after viewing films of claimant laboring on June 9-12, 1980.

12. Dr. Roland first stated claimant to be permanently impaired to the extent of 2 percent of the body as a whole.

13. Dr. Roland withdrew his impairment rating after viewing films of claimant laboring on June 9-12, 1980.

14. At the time of the hearing, claimant was restoring antique furniture out of his home.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the evidence that he has any permanent impairment which is causally related to the injury of July 11, 1979.

Claimant was temporarily totally disabled from July 11, 1979 until he began work in December 1979.

Claimant was temporarily totally disabled during his stay at the Northwest Pain Clinic from July 19, 1980 to July 23, 1980.

THEREFORE, it is ordered:

That defendants pay unto claimant temporary total disability benefits at a rate of two hundred fifty-seven and 42/100 dollars during his hospitalization in 1980.

That defendants pay interest pursuant to section 85.30, The Code, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in thirty days.

Signed and filed this 18th day of February, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW J. MOORE,	:	
Claimant,	:	
vs.	:	File No. 609316
CECO CORPORATION,	:	N U N C
Employer,	:	P R O
and	:	T U N C
COMMERCIAL UNION ASSURANCE COMPANY,	:	O R D E R
Insurance Carrier, Defendants.	:	

The order on page 16 of the appeal decision filed February 18, 1983, that defendants pay unto claimant temporary total disability benefits, erroneously ommited to state the duration of benefits. The correct order shall read as follows:

THEREFORE, it is ordered:

That defendants pay unto claimant temporary total disability benefits at a rate of two hundred fifty-seven and 42/100 dollars ($257.42) until his return to work in December of 1979 and during his hospitalization in 1980.

Signed and filed this 23rd day of February, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEROY MOORE,	:	
Claimant,	:	
vs.	:	
FIRESTONE TIRE & RUBBER COMPANY, WHOLESALE RETREAD PLANT,	:	
	:	File No. 602545
and	:	A P P E A L
INSURANCE COMPANY OF NORTH AMERICA,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed August 5, 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 depositions of Paul From, M.D., Michel W. Andre, M.D., Robert A. Hayne, M.D., and Donald Thomas; exhibits A, B, C, D, E, F, G, H, I, J and K (exhibit I is Dr. Andre's deposition; exhibit J is Dr. Hayne's deposition; and exhibit K the deposition of Mr. Thomas); and defendants' exhibits 1, 2 and 3 (exhibit 3 being the deposition of Dr. From).

The result of this final agency decision will be the same as that reached by the hearing deputy. The findings of fact have been numbered for convenience; number 6 has been revised, and number 11 is new.

STATEMENT OF THE CASE

Claimant, a long-time employee of the Firestone Tire & Rubber Company, bumped the right side of his head on a part of a machine. He developed some symptoms and was the next day admitted to the hospital for treatment of a stroke. The arbitration decision summarizes the facts sufficiently.

ISSUE

The hearing deputy found that claimant sustained an injury which arose out of and in the course of his employment when he bumped his head on the machine, and, further, awarded benefits for permanent and total disability. Defendants in their appeal claim that the evidence showed claimant had a preexisting condition that culminated in a stroke and that the work incident was coincidental or had nothing to do with the fact that claimant had a stroke.

APPLICABLE LAW

The question is whether claimant sustained an injury which arose out of and in the course of his employment. Claimant has the burden of proof. Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945); Almquist v. Shenandoah Nurseries Inc., 218 Iowa 724, 254 N.W. 35 (1934). A personal injury is an impairment of health which resulted from work. Jacques v. Farmers Lumber and Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951); Lindahl, 236 Iowa 296, 18 N.W.2d 607; Almquist, 218 Iowa 724, 254 N.W. 35. Claimant must show that the health impairment was probably caused by his work; possible cause is not sufficient. 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, 218 Iowa 724, 254 N.W. 35. 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).

A preexisting disease or condition which is aggravated at work is compensable. 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); Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956); Oldham v. Scofield & Welch, 222 Iowa 764, 266 N.W. 480, 269 N.W. 925; Almquist, 218 Iowa 724, 254 N.W. 25.

ANALYSIS

There is considerable medical evidence of the type necessary to support an award. The initial treating physician, Vivekananda Wall, M.D., a general practitioner, stated the diagnosis as "[m]ild stroke aggravated by trauma." (claimant's exhibit A) Robert Hayne, an examining neurosurgeon states flatly:

> I think that although he had some symptoms antedating that particular accident, it seemed from the history that they were more or less precipitous in developing following the event, and in my opinion the trauma that he sustained to his head did contribute to the disorder that resulted in the speech difficulty particularly that he had following that accident. (Exhibit J, Hayne dep., p. 9)

There is, of course, much evidence to the contrary. In the opinion of Michel Andre, a neurosurgeon, the stroke occurred before the head trauma and claimant fell because of dizziness from the stroke. (Exhibit I, Andre dep., p. 17) Likewise, in the opinion of Paul From, an internist, the stroke antedated the head trauma. (Defendants exhibit 3, From dep., p. 53; see also defendants exhibit 1 in that deposition)

However, in exhibit A, which was the initial finding of Dr. Andre dated June 30, 1979, he stated "I suspect that we are still seeing the residuals of this episode which have been accentuated by the trauma he has sustained." Further, Dr. From conceded that a trauma might induce a clot to break off and produce blockage later in the system. (Defendants' exhibit 3, From dep., p. 58)

The dispute of the evidence may be resolved in favor of claimant because there is solid evidence from a treating doctor (Wall) and from a neurosurgeon (Hayne) who examined the records, both to the effect that there was a causal relationship between the bump on the head and the stroke. The fact that Dr. Andre states in one report that the trauma accentuated the episode and later testifies to the contrary is inconsistent and lowers the weight of his evidence. Likewise, Dr. From's testimony, as shown above, is at least somewhat equivocal. However, defendants bring up some matters which need discussion.

First, there is the question of whether claimant exhibited any symptoms prior to the bump on the head, with claimant stating he did not and defendants stating that he did. In this respect, the evidence of claimant's fellow workers seems fairly conclusive to establish the point that claimant did have problems with his coordination and mental capacity prior to the injury. Of course, Dr. Hayne's opinion, upon which great reliance is placed, takes a preexisting condition into consideration, so the fact that that condition existed is of little weight. Second, defendants point out that the hearing deputy referred to Dr.

Andre's "examination" of claimant, whereas, Dr. Andre was an important treating physician in this case, and his evidence was weighed in that light.

Dr. Andre is no doubt an expert in his field, but he makes certain assumptions which go beyond his expertise. For example, as was stated, he assumed that claimant had the head trauma subsequent to the stroke. (Andre dep., p. 17, 30) Claimant testified that he slipped and bumped his head. Whether or not he had a stroke, it seems logical that he could have slipped and bumped his head. It is some form of faulty post hoc reasoning to assume that one event (the stroke) occurred first and was the cause of a second event (the bump on the head). Likewise, Dr. Andre formed an erroneous assumption that four days elapsed between claimant's bump on the head and the additional difficulty. (Andre dep., 21, 45) Finally, and this is perhaps the coup de grace to Dr. Andre's testimony, he initially stated that the trauma "accentuated" the episode. Webster's New World Dictionary of the American Language, College Edition, defines "accentuate" as "to emphasize; heighten the effect of." Such a description of the event satifies the requirement of aggravation.

Finally, defendants make something of the fact that claimant sustained a blow to the right side of his head and the stroke occurred in the left portion. (Defendants' brief, p. 2) As one understands the physics of such a blow, the damage occurs on the side opposite to the blow because of the momentum produced. This being the case, the fact that the blow occurred on the right side of the head and the stroke occurred in the left would actually aide claimant's case.

* * *

There was no appeal concerning the rate of weekly compensation, and the extent of claimant's disability appears to be permanent and total, unless drastic improvement is achieved.

FINDINGS OF FACT

1. That on June 27, 1979 claimant, LeRoy Moore, was an employee of the defendant having commenced that relationship in 1960.

2. That on June 17, 1979, while working at his employer's place of business and attempting to dislodge an orbitread machine, the claimant slipped and struck the right front and right side of his head against a vertical steel beam.

3. That the impact was of sufficient magnitude to cause the claimant to "see stars."

4. That a headache was noted which was treated with Anacin.

5. That on the day after the injury in question, claimant worked and noted his speech was slurred and he had difficulty communicating and taking measurements.

6. That claimant was hospitalized and on the next day, that being June 28, 1979, was treated by Dr. Wall and then by Dr. Andre beginning on June 30, 1979.

7. That claimant has not returned to any form of gainful employment since the date of hospitalization.

8. That the claimant is credible in his testimony.

9. That claimant did not experience episodes of lightening-like flashes involving the right half of the visual field prior to the date of injury.

10. That the opinions of Dr. Wall and Dr. Hayne are given the greater weight in the final disposition of this case.

11. That although claimant had some symptoms which predated June 17, 1979, the trauma to the head contributed to the stroke.

12. That there is a causal relationship between the work injury of June 27, 1979 and claimant's present disability.

13. That claimant's present disability is permanent in nature and total in extent.

CONCLUSIONS OF LAW

That claimant was, on June 27, 1979, an employee of the defendant.

That on June 27, 1979 claimant sustained a personal injury as contemplated by the workers' compensation act and that said injury arose out of and in the course of claimant's employment with this defendant.

That there exists a causal connection between the injury and the resulting disability.

That claimant is permanently and totally disabled under §85.34(3).

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay the claimant workers' compensation benefits at the stipulated rate of one hundred fifty-two and 79/100 dollars ($152.79) beginning on the date of injury and continuing during the period of the employee's disability as contemplated under §85.34(3).

That defendants shall pay claimant all accrued benefits in a lump sum.

That interest shall accrue pursuant to the terms of §85.30.

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

Signed and filed at Des Moines, Iowa this 21st day of October, 1982.

Appealed to District Court;
Remanded for Settlement

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES D. MORTIMER, Claimant, vs. FRUEHAUF CORPORATION, Employer, and CNA INSURANCE, Insurance Carrier, Defendants.	File No. 506116 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This matter came on for hearing at the Linn County Juvenile Court Facility in Cedar Rapids on October 27, 1982 at which time the case was fully submitted.

A review of the commissioner's file reveals that an employers first report of injury was filed on August 16, 1978. Although the commissioner's file indicates no memorandum of agreement was filed, defendants indicate that the document was filed. The record consists of the testimony of the claimant and Juanita Mortimer; and exhibits 1 through 38.

ISSUES

The issues for resolution are:

1) Whether there is a causal connection between the injury and the disability.

2) The nature and extent of disability.

3) The rate of compensation.

REVIEW OF THE EVIDENCE

Claimant, presently age 30, was employed by Fruehauf Corporation on August 14, 1978. On that date he sustained an injury while working when a cable snapped and struck him on the left foot. He was taken to the Fort Madison Community Hospital and admitted. He was initially evaluated by G. C. McGinnis, M.D., who treated claimant for a laceration across the dorsum of the left foot, a contusion of the sole of the left foot and fractures of the proximal phalanges of the second, third, fourth and fifth toes of the left foot. Shortly after his hospitalization, claimant "became very unreasonable, belligerent, antagonistic, etc.", and Dr. McGinnis withdrew from the case (exhibit 36). Claimant had contracted gangrene and was transferred to the Burlington Medical Center on August 28, 1978 under the care of Jerry L. Jochims, M.D., a Burlington orthopedist. During this hospitalization debridement and amputation of the first through third toes were conducted with a skin graft being made with skin from the left thigh. Claimant was released from the hospital in mid-September 1978 (exhibit 39's dates are unreadable). Claimant testified that during these hospitalizations he became devastated emotionally, cried, threw things and suchlike. When he was at home claimant testified that he was "full of anger."

Claimant never did return to work for Fruehauf. It appears uncontested that claimant sustained some permanent partial impairment to his left leg and foot. At issue is the crucial question of whether the psychological problems are related to the original injury. If they are and found to be permanent, then the injury is to the body as a whole. Since this raises a more extensive potential award, the nature and extent of the foot injury will only be discussed in cursory fashion and the emphasis will be on the psychiatric injury.

In a report dated October 4, 1982 Bruce L. Sprague, M.D., of Iowa City, an orthopedist, gave claimant a "final evaluation" wherein he felt that claimant had sustained a 27 percent impairment to the left lower extremity. Dr. Jochims estimated 36 percent of the left lower extremity.

The claimant's psychological problems started when he was hospitalized as aforesaid. Claimant also had problems when he returned home. He did not return to work with defendant employer, but became employed at a pizza place in Mount Pleasant. Claimant was married to his second wife at the time of the injury and they became separated during this three month period of employment and they were eventually divorced. He has since remarried. Claimant went to work for another similar concern before starting his own pizza business. Simultaneously, claimant was employed as a security guard. In July 1981 he sold the pizza business at a loss. He is presently attending school to become an automotive repair technician. He expects to graduate in July 1983 and open his own shop.

Claimant was first seen by a psychiatrist in March 1981. Vernon P. Varner, M.D., J.D., of Iowa City, examined claimant and it was reported that claimant had been suffering from depressive symptoms since 1968. At the time of examination claimant had blue spells, crying spells, decreased concentration, decreased short term memory, increased anxiety and irritability. These had apparently increased since the statute of limitations had expired on the possible common law action in this case. His appetite had increased, and he gained 30 pounds. He had increased alcohol consumption. He diagnosed claimant's condition as DSM-III, Major Depressive Disorder without Melancholia. Dr. Varner reported that "the onset of this depression can be very reliably traced and attributed to the effects of the injury." He prescribed Imipramine and thought claimant should undertake psychiatric treatment. Upon becoming aware of this, defendants' counsel wrote a letter authorizing Satyanarayana Kantamneni, M.D., a Keokuk psychiatrist, to treat claimant (exhibit 21). The authorization appears to be motivated by convenience (claimant was closer to Keokuk than Iowa City). On August 10, 1981 claimant was examined by Dr. Kantamneni. He, too, diagnosed claimant as having a major depression. He thought claimant would benefit from individual psychotherapy as well as placing him on an appropriate tricylic-antidepressant medication. Claimant was treated again on August 18, 1981, and claimant was placed on Mellaril. Claimant last saw Dr. Kantamneni on October 8, 1981. Defendants' counsel wrote claimant's counsel on December 11, 1981 (exhibit 13), noting that no dissatisfaction was expressed to him regarding treatment by Dr. Kantamneni.

When claimant was treated in the hospital for his foot in January 1982, Dr. Sprague referred claimant to Dr. Varner for consultation. Dr. Varner thought claimant was clinically depressed. Claimant's mood was anxious and he described some alcohol abuse. Dr. Varner thought claimant had a reactive major depressive disorder. Claimant, after his release from the hospital, continued to be treated by Dr. Varner. The treatment modalities appear to have been therapy and anti-depressant medication.

As regards the authorization of Dr. Varner's services, exhibit 7 indicates that Dr. Sprague sought out Dr. Varner because he had been treating claimant and Dr. Varner's treatments were needed for the stabilization of claimant's condition. As of August 1982 claimant's medications were Ludiomil, Xanax and Mellaril. Dr. Varner thought claimant's depression was related to the foot injury. He thought it was likely that claimant could experience a complete recovery from the depression. He cautioned that claimant had a fifty percent risk of having another depressive episode along with various physical maladies. Although claimant testified that he had no prior depressive episodes, a discharge summary from a prior hospitalization for gastrointestinal problems in 1976 (exhibit 38) reveals that a diagnosis of depression was given. It would appear that the depression was related to the apparent failure of treatment. Claimant was treated with Triavil, an anti-depressant. The records do not indicate any psychiatric consultation or treatment.

At the time of his injury claimant was married and had two children by his first marriage. By decree, he was to take one of the children as an exemption.

Claimant is a high school graduate. He has been involved in family farm work, factory work and worked in a lumberyard.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon this agency in workers' compensation cases.

2. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 14, 1978 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).

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of Augut 14, 1978 is causally related to 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 (1955). 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).

4. While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. 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).

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. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

5. An injury to a scheduled member may, because of after effects (or compensatory change), result in permanent impairment of the body as a whole. Such impairment may in turn form the basis for a rating of industrial disability. 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).

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).

6. 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, 1121, 125 N.W.2d 251, (1963).

7. Section 85.34(1), Code of Iowa, provides for a statutory healing period from the date of injury until claimant returns to work or reaches maximum medical recuperation.

8. Section 85.27, Code of Iowa, provides for payment of medical care made necessary because of injury. The employer may choose the care, except in an emergency.

9. Section 85.61(10), Code of Iowa, provides that the exemptions computed in the compensation rate be computed "as though the employee had elected to claim the maximum number of exemptions for actual dependency...to which the employee is entitled on the date on which the employee was injured."

ANALYSIS

The principles enunciated above indicated that claimant sustained an injury arising out of and in the course of his employment entitling him to permanent partial disability compensation. There also appears to be a direct causal connection between the injury and the psychological problems. The record also indicates that claimant's penchant for depression antedated the injury but that the episode in question (the 1976 digestive problem) was not of sufficient magnitude to show that the present problems are a continuation thereof. However, although the present psychological problems have been in existence for some time, the "jury is still out" with regard to permanency of the depression. Claimant's depressive state may well be found to be permanent at some future time. However, viewing the record as a whole it is found that claimant has sustained a temporary aggravation of a preexisting depressive condition.

The permanent effects of the injury are confined, then, to the left lower extremity. Two ratings were given. The rating appears to be to the leg since some knee motion restriction is noted. Dr. Sprague's rating would appear to be more accurate since it is made after the most recent surgery and will therefore be adopted as 27 percent of the left lower extremity.

As far as healing period is concerned, the record indicates that claimant is entitled to this from August 15, 1978 through June 30, 1979 and from July 9, 1981 until September 1, 1982, when claimant started school.

The cost of Dr. Varner's treatments should be borne by defendants. Dr. Varner's first course of treatment can be seen to have been in response to an emergency. Defendants then authorized Dr. Kantamneni to treat claimant. Rather than going back to Dr. Varner claimant elected to not have treatment at all and did not have treatment until Dr. Varner consulted with claimant in January 1982 at the behest of an authorized physician.

Claimant's dependency status at the time of injury indicates that he was entitled to three exemptions (himself, his wife and one child).

FINDINGS OF FACT

1. Claimant was employed by defendant employer on August 14, 1978.

2. On August 14, 1978 claimant sustained an injury at work.

3. That the injury is of a permanent nature causing a 27 percent loss to the left leg.

4. The injury also aggravated a preexisting depressive

condition more than slightly, but the depression is a temporary aggravation under the status of the present record.

5. Claimant returned to gainful employment from July 1, 1979 through July 8, 1981. He reached maximum medical recuperation on September 1, 1982.

6. Claimant's treatment by Dr. Varner was authorized.

7. Claimant was married and entitled to three exemptions at the time of injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant sustained an injury arising out of and in the course of his employment on August 14, 1978.

3. Claimant is entitled to be paid 105 5/7 weeks of healing period compensation.

4. Claimant is entitled to 59 4/7 weeks of permanent partial disability compensation.

5. Dr. Varner's bill should be paid.

6. Claimant's rate of compensation is $139.20.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred five and five-sevenths (105 5/7) weeks of healing period compensation at the rate of one hundred thirty-nine and 20/100 dollars ($139.20) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant fifty-nine and four-sevenths (59 4/7) weeks of permanent partial disability at the rate of one hundred thirty-nine and 20/100 dollars ($139.20) per week.

IT IS FURTHER ORDERED that defendants pay for services rendered by Dr. Varner.

Defendants are to receive credit for amounts already paid.

Cost of this action are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 13th day of January, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERENICE MOSS, Claimant, vs. PHILIP MOSS & CO., Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	FILE NO. 529490 C O M M U T A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding for the commutation of benefits brought by Berenice Moss against Philip Moss & Co., employer and United States Fidelity and Guaranty Company, insurance carrier, defendants, as the result of the death of claimant's husband, Philip Moss, on February 22, 1979. On May 26, 1983 this case was heard by the undersigned and was considered fully submitted upon completion of the hearing. Briefs have been filed by both claimant and defendants.

The record consists of the testimony of claimant and Ira Ernest White; claimant's exhibit 1; and defendants' exhibits A-P.

ISSUES

The only issue presented by the parties is whether claimant should have a commutation.

FACTS PRESENTED

On February 22, 1979 claimant's husband died as the result of an airplane accident. At the time of his death claimant and decedent had two adult children. Decedent was president, sole stockholder and a distributor for defendant which is in the business of selling coin operated equipment.

Claimant testified she has not remarried and has no plans to do so. Claimant indicated she was born on January 1, 1923 and is in good health. Claimant disclosed that she is a high school graduate and has taken six years of college, but does not have a degree. Claimant owns several companies and is a multimillionaire. Since her husband's death the companies which claimant controls have expanded and claimant's net worth has increased. Claimant testified that she would like a commutation so that she could invest the money. Claimant indicated she is not sure how she would invest the money. Claimant stated she might buy another condominium with the proceeds or invest it back into her corporation.

On cross-examination, claimant indicated that she does not need or use the workers' compensation benefits to meet her living expenses. Claimant disclosed that she does not know where a lot of her wealth or property is but has people help her with her investments and has tried to surround herself with experts.

Ira Ernest White testified that he is a CPA and works as comptroller for claimant's corporation and stated claimant's net worth has grown since decedent's death. Mr. White described how he has also been involved with claimant's personal finances. Mr. White revealed that no major decisions were made without claimant's approval.

APPLICABLE LAW

Section 85.45, Code of Iowa, states in part:

> Commutation. Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:
>
> ....
>
> 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.

In the decisions of Williams v. HLV Community School District, Appeal decision, July 2, 1981; and Dameron v. Neumann Brothers, Inc., Appeal decision, November 9, 1981, the following language appeared.

> 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.
>
> 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 her best interests.

ANALYSIS

The greater weight of evidence discloses that the period during which compensation is payable to claimant can be defi-

nitely determined. Defendants in fact have not argued otherwise.

Claimant has also met her burden in proving that a full commutation would be in her best interest. The greater weight of evidence indicates that claimant has the ability to make more money by investing the money than by having it paid out on a weekly basis. Claimant uses qualified advisors to help her with her financial affairs and has increased her net worth since decedent's death. It is noted that defendants failed to present any evidence rebutting claimant's testimony and that of Mr. White's to indicate that claimant would not properly use the money received in a commutation.

Defendants may argue that claimant should not have a commutation because claimant's sole motivation in obtaining a commutation appears to be because of her financial advantage in doing so. Under most situations, claimant's financial interests would be the greatest if not the only reason for granting a commutation. However, in many instances it is necessary to protect the claimants from themselves or others who would not use the commutation in such a way that claimant's interests would be protected. The greater weight of evidence would indicate such is not the situation in the case at hand.

Defendants argue that claimant knows very little about her financial affairs. Although some testimony would indicate defendants are right, claimant has employed experts to help her in this regard and the only evidence presented indicates that with the use of these experts, claimant's financial status has greatly increased since decedent's death.

The undersigned fails to see any indication in chapter 85 of the Code that would indicate that a different standard exists for the wealthy in obtaining a commutation than the poor. The only question that needs to be determined is whether it is in the claimant's best interest. In this case all the evidence would indicate it is in claimant's best interest to have a commutation.

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 22, 1979 claimant's husband died in an airplane crash.

Finding 2. As a result of decedent's death, claimant has been receiving workers' compensation benefits.

Finding 3. At the time of his death claimant and decedent had two adult children.

Finding 4. Claimant was born on January 1, 1923 and is in good health.

Finding 5. Since decedent's death claimant has not remarried and presently has no intention to marry.

Conclusion A. The period during which compensation is payable to claimant can be definitely determined.

Finding 6. By obtaining a commutation claimant will be able to make more money than if she were paid for the period of her entitlement.

Finding 7. Claimant uses qualified advisors in her financial affairs.

Finding 8. Claimant's net worth has increased since decedent's death.

Finding 9. Claimant is a multimillionaire.

Finding 10. Claimant does not need weekly compensation benefits for her daily living expenses.

Conclusion B. It would be in claimant's best interest to have a full commutation.

THEREFORE, it is ordered that claimant be granted a full commutation of future benefits.

As the amount of payments previously paid and the future payments to be made will change up to the date this decision becomes final, the parties shall resubmit the current payment status so that the commutation can be computed.

Defendants are to pay the costs of this action.

A final report is to be filed upon payment of this award.

Signed and filed this 25 day of July, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD E. MOZINGO, Claimant, vs. AAA MECHANICAL CONTRACTORS, Employer, and COMMERCIAL UNION ASSURANCE, COMPANIES, Insurance Carrier, Defendants.	:	File No. 605812 R U L I N G

On July 14, 1982 a review-reopening decision was filed in this contested case. On August 4, 1982 claimant filed a notice of appeal. On August 20, 1982 defendants filed a motion to dismiss claimant's notice of appeal to which claimant filed a resistance on August 27, 1982.

The essence of this matter is that claimant's notice of appeal was filed twenty-one days after the review-reopening decision was filed and according to claimant's certificate of service stamp, mailed twenty days after the review-reopening decision was filed.

Iowa Code section 86.24 states: "Any party aggrieved by a decision, order, ruling, finding, or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter 85 or 85A may appeal to the industrial commissioner in the time and manner provided by rule." Industrial Commissioner Rule 500-4.27 states:

> Except as provided in 4.2 and 4.25, an appeal to the commissioner from a decision, order or ruling of a deputy commissioner in contested case proceedings where the proceeding was commenced after July 1, 1975, shall be commenced within twenty days of the filing of the decision, order or ruling by filing a notice of appeal with the industrial commissioner. The notice shall be served on the opposing parties as provided in 4.13. An appeal under this section shall be heard in Polk county or in any location designated by the industrial commissioner.
>
> This rule is intended to implement sections 17A.15 and 86.24 of the Code. (Emphasis supplied.)

This rule clearly states that the appealing party has twenty days following the day in which the deputy commissioner's decision, order or ruling is filed in which to file a notice of appeal with the commissioner.

Iowa Code section 4.1(22) provides the method for computing time in applying rule 500-4.27. It states in part: "In computing time, the first day shall be excluded and that last included, unless the last falls on a Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday. . . ." Therefore, under rule 500-4.27, the last day on which an appeal could be filed from the July 14, 1982 decision of the deputy industrial commissioner was August 3, 1982.

If "service" were "filing" then notice would have been timely as the twentieth day. Service, however, does not constitute filing. "A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file." Mills v. Board of Supervisors, 227 Iowa 1141, 1143; 290 N.W. 50, 51 (1940); Bedford v. Supervisors, 162 Iowa 588, 591; 144 N.W. 301, 302 (1913).

Claimant asserts that the Iowa Industrial Commissioner Rules do not define "filing" and that Iowa R.Civ.P. 82(d) properly provides that definition pursuant to Industrial Commissioner Rule 500-4.35. Iowa R.Civ.P. 82(d) provides:

> Filing. All papers after the petition required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Whenever these rules or the rules of appellate procedure require a filing with the district court or its clerk within a certain time, the time requirement shall be tolled when service is made, provided the actual filing is done within a reasonable time thereafter.

The above rule is similar to Industrial Commissioner Rule 500-4.14 which provides: "All documents and papers required to be served upon a party under 4.12 shall be filed with the industrial commissioner either before service or within a reasonable time thereafter."

The fact that the above two rules appear similar does not dictate identical application in every circumstance. Industrial Commissioner Rule 500-4.14 is intended to facilitate prehearing

procedures between the parties without rigorous formality. However, Rule 500-4.14 does not relax the plain obligations of Rule 500-4.27 in filing the notice of an appeal.

Claimant cites Cook v. City of Council Bluffs, 264 N.W.2d 784 (Iowa 1978) for the proposition that Iowa R.Civ.P. 82(d) is as applicable under the appeal process as it is for discovery. However, the court in Cook endeavers to point out that the appeal notice requirements of Iowa R.Civ.P. 336(a) which would allow amelioration by Rule 82(d) were replaced by Iowa R.App.P. 5 and 6. These new rules clarify the deadline requirements at the appellate level and serve to limit the scope of Iowa R.Civ.P. 82(d) to pre-judgment filings. See Mantz v. Mantz, 266 N.W.2d 758, 759 (Iowa 1978).

Even if there was good cause for the late appeal this commissioner could not allow such appeal. Section 17A.15(3) provides: "When the presiding officer makes a proposed decision, that decision then becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule." (Emphasis supplied.)

The Iowa Supreme Court in Barlow v. Midwest Roofing Co., 249 Iowa 1358, 1360, 92 N.W.2d 406, 407 (1958) stated:

> The industrial commissioner can exercise only the powers and duties prescribed in the Workmen's Compensation Law. The legislature, of course, has the authority to create and restrict rights given workmen under the Act, as well as prescribe the power and duties of the commissioner. It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law.

It is noted that the Barlow decision was entered when the time limitation for filing an appeal from a deputy to the commissioner was ten days. This was not expanded to twenty days until 1976.

Even if it were argued that Iowa R.Civ.P. 82(d) is applicable at the agency level, jurisdictional limitations do not allow for exception in light of section 17A.15(3). Jurisdictional limitations which confront this agency are far different from those confronted at the district court level as contemplated by Iowa R.Civ.P. 82(d). The jurisdiction of this agency terminates with the expiration of a prescribed number of days as mandated by statute in section 17A.15(3) whereas the jurisdiction of the district court is not so limited by statute, but rather is of a continuing nature until final adjudication. Once a case becomes final at the agency level under Iowa Code section 17A.15(3), the agency lacks even a scintil'a of jurisdictional authority to overlook the most blameless oversight.

Thus, the commissioner has no jurisdiction to hear an appeal when the time prescribed for filing the appeal has passed. The commissioner is limited to the exercise of those powers prescribed in the workers' compensation law and Iowa Administrative Procedure Act. He cannot extend his jurisdiction to include matters expressly excluded by these laws.

The deputy's proposed decision was filed on July 14, 1982. The twenty-day period prescribed in Iowa Industrial Commissioner Rule 500-4.27 expired on August 3, 1982. Thus, the proposed decision became, by operation of law, the final decision of the agency on August 3, 1982. Based upon the above considerations, the motion to dismiss claimant's notice of appeal is sustained.

THEREFORE, claimant's notice of appeal is hereby dismissed.

Signed and filed this 2nd day of September, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY MURKINS,	:	
Claimant,	:	File No. 441491
vs.	:	D E C I S I O N
DEPARTMENT OF TRANSPORTATION,	:	O N
Employer,	:	A P P L I C A T I O N
and	:	F O R
STATE OF IOWA,	:	§85.27
Insurance Carrier, Defendants.	:	B E N E F I T S

This is a proceeding as contemplated by §85.27 wherein Randy Murkins, the claimant, brings this action against Department of Transportation, his employer, and State of Iowa, insurance carrier, requesting an order requiring the payment of certain unpaid chiropractic bills and a further order mandating a requested change of treating physician.

This matter was heard in Sioux City, Iowa, on January 21, 1983 and considered as fully submitted at the conclusion of the hearing. The record in this matter, based upon the undersigned's notes, consists of the claimant's testimony together with his exhibits 1 through 8.

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

Claimant, aged twenty-eight and married, is an eight year employee of the Department of Transportation. On October 19, 1981, he entered into the following special case settlement agreement with his employer:

> Be it remembered, that on this 19th day of October, 1981, an application jointly filed by Randy G. Murkins, Claimant; and Department of Transportation, Employer; and the State of Iowa, Insurance Carrier, setting forth a proposed compromise special case settlement between the parties in the above-entitled matter, was presented to the Iowa Industrial Commissioner for consideration, approval and for an order authorizing and approving the same.
>
> The Commissioner having reviewed the Joint Application for Special Case Settlement and the allegations set forth therein, and being fully advised in the premises, finds that the question of liability and, therefore, the compensability of the Claimant's injury of September 12, 1975, and November 24, 1976, is in dispute between the parties and that a bona fide dispute exists herein and that the situation is such that pursuant to Section 85.35, The Code 1981, a compromise and special case settlement should be authorized.
>
> IT IS HEREBY ORDERED AND ADJUDGED that the Joint Application for Special Case Settlement of the parties filed in this case before the undersigned Deputy Industrial Commissioner be and the same is hereby approved and made binding upon the parties hereto.
>
> IT IS FURTHER HEREBY ORDERED AND ADJUDGED that the Claimant, and anyone acting on his behalf, upon accepting the proposed settlement and the payment of the Employer and the Insurer of the sum of Eight Thousand and Twelve Dollars and Twenty-Five Cents ($8,012.25) from thereafter questioning the validity of said settlement and from instituting or maintaining any further action or actions for review or otherwise and that these payments shall not act to toll the running of the statute of limitations.
>
> IT IS FURTHER ORDERED AND ADJUDGED that the Department of Transportation and the State of Iowa, upon payment of the sum hereinbefore mentioned be paid to the Claimant under proposed settlement agreement, be and they are hereby discharged, released, and exonerated from any and all further liability to the Claimant and/or to any other person or persons, corporation or firm, by reason of any and all of the injuries sustained, by the Claimant on or about September 12, 1975, and November 24, 1976, arising out of the circumstances set forth in said Joint Application for Special Case Settlement, or which may hereafter arise out of or result therefrom except further medical benefits. (Emphasis added.)

Claimant testified that he had gone to his regular physician, Mark Kruse, D.C., for treatment in 1975 or 1976 and that his employer paid those incurred costs as part of the aforesaid settlement.

Claimant further testified that his injuries require further periodic treatment, that he has gone for such assistance to Dr. Kruse every six to eight weeks and that his employer has refused to honor such expense. Claimant also testified that following such treatments his low back discomfort is ninety percent improved enabling him to continue his employment duties without interruption. Claimant states that the services of Dr. Kruse "does me some good" as opposed to the lack of improvement the claimant has experienced when treated by other physicians.

Defendants offered the services of three Sioux City physicians, all of which claimant rejects, and claimant requests the agency to appoint Mark Kruse, D.C., as his attending medical practitioner by virtue of the provisions of §85.27, Code of Iowa 1979, which reads 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.

In light of the aforementioned statutory authority, Mark Kruse, D.C., is appointed as claimant's practitioner for the care and treatment of claimant's industrial injury.

WHEREFORE, 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 the claimant sustained previous industrial injuries which require continuing periodic care.

2. That Mark Kruse, D.C., provide such care which is limited to treatment of claimant's industrial injury.

THEREFORE, IT IS ORDERED that Mark Kruse, D.C., is appointed as claimant's practitioner.

It is further ordered that defendants pay claimant the following expenses he has incurred in treating the injury:

Mark Kruse, D.C., $266.00

Costs are charged to the defendants in accordance with Rule 500-4.33.

Signed and filed this 31st day of January, 1983.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANITA NORCOTT, Claimant,	:	File No. 663750
vs.	:	R E V I E W -
SIOUX CITY COMMUNITY SCHOOL DISTRICT, Employer,	:	R E O P E N I N G
and	:	D E C I S I O N
EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Anita Norcott, the claimant, against her employer, Sioux City School District, and their insurance carrier, Employers Mutual Casualty Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on January 27, 1981.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Woodbury County Courthouse in Sioux City, Iowa on July 13, 1982. The record was considered fully submitted on August 11, 1982.

An examination of the industrial commissioner's file reveals that a first report of injury was filed March 18, 1981. Subsequently, a memorandum of agreement was filed on March 18, 1981. A Form 2A was filed by counsel for the defendants on or about August 11, 1982.

The record in this case consists of the testimony of the claimant, Valentine Norcott, Darold Sea, Harold McDermitt, George Fenson; claimant's exhibits 1 through 4 inclusive (exhibit 2 is a joint exhibit); and defendants' exhibit A.

ISSUES

The issues to be resolved in this decision are whether there exists a causal relationship between the claimant's January 27, 1981 work injury and her present disability, as well as the extent of that disability. There is also an issue concerning mileage expense.

REVIEW OF THE EVIDENCE

At the time of hearing the parties, through counsel, were able to stipulate that the applicable rate in the event of an award is $143.98. It was agreed that the claimant had not returned to work, but it was not stipulated that this inability to return to work was in any way causally related to the January 27, 1981 incident. All medical bills appear to have been paid.

The claimant, Anita Norcott, testified that she is 61 years of age, married, with three children. All of her children are grown and not dependent.

Her educational background indicates that she is a high school graduate and a registered nurse. She has held her RN Certificate since 1943.

She had been employed by the defendant 16 years as a registered nurse and was functioning in that capacity on the date of injury, January 27, 1981. Her work history reveals that this is the only occupation she has ever pursued.

The claimant testified that her employment duties for the defendant required that she be assigned to several elementary and junior high schools in the district. She would work approximately one-half day at each school and move from school to school. She testified that as she moved from school to school she was required to carry various supplies with her.

Factually, on January 27, 1981 the claimant was leaving one of her assigned schools when she fell down the steps and landed on her shoulder and head. The record establishes that defendants filed a memorandum of agreement with respect to this case and do not dispute that on January 27, 1981 the claimant was their employee, and that on that date sustained a personal injury which both arose out of and in the course of her employment.

Mrs. Norcott stated that immediately after the incident in question she noted pain in her shoulder and head and dizziness. Her neck then began to stiffen up and discomfort was noted. Soon after the incident she called James H. Walston, M. D., and he prescribed medication for her discomfort. The record establishes that claimant continued to work for the defendant for approximately one month post injury. Mrs. Norcott testified that she had difficulty turning her head at work and was unable, in her opinion, to adequately do her job. She states that she returned to Dr. Walston for purposes of an examination and treatment. Claimant indicates she has subsequently seen Dr.

Walston on a multitude of occasions related to treatment. She also describes certain traction devices which he has prescribed for home use. She has also been x-rayed and a cervical collar was prescribed. She has received and continues to receive ultrasound treatments and some relief has been noted.

The claimant was examined by William P. Isgreen, M.D., at the request of the defendants. The testimony establishes that the claimant had seen Dr. Isgreen on a prior occasion due to an ear difficulty. She denies consulting him for any neck problems.

Mrs. Norcott indicates that she has not worked since February 27, 1981 and is presently on a leave of absence from the Sioux City school system. The record reveals that as early as 1977 the claimant experienced mild neck discomfort and was treated for this by E. L. Van Bramer, M. D. In approximately 1960 she fell in a parking lot and sustained a neck injury. She indicates that in her opinion there were no residual difficulties attendant this injury. The physical difficulties she is experiencing now are similar but more intense than those which she experienced in 1977. Her pain is described as being more intense and extending into the neck and shoulder areas. The claimant has taken Motrin prior to this injury. She is of the opinion that the present medication she is taking does not relieve the painful symptoms. She was always able to relieve the symptoms with medication prior to the date of injury herein.

The claimant testified that she has difficulty turning her head and as a result would have difficulty with certain job functions required of a school nurse. She also noted difficulty in driving, which she claims will prohibit her from home visits in conjunction with her nursing duties. Mrs. Norcott is of the opinion that she cannot do her former work because of the pain caused by movement of her neck and shoulders.

The claimant's daughter now helps her with work around the house. As the claimant stated, she is unable to do many of the basic household chores. She notes difficulty in pushing, pulling and lifting and has experienced muscle spasms on occasions.

Mrs. Norcott indicates that no mileage has been paid to her in conjunction with this case. She indicates that Dr. Isgreen's office is only a few blocks from her residence but that Dr. Walston's office is between 20 and 30 miles. The record establishes that she has consuted Dr. Walston approximately 100 times.

The claimant admitted that February 24, 1981 was the first occasion on which she was examined by a physician for this injury. She is insistent that she called Dr. Walston on or about the date of injury and he prescribed medication for her. Any variance in his dates from this testimony she considers to be an error on his part. Dr. Walston took care of the claimant's husband and children prior to the date of injury but never treated the claimant until February 24, 1981. Exhibit 2 is the official job description prepared by the Sioux City School District covering claimant's position. Exhibit 3 is a compilation of job duties that claimant stated she cannot do, which was prepared by her former counsel and the claimant. The claimant admitted that she would not do all of the items listed on exhibit 3 every day. On cross-examination, she acknowledged that she took Motrin prior to the date of injury on a daily basis and continued to take it after the date of injury. She also conceded that she had traction in regard to the 1977 discomfort.

Claimant conceded that she has not applied for any other positions as she is on a leave of absence from the defendant. She has not attempted to return to work for the Sioux City school system.

Claimant's husband, Valentine Norcott, testified on her behalf. He is the retired Superintendent of Vocational Rehabilitation in Sioux City. He is a college graduate and is clearly well qualified in the area of vocational rehabilitation generally. Counsel for the claimant attempted to qualify this witness as an expert witness to testify on behalf of his wife, Anita Norcott. It appears to the undersigned deputy that in any other case this witness may indeed be qualified to express an expert opinion. However, in this case clearly a professional opinion from him is self-serving and is highly prejudiced. Additionally, this gentleman has at least an indirect interest in the outcome of the litigation. Therefore, the undersigned has disregarded, in total, his opinion.

Darold Sea testified on behalf of the defense. He is the Director of Personnel and Employee Relations for the defendant. He has held that position for 17 years. He knows the claimant and is familiar with her job and job description. He indicates that claimant's exhibit 2 is an accurate job description of claimant's position. He indicates that if an employee could do the functions listed on claimant's exhibit 2 they would be a satisfactory employee for the defendant.

This witness has examined claimant's exhibit 3 and is in agreement that many of the items listed on this exhibit cover a portion of the duties of the claimant as a school nurse. However, he notes that claimant's exhibit 3 is not all inclusive. He concedes that a nurse would have to do the duties outlined in exhibit 2 and exhibit 3 in order to work for the defendant. He is unable to say how often the person would have to perform the jobs outlined in exhibit 3.

Harold McDermitt testified on behalf of the defendants. He is the Director of Pupil Services for the defendant and has held this position for four years. He supervises many of the activities for the defendant, including the nursing program. He is also aware of the duties of the school nurse and confirms that claimant's exhibit 2 outlines those duties. He indicates that if an individual were able to perform the duties outlined on claimant's exhibit 2 they would be performing satisfactorily. He also indicates that nurses are able to ask for assistance when performing certain functions. He conceded that a nurse would have to be able to drive a car in her position. She might also be required to carry certain equipment from school to school. He concedes that some of the items listed on claimant's exhibit 3 could be included in the general job description, depending upon the circumstances.

George Fenson testified on behalf of the defendant. He is the elementary school principal at Hunt School, where the claimant was injured. He is familiar with the claimant and reviewed claimant's exhibits 2 and 3. He concedes that exhibit 2 describes the job of a school nurse and some of the items on exhibit 3 might have to be performed by the school nurse.

James H. Walston, M. D., testified on direct examination conducted by counsel for the claimant that he is a Board Certified family practitioner and surgeon practicing in South Sioux City, Nebraska. He is also licensed to practice medicine in Iowa. He knows the claimant and confirms that she has been a patient of his since February 1981. He confirms that the first visit by the claimant to his office was in February of 1981 and she recited a history at that time of having fallen at a school in Sioux City and injuring her arm, neck and back. An examination was conducted and x-rays were taken. The x-rays revealed "some narrowing of the cervical spine to the level of C-6 and C-7.... There was also some straightening of her cervical spine and some spurring of some of the cervical bodies." He confirms that the only thing he has ever treated Mrs. Norcott for are her neck complaints. Eventually the physician reached a diagnosis that as a result of the fall on January 27, 1981 the claimant sustained "cervical myositis and possible intervertebral disk lesion." He confirmed the last examination of the claimant was on June 9, 1982. During the course of his treatment he has prescribed various muscle relaxants and pain relievers, including Motrin. He also confirmed that a neck collar was prescribed by him and traction and ultrasound treatments were also undertaken. He confirms that her condition improved during the course of his treatment but to a very small degree. He is of the opinion that as of April 1982 the claimant reached maximum medical recovery. He is also of the opinion that based upon a reasonable degree of medical certainty, claimant has sustained a functional disability of 15-20 percent as a result of the incident in question. He further adds:

> A. Well, it would be 15 percent -- 15 percent of her bodily function, I would guess. Now, certainly she would be more disabled for specifically carrying out her duties as a school nurse, which is what I guess we are talking about. I mean, she can probably do her housework and probably make meals and pretty much function around the home, but I don't think she would be able to -- she would be disabled more than that if you are talking strictly about her duties as a school nurse.

He is of the opinion she could not return to her job as a school nurse. He further indicates:

> Q. Doctor, do you have an opinion, again based upon a reasonable degree of medical certainty, as to what type of activities she will no longer be able to do we'll say outside of the specific job that she had in the past?
>
> A. Well, it would be similar to what she is doing at school. She wouldn't be able to use her arms above her head. She wouldn't be able to lift or carry. She wouldn't be able to turn her head suddenly without pain. She wouldn't be able to lift or carry over 20 pounds, I suppose. I guess that would be it.
>
> One thing she has mentioned to me is that she takes medicine, but it makes her light-headed and dizzy at times. That's why we've switched to several different medications for pain. She says she is unable to sit for any period of time without having a lot of pain in her neck. She is unable to read because you have to put her head down. So I suppose all those things would be taken into consideration.
>
> He further testifies:
>
> MR. PLAZA: Doctor, as a bit of a summary then and hopefully my last questions -- or three maybe, do you have an opinion, once again based upon a reasonable degree of medical certainty, as to whether or not Anita Norcott aggravated her condition as a result of her fall on January of 1981?
>
> THE WITNESS: Well, yes. Looking at the X rays, getting back to the X rays we took, she did have some spurring, which would indicate that she had had arthritis in her neck, which obviously was not caused by the fall that she suffered shortly before
>
> I saw her and x-rayed her. So apparently she had some antecedent arthritic changes in her neck, as many of us do at that age group.
>
> Certainly, the trauma she sustained has and -- would have and has caused her symptoms to be much worse, and it aggravated any preexisting arthritis she might have had.

He is of the opinion she will require further medical treatment.

On cross-examination, he testifies:

> Q. Dr. Walston, I will try to be very brief. You have testified that Mrs. Norcott's disability to the body as a whole is 15 to 20 percent. Are you able to say with reasonable medical certainty how much of that 15 to 20 is attributable to the preexisting changes that the X rays show? I am

talking here strictly about the physical impairment, not how it might relate to her employment.

A. Yeah. Certainly, she has some preexisting arthritis. I -- she had not apparently sought any medical help prior to the time she was injured. At least I have no knowledge of this. I was the physician and am the physician for her husband and some of her children. As I stated previously, I had prescribed medication over the telephone for her.

I do not know whether she had any problems with her neck -- with her arthritis before this time or not. If she did, she did not consult me for it. She was not on any medication except the Premarin for menopause symptoms. I guess I am kind of losing track of your question. You are asking me --

Q. Were you able to say with certainty how much of the 15 to 20 would be attributable to the preexisting condition?

A. No, I guess I can't, except --

Q. All right.

A. -- as I previously said, I am sure that whatever disability she might or might not have had prior to this time, and I don't know that she had any, would certainly be aggravated by her injury in February.

Q. All right. You are not aware of an injury to her neck in 1960 and treatment by Dr. Heiden [phonetic] as recently as '76 or '77?

A. No. That's what I am saying. I do not know what her previous problem was.

Q. All right. Would I be safe in assuming, Doctor, that you have ruled out the intervertebral disk lesion at this time.

A. I think so, yes.

Q. So are we dealing primarily with a soft tissue injury?

A. Yes.

William P. Isgreen, M.D., testified on behalf of the defense. On direct examination conducted by counsel for the defense, Dr. Isgreen indicated he is a Board Certified specialist in neurology. An examination of his curriculum vita indicates that he is highly qualified in this area.

Dr. Isgreen confirms that he examined the claimant on August 26, 1981 at the request of the defense. He confirms that he examined her on one occasion prior to the date of injury, and in this case the examination was conducted on December 8, 1980. At that time Mrs. Norcott was complaining of vertigo. She, at that time, recited a history of arthritic complaints and neck pain persisting since 1960, when she was injured during a slip and fall incident.

This physician is also aware that the claimant was receiving treatment for neck complaints in 1976 or 1977 from Dr. Hyden. With respect to his examination of the claimant in December of 1980, he indicates:

Q. Was there any restriction of motion in her neck?

A. The physical examination at that time showed restriction of movement of the neck both laterally and vertically. The degrees at that time, I did not note, but there was, as noted at that time, restriction of movement.

Dr. Isgreen kept the claimant off work as a result of his findings in this earlier examination. She was permitted to return to work on or about January 2, 1981.

With respect to his second examination conducted on August 26, 1981 at the request of the defendants, the claimant recites history which is consistent with her testimony. Dr. Isgreen indicates:

MR. HARRISON: Q. Doctor, in general was the location of Mrs. Norcott's pain similar to that that she had had prior to January 27 of 1981? By that, I'm referring to the pain in the neck.

THE WITNESS: A. The pain, as near as I can remember it and as near as the notes reveal, was not different in significant fashion from the previous pain that she had described.

With respect to the examination he conducted in August of 1981, Dr. Isgreen indicates:

Q. Were the results of the examination on January-- or I'm sorry-- August 26 terribly different from those in December or January prior?

A. The only difference in the exam was that the restriction of movement of the neck was worse in the August examination of '81 while the examination of the eyes with the abnormality of occular movement that was noted in December was now, in August, absent.

As a result of his examination, Dr. Isgreen concluded:

THE WITNESS: A. I felt that Mrs. Norcott had at the time sustained soft tissue injury to the cervical area, a feeling that this was an exaggeration or a furtherance of the problem that had been there for a rather lengthy period of time.

With respect to the issue of permanency, Dr. Isgreen testifies:

Q. Doctor, did you form an opinion with reasonable medical certainty as to whether or not Mrs. Norcott has permanent impairment of her nervous system, based on your examination?

A. I did.

Q. Okay. And what is that opinion?

A. I felt that I could find no evidence of permanent impairment in Mrs. Norcott.

With respect to aggravation of a preexisting condition, Dr. Isgreen indicates:

Q. In your report, Doctor, you say that the problem has been--her problem has been perpetuated in exaggerated fashion because of her previous injury. Can you tell the Commissioner what you mean by that?

A. I suppose what I mean by that is that the neck in Mrs. Norcott would appear to be a sensitive or a weak area that perhaps is triggered by even sometimes trivial sorts of injury; that this, for her was her, if you will, her Achilles tendon or her soft spot, her weakness, that simply was easily aggravated and perhaps perpetuated by activities or injuries.

Q. Do you have an opinion, Doctor, again based on your examination of August 26 and your knowledge of Mrs. Norcott as a patient prior to that, as to the extent within which her condition has been aggravated?

MR. PLAZA: Are you talking about as a result of which injury?

MR. HARRISON: As a result of the January 27 incident.

THE WITNESS: A. Well, I felt, as I said, that it may have hastened her getting to a point in time where she may have gotten to naturally anyway. I'm not answering your question directly, I suspect, but I'm not so sure I can do a better job of it.

Q. In your report you mentioned that you thought a figure of 5 percent impairment was not out of order. Would that still be your opinion today?

A. That's correct.

Dr. Isgreen indicates, in his opinion, that as of August 26, 1981 the claimant was capable of gainful employment.

Dr. Isgreen reviewed the job description of a school nurse in the Sioux City School District and expressed the professional opinion that as of August 26, 1981, the claimant would be able to carry out the duties outlined in the job description. Dr. Isgreen also expressed the opinion that the claimant did not appear anxious to return to work.

Dr. Isgreen concedes that there are certain activities which are contraindicated. With this respect, he indicates:

THE WITNESS: A. Any sustained sort of activity requiring bending, lifting, pushing, pulling, carrying and the like, I felt, would not be in Mrs. Norcott's best interest.

Q. Could you define for the Commissioner what you mean by "sustained"?

A. Well, I think in the course of an hour, if she were having to bend over or lift or push or pull things for more than 30 minutes out of that hour, that that would be over and above what one would like to see in a lady with these sorts of complaints.

Q. Based on that history of arthritic and neck pain complaints and her light-headedness, would those types of activities that you just mentioned, sustained lifting, bending, stooping, would those have been contraindicated at the time of her December 1980 examination?

A. Given the history of difficulties since 1960 of neck problems, those restrictions would have been in effect without her injury of the 27th of January.

After examining deposition exhibit 5, which is a compilation of job duties prepared by counsel for claimant, he testifies:

THE WITNESS: A. I felt then--and there's no information I have to change that opinion--that, as outlined in Exhibit 5, that there were certain obvious difficulties with that description and with her condition. That is, I felt, as I've said previously, that lifting and carrying were to be avoided as much as possible, and when unavoidable to be done with reasonable care and not to involve heavy objects. I didn't feel that carrying supplies upstairs three stories was in her best interest,

and particularly downstairs was also not in her best interest. Perhaps the most difficult aspect of her job description as outlined--on her job duties as outlined in Exhibit 5 was that there may have arisen the need to do cardiopulmonary resuscitation.

Mrs. Norcott was concerned about her abilities to do that, and I would concur with her concern. Cardiopulmonary resuscitation is at times an exceedingly strenuous activity, and I know in both of the hospitals that we have the person that does the cardiac massage, is usually the biggest individual we can get off the streets, who simply is hired by the hospital to be on duty to do cardiac resuscitation, so that it really was not in Miss Norcott's best interest to fill that role. So obviously there was a difference between Mrs. Norcott's activities as she stated and as outlined in Exhibit 4.

He further testifies:

MR. PLAZA: Q. Well, Doctor, assuming her job description is accurate, she does those duties in addition to the duties described in Exhibit No. 2, do you feel within a reasonable degree of medical certainty that she can return to her prior employment as a school nurse, again assuming those duties are part of her yearly functions as a school nurse?

THE WITNESS: A. If those are required activities of Mrs. Norcott, then she should not return to that position.

With respect to aggravation of a preexisting condition, this physician testifies on cross-examination:

MR. PLAZA: Q. Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not Anita Norcott aggravated her preexisting medical condition as a result of her January 27, 1981, fall?

THE WITNESS: A. I Do.

Q. And what is that opinion?

A. I feel with reasonable medical certainty that Mrs. Norcott, in her accident of January '81, exaggerated and furthered a condition that had been there for at least the previous 20 years.

Claimant's exhibit 1, which is a compilation of medical reports, has been examined in conjunction with the disposition of this case.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 27, 1981 is causally related to 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. 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).

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. U. S. Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, ___ (1961).

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 299 (1961); 100 C.S.J. Workmen's Compensation §555(17)a.

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).

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, ___, cited with approval a decision of the industrial commissioner for the following proposition:

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

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, ___ (1963).

ANALYSIS

The defendants in this case filed a memorandum of agreement and by that action admit that on the date of injury, January 27, 1981, the claimant was an employee. They also admit that on that date she sustained a personal injury which both arose out of and in the course of her employment with them. It is noted in the issues portion of this decision, the issues to be determined are the existence of a causal relationship between the injury of January 27, 1981 and her resulting disability, as well as the extent of that disability which is attributable to the work injury.

The records in this case make it clear that the claimant had a preexisting arthritic condition to her neck area. Whether this was brought on by the trauma of 1960 or 1977 is of no consequence. The fact remains that the preexisting condition existed.

It is further clear that the claimant materially aggravated that condition through the incident of January 27, 1981 to the point that the aggravation becomes a compensable injury under the Iowa Workers' Compensation Act. Defendants, in substance, concede this through the memorandum of agreement and payment of benefits.

The claimant was treated for an extended period of time by Dr. James Walston and his testimony has been thoroughly reviewed in conjuction with the final disposition of this case. Dr. Walston testified that the claimant had a permanent functional impairment of 15-20 percent, which is substantial. Close examination of his testimony reveals, however, that he was not aware of the claimant's preexisting arthritic condition. Nor was he aware of the 1960 and 1976, or 1977 treatments. He also was not able to indicate, in terms of a professional opinion, how much of the disability rating that he gave is attributable to the preexisting condition and how much is attributable to the aggravation. A close examination of his qualifications indicates that he does not have the highly specialized training and background that Dr. Isgreen does.

Dr. Isgreen is clearly of the opinion that the incident of January 1981 aggravated the preexisting condition. He is aware of the preexisting condition and the prior injury. He is of the opinion that the claimant has sustained a 5 percent permanent functional impairment as a result of the January 1981 incident. An examination of his qualifications indicates that he has a significant background in the area of neurology and his opinion, in the final analysis, will be given the greatest weight in the final disposition of this case, including his opinion regarding the length of healing period.

Two job descriptions have been submitted in conjunction with this case. Claimant's exhibit 2 appears to be the official job description of the Sioux City Community School District. Claimant's exhibit 3 is a hybrid job description, which has been compiled by claimant's counsel. Probably a fair job description would consist of a mix of claimant's exhibits 2 and 3. To say that claimant's exhibit 3 is a total compilation of the claimant's job description is in error and will not be adopted in this decision. The greater emphasis will be placed on claimant's exhibit 2 as this appears to be the official job description, although some consideration will be given to claimant's exhibit 3 taken in conjunction with claimant's description of some of the specific duties that she must perform. Dr. Isgreen, in the final analysis, recommends that the claimant avoid certain types of activities on a continuing basis. He is also of the opinion that, after reviewing claimant's exhibit 2, she should be able to return to work and certainly perform the majority of the tasks outlined on claimant's exhibit.

The claimant is found to be credible in her testimony in this case. She is 61 years of age and has substantial background and training in the nursing area. She has been a school nurse for an extended period of time. The facts in this case establish that prior to January 27, 1981 she was able to carry out her duties as a school nurse without apparent restriction or difficulty. After January 27, 1981 she has indeed no substantial difficulty in following through with those responsibilities. She has not returned to work. Dr. Isgreen indicates that he felt that perhaps she was not too anxious to return to work.

Valentine Norcott's testimony has been rejected in terms of the final disposition of this case due to the clear prejudice of this individual in the case. While his testimony has been rejected, his opinions were still at least heard by the undersigned. Perhaps it is a combination of Mr. Valentine's opinions, in part, and claimant's discomfort, in part, which have contributed to the overall present posture of the case.

Based upon the record as a whole, and taking into consideration the aforecited industrial disability considerations, it is determined that the claimant has sustained an industrial disability of 20 percent of the body as a whole. Healing period terminates August 26, 1981 pursuant to the opinion of Dr. Isgreen.

FINDINGS OF FACT

That on January 27, 1981, the claimant was an employee of the defendant.

That on January 27, 1981, the claimant sustained an injury which both arose out of and in the course of her employment with the defendant.

That the claimant has a preexisting arthritic condition of her cervical spine.

That the claimant has not returned to work since February 24, 1981

That the claimant was treated for an extended period of time by Dr. James Walston, a Board Certified family practitioner.

That Dr. Walston was not aware of the extent of claimant's underlying condition.

That the claimant was also examined by Dr. William Isgreen, a Board Certified neurologist.

That Dr. Isgreen was aware of the underlying arthritic condition and stated she had a 5 percent functional disability as a consequence of this incident.

That the claimant through the work injury of January 27, 1981, materially aggravated the underlying arthritic condition in her cervical spine.

That the claimant is 61 years of age, married, with no dependent children.

That the claimant is a registered nurse and has been a school nurse for 16 years.

That the claimant has no other training in any specific field.

That the claimant has an industrial disability of 20 percent of the body as a whole.

That the healing period terminates on August 26, 1981.

CONCLUSIONS OF LAW

That the claimant has sustained her burden of proof in establishing a causal relationship between the injury of January 27, 1981 and her present industrial disability of 20 percent of the body as a whole.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the stipulated rate of one hundred forty-three and 98/100 dollars ($143.98) per week.

That the defendants shall pay claimant healing period benefits from February 27, 1981 through August 26, 1981 at the weekly rate of one hundred forty-three and 98/100 dollars ($143.98).

That the defendants shall pay unto claimant mileage expense in the following amounts:

3000 miles (30 miles x 100 trips) at $.20/mile = $600.00

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

That the defendants are given credit for all benefits previously paid.

That interest shall accrue pursuant to section 85.30 as amended by S.F. 539.

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

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

Signed and filed this 20th day of October, 1982.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERI E. NUNGESSER, Claimant, vs. GOODYEAR TIRE & RUBBER CO., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 642999 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Beri E. Nungesser, the claimant, against his employer, Goodyear Tire & Rubber Company, and the insurance carrier, Travelers Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on December 19, 1979. This matter came on for hearing before the undersigned deputy industrial commissioner at the Juvenile Court Facility in Cedar Rapids, Iowa on August 23, 1982. The record was considered fully submitted on September 13, 1982.

An examination of the industrial commissioner's file indicates that a first report of injury was filed August 6, 1980. A memorandum of agreement was filed on that same date. An application for partial commutation was filed and approved on August 4, 1980. This partial commutation dealt with an injury to claimant's left leg. A joint application for approval of compromise special case settlement was filed February 20, 1981 and approved on that date. Claimant's receipt and satisfaction of the funds provided for in the special case settlement was filed February 25, 1981. The final report was filed February 25, 1981, reflecting the extent of benefits paid.

The record in this case consists of the testimony of the claimant, Mike Perman, the deposition testimony of Deputy Industrial Commissioner Barry Moranville, the medical testimony of Fred J. Pilcher, M.D.; claimant's exhibits A through M, inclusive; and defendants' exhibits 1 through 18, inclusive. Objections lodged to claimant's and defendants' exhibits are overruled. All of the aforementioned exhibits will be considered by the undersigned for whatever probative value they may be deemed to contain.

ISSUES

The issues sought to be determined in this proceeding include a determination of whether there exists a causal relationship between the claimant's injury of December 19, 1979 and the present disability to his left leg; the nature and extent of that disability; the appropriateness of medical charges under section 85.27 of the Code; and the effect the approved compromise special case settlement has on this proceeding.

REVIEW OF THE EVIDENCE

The claimant, Beri E. Nungesser, testified that he is 28 years of age. Mr. Nungesser is a skilled, master mechanic but is presently unemployed.

The claimant confirmed that on December 19, 1979 he was injured while employed by Goodyear Tire & Rubber Company. The injuries claimant sustained were to his left leg and to his jaw.

With respect to the left leg injury, the claimant testified that he has noted continuing problems with that area of his body. He indicates that the leg "goes out" on a frequent basis, and he will fall to the ground as a result. The undersigned observed at time of hearing that the claimant walked with a noticeable limp. Mr. Nungesser has also detected a loss of sensation in this member. He stated that the leg has been painful since the date of injury, December 19, 1979. The claimant stated that he is unable to stand on his left leg for an extended period of time. From his testimony, it appears that difficulty is noted after standing for approximately two hours. The leg then becomes painful and may give out.

Mr. Nungesser stated that in 1981 he worked at Perkins Steak and Cake restaurant for a period of two weeks, but was forced to quit that position because his leg gave out.

The claimant confirms that in July 1980 his physician, Fred J. Pilcher, M.D., was of the opinion that he had a 15 percent permanent partial impairment of the left leg. Mr. Nungesser further confirms that he has been compensated for a disability of 15 percent of the leg by Travelers Insurance Company.

Of critical importance in the disposition of this case is the joint application for approval of a compromise special case settlement, filed and approved on February 20, 1981. That document provides:

Comes now the Claimant, Beri E. Nungesser, the Employer, Goodyear Tire & Rubber Co., and its Insurance Carrier, the Travelers Insurance Co., and respectfully petition the Iowa Industrial Commissioner to approve Special Case Compromise Settlement and in support thereof state:

1. That claimant was employed as a mechanic for the employer. That he had worked for the employer for a period of approximately nine days prior to the accident occurring.

2. That the claimant claims he sustained an injury to the left knee and his jaw while he was adjusting the carburetor on a car which allegedly slipped into gear and moved forward pinning the claimant between the front of the automobile and some tires stacked in the area.

3. That as a result of the injury to the left leg, medical treatment was conservative in nature and no surgery was performed. A permanent partial disability rating of 15% of the leg was assessed by Fred J. Pilcher, M.D. and benefits paid accordingly for the same.

4. That the claimant also alleges acute pain in the right temporomandibular joint, which he alleges is a result of the accident also. Claimant saw Dr. VanCleve for routine dental checkup on June 13, 1980 at which time there was no indication of jaw injury. First indication of probable jaw injury was pursuant to examination by Dr. Imoehl on August 13, 1980, at which time a diagnosis of TMJ was made.

That there has been a submission of all medical reports, x-rays and tomograms to the National Dental Consultants in Islip, N.Y. for review and their opinion, which is attached hereto, indicates that the claimant's TMJ problem is not related to the accident of December 19, 1979.

5. That there is a serious bonafide [sic] dispute between the claimant, employer, and insurance carrier, as to whether or not the claimant sustained an injury arising out of and in the course of his employment, as it relates to his TMJ complaint; whether there was any causal connection whatsoever between claimant's employment with the employer and his condition of ill-being; and whether he has incurred any functional or industrial disability as a result of this condition.

6. That the parties are desirous of resolving their differences and compromising this dispute. The employer and insurance carrier by way of compromise have offered to the claimant ($7,500.00) Seven Thousand Five Hundred Dollars in one lump sum in Compromise Settlement of all of his claims for any and all disability and medical expenses or other benefits that the claimant may claim he is entitled to under the Iowa Workers' Compensation Act relative to the jaw injury.

7. That the parties agree that in order to avoid litigation, this matter should be settled, and the settlement should be submitted in writing to the Iowa Industrial Commissioner for approval. The parties further waive all requirements of notice and hearing as provided in the Code of Iowa, Section 17A.12 and the rules of the Iowa Industrial Commissioner.

It is further agreed by and between the parties that the approval by the Iowa Industrial Commissioner shall be binding upon the parties and shall not be construed as an original proceeding estopping the running of Section 85.26 of the Iowa Code or impairing or mitigating the defense of said statute and that said settlement shall constitute a final bar to any further rights arising under Chapters 85, 86, 85A, or 87 of the Code of Iowa.

The parties have waived presentation of this agreement to the District Court.

WHEREFORE, the Claimant, Employer and Insurance Carrier respectfully request that the Iowa Industrial Commissioner enter an appropriate order approving this Special Case Compromise Settlement and authorizing the completion of the settlement.

The order approving the compromise special settlement, signed February 20, 1981 provides:

On this 20th day of February, 1981, the Joint Application For Approval of Compromise Settlement came on for Hearing, and being fully advised in the premises, it is found and held:

1. The parties are involved in a bona fide contested case.

2. The parties have agreed upon a settlement, subject to the approval of the Iowa Industrial Commissioner.

3. The Settlement Agreement should be approved.

WHEREFORE, it is ORDERED that the Joint Application For Approval of Special Case Compromise Settlement be and the same hereby is approved. This approval is binding upon the parties and is not to be construed as an original proceeding.

It is further ORDERED that appropriate filings be made upon payment of the proceeds to the claimant in the amount of Seven Thousand Five Hundred Dollars ($7,500.00) for the Settlement Agreement.

The statement of awareness executed by claimant and filed February 20, 1981 provides:

I, Beri E. Nungesser, hereby state that I have been fully advised, and that I fully understand the effect of a Compromise Special Case Settlement of my claim for Workers' Compensation benefits; I fully understand that said settlement will constitute a full, final and complete settlement in satisfaction of any and all claims under the Iowa Workers' Compensation law or otherwise, which I may have against Goodyear Tire & Rubber Co. and/or the Travelers Insurance Co., growing out of or resulting from an injury claimed to have been sustained by me some time between, on or about December 19, 1979, arising out of and in the course of employment; I further understand that a genuine and justiciable controversy exists as to whether or not my claim is compensable in the Iowa Workers' Compensation law, and I understand that I have the right to retain counsel of my choice in representing me in this matter before the Iowa Industrial Commissioner, which I do not desire to do, and it is my desire that this matter be settled in accordance with the terms set out in the Application For Compromise Special Case Settlement, which has been signed by me.

Signed this 20th day of February, 1981.

Claimant's receipt and satisfaction filed February 25, 1981 provided:

COMES NOW the Claimant and hereby certifies and acknowledges that the Defendant/Employer or its Insurance Carrier has paid unto the claimant the sum of Seven Thousand Five Hundred Dollars ($7,500.00), which payment was made under and in compliance with an Order made and entered in the above entitled proceeding by the Iowa Industrial Commissioner, being entered on the 20th day of February, 1981, and in consideration of said payment, the Defendants are hereby released and forever discharged from any and all further liability on account of an injury or injuries claimed to have been sustained by me on or about December 19, 1979, and any and all disability resulting or to result therefrom.

Mr. Nungesser testified that he thought he was only settling the jaw injury claim via the aforequoted special case settlement. Mr. Nungesser added that on the date the special case settlement was approved the permanency impairment for the leg injury had been assessed and paid by Travelers. In his judgment the only matter that remained open at that time was the compensability of the jaw injury.

Claimant confirmed that he has received treatment from Alan C. Robb, M.D., and Donald W. Hilliard, M.D. An assortment of statements for medical services rendered for medication consumed have been presented in conjunction with the prosecution of this case. Mr. Nungesser is of the opinion that all of these charges were incurred as a result of his compensable leg injury.

On cross-examination, Mr. Nungesser acknowledged that he is not presently being regularly treated by Dr. Pilcher nor any other orthopedist. He acknowledged that occasionally he is seeing Dr. Robb for muscle spasms. The claimant acknowledged that he has been employed as a mechanic during the last year. He further acknowledged that at one time he had a workers' compensation claim case against Perkins Steak and Cake restaurant, and received some compensation for a back injury sustained while in their employ.

It appears, from the record, that surgery was once considered to rectify claimant's knee condition. Mr. Nungesser, however, indicates that he will not undergo surgery unless the physicians guarantee that he will have a good knee as a result. No surgery has been undertaken.

Mr. Nungesser denied that he indicated to representatives of Travelers Insurance Company that he was planning to go to California and, thus, was anxious to settle his compensation case. He acknowledged that he negotiated directly with the insurance carrier and, in fact, drove to Des Moines and was present in the industrial commissioner's office when the settlement documents were executed. He confirmed that he read all the documents prior to signing them. Claimant has a GED.

With respect to the Mayo Clinic treatment, the claimant acknowledged that he visited that institution on his own accord. He believed at one point that he had had a stroke and was suffering paralysis on his left side. This belief precipitated the Mayo Clinic examination.

Mike Perman testified on behalf of the defendants. Mr. Perman is the Senior Claim Supervisor at The Travelers Insurance Company in West Des Moines, Iowa. He has been involved in adjusting claims for The Travelers for 15 years.

Mr. Perman became involved in this file on November 26, 1980. At the time of his initial involvement, the partial commutation, previously discussed, had been approved by the commissioner's office. Medical diagnoses were secured concerning the jaw complaint. Mr. Perman, after examining the data, was of the opinion that there was a causal connection problem which had been substantiated by the medical data. Mr. Perman testified that he had some concern about the status of the claimant's leg. He was surprised to discover the claimant was limping and walking with a cane. During the negotiation of this claim, the

claimant called Mr. Perman repeatedly and advised that he was represented by legal counsel. Mr. Perman stated that he asked the claimant to have his counsel contact The Travelers. Subsequently, the claimant advised the carrier that there was no attorney involved in the case and that he would like to deal direct. Mr. Perman indicates that the claimant was anxious to settle the case because he had a job lined up in the state of California.

Mr. Perman confirms that the claimant arrived one day at his office in Des Moines and settlement was negotiated. Mr. Perman prepared the documents. Both Mr. Perman and claimant were present when Deputy Industrial Commissioner Moranville approved the papers in question. Mr. Perman confirmed that the claimant was permitted to review all of the documents and stated that the claimant was advised that this was full settlement and he would not receive further benefits. Mr. Perman is of the opinion that the claimant knew the settlement included the leg and the jaw injuries.

Mr. Perman testified that it was his intent to settle all claims arising out of the December 1979 work incident. The defendants were interested in finalizing the case based upon what appeared to be excessive amounts of pain medication being taken and what they considered future problems that might arise with Mr. Nungesser.

On cross-examination, Mr. Perman acknowledged that at the time of his initial involvement in the case, the leg injury was being paid and the jaw injury was unresolved. Mr. Perman indicated that he did not feel that the settlement documents in question were ambiguous.

Fred J. Pilcher, M.D., a board-certified orthopedic specialist, testified in these proceedings. This physician's first contact with the claimant was on February 8, 1980 at Mercy Hospital. This physician confirmed that at one time Dr. Jack Koch, another orthopedic specialist, was involved in the treatment of claimant's condition. He also confirmed that Dr. Koch recommended an arthroscopy, but this procedure was not carried out. From Dr. Pilcher's testimony it appears that conservative treatment and physical therapy were initially undertaken. The physician is not aware of any lower extremity problems the claimant may have experienced prior to the date of injury.

In a report dated July 23, 1980, marked deposition exhibit 3, Dr. Pilcher assessed a permanent partial impairment rating of 15 percent to the left lower extremity. In a subsequent report dated January 19, 1982, marked deposition exhibit 4, he increased this rating from 15 percent to 22 percent of the left lower extremity. With reference to the second impairment rating, Dr. Pilcher testified:

> A. Well, I'm going to refer to that last letter. And I spent a lot of time going over this, because I thought we had to somehow get this settled. And I didn't raise the disability rating just because I thought he had changed. In fact, I didn't think he had changed much at all. I probably was in error earlier, in that I did not take into account the fact that he could not straighten his knee and that he had lost 15 degrees. Now, you must realize that these are rough numbers as far as the degrees go. Now, one day it might be 15, the next day it could be 20, you know, 10. So we work on averages. And when I -- based on the actual motion that he has remaining to 115 degrees of flexion, that's just a little bit more than you need to get out of a chair. When you go to get out of a chair, you have trouble if it only goes to 90. You have to boost away with your other foot, your other leg.
>
> Q. So you're confident this 22 percent functional rating is accurate, in your estimation?
>
> A. Well, unless I made a mistake adding or subtracting or reading the wrong charts. It's basically right, according to the book, from what I can tell.

On cross-examination, Dr. Pilcher acknowledged that the physical difficulties claimant is experiencing today are directly traceable to the work incident of December 19, 1979. The balance of this witness' testimony has been reviewed and considered in the final disposition of the case.

An examination of the Mayo Clinic records establishes that Mr. Nungesser went through a multitude of diagnostic examinations and tests at that facility. These appear to be related to an alleged stroke the claimant felt he sustained. A close scrutinization of these records indicate, in fact, that the physicians at that facility are of the opinion that claimant did not sustain a stroke. Additionally, there is no data in these records which would, in any way, causally relate this examination and eventual diagnosis to the work incident of December 19, 1979.

The deposition of Deputy Industrial Commissioner Barry Moranville has been reviewed and considered in conjunction with the disposition of this case. The defense counsel's objections lodged at the time of hearing to portions of Mr. Moranville's deposition are sustained. The contents of the deposition, other than those matters which were objected to, have been considered in the final disposition of this case.

The balance of the exhibits which were offered at the time of trial have also been reviewed and considered in the final disposition of this litigation.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 19, 1979 is causally related to 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 (1955). 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 Co., 222 Iowa 272, 268 N.W. 598 (1936).

Section 85.35 provides in part:

> The parties to a contested case, or persons who are involved in a dispute which could culminate in a contested case may enter into a settlement of any claim arising under this chapter, chapter 85A or chapter 86, providing for final disposition of the claim, provided that no final disposition affecting rights to future benefits may be had when the only dispute is the degree of disability resulting from an injury for which an award for payments or agreement for settlement under section 86.13 has been made. The settlement shall be in writing and submitted to the industrial commissioner for approval....
>
> ....
>
> ...[A]n approved settlement shall constitute a final bar to any further rights arising under this chapter and chapters 85A, 86 and 87.

ANALYSIS

It is undisputed that on the date of injury, December 19, 1979, the claimant was an employee of the defendant.

Since this is a multiple injury case involving both the claimant's left leg and his jaw these injuries will be discussed separately. It must be kept in mind, however, that Mr. Nungesser is only making claim in this action for disability to the knee.

With respect to the leg injury, it is undisputed that this injury arose out of and in the course of claimant's employment with this defendant employer on December 19, 1979. The record is clear that the defendants agreed to a partial commutation of benefits with respect to the left leg injury. This partial commutation was approved August 4, 1980. Fred J. Pilcher, M.D., has been the treating physician from the date of its occurrence. Initially, he expressed the professional opinion that the impairment was 15 percent of the lower left extremity. Later he revised this opinion and stated that the impairment rating should be, in fact, 22 percent of the left lower extremity. This opinion is uncontroverted. It is clear, based on the medical testimony submitted, that this injury is to a scheduled member only and not to the claimant's body as a whole. As a consequence, the disability evaluation is to the scheduled member and the potential award is governed by section 85.34(2)(o). There does not appear to be any evidence in the record that claimant had any pre-injury difficulties or limitations in this member. The record does not support any finding that he has somehow incurred a post-injury aggravation, not related to the work incident in question.

The jaw injury, according to the record, did not surface until August 1980, some nine months after the work incident. The allegations in the joint application for approval of compromise special case settlement established that there was a bona fide dispute as to the cause of the jaw discomfort noted by the claimant. Based on these allegations of a bona fide dispute it is clear that the jaw injury was a candidate for a special case settlement under the terms of section 85.35 of the Code.

The cutting issue concerns the effect on this claim of the joint application for approval of compromise special case settlement and subsequent approval thereof.

The undersigned closely examined the joint application for approval of compromise special case settlement and is of the opinion that that document and the resulting approval relates to the jaw condition only. The basis for this determination is that in paragraph 3 of that document the parties acknowledged that Dr. Pilcher has assessed a 15 percent permanent disability rating to the leg and that benefits had been paid accordingly. In paragraph 4 of that document the parties set forth the allegations concerning the jaw injury and specifically allege that the problem may not be related to the December 1979 incident.

Additionally, in paragraph 5 the parties stipulate:

> That there is a serious bonafide [sic] dispute between the claimant, employer, and insurance carrier, as to whether or not the claimant sustained an injury arising out of and in the course of his employment, as it relates to his TMJ complaint; whether there was any causal connection whatsoever between claimant's employment with the employer and his condition of ill-being; and whether he has incurred any functional or industrial disability as a result of this condition. (Emphasis added.)

In paragraph 6 of the aforementioned document parties indicate that they desire to settle the controversy, and further state that for the payment of $7,500.00 in a lump sum, settle "all of his claims for any and all disability and medical expenses or other benefits that the claimant may claim he is entitled to under the Iowa Workers' Compensation Act relative to the jaw injury." (Emphasis added.)

In the opinion of the undersigned, the joint application, which is signed by the parties hereto, is controlling as to what

actually was settled in this case. The balance of the documents appear to be in form and other than the recitation of the dollar amount are not specific as to the actual intent of the parties.

In the undersigned's opinion, it is clear from this joint application for approval of compromise special case settlement that the jaw injury is settled in total. The approval of the document constitutes a full, final and complete bar to any attempt at further recovery for that injury. In the opinion of the undersigned deputy industrial commissioner, the left leg injury remains a candidate for review-reopening proceeding under section 85.26(2).

Based upon the record as a whole and taking into consideration all of the evidence, it found that claimant sustained a permanent partial disability to the extent of 22 percent of the lower left extremity as a direct consequence of the work injury of December 19, 1979.

A number medical bills have been submitted in conjunction with the trial of this case. There is no testimony in this record to establish that the figures set out in petitioner's exhibit J are in any way causally related to the leg injury and no award will be made for those charges. Petitioner's exhibit F is a statement from Dr. Allen C. Robb, and that statement indicates that claimant was treated for "numbness of the right arm." There is no data in the record which would causally relate this to the injury of December 19, 1979, and no award will be made for these charges. There is a statement in the record from Donald W. Hilliard, M.D., marked petitioner's exhibit G. However, there is no testimony in the record concerning the basis for the treatments by Dr. Hilliard, and no award will be made for that charge. There is a lengthy list of prescription charges, marked petitioner's exhibit H contained in the record. There is, however, no testimony establishing any causal relationship between the various medications listed and the claimant's left leg injury; hence, no award will be made. Additionally, there is a substantial list of medication puchased at the Paramount Pharmacy West and marked petitioner's exhibit I. There is no testimony in the record establishing any causal relationship between the condition for which those medications were prescribed and the left leg injury of December 19, 1979. As a consequence, no award will be made for those charges.

There is a notation from the Allied Medical Accounts Control Group, marked petitioner's exhibit N. This charge relates to the Mayo Clinic's examination of the claimant. As previously noted, these examinations were for conditions other than the leg injury. There is no data in the record establishing any causal relationship between the examinations sought at the Mayo Clinic and the work injury of December 19, 1979. As a result, no award will be made for these expenses. Petitioner's exhibit K is a statement from the Credit Bureau of Iowa City concerning an outstanding debt at University Hospitals. There is nothing in the record to establish the basis for this treatment or that the treatment rendered was in any way causally related to the December 19, 1979 leg injury. No award will be made for these charges.

Petitioner's exhibit L is a statement from the Linn County Orthopedics, P.C., in the amount of $235.33. Dr. Pilcher is connected with this institution, and it appears that based upon the record as a whole these services were rendered in connection with treatment for claimant's left leg injury. They are the responsibility of defendants under section 85.27 of the Code. The charge for services by the Linn County Orthopedists, P.C., attached to The Travelers Insurance Company letter of August 11, 1981 appears to be included in the petitioner's exhibit 11.

FINDINGS OF FACT

That on December 19, 1979 the claimant was an employee of the defendant.

That on December 19, 1979 the claimant sustained a personal injury to his lower left extremity which both arose out of and in the course of his employment with this defendant employer.

That claimant sustained a 22 percent permanent functional impairment of the lower left extremity as a result of the work injury of December 19, 1979.

That in August 1980 claimant complained of jaw discomfort which he alleged was causally related to the work incident of December 19, 1979.

That on February 20, 1981 a joint application for approval of compromise special case settlement was filed with the commissioner and approved by Deputy Industrial Commissioner Barry Moranville.

That there is no relationship between the figures or charges set out in petitioner's exhibits F, G, H, I, J, K, N, and the lower left extremity injury.

That there is a relationship between the charges set out in petitioner's exhibit L and the work injury.

CONCLUSIONS OF LAW

The claimant has sustained his burden of proof and has established a causal relationship between the injury of December 19, 1979 and his present lower left extremity disability.

That the approved joint application for compromise special case settlement settled only the jaw injury claim.

That the claimant has failed in his burden of proof and not established a causal relationship between the medication or services represented by charges set out in petition's exhibits F, G, H, I, J, K, N, and the work injury.

That claimant has sustained his burden and established a relationship betwen the services represented by exhibit L and the work injury.

ORDER

THEREFORE, IT IS ORDERED that the defendants shall pay unto claimant forty-eight and four-sevenths (48 4/7) weeks of permanent partial disability benefits at the rate of one hundred forty-four and 13/100 dollars ($144.13) per week.

That the defendants are given credit for benefits previously paid.

That interest shall accrue pursuant to section 85.30, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

That the defendants shall pay unto claimant the following medical expenses:

Linn County Orthopedists, P.C. $235.33

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

Signed and filed this 27th day of January, 1983.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PENNY O'MARA,	:	
Claimant,	:	
vs.	:	File No. 671900
SWIFT FRESH MEATS,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

Mr. MacDonald Smith
Attorney at Law
632-640 Badgerow Bldg.
Sioux City, Iowa 51101 — For Claimant

Mr. Frank T. Harrison
Attorney at Law
1040 Fifth Avenue
Des Moines, Iowa 50314 — For Defendant

STATEMENT OF THE CASE

Claimant appeals from a proposed arbitration decision filed May 17, 1982 wherein claimant was denied compensation benefits for an injury allegedly occurring on November 3, 1980.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Vernon Tott, Sara McKenzie, and Sylvia Betsworth; claimant's exhibits 1 through 5 inclusive; defendant's exhibits A through F inclusive; the deposition testimony of John J. Dougherty, M.D.; and the briefs of both parties on appeal.

ISSUE

The issue on appeal is whether claimant has sustained an injury arising out of and in the course of her employment which is causally related to the disabilities alleged. Claimant's original petition in arbitration filed June 3, 1981 seeks permanent partial disability and medical benefits for the injury of November 3, 1980. However, claimant's brief on appeal asks for an award of temporary total disability and medical expenses.

REVIEW OF THE EVIDENCE

Claimant testified at hearing that she was employed by

defendant on November 3, 1980 to separate "black guts" which are intestines filled with manure. The average lifting involved was approximately five pounds and claimant was required to lift this to shoulder level. During early November 1980, claimant was working 9 1/2 hour days which were in excess of her normal working day. (Tr., p. 11) On or about November 3, 1980 claimant noted sharp pains in her middle back. She sought medical treatment from her family physician, James H. Walston, M.D. In addition to the back problems, claimant was being treated for a cystocele. Claimant continued to work until she was admitted to the hospital on November 29, 1980 for treatment of both low back pain and repair of a rather large cystocele. The cystocele is not alleged to be work related and was repaired. (Tr., p. 31)

While hospitalized, claimant was examined on December 4, 1980 by John Dougherty, M.D., an orthopedic surgeon, on a referral by Dr. Walston. Dr. Dougherty treated claimant conservatively. She was released from hospitalization on December 14, 1980 with a prescription for a TNS unit. (Tr., p. 17) Claimant continued to see Dr. Dougherty for her back problems and he readmitted her to the hospital on January 28, 1981. Claimant had persistent back pain. A bone scan and myelogram were performed. (Tr., p. 18)

Claimant testified that she returned to work on March 3, 1981. In October of 1981, claimant bid for and was transferred to a "flushing" job. (Tr., p. 19) This new job required no separating or lifting. Claimant indicated that she had been able to work her new job without difficulty despite longer than normal working hours. (Tr., p. 20) Claimant also indicated that she has not missed any work since March of 1981 because of her back problems. (Tr., p. 36)

On cross-examination, claimant indicated that she injured her back in early January of 1979 in a slip and fall accident while entering defendant's plant. (Tr., pp. 21-22; defts. exh. C) Claimant was treated during the period by Thomas L. Coriden, M.D. Claimant also indicated that she had undergone a laminectomy in 1973 but insisted that she felt no residual effects. (Tr., p. 24) Finally, claimant admitted on cross-examination that she had not given Dr. Dougherty a history of the November 3, 1980 injury. (Tr., p. 32)

Vernon Tott testified that he was claimant's supervisor on November 3, 1980. Mr. Tott stated that he was required to make out injury reports in the department where claimant worked. The witness testified that claimant never told him that she had injured her back as a result of her work. (Tr., p. 40) Mr. Tott further testified that he was aware of claimant's bladder problems but denied that she ever complained of back pain. (Tr., p. 43)

Sara McKenzie testified that she worked beside claimant prior to November of 1980. The witness stated that claimant never complained of back pain nor gave any indication that she was experiencing difficulty. (Tr., p. 46)

Sylvia Betsworth testified that she is defendant's plant nurse with the responsibility of making out compensation claims and injury records. Ms. Betsworth stated that claimant had complained of bladder and shoulder problems prior to November of 1980, but had never complained of pain in her lower back. (Tr., p. 57) The witness testified that she spoke to the claimant during the hospitalization of November 1980. Ms. Betsworth indicated it was at this time that claimant disclosed that she was receiving treatment for low back pain. Ms. Betsworth stated, however, that she had no notice that the back pain might have been work related until she received a request for a first report from this agency. (Tr., p. 58)

Dr. Dougherty testified by way of deposition that he treated claimant from December 4, 1980 through March 26, 1981. Dr. Walston did not treat claimant's back difficulties, but hospitalized her for a variety of other problems she was experiencing. (Claimant's exh. 4)

In a report dated January 19, 1981, Dr. Dougherty writes:

> In attempting to further clarify the position on Penny O'Mara, it appears that she probably had a compression fracture but the age, as I have mentioned before, I am not sure. It is conceivable she may have had this one year ago.
>
> I am at a little bit of a loss as to explain why she suddenly started having problems three weeks before the time I saw her. As you know I did see her on the 6th and I advised her to return to see me in approximately three weeks. Certainly her obesity compounds her problems but she has a back support.
>
> I am not sure exactly what she does at work but I would feel that if Doctor Walston has released her, I think that after I see her next time I probably can get her back to work.
>
> Whether this is compensation or not, this is a little difficult for me to say. She denied any injury and apparently she does fairly light work at Swifts. She does mention this accident of a year ago and this may very well have caused the compression fracture, unless she had it before and I do not think we can say without having previous films.
>
> Therefore it certainly would appear that there is a question if this is compensation, however, unless she aggravated something she did a year ago when apparently she was on the job.
>
> Therefore hopefully after I see her next time we can get her back to work and how much work connected, I do not know. In view of the fact that she did not have any injury, except it just suddenly started, unless she did something else to account for this, I do not know how we are going to make any definite statement along this line. It does appear it is probably an old injury. I do not know if I can be anymore specific than this but I can only say that, if she has been released to go back to work by Doctor Walston, then I would feel that probably she can get back to work after I see her again. (Claimant's exhibit 2)

In another report dated January 28, 1981, Dr. Dougherty states:

> I have continued to follow her after her cystocele was repaired and she continues to complain of pain. Last week she said she stood for six hours baking, and this gave her pain in the back. If she drives long distances, she gets some pain into the left rump and lateral aspect of the left leg. Saturday night she tried dancing and on Sunday she could hardly move. She doesn't wear her support to drive. Occasionally her left arm feels like it is numb.
>
> Dr. Dougherty continues:
>
> The patient walks okay. She can walk on her toes and her heels but it bothers her, it pulls in her left leg when she walks on her heels. She stands pretty straight. She is still heavy. She said she was bleeding from a kidney.
>
> Forward bending, probably 70 degrees, her back is tight. It bothers her some. Extension bothers her some. Right and left lateral bending is markedly restricted. She remains a little tender in the dorsal lumbar junction. She doesn't seem tender lower down. She has minimal tenderness in the left gluteus; not on the right.
>
> Her reflexes I think are okay. Straight leg raising slight discomfort on the left but it goes pretty good on the right. It doesn't bother her.
>
> DIAGNOSIS: 1. PAIN IN THE BACK, DORSAL LUMBAR JUNCTION, WITH WHAT APPEARS TO BE AN OLD WEDGING OF L-1, WITH SOME NARROWING OF THE D-12/L-1 DISC SPACE.
>
> 2. PREVIOUS LAMINECTOMY APPARENTLY L-4-5, WITH NARROWING OF THE L-4-5, DISC SPACE, WITH DEGENERATIVE CHANGES, QUESTIONABLE LUMBAR DISC SYNDROME. (Defendant's exh. F)

In an addendum to the above report, Dr. Dougherty further states:

> The above patient was readmitted to the hospital on 1-28-81 because of persistent pain in the back. I'd previously seen her when she was hospitalized by Dr. Walston at the time she had a cystocele repair. Continued to complain of difficulty. She was admitted to the hospital at this time and a bone scan was done as well as a myelogram. The myelogram was not felt to be significant although there were some changes. There was some narrowing of L4/5 but this was felt to be post-surgical. Didn't really think there was enough to warrent being called significant and her spinal fluid protein was normal with a normal pattern. We also did a bone scan on her which was felt to be within normal limits.
>
> Now going back over some of the previous films she had, it appeared that the compressions of D-12 and L-1 had been present there for at least 3 years. Therefore this is felt to not be a recent injury of a year ago. Patient seemed to improve. Dismissed on 2-24-81 to be followed in the office. Weight loss, exercises and back support.
>
> FINAL DIAGNOSIS:
> Pain in the back, dorsal-lumbar junction; appears to be an old wedging of L1 with some narrowing of D12/L1 disc space, probably dorsal lumbar strain. Bone island in D-12, significance? and previous laminectomy L4/5 with some narrowing of the disc space and degenerative changes and obesity. (Defendants' exh. F)

Dr. Dougherty testified that claimant had suffered a dorsal-lumbar strain. The physician indicated that an old compression fracture and degenerative changes had contributed to the strain. Dr. Dougherty testified that "overdoing" and claimant's excessive weight had also played a part in claimant's difficulties. Dr. Dougherty indicated that given claimant's weight, merely being in an upright position, would place considerable stress upon the dorsal and lumbar areas of the spine. (Dougherty depo., p. 15)

In his final report of June 3, 1981, Dr. Dougherty writes:

> The patient was first seen by me on 12-4-80 with complaints of pain in her back for approximately three weeks duration, which she described as in the dorsal lumbar junction. She did not have any history of any injury. She was not in the hospital specifically for this, although she previously had had a laminectomy in Omaha, Nebraska about seven or eight years ago.
>
> An examination and x-rays were carried out and it was felt that this probably represented a dorsal lumbar strain, superimposed upon an old wedging of D-12/L-1 and narrowing of the disc space.
>
> The patient was treated conservatively and continued to complain of difficulty. She subsequently was

readmitted to St. Vincent's Hospital and a myelogram was carried out. The myelogram was within normal limits. A bone scan was not really remarkable. We did find some old films of two or three years ago, prior to this and it appeared that at that time she had the changes in her dorsal lumbar junction. Therefore it was my opinion these were not new. She was treated conservatively and was advised to lose some weight. She was put on an exercise program and I also gave her a TNS unit.

She was last seen by me on 3-26-81 and she seemed to be getting along better. She was working. I did not make any appointment for her to return to see me, at that time, unless she had more difficulty.

She certainly does have some disability in her back and I would feel that it is in the neighborhood of 10% of the spine, but how much of this is related to work, I am not sure. She certainly had the old laminectomy and she has the compression fractures. How long she has had these and the exact cause I am not sure, whether this is more just a postural strain, again this is a possibility. (Claimant's exh. 1)

Finally on cross-examination, Dr. Dougherty indicated that given claimant's preexisting back difficulties, a longer than normal work day could be an aggravating factor. (Dougherty depo., p. 27) Dr. Dougherty added, however, that any additional activity, such as lifting or cutting grass, could aggravate her back condition. Dr. Dougherty opined an employment injury had not contributed to nor aggravated her preexisting condition and that any employment aggravation did not enter into his findings. (Dougherty depo., p. 28)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 3, 1980 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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 3, 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).

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 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 ommitted.] 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.

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 299 (1961); 100 C.S.J. Workmen's Compensation §555(17)a.

Iowa Code section 85.23 provides:

> Notice of injury--failure to give. Unless the employer or his representative shall have actual knowledge of the occurence [sic] of an injury received within ninety days from the date of the occurence [sic] of the injury, or unless the employee 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 (Iowa 1980), the court stated:

> As a result, the actual knowledge provision of section 85.23 cannot be construed in isolation from the alternative requirement of notice. Obviously the notice requirement cannot be satisfied without an allegation that the injury was work-connected. Section 85.24 provides a form of notice which not only includes information about the injury but "that compensation will be claimed therefor." The provision includes a summary of what a notice must contain: "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." (emphasis supplied). If the actual knowledge requirement were satisfied without any information that the injury might be work-connected, it should not be necessary to allege the injury was work-connected when giving the statutory notice. In fact, however, it is necessary to allege the injury was work-connected when giving notice. It logically follows that the actual knowledge alternative is not satisfied unless the employer has information putting him on notice that the injury may be work-related.

ANALYSIS

Claimant now asserts that she sustained an employment related injury which aggravated a preexisting back condition. Claimant's brief on appeal does not point to a single incident, but to the fact that she put in considerable overtime during the period immediately prior to her condition becoming symptomatic and that the flare-up of her preexisting back condition was the result of "overdoing". Finally, claimant admits that she has not suffered a permanent functional impairment, but asserts that an aggravating injury of November 3, 1980 caused her to be temporarily and totally disabled.

Review of the record on appeal, however, points out that the average amount of lifting claimant was required to do prior to November of 1980 was five pounds. The greater weight of the hearing testimony establishes that claimant did not complain of back pain until after she was hospitalized for repair of a cystocele. Dr. Dougherty, the only physician to provide information specifically relating the claimant's back difficulties, stated unrefutably that claimant's present difficulties are not related to any work injury, while Dr. Dougherty opined that "overdoing" at work could aggravate claimant's preexisting back condition, he would not state that such was the case here. Indeed, claimant herself denied any relationship between her work and her back pain when Dr. Dougherty examined her. The only injuries Dr. Dougherty found were at least one year old with no signs of a recent aggravation. Dr. Dougherty is at a loss to explain the sudden onset of her symptomatology and opines that her present complaints are as much attributable to her old laminectomy, or the injury in January of 1979 or even her excess weight as they are to overtime at work. Such testimony does not meet claimant's burden of proof.

Further review of the record establishes that claimant was hospitalized from November 29, 1980 until December 14, 1980 primarily for treatment of her cystocele. She was readmitted for myelogram and bone scan on January 28, 1981 and was unable to return to work until March 3, 1981. She apparently continued working from November 3, 1980 until November 28, 1980. Since March 3, 1981, claimant has worked in excess of 40 hours per week without complaint or restriction. While claimant may have been unable to work from January 28, 1981 until March 3, 1981 because of back difficulties, the medical and lay evidence does not clearly indicate that she suffered an aggravation of her preexisting condition in November of 1980 let alone that such an aggravation was work related. The simple assertion that working long hours is bad for her preexisting back condition does not meet claimant's burden that she did in fact suffer a material aggravation of a preexisting condition as a result of her employment.

Notwithstanding the above, testimony at hearing makes it highly questionable whether claimant even gave defendant notice of an injury or that such was related to her employment as contemplated by Iowa Code section 85.23. Merely alerting defendant that she was being treated for back pains in late November of 1980 does not give notice as to the possible compensability of such complaints. Apparently, defendant had no basis for believing that claimant's complaints were work related until asked to make a first report by this agency.

Based upon the enunciated principles of law and exhaustive review of the record on appeal, it must be concluded that claimant has failed to provide this agency with medical or lay evidence sufficient to sustain her burden of proof.

FINDINGS OF FACT

1. That claimant was hospitalized from November 29, 1980 until December 14, 1980 primarily for the treatment of conditions not related to the present action.

2. That during the above hospitalization, claimant complained of and was treated for back pain.

3. That during the above hospitalization, claimant notified defendant that she was being treated for back pain, but did not indicate that her back difficulties were related to her employment.

4. That claimant was hospitalized on January 28, 1981 for a myelogram and bone scan with claimant returning to work on March 3, 1981.

5. That claimant underwent a laminectomy at the L-4, L-5 disc space in 1973.

6. That claimant sustained back and hip injuries in a January 1979 fall.

7. That claimant suffers a 10 percent permanent functional impairment as a result of back difficulties predating November 3, 1980.

8. That claimant's present back difficulties are a result of old injuries, degenerative changes, previous surgical procedures and obesity.

9. That claimant has worked extended hours since March 3, 1981 without difficulty or restriction.

10. That claimant's preexisting back condition was not materially aggravated, accelerated, lighted up, or otherwise contributed to by her employment.

CONCLUSIONS OF LAW

That claimant has failed to sustain her burden that the disabilities alleged are causally related to an injury arising out of and in the course of her employment.

That claimant is not entitled to compensation benefits for an alleged injury of November 3, 1980.

WHEREFORE, the above findings of fact and conclusions of law having been made.

THEREFORE, it is ordered:

That claimant take nothing as a result of these proceedings.

That costs of the arbitration proceeding are taxed to defendant and the costs of this appeal are taxed to claimant pursuant to Iowa Industrial Commissioner Rule 500-4.33.

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

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD G. PARR,	:	
Claimant,	:	File No. 495304
vs.	:	A P P E A L
FMC CORPORATION,	:	D E C I S I O N
Employer,	:	
and	:	
KEMPER INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed February 22, 1983 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse decision on application for disbursement of funds.

The record on appeal consists of the various filings in the case.

The result of this final agency decision will differ from that of the hearing deputy in that the fee of the attorney for claimant for certain services will not be approved.

SUMMARY

In an arbitration of April 14, 1980, another deputy industrial commissioner awarded benefits to claimant for 69 weeks 5 days healing period and 30 weeks permanent partial disability at the rate of $182.50 per week plus some $6,044.88 in medical and allied expenses. The order of payment made no mention of any credit under §85.38(2). That decision was not appealed. Payment of those benefits was made; however, $2,990 in disablity benefits and $816.64 in medical services were withheld because the employer had already paid the amounts unto claimant or on behalf of claimant under a self-insured group insurance plan administered by the Equitable Life Assurance Society of the United States.

Rather than reducing the award of April 14, 1980 to judgment under §85.42 and levying thereon, claimant chose to file an action called Application for Disbursement of Funds. Paragraph three of that application stated: "That there has been a dispute between the Claimant and the Insurance Carrier as to whether or not said funds to be reimbursed are subject to the Claimant's attorney's lien of one-third of all amounts recovered."

In granting the application, the hearing deputy stated: "This [the original proceeding which was decided on April 14, 1980] was a proceeding in arbitration. The work of claimant's attorney resulted in an award of benefits and ultimately in the credit to the group plan. Based on the facts here presented, claimant's attorney's fee of $1,267.61 out of the credit to the group plan will be approved." The hearing deputy's order stated the following: "That Stephen B. Jackson's fee of one thousand two hundred sixty-seven and 61/1090 dollars ($1,267.61) out of the three thousand eight hundred six and 64/100 ($3,806.64) reimbursable to the group plan is hereby approved."

ISSUE

Defendants state the issue: "Is a group carrier and/or employer required to pay attorney's fees out of the credit received for benefits paid prior to a determination of compensability of a claim pursuant to Section 85.38(2), the Code."

APPLICABLE LAW

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 non-occupational 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, chapter 85A or chapter 85B, 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, chapter 85A or chapter 85B. Such amounts so credited shall be deducted from the payments made under these chapters. Any non-occupational 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 or an occupational hearing loss under chapter 85B. 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.

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.

In Tucker v. Nason, 249 Iowa 496, 87 N.W.2d 547 (1958), the Iowa Supreme Court refused to grant attorney's fees to a claimant's lawyer whose efforts helped a workers' compensation insurance company recover the amount of their subrogation lien under §85.22(1). The statute was later amended to provide fees for claimants' attorneys out of subrogation recoveries.

In Litton v. Wean Chevrolet Olds, Inc., 34th Biennial Report of the Iowa Industrial Commissioner, page 192, the industrial commissioner in 1980 refused to allow an attorney's fee to a claimant's attorney with respect to payments made by a group carrier under §85.38.

ANALYSIS

Based on the precedent of the analysis found in the Tucker case, which seems analagous, §85.38(2) does not provide for payment of attorney's fees. Nor could §86.39 be construed to mean that an employer or its group carrier somehow impliedly hires the claimant's lawyer. Claimant's laywer represented claimant in order to obtain certain benefits under the workers' compensation law. That attorney skillfully obtained those benefits for the claimant. However, if some of those benefits were subject to a credit under §85.38(2) (and that has not been decided), there is no statutory authority giving claimant's attorney a right to a fee.

WHEREFORE, claimant's application for disbursement of funds is hereby denied.

Signed and filed at Des Moines, Iowa this 18th day of May, 1983.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDITH RIESSELMAN, Claimant, vs. CARROLL HEALTH CENTER, Employer, and ST. PAUL FIRE & MARINE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 642602 A P P E A L D E C I S I O N

By order of the industrial commissioner filed October 26, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, to issue the final agency decision on appeal in this matter. Defendants appeal from an adverse review-reopening decision.

On appeal the record consists of the transcript; exhibits 1 through 21; and exhibits A through J (the depositions of Philip Meilman, M.D., and J. Calvin Davis, M.D., were exhibits H and I respectively), all of which evidence was considered in reaching this final agency decision.

The result of this final agency decision will be the same as that reached by the hearing deputy.

SUMMARY

As the above recital of the record might suggest, the industrial commissioner's file is bulky; however, a brief capitulation should suffice. Claimant was injured on the job on three different occasions, May 22, September 3 and September 4, 1979. On August 28, 1980, the insurance carrier filed a memorandum of agreement for the September 3, 1979 injury. On July 24, 1981, claimant filed an action and was awarded benefits by the hearing deputy as follows:

> [H]ealing period benefits from October 1 through October 15, 1979; March 26 through April 13, 1980; April 15 through April 28, 1980; May 12 through June 30, 1980; and August 1, 1980 through March 12, 1982 [A total of 98 1/7 weeks] at the rate of eighty-eight and 29/100 dollars ($88.29).
>
> ....[S]eventy-five (75) weeks of permanent partial disability at the rate of eight-eight and 29/100 dollars ($88.29).
>
> ....[T]he following bills:
>
> Pharmacy bills - Exhibit E $77.85
> Miscellaneous bills - Exhibit D $277.22
> Medical Expenses - Exhibit B $1,752.40
>
> ....[T]he sum of one thousand one hundred twenty-one and 70/100 dollars ($1,121.70) as mileage expense.

Prior to the award, on June 15, 1982, defendants filed a supplemental claim activity report, of which notice is taken, which showed weekly payments as follows:

Date Disabilities Began Thru Date Disabilities Ended

Began	Ended	Weeks	Days
10-01-79	10-10-79	1	3
3-26-80	4-13-80	2	5
4-15-80	4-28-80	2	
5-12-80	6-30-80	7	1
8-01-80	8-15-80	2	1
8-16-80	7-14-81	47	4
	Total	63	

Weekly benefits paid total 63

Total payments $5,574.83

The supplemental report also showed payments of benefits under §85.27, Code of Iowa, in the amount of $5,187.66.

ISSUE

Defendants state the issue: "Healing period benefits cannot legally be awarded for a period after the claimant has returned to work." Their argument is taken to mean that a claimant cannot lawfully receive benefits for an interrupted healing period. They state, inter alia: "The statute ineluctibly, unequivocally, indisputably, undeniably, indubitibly [sic], unarguably, and clearly provides that healing period benefits end when a claimant returns to work."

APPLICABLE LAW

Section 85.34(1) provides 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 hearing deputy's citation of authorities is adopted. Other propositions of law are discussed below.

ANALYSIS

The Iowa Supreme Court has never ruled on the issue of whether or not a claimant may draw healing period benefits over different periods of time as opposed to one period of time. Defendants are correct, of course, that the statute states that the healing period lasts "until [claimant] has returned to work." Their interpretation, a very literal and narrow one, is that the healing period cannot recommence.

Defendants' theory therefore is that the expression of one (that healing period ends when claimant returns to work) is the exclusion of the other (recommencing the healing period). The Iowa Supreme Court refused to follow that maxim of statutory construction in Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (1982), a case wherein an overpayment of healing period was allowed as a credit against the permanent partial disability even though the statute did not expressly permit such a credit. Here, one can conclude that the legislature did not choose to omit a recommencement of the healing period; it is a question the legislature did not address. Since that maxim does not govern here, one must turn to other methods of interpretation.

The first that comes to mind (and needs no citation of authority) is that the workers' compensation law should be liberally interpreted in favor of the claimant. Only a totally illiberal interpretation would say that a claimant who tries to return to work but fails looses all further healing period benefits. Such an interpretation might ultimately work entirely

against employers if employees began to avoid a return to work for fear of loosing their healing period benefits.

Finally, Professor Larson says "[t]he disability period is not automatically terminated merely because claimant obtains some employment, if maximum recovery had not been achieved at that time." 2 Larson Workmen's Compensation Law, 10-17, 18, §57.12; see also the supplement to that volume, p. 10.

One can olny conclude that defendants' interpretation of the healing period section is more narrow than the overall intention of the legislature in providing such benefits in the first place.

A de novo review of the decision on matters other than the appeal point shows that the outcome reached by the hearing deputy was correct. The findings of fact and conclusions of law will be adopted below.

FINDINGS OF FACT

That on May 22 and September 3 and 4, 1979 claimant was an employee of the Carroll Health Center.

That on May 22, 1979 claimant, while lifting a patient from the toilet at defendant's place of business, injured her back.

That on September 3, 1979, while lifting a patient from the toilet at defendant's place of business, claimant injured her back.

That on September 4, 1979 claimant injured her back in an attempt to break a patient's fall at defendant's place of business.

That claimant was in a period of healing from October 1 through October 15, 1979; March 26 through April 13, 1980; April 15 through April 28, 1980; May 12 through June 30, 1980; and August 1, 1980 through March 12, 1982.

That claimant suffers from chronic intractable low back pain.

That the claimant is credible in her complaints.

That the claimant was not afflicted with this condition prior to the date of her injuries.

That the claimant's complaints of pain are causally related to her injuries at the Carroll Health Center.

That claimant has no particular skills in any field.

That claimant is 50 years of age and a high school graduate with six months training at AIB.

That the applicable rate in this case, based on the record, is $88.29.

CONCLUSIONS OF LAW

That claimant sustained her burden of proof and established that on May 22, September 3 and September 4, 1979 she sustained personal injuries which both arose out of and in the course of her employment with Carroll Health Center.

That claimant sustained her burden of proof and established a causal relationship between those work injuries and her present disability.

That the healing period extends from October 1 through October 15, 1979; March 26 through April 13, 1980; April 15 through April 28, 1980; May 12 through June 30, 1980; and August 1, 1980 through March 12, 1982.

That claimant has sustained an industrial disability of 15 percent of the body as a whole as a result of the work injuries.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant healing period benefits from October 1 through October 15, 1979; March 26 through April 13, 1980; April 15 through April 28, 1980; May 12 through June 30, 1980; and August 1, 1980 through March 12, 1982 at the rate of eighty-eight and 29/100 dollars ($88.29).

That defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability at the rate of eighty-eight and 29/100 dollars ($88.29).

All accrued payments shall be made in a lump sum, and defendants are given credit for all payments heretofore made.

That the defendants shall pay unto claimant the following bills:

Pharmacy bills - Exhibit E	$ 77.85
Miscellaneous bills - Exhibit D	277.22
Medical Expenses - Exhibit B	1,752.40

That defendants shall pay unto claimant the sum of one thousand one hundred twenty-one and 70/100 dollars ($1,121.70) as mileage expense.

That defendants are given credit for benefits previously paid.

That interest shall accrue according to the terms of section 85.30.

That the costs of this proceeding are charged 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 at Des Moines, Iowa this 28thday of December, 1982.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID L. RITTGERS, Claimant, vs. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 472003 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision filed May 4, 1982 wherein claimant was awarded a running healing period and medical expenses for injuries arising out of and in the course of his employment on January 28, 1977 and May 31, 1977.

The above entitled matter is but a portion of a lengthy and complex chain of litigation. A brief capsulization serves to clarify the status of the proceedings. On August 22, 1980, the undersigned filed an appeal decision wherein claimant's healing period was found to have terminated on July 6, 1978. The injuries of January 28, 1977 and May 31, 1977 were found to have resulted in a permanent partial disability of 45 percent. Further, the treatment of Howard E. Johnson, M.D., prior to May 2, 1979 was found to be unauthorized.

On September 11, 1980, claimant sought an enlargement of the above appeal decision. Claimant petitioned for judicial review on September 22, 1980. A second petition in review-reopening was filed by the claimant on September 26, 1980.

In the meantime, claimant and defendants entered into a joint stipulation for a partial commutation which would allow the claimant to undergo fusion surgery by Dr. Johnson. A partial commutation was granted from which defendants appealed. An appeal decision was filed on February 23, 1981 affirming the approval of the commutation.

A third petition for review-reopening was filed by the claimant on February 26, 1981. An order filed March 19, 1981 consolidated that proceeding with the one filed September 26, 1980 to form the present matter.

On May 4, 1982, the deputy filed a proposed decision wherein a new healing period was found to begin on February 20, 1982 and was to run until claimant's recuperation from fusion surgery was complete. Claimant appeals from that proposed decision asserting that the healing period should not have been terminated on July 6, 1978 and at the same time, that the previous finding of 45 percent permanent partial disability should remain intact. Further, claimant reasserts defendants' liability for the treatment provided by Dr. Johnson.

Claimant's petition for judicial review of the August 22, 1980 appeal decision remains pending. A fourth petition for review-reopening was filed by defendants on September 29, 1982.

The record on appeal, as stipulated between the parties, consists of claimant's exhibits 1 through 20 inclusive, defendants' exhibits A through N inclusive; defendants' exhibit AA; the depositions of the claimant, Judith Rittgers, Keith A. Taylor, M.D., Howard E. Johnson, M.D., Donald W. Blair, M.D.; the report of John M. Havlina, Jr., M.D., dated December 17, 1979; the undated report of Leonard E. Alkire, M.D.; the affidavit of defendants' counsel with attached correspondence; a reproduction of a transcript of the deposition of Gene Jackson; medical bills; a list of mileage expenses; and the briefs of all parties on appeal.

ISSUES

The issues for determination on appeal are:

1. Whether claimant is entitled to additional healing period benefits.

2. Whether defendants are liable for medical expenses incurred through the treatment of Dr. Johnson.

3. Whether benefits awarded to the claimant are subject to apportionment.

REVIEW OF THE EVIDENCE

Claimant began work for defendant-employer in 1975 as a package driver. On January 28, 1977, claimant sustained a "slip and fall" injury to his back. Claimant missed only three days of work but continued to complain of pain. He was treated by William L. Reinwasser, M.D., throughout the period. (Defendants' exhibit D) On March 15, 1977 claimant suffered a mild sprain in his work and was again off work for a few days.

On May 31, 1977, claimant reinjured his back while attempting to lift parcels. Claimant was able to work intermittently until August 24, 1977 when he again temporarily strained his back while attempting to lift parcels.

Claimant was hospitalized on September 9, 1977 for a myelogram and foraminotomy at the L-4, L-5 disc space by F. M. Hudson, M.D. Claimant subsequently consulted Donald W. Blair, M.D., who readmitted claimant to hospitalization for another myelogram. Based upon that myelogram, Dr. Hudson performed a repeat hemilaminectomy and foraminotomy on March 24, 1978. Dr. Blair released claimant from further treatment on July 6, 1978 and assessed permanent functional impairment as 15 percent of the body as a whole. (Claimant's ex. 7)

Defendant employer failed to locate alternative work for the claimant. A program of vocational rehabilitation was therefore undertaken with use of state funds. The program placed the claimant in classes designed to upgrade his skills as a commercial pilot. The claimant had only limited success in this program, however, due to continuing physical difficulties and interruptions in funding.

In May of 1979, claimant moved to Boise, Idaho in hope of finding employment in the aviation industry. He returned to Des Moines for a short period to resume the classes he had started.

Claimant indicated that he began to experience increased back discomfort after moving to Idaho. The record does not indicate whether there was any incident related to claimant's increased discomfort. Claimant testified that friends referred him to Howard E. Johnson, M.D., for treatment. Apparently claimant had not been under treatment since being discharged by Dr. Blair on July 6, 1978.

Dr. Johnson first examined the claimant on August 29, 1979. In his report of September 19, 1979. Dr. Johnson noted limited function on testing. X-ray films reportedly showed "early spur formation" indicating a recent aggravation of his lumbar injuries. Dr. Johnson prescribed that the claimant resume wearing a back brace similar to that prescribed by Dr. Blair. (Cl. ex. 18) Subsequent examinations revealed that wearing of the brace decreased complaints of pain. Dr. Johnson therefore undertook to fit the claimant with a partial body cast in an effort to determine if fusion surgery was indicated. Favorable results from wearing the cast led Dr. Johnson to suggest the fusion procedure. Dr. Johnson was of the opinion that claimant's condition would continue to degenerate without the surgery. (Cl. ex. 19)

The defendants referred the claimant to Keith A. Taylor, M.D., for examination on November 30, 1979. In his report of December 18, 1979, Dr. Taylor writes:

> I believe that Mr. Rittgers had findings and complaints consistent with some residual peripheral nerve entrapment most likely as a result of scarring secondary to his injury and subsequent surgery on two occasions. The complaints are in both lower extremities of a generalized nature with no localizing symptoms. He is somewhat improved with the back brace. He feels that with the degree of discomfort that he has now, he could function in light occupational endeavors, such as a instrument instructor in aviation, etc. I think it is unlikely that any further surgical intervention will significantly change or alter his present condition and course. I would anticipate that he will improve to some degree over an ensuing period of time but will not be free of pain. I believe that he should learn to function with the present condition of his back. He should be encouraged to continue retraining. He has previously been rated with a permanent physical impairment of 15 percent as compared to loss of the whole man. I believe his condition has not changed since that rating was given. I recommended that Mr. Rittgers also have a consultation with Dr. Jack Havlina, neurosurgeon, for additional evaluation of his neurologic status and considerations for myelography and his findings as to the need for surgical exploration. I will let you know as to what Dr. Havlina's findings were with a copy of his report. (Def. ex. AA)

Dr. Taylor did not instruct the claimant to return for further examination or treatment.

Claimant was referred to John M. Havlina, Jr., M.D., for neurological evaluation. In his report of December 17, 1979, Dr. Havlina suggested repeat myelography but advised against further surgery.

Claimant was seen by Leonard E. Alkire, M.D., on January 4, 1980. In his undated report, Dr. Alkire writes in part:

> Diagnosis is felt to be post-lumbar laminectomy low back pain syndrome. There does not appear to be gross neurologic deficits relative to lower extremities. Thus the functional disability is based to a high degree on the presence of a good deal of post-operative pain which has not disappeared.
>
> Permanent impairment is felt to be 15% of the whole man.
>
> It would appear that this man is not a candidate for further low spinal surgery at this time. Management should be on the basis of an intense rehabilitative program with probable in-patient attendance at a "low back school" and rehabilitation center.
>
> In terms of functional ability this man shows considerable dysfunction in the area of the low spine. At the present time he is under treatment in a body jacket and therefore would not be considered employable. Certainly those vocations that would require carryings, prolonged standing, a good deal of walking, climbing, running, jumping or working in tight enclosures and/or stooping and squatting would not seem feasible for this man in the near future and probably not even in the distant future after completion of a treatment program. (Taylor dep. ex. A)

The defendants had not referred claimant to Dr. Johnson, nor had they authorized his treatment. Based upon the above three reports, the defendants declined to fund the fusion surgery proposed by Dr. Johnson.

As was previously noted, the first hearing in review-reopening was held February 20, 1979 with the case fully submitted May 2, 1979. In the appeal decision by the undersigned filed August 22, 1980, claimant was found 45 percent permanently disabled. Further, the treatment of Dr. Johnson prior to May 2, 1979 was found to be unauthorized under the provisions of Iowa Code section 85.27.

Claimant testified that he continued to wear a body cast in lieu of surgery until August of 1980. On December 17, 1980, an order of partial commutation on the previous award was entered. Claimant sought the partial commutation to finance the fusion surgery suggested by Dr. Johnson.

Claimant was flown back to Des Moines from Idaho in February of 1981 for further examination.

Dr. Blair examined the claimant on February 27, 1981. Dr. Blair found that claimant's symptoms were somewhat more pronounced when claimant was not wearing the cast or brace. Dr. Blair testified as to his conclusions at that time:

> Q. Did you advise or recommend to Mr. Rittgers that he obtain a fusion?
>
> A. My conclusion was that I recommended that a repeat myelogram be considered, and probable additional surgery, which would include a fusion, because of the benefit which had been obtained by previous immobilization. Because of this, I felt that a spinal fusion would be of benefit to him. (Blair dep., p. 26)

Dr. Blair opined that claimant had undergone a change of condition since his examination of July 6, 1978. (Blair dep., p. 87) He stated, however, that an individual with claimant's operative history could degenerate with minimal strain or without any trauma at all. (Blair dep., p. 78)

Joe P. Fellows, M.D., examined the claimant on February 20, 1981. Dr. Fellows also concluded that given the improvement brought on by body cast immobilization and claimant's continued degeneration, the fusion surgery suggested by Dr. Johnson was advisable. Defendants continued to decline authorization for Dr. Johnson's services.

Nonetheless, spinal fusion surgery was carried out by Dr. Johnson on March 3, 1981. Dr. Johnson testified that as of April 29, 1981, the fusion was healing well and by June 9, 1981,

claimant was essentially painfree. (Johnson dep., pp. 24-35, 44-45) On August 4, 1981, claimant's spinal fusion was found to be solid. (Johnson dep., p. 45)

Dr. Blair indicated that claimant's recuperation from the fusion would take at least a year and that the degree of permanent functional impairment could not be determined until then. (Johnson dep., pp. 54-55) The claimant testified that Dr. Blair had given a release, but that it was for "academic purposes" such that he would be eligible to participate in a CETA job training program.

Finally, Dr. Johnson opined that Dr. Blair's assessment of maximum recuperation on July 6, 1978 was not in error based upon the information available at that time. Dr. Johnson testified on direct examination:

> Q. And because of those findings, might Dr. Blair or others might feel that the recovery or recuperation period from those injuries had occurred by that time?
>
> A. It is very possible, yes.
>
> Q. And we lawyers refer to the foreseeability test and the hindsight test. And we have found that the hindsight test is many times more accurate than the foreseeability test.
>
> And if we could all look backwards, you know, at the time it would be nice. But we can't.
>
> Using the hindsight test, now that you have taken care of this patient for these many months, since February of 1979, and having examined all the documents in connection with his prior treatment, do you feel there is really any way that he could have foretold with any degree of certainty that he was in error, that recovery had not taken place and that he had not stabilized?
>
> ....
>
> THE WITNESS: I don't know of any way that he can look forward and all you can do is make a judgment to your best ability with information you have at the time that you see the patient and write the report.
>
> And I think we have discussed this before. The majority of the patients, once they have reached stationary, go ahead and progress and heal and do fine. It is the small numbers that create the ongoing chronic problems.
>
> Q. BY MR. HUEBNER: If you reach a stationary or static condition for as long as maybe six or eight months, you would be encouraged then, I suppose, as a doctor to think maybe things had stabilized and the recovery period had ended.
>
> A. Yes.
>
> Q. But is there anything -- in other words, there is nothing you can do to determine or discover what is going to happen in cases of this kind and even the next day. Is that fair to say?
>
> A. If anyone could develop that ability, it would be fantastic, yes. (Johnson dep., pp. 65-66)

Since August 4, 1981, claimant has continued under the care of Dr. Johnson and testifies to feeling much better than before the fusion surgery. Claimant has also had neurological examination since his surgery for vision and hearing problems apparently unrelated to his industrial injuries.

APPLICABLE LAW

The claimant has the burden of establishing that his injury is causally related to 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, 19 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).

As there has been a prior decision in review-reopening in this matter, claimant has the burden of proving by a preponderance of the evidence that increased incapacity is a proximate result of the original injury which entitles him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 457 (Iowa 1969). Wagner v. Otis Radio & Electric Co., 254 Iowa 990, 993, 119 N.W.2d 751 (1963).

In Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968) the court stated in part:

> 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 ommission due to mistake, at time of any prior settlement or award.

Iowa Code section 85.27 provides in part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care 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.

Iowa Code section 85.34(1) provides:

> Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first. (Emphasis added.)

Iowa Industrial Commissioner Rule 500-8.3 provides:

> 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. (Emphasis added.)

ANALYSIS

In the proposed decision of May 4, 1982, the deputy finds that claimant underwent a new healing period on February 20, 1981, the date of Dr. Fellows' examination. The defendants do not dispute the payment of these additional benefits. In their brief on appeal, defendants state the main issue remaining in dispute:

> The claimant is not entitled to healing period benefits between July 6, 1978 to February 20, 1981. The hearing officer in this matter determined that there was sufficient evidence in the record to establish temporary total disability [sic] had resumed on February 20, 1982 [sic] which related to his injury of May 31, 1977 and the aggravation of August 24, 1977. The defendants have in fact recognized this disability prior to any ruling by the Industrial Commission [sic] and had commenced paying temporary total disability benefits prior to this time. The real issue is whether or not claimant was entitled to healing period benefits between July 6, 1978 and the date of surgery on March 3, 1981.

Claimant asserts that he is entitled to healing period benefits between July 6, 1978 and March 3, 1981 because Dr. Blair "mistakenly" released him from treatment on the former date. Claimant contends that information is now available which was not available at the time of the original hearing. Claimant therefore asks this agency to reconsider its prior determination as to healing period, based upon Gosek, but also to leave intact the prior finding of permanent partial disability.

The record in this matter is clear that Dr. Blair made a proper determination on July 6, 1978, based upon the information then available. The fact that claimant's condition worsened after that time does not indicate that Dr. Blair's evaluation was incorrect or in ignorance of information available at that time. Dr. Blair indicated that an individual with claimant's history could experience aggravation of their injury with little or no outside influence. As the testimony of Dr. Johnson points out, the fact that hindsight is better than foresight does not indicate that Dr. Blair was in error.

While claimant's condition worsened around the time of his move to Idaho, there is no medical evidence either to explain this sudden degeneration or to reassess his functional impairment. The testimony of Dr. Johnson, however, does establish that claimant was totally disabled from March 3, 1981, the date of his fusion surgery, and that this total disability would likely run until approximately March 3, 1982 at which time the extent of permanent partial disability could be assessed.

The record indicates that claimant's condition has probably improved since the surgery of March 3, 1981. The factors which led to the prior assessment of industrial disability have been changed due to the fusion surgery. There is, however, no current assessment of permanent functional impairment in the record upon which an altered of permanent industrial disability may be based. The proposed decision of the deputy was based upon medical evidence available in August of 1981. Any permanent industrial disability which exists after the surgery of March 3, 1981 will have to be determined at another time based upon medical evidence available when claimant's condition has stabilized.

The evidence indicates claimant's post operative condition should run for one year from the date of surgery and therefore temporary total disability benefits will be allowed until March 3, 1982. In the event additional permanent partial disability is found to exist, temporary total benefits can be converted to healing period.

It is remembered that the treatment provided by Dr. Johnson was previously found to be unauthorized. As of that time, there was no evidence to suggest that Dr. Johnson had performed services more effectively than the medical care that had been provided by the defendants. However, the evidence now in the record reveals that claimant's condition continues to improve because of the surgery performed by Dr. Johnson. Such an improvement in claimant's condition not only helps the claimant, but also provides the possibility that defendants' ultimate liability may be mitigated. Although defendants are entitled to choose the claimant's medical care provider, it appears questionable that the claimant's condition would have improved as it did had defendants continued control of claimant's care. Defendants had ceased providing care for the claimant subsequent to the first proceeding. Examination by doctors of defendants' choice currently concurs with the care provided by Dr. Johnson. The care provided to claimant by Dr. Johnson proved to be reasonable and necessary for the treatment of claimant's employment related injuries as contemplated by Iowa Code section 85.27. The expenses involved in the services of Dr. Johnson and the surgery of March 3, 1981 should properly be paid for by the defendants.

Finally, claimant seeks an apportionment of benefits previously awarded.

In the proposed decision filed October 10, 1979, the deputy found in part:

> Claimant has not been gainfully employed since the initial injury. The abortive attempt to resume employment activities on August 24, 1977 is found to be a mere aggravation of the condition present as the result of the May, 1977 incident, and not a new occurrence as urged by the claimant.

The deputy's refusal to find the August 24, 1977 incident compensable is adopted and remains undisturbed.

FINDINGS OF FACT

1. That claimant sustained admitted industrial injuries on January 28, 1977 and May 31, 1977.

2. That claimant received no compensable injury on August 24, 1977.

3. That claimant was 15 percent functionally disabled after two surgical procedures and that his condition degenerated around the time he moved to Idaho in May of 1979.

4. That Dr. Johnson has provided claimant with the only treatment for his lumbar condition since May 2, 1979.

5. That claimant underwent fusion surgery on March 3, 1981 which was intended to correct lumbar difficulties.

6. That the care provided by Dr. Johnson was reasonable and necessary to treat claimant's injuries.

7. That claimant had not been released for work or been found to have reached maximum medical recuperation from the May 3, 1981 surgery as of the time of the hearing before the deputy but maximum medical recuperation was anticipated to be accomplished on May 3, 1982.

CONCLUSIONS OF LAW

That the expenses involved in the fusion surgery and in Dr. Johnson's treatment after May 2, 1979 were reasonable and necessary for the treatment of claimant's industrial injuries of January 28, 1977 and May 31, 1977.

That as a result of fusion surgery performed on March 3, 1981, claimant became temporarily totally disabled.

That claimant is entitled to temporary total disability benefits until March 3, 1982.

That benefits are payable at the rate of $174.00 per week.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision of May 4, 1982 are proper as modified.

THEREFORE, it is ordered:

That defendants pay the claimant temporary total disability beginning March 3, 1981 at the rate of one hundred seventy-four dollars ($174.00) per week until March 3, 1982 together with statutory interest from the date due as contemplated by Iowa Code section 85.30.

That defendants pay the claimant expenses incidental to medical treatment given by Dr. Johnson including the expenses incidental to the fusion surgery of March 3, 1981 as contemplated by Iowa Code section 85.27.

That costs of these proceedings are charged to defendants pursuant to Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 19th day of October, 1982.

Appealed to District Court;
Remanded for Settlement

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MATT W. SANDERS,	:	
Claimant,	:	File No. 671913
vs.	:	A R B I T R A T I O N
OSCAR MAYER & CO.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Matt W. Sanders, Jr., the claimant, against his self-insured employer, Oscar Mayer & Co., to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he allegedly discovered May 19, 1981. This matter came on for hearing before the undersigned at the Muscatine County Courthouse in Muscatine, Iowa on March 24, 1982. The record was considered fully submitted on April 1, 1982.

Defendant has made no official filings regarding the alleged injury.

The record consists of the testimony of the claimant; the testimony of Vernon E. Keller; claimant's exhibits 1-5, letters and clinical notes from John E. Sinning, Jr., M.D.; defendant's exhibit A, copy of Dr. Sinning's June 25, 1979 deposition; defendant's exhibit C, defendant's illness and accident disability report signed by Dr. Sinning and dated March 23, 1979; defendant's exhibit D, a surgeon's report dated October 25, 1978; defendant's exhibit E (including updated records filed April 1, 1982), defendant's first aid and time off records regarding the claimant; defendant's exhibit F, summary of sick leave and medical benefits paid for current claim; defendant's exhibit G, duplicate of F; claimant's discovery deposition; and Dr. Sinning's March 2, 1982 deposition. Defendant's objection to claimant's exhibit 6 was sustained. Defendant did not offer exhibit B. Defendant asked that official notice be taken of the prior Code section 85.35 settlement between the parties and of all records material to that earlier case.

ISSUES

The issues to be determined include whether claimant sustained an injury in the course of and arising out of his employment separate from the subject matter of the 1979 compromise settlement; whether there is a causal connection between any such separate injury and claimant's present disability; the nature and extent of that disability; whether claimant's action is barred by operation of Code section 85.26; and whether defendant is entitled to credit for benefits paid, in accordance with Code section 85.38. At the time of the hearing the parties stipulated that the applicable rate of compensation for any new

injury would be $248.74.

RECITATION OF THE EVIDENCE

On April 12, 1979 claimant filed an application in arbitration seeking benefits for an alleged injury of August 23, 1978. (File 535022.) Claimant further alleged that the injury occurred "over a period of time, working with much larger weight hams" and that the injury affected or disabled his "right shoulder, elbow, and hand" from "12-19-78 to unknown." On October 24, 1979 the parties filed a joint application for approval of compromise settlement wherein defendant offered to pay $6000 in a lump sum to settle all claims claimant alleged he had against them for his condition of anterior impingement syndrome. The Code section 85.35 settlement was approved and claimant filed a dismissal with prejudice. (That the dismissal was actually filed before the approval possibly is attributable to time constraints and the mail.)

In medical reports and clinical notes attached to the application for settlement, John E. Sinning, Jr., M.D., orthopedic surgeon, related that claimant began suffering from anterior impingement syndrome, "a mechanical problem in which the moving parts of the shoulder impinge on each other with repeated forward motions," in the summer of 1978. On March 6, 1979 Dr. Sinning performed a partial acromionectomy and incision of the coracoacromial ligament in the front of the right shoulder. Bursal thickening beneath the ligament was excised. Exploration of the shoulder joint revealed no sign of derangement of the interior of the joint. Also attached to the application was the following clinical note from the University of Iowa Hospitals and Clinics dated June 6, 1979:

> Mr. Sanders is a 30-year-old male who is referred to us from Dr. Sinning for our evaluation of his right shoulder pain. Patient began having snapping in his right shoulder while at work. His work is lifting hams. He noticed the pain when he would lift across his body to the left then he'd get the snapping. He saw Dr. Sinning for this who felt that he had impingement syndrome and did acromioplasty in March of 1979. This has relieved the symptoms of the snapping. However, he is having persistent pain posteriorly in the shoulder around the area of the posterior fibers of the deltoid. He has returned to work with a 30 lb. weight restriction but has pain when he does try to reach across his body as before, especially while lifting weights or having his muscle tense. He apparently has tried TNS, ultrasound, anti-inflammatory agents without apparent relief.
>
> Physical examination: Patient has full range of motion of the right shoulder. Muscle strength is intact. He has very mild tenderness along the area of the incision anteriorly, and he has an area of tenderness of the posterior fibers of the deltoid. He has giving away of his shoulder when attempting to resist adduction of the shoulders. Neurologic examination is normal in the upper extremities.
>
> X-rays, AP internal and external rotation views of the right shoulder reveal mild AC joint degenerative changes. No other abnormalities.
>
> Impression and plan: The patient was seen with Dr. Cooper, and we feel that the patient's pain pattern at this time is most compatible with chronic deltoid muscle strain. Dr. Cooper would like to talk to Dr. Sinning personally before recommending further therapy and he will be in contact by phone. Patient was given a prn return to our clinic.

During his deposition on June 25, 1979, Dr. Sinning noted that the claimant was treated for a wrist injury from March to August of 1976 and that the claimant verbalized complaints compatible with epicondylitis on the right from August 23, 1978 until January 11, 1979, at which time:

> ...[H]e still had the problem of numbness in the forearm, but he said the problem was really his shoulder, and he outlined the history of this shoulder problem. This is his right shoulder, and he said that he became aware the previous summer, that is, the summer of 1978, with a feeling in the shoulder that it wasn't holding his arm properly, and he described that as a feeling in the pivot point of the shoulder so that when he would hold his arm outstretched or reach across his body, that the shoulder wasn't strong enough to hold up what he was holding in his hand. He said sometimes there was some pain, but usually it was a feeling of weakness. He reported that, ordinarily, he could hold his arm outstretched holding a ham in his hand all day, but that at this point that I was seeing him, he could hardly hold a few pounds in his hand out for more than a minute. (Sinning 1979 deposition, p. 8.)

In supporting his conclusion that the anterior impingement syndrome was related to claimant's work, Dr. Sinning testified:

> Mr. Sanders describes his work as a ham boner in the use of his right arm as requiring that he reach his right arm across his body, elbow outstretched, so that his right hand reaches beyond his left shoulder, and then that he bring his arm back across in front of his body and that he at some point in that maneuver has his right arm then extended away from his body at shoulder level in the same plane as his body. That is, the hand is not outstretched in front but is outstretched on the side. Now, the pain problem seems to localize in the front of the shoulder joint. That is in the same area that the head of the humerous or the upper part of the shoulder bone is impinging against the ligament that makes the front of the shoulder joint, and in a mechanical way, that motion of reaching across the body and bringing the arm then across in front of the body puts pressure along the front of the shoulder joint in the area of the ligament of the front of the shoulder. That is where he was hurting. The situation here of anterior impingement gets its name from that situation of the bone, the moving bone in the shoulder impinging againt a ligament and a stationary bone.
>
> ....
>
> I am not clear whether he lifts anything with the hand outstretched from him, but he is holding weight as he reaches across his left side and comes across, and that seems to be the critical motion in which the humeral head or upper part of the arm bone is impinging against the front of the scapula or the acromion.
>
> (Sinning 1979 depo, pp. 12-13. Dr. Sinning indicated that the company illness and accident report signed by him [defendant's exhibit C] was incorrect insofar as it indicated the matter was not an occupational injury.)

At the time of his first deposition, Dr. Sinning anticipated claimant's impairment of the right arm would be 10 percent or less. He alluded to the possibility of some functional overlay and reported that he had arranged for claimant to see Dr. Campbell, a psychiatrist, on June 28, 1979. Dr. Sinning further testified that as of May 11, 1979 claimant stated the front of the shoulder felt good and was able to reach overhead and had good strength as he was reaching towards the opposite shoulder. Accordingly, he arranged for claimant to return to work. (The exact date is unknown. Defendant's first aid records cover a time period from March 1969 to December 1978 and the employee attendance records covered only 1980 and 1981. [Defendant's exhibit E.] Claimant thought he returned to work in mid 1979.) However, Dr. Sinning did not release the claimant from his care at that time because the claimant complained of some pain over the back of the shoulder.

According to clinical notes attached to the application for settlement, claimant was working at 170 percent capacity and taking six Tylenol #3 tablets per day for pain as of July 5, 1979. Dr. Sinning wrote "[h]e does not have comfortable reaching to the opposite shoulder and does splint a bit as he comes down from the overhead position. This is flattening of the anterior portion of deltoid in front of the acromion." On September 10, 1979 claimant was working full-time without a weight limit. He regained full range of shoulder motion but continued taking the same amount of pain medication per day. Reaching across the opposite shoulder and across the lower portion of the shoulder in the area of the teres minor caused pain. Pressure and resistance at a pulled back position generated discomfort in the muscle. Overhead rotational motion and adduction did not hurt him.

When deposed on March 2, 1982, Dr. Sinning testified that he continued to treat the claimant for complaints of right shoulder pain after September 1979. He related that an arthrogram performed at the University of Iowa Hospitals and Clinics on August 26, 1980 revealed a definite tear in the shoulder tendon in the general area where surgery was performed in March 1979. He further testified:

> ....Mr. Sanders' operation was generally over the front of the shoulder, in the prominence of the shoulder that you feel as you reach to your opposite shoulder.
>
> Q. You mean, the prominence of the humerus?
>
> A. Yes, anterior or front of the shoulder. The tendons of the shoulder which show the tear are in that same area. They change according to whether the arm is turned in or turned out. With the arm turned in, that would bring the area of the tear to the front of the shoulder. As the arm is turned out, the area of the tear moves backward.
>
> Q. Was that tear there when you performed this first surgery?
>
> A. I answer the question by saying no because I looked for just such a tear. That is certainly not to say that it wouldn't have been there.
>
> Q. It could have been there?
>
> A. But at least it was looked for.
>
> Q. It could have been there?
>
> A. It could have been there.
>
> Q. Could it have been something which was developing in that area?
>
> A. Yes.
>
> Q. Before the first sugery?
>
> A. I think something that was developing is probably more to the point, because the tear of the rotator cuff tear -- and that is the area we are talking about -- was described as a very small tear, and, in fact, I reviewed the X-ray that was taken at University Hospitals, and it is a very small tear. It was sufficiently small that the

physician seeing Mr. Sanders did not recommend that he have surgery to fix it.

(Sinning 1982 deposition, pp. 8-9.)

According to Dr. Sinning's office notes, he saw claimant on October 10, 1980 for the onset of left shoulder pain referrable to lifting heavier hams at work a week earlier. Dr. Sinning wrote that claimant "no longer has the area of pain which I localized on the right at the posterior margin of the scapula along the teres." His examination revealed normal range of motion, no splinting and ability to bring both shoulders overhead. He commented: "The only difference is the slightly diminished strength on the right compared to the left, with the arm in the mid range of abduction." (Claimant's exhibit 3, p. 1.) Yet, according to defendant's records, claimant apparently was off work for a sore shoulder from October 13, 1980 to November 21, 1980. On October 30, 1980, Dr. Sinning advised the claimant of the arthrogram results and recommended a nautalis exercise program. Claimant thought additional time off work would improve his condition.

Dr. Sinning testified that since claimant continued to complain of right shoulder pain, another arthrogram was conducted in March of 1981. This time the tear in the tendon was sizeable. Accordingly, claimant was hospitalized in April of 1981 for surgical repair of "a rupture of the supraspinatus portion of the rotation cuff." (Claimant's exhibit 4.) Dr. Sinning initially anticipated that claimant would be off work three months following surgery. (Claimant's exhibit 5.)

Dr. Sinning reported to defendant on June 17, 1981 that claimant had gained full range of motion of his shoulder and was participating in a program of strength restoring exercises. He then opined:

> I think it is clear that the rotator cuff tear was not present at the time of his original surgery as documented by the preoperative arthrogram and the intrasurgical inspection. The rotator cuff tear was first noted by arthrogram more than a year later with documentation of progression of that tear on the subsequent arthrogram. There does indeed seem to be a new problem superimposed on the old difficulty.
>
> (Claimant's exhibit 4. Dr. Sinning began the letter noting that claimant had asked him to clarify the situation to defendant. Claimant testified that he asked Dr. Sinning whether he suffered a new injury in light of his attorney's explanation about the ramifications of the settlement.)

Dr. Sinning released the claimant to return to work in September of 1981 on a restricted basis -- no repeated rotational shoulder movements and no work above waistline level. (At that time he also advised the claimant that an arthrogram performed in August of 1981 on the left shoulder was normal.) However, defendant employer had no position available that was suitable to claimant's limitations. Since claimant had not been given a release by Dr. Sinning he was denied unemployment benefits.

In office notes for November 12, 1981, Dr. Sinning observed that claimant's mid range of abduction "is perhaps a little weak, at least he can't sustain strength as he once could. External rotation is a little weak but there is no panic sign on external rotation." (Claimant's exhibit 2.) On November 30, 1981 Dr. Sinning advised claimant's counsel that claimant's right shoulder problem was work related, that claimant had a 20 percent impairment of the right upper extremity, that the only recommended further treatment was "an active assistive exercise program to maximize recovery," and that claimant was "close to a point of maximum recovery and as such will be returned to work on a full duty basis although his impairment of function may dictate some modification in work possibilities." (Claimant's exhibit 1.)

Regarding claimant's recovery, Dr. Sinning testified:

> Generally, strength continued to improve, but he continued to have some problems with strength and discomfort in bringing the arm up above the shoulder-high position.
>
> In an effort to make that evaluation as exact as possible, he was evaluated with one of the muscle testing machines at Americana Extended Care Facility, and their physical therapy department. And we used that evaluation as a means of quantitating where he had strength and where he had weakness.
>
> So finally, I would say that Mr. Sanders regained good motion in his shoulder and control, but continues to have weakness in the arm above the shoulder level. And with this weakness, he splints the shoulder joint; that is, he overuses the shoulder blade to chest joint as a means of protecting the motion within the true shoulder joint.
>
> (Sinning 1982 deposition, p. 13. Claimant's exhibit 2 suggests Dr. Sinning sent the claimant to Americana in November 1981.)

While Dr. Sinning wished the claimant would attempt ham boning again just to see if claimant could do it, he conceded he did not think claimant would be able to keep up with the other boners.

Dr. Sinning further testified that his impairment rating was based on the AMA Guides and included the impairment attributable to the anterior impingement syndrome. (Dr. Sinning subsequently agreed that the entire 20 percent impairment was attributable to the rotator cuff tear. [Contrast Sinning 1982 deposition, p. 19 against pp. 25-26.]) Based on Dr. Campbell's consultation, Dr. Sinning felt that there were some non-significant functional aspects to claimant's pain.

Dr. Sinning was questioned at length about the onset and cause of the supraspinatus tear:

(By defense counsel)

Q. Would it be fair to say, Dr. Sinning, that whether or not the tear was there with a certainty, when you operated on March 6, 1979, the weakness that permitted the development of the tear was at least there at that time and had been developing probably for some time?

A. That is a very hard question to answer.

Q. Okay. Phrase it another way for me then.

A. It is a hard question to answer because tears in the rotator cuff occur presumably for two reasons: one is the sudden stress on the tendon that causes it to tear apart.

Q. A sudden trauma?

A. A sudden trauma, a fall or a jerk. And a second way, by continued accumulated stress and what you might call an overuse type of situation in which a weak spot has developed and is continually aggravated by some working maneuver.

Q. Isn't that what you testified to in your first deposition of this man's continued use of his arm and shoulder in a certain way was creating the shoulder problems?

A. Yes.

Q. And that then developed ultimately into a rotator tear; is that correct?

A. Yes.

Q. When you performed your first surgery in March of 1979, I think your operative notes, as I recall, in part, showed that the shoulder was normal. Can you find those notes just briefly?

A. Sure.

Q. Or do you recall?

A. Let me look at that note. I'm looking at the notes from the surgery on March 6, 1979. Two things are significant. One is the note about some bursal thickening beneath the ligament is excised. That is a reference to the point of impingement between the tuberosity of the humerus and the ligament that impinges against the greater tuberosity.

So in between those two areas, the tissue had thickened as a sign of the irritation that was going on.

Q. That is the bursitis?

A. That is the bursitis. And then the second thing that is significant is the tendon looked normal from the outside, and then from the inside, that was the exploration to see if there was a tear that needed to be fixed.

Q. And you didn't find any?

A. That I could not find, that is right.

....

Q. Doctor, have you seen any other cases of rotator cuff tear connected in any manner with this ham boning operation at Oscar Mayer?

A. No.

Q. Have you seen any other cases of rotator cuff tear -- if I am using -- the tear of the rotator cuff, from continued usage of the patient's shoulder?

A. That is a really hard question --

Q. I mean, in your own practice.

A. I recognize that, and that is a very hard question to answer, first, because of my memory, and secondly, because there is most often a combination of a work environment that requires repeated special uses of the shoulder that put a stress on the shoulder. And then the person most often comes to see me following what is considered a precipitating event, something that makes the shoulder worse.

My overall view of that sequence is that the final event that brings them to my office is often inconsequential and that it is the accumulation of use rather than the minor event that is the cause.

(Sinning 1982 deposition, pp. 10-11 and pp. 17-18.)

(By claimant's counsel)

Q. (Quoting the above set forth paragraph from Dr. Sinning's June 17, 1981 letter to defendant) Do you agree or disagree with that statement?

A. I agree.

Q. Do you have an opinion whether the increased tear was work related -- and I am referring here to the fact, Doctor, that at first, a small tear was detected and then it had been enlarged subsequently?

A. Yes. I think it's aggravated by the type of work that he does.

Q. Are you testifying then, Doctor, that the increase in the tear was caused by his ham boning?

A. I believe so.

(Sinning 1982 deposition, p. 23.)

(By defense counsel)

Q. The whole problem has always been in the upper right shoulder, the impingement, the rotator cuff, the bursitis and everything; is that right?

A. Yes.

Q. And it is employment connected?

A. Yes.

(Sinning 1982 deposition, p. 28.)

Dr. Sinning reported that since claimant had been suffering from deQuervains disease, continual inflammation of the cover of the tendon at the radial side of the wrist, for some time prior to the April 1981 surgery, he went ahead and released the tendon at the time he repaired the rotator cuff tear. With regard to whether the wrist problem arose out of claimant's work, Dr. Sinning testified:

> A. I have two opinions about that. The first is that I cannot pin it down one way or the other. If I were to perhaps speculate, I would speculate more in the area of possibility than probability, and I would probably lean away from it being work related only in terms of it being a sufficiently vague and migrating symptom, that it is too difficult to pin down to the work situation.
>
> Q. What about his work as a ham boner? Would it aggravate that wrist condition?
>
> A. There is no question that whatever condition might have existed in the wrist that was causing him trouble or was a mechanical strain, working as a ham boner would aggravate that.
>
> (Sinning 1982 deposition, page 22.)

Dr. Sinning explained that the disease and subsequent surgery resulted in no permanent impairment.

Claimant's testimony regarding the work he performed as a ham boner was more detailed but consistent with the history he gave to Dr. Sinning. Claimant reported that he continued to work after the settlement in 1979 and that he was able to perform his job duties. (During his deposition on July 31, 1981, claimant testified he never again had pain in the front of the shoulder as he did prior to the first surgery.) Claimant stated he first noticed increased right shoulder pain in February of 1980 when handling hams. (Claimant's deposition testimony suggests he first noticed the increase in late 1979.) He recalled that the discomfort became so intense in the fall of 1980 that he was unable to meet daily quotas and missed a number of work days. (Defendant's exhibit E indicates claimant was paid sick leave for two days in July, four days in August, six days in September, 30 1/2 days in October and November and 2 1/2 days in December [for complaint of sore shoulder].) Claimant testified that his problems continued into 1981 -- he was unable to meet the standard and had trouble lifting the hams. (Defendant's exhibit E reveals claimant was paid sick leave for twelve days in January, two days in February, three days in March and from April 9 through July 15, 1981 [for complaint of sore shoulder].)

Claimant testified that when Dr. Sanders released him to return to light duty work in the fall of 1981, he contacted Vernon E. Keller, the safety manager, about an appropriate job. According to the claimant, Mr. Keller said he would check into the matter, yet, did not do so and did not return claimant's calls. Claimant emphasized that he is willing to do light duty work and that he performed cleanup work after the first surgery. Claimant was under the impression that light duty work was available. Claimant was not aware of Dr. Sinning's suggestion that he attempt to return to work ham boning. Claimant doubted he could maintain the higher standard and was fearful of harming his left shoulder which has caused him some discomfort similar to the right arm condition. Claimant testified the pain in the right shoulder includes and extends beyond the area of the first surgery. Certain motions such as wiping a counter cause him discomfort in that shoulder. If he rolls over on that shoulder in his sleep, he will awake with pain. Claimant disputed that he lifts more than 2 1/2 pounds at home or has ever lifted weights except those prescribed for physical therapy.

Mr. Keller, defendant's safety security director, testified that he has handled claimant's case from its inception and thought the special case settlement was to conclude the shoulder claim forever. He relied in part on defendant's exhibit's C for his conclusion that the shoulder problem was not work related. Mr. Keller further testified that no work suitable to claimant's physical limitations was currently available. He observed that defendant's usual work force of 1700 employees had been decreased to 750 over the past year. According to Mr. Keller, claimant had received all of his accrued sick leave, but if claimant returned to work, his sick leave would be replenished by two weeks for every year of service.

Claimant is 34 years old, completed high school and three months of chiropractic training (curtailed due to lack of funds) and has a work history that includes six months running a gas station, one year as a common maintenance mechanic at the arsenal, and one year working for a car dealership. As of March 1982, claimant had been employed by defendant for fourteen years. Most of that time claimant was assigned to ham boning. (During his deposition, claimant testified that he also worked about seven weeks in 1980 at an extra part-time job in a meat market cleaning the floors and stocking the counter.) Claimant has not returned to work since April of 1981.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury 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 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.
>
> ....
>
> 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 claimant has the burden of proving by a preponderance of the evidence that the alleged injury and disability are causally related. 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 (1955). 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, 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, 247 Iowa 691, 73 N.W.2d 732 (1955). In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. Sondag, 220 N.W.2d 903 (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. 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).

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, 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 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 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.

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. McSpadden, 288 N.W.2d 181.

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. McSpadden, 288 N.W.2d 181.

Section 85.34(1), as clarified by the 69th General Assembly, 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 injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

ANALYSIS

Claimant has sustained his burden of proving that he suffered an injury -- a rupture of the supraspinatus portion of the rotator cuff -- in the course of and arising out of his employment as a ham boner at some point after he returned to work in mid 1979. Dr. Sinning's written conclusion that the rotator cuff tear was "superimposed" upon the anterior impingement syndrome is founded on the fact that no tear was discovered prior to or at the time of surgery. Dr. Sinning's acknowledgement that a tear might have been present at the time of the first surgery was not based on any degree of medical certainty. Furthermore, he verified that continued ham boning would have materially aggravated the small tear to the point where it became disabling. The theory that the tendon tear developed after and from claimant's return to ham boning is supported by claimant's testimony and Dr. Sinning's notes and testimony which reflect that the pain claimant experienced in late 1979 was in a somewhat different area. That Dr. Sinning continued to treat the claimant for shoulder pain is mentioned in his testimony but is not supported by reference to specific visits after September 1979. Likewise, defendant offered no records showing claimant continued to miss time off work for his shoulder after mid 1979 and before 1980. The record viewed as a whole supports finding that the rotator cuff tear was directly traceable to the claimant's work and not to the anterior impingement syndrome.

Defendant attempts to undermine Dr. Sinning's uncontroverted opinion by suggesting that the syndrome weakened the shoulder structure and thereby predisposed the claimant to incurring a rotator cuff tear. At best the anterior impingement syndrome, as corrected by surgery, might be considered a preexisting condition. However, the weight of the evidence would support finding that the ham boning after mid 1979 materially aggravated any such underlying problem so as to result in a separate injury. Indeed, if claimant had not special case settled the anterior impingement syndrome claim and had reopened any award or agreement for settlement regarding that condition, he would not have established that the change in his condition was traceable to such earlier event. (See De Shaw v. Engery Manufacturing Company, 192 N.W.2d 777 [Iowa 1971].)

With regard to the deQuervains disease, Dr. Sinning's opinion would not support a finding of causal connection. That is, Dr. Sinning leaves the impression that the underlying condition made it difficult for claimant to perform his ham boning tasks, not that the work materially aggravated the wrist tendon. In any event, Dr. Sinning observed that no impairment resulted from the surgical release and such discomfort was not among claimant's present complaints.

At this point it should be noted that because the injury resulted from accumulated stress, pinpointing an actual date of injury is impossible. For purposes of establishing defendant's liability for healing period, the date the rotator cuff tear was first discovered, August 26, 1980, will be considered the date of injury. Since Dr. Sinning seemingly did not anticipate "significant" improvement as of November 30, 1981 and had released claimant to return to only light work prior to that date, such date will be considered the termination of healing period. (While it is possible that the healing period may have been shorter or longer in reality, neither party explored such issue in terms compatible with the standard set forth in Code section 85.34[1].) Hence, defendant is liable for the days claimant missed work for the right shoulder condition between those two dates. Although claimant testified in general to a number of days that he missed work and did not receive sick leave benefits, the only documentation of time loss appears to be defendant's exhibit E which indicates what days claimant received sick leave in 1980 and 1981. Hence that exhibit will be used to determine the sporadic days lost prior to the April 1981 surgery. (It is possible that some of the days off were due to the left shoulder problem [see Dr. Sinning's October 10, 1980 notes]; however, once again the record does not allow a more specific determination and, of course, defendant did offer the updated portion of exhibit E as evidence of benefits they paid for the right shoulder.) Defendant is entitled to credit for the sick leave benefits paid from August 26, 1980 to July 15, 1981.

Since an injury to the rotator cuff is considered an injury to the body as a whole, claimant is entitled to a determination of his loss of earning capacity resulting from the rotator cuff tear. Although Dr. Sinning testified at one point during his deposition that the tear resulted in 20 percent impairment of the upper extremity, it is clear from his earlier testimony both on March 2, 1982 and on June 25, 1979 that the anterior impingement syndrome was responsible for approximately half of that impairment rating. Dr. Sinning did not convert the upper extremity rating to a body as a whole impairment but did report that his rating was based on the AMA Guides. The 1977 edition of that evaluation tool indicates a ten percent impairment to the upper extremity converts to a 6 percent body as a whole impairment.

In assessing a claimant's loss of earning capacity as a result of a particular injury, the actual physical limitations and restrictions are usually of more assistance than a bare impairment rating. Dr. Sinning has revealed that although claimant's range of motion is good, claimant continues to be limited by weakness in the arm when raised above shoulder level. Claimant testified that rotational movement caused discomfort. Exactly what jobs claimant would not be able to perform because of those factors is not clear. While Dr. Sinning's recommendation that claimant attempt ham boning is not deemed the equivalent of saying claimant is able to perform such work, especially in light of Dr. Sinning's clarification that he did not think claimant would be able to meet the standard, the fact that claimant has not attempted a return to some form of gainful employment nor engaged in some type of physical activity, that would demonstrate what he is able or is not able to do, further frustrates establishing what work claimant is no longer able to perform because of the compensable injury or awarding disability on the basis of an inability to find suitable work. Claimant's age and basic education would be assets if he pursued retraining. Hence, despite claimant's attempts to return to light work in September 1981, his failure to pursue any other work or to inquire into some form of vocational rehabilitation in the half year following that time and prior to the hearing brings his motivation into question. Furthermore, defendant's failure to give claimant a light duty job in September of 1981 cannot be attributed to the injury alone in light of the significant reduction in the work force from March 1981 to March 1982. However, that no suitable work was available, for whatever reason, lends some weight in claimant's favor.

Thus, as indicated in the above discussion, the evidence regarding claimant's industrial disability is nebulous at best. Claimant has established a 10 percent loss of earning capacity attributable to the rotator cuff tear.

Finally, claimant's action is not barred by the two years statute of limitations even if some point in late 1979 when he first noticed increased shoulder pain is construed as the occurrence of the injury. Claimant timely filed his action before this agency on June 15, 1981. Parenthetically, it should be noted that the date claimant conferred with Dr. Sinning regarding whether the rotator cuff tear was a separate injury from the anterior impingement syndrome, rather than later 1979 or May 19, 1981 (as alleged in the petition), is a more likely date for the occurrence of the injury.

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. In March of 1979 claimant and defendant entered a Code section 85.35 settlement of claimant's claim for benefits based on his condition of anterior impingement syndrome in the right shoulder.

FINDING 2. A preoperative arthrogram and exploration of the shoulder joint at the time a partial acromionectomy and incision of the coracoacromial ligament were performed in March of 1979 revealed no tendon tear.

FINDING 3. Claimant returned to ham boning for defendant in mid 1979. In late 1979 he noticed increased right shoulder pain.

FINDING 4. An August 26, 1980 arthrogram revealed a small tear in the shoulder tendon in the general area where prior surgery had been performed. A March 1981 arthrogram indicated the tear had increased. In April of 1981 claimant was hospitalized for surgical repair of the rupture of the supraspinatus portion of the rotator cuff.

FINDING 5. The accumulated stress of ham boning after claimant returned to work in mid 1979 caused the rotator cuff tear. The tear was not a natural incident of the anterior impingement syndrome.

FINDING 6. Claimant also suffered from deQuervains disease in the right wrist. A release of the culprit tendon was performed at the time the rotator cuff tear was repaired.

FINDING 7. The preexisting right wrist condition was not materially aggravated by ham boning.

CONCLUSION A. Claimant has sustained his burden of proving that he suffered a tear of the rotator cuff in the course of and arising out of ham boning for defendant after returning to work in mid 1979 and that such tear constituted an injury separate from the subject matter of the special case settlement.

CONCLUSION B. Claimant is entitled to a determination of industrial disability because his injury is to the body as a whole.

FINDING 8. Claimant sustained 10 percent impairment of the upper right extremity as a result of the rotator cuff tear. (According to the AMA Guides, that rating converts to 6 percent impairment to the body as a whole.)

FINDING 9. Claimant sustained 10 percent impairment as a result of the anterior impingement syndrome and no impairment as a result of the right wrist tendon release. He has no other physical impairments.

FINDING 10. In September of 1981 claimant was released to return to light duty work -- no repeated rotational movements and no work above waistline level. Defendant had no suitable work available at that time or at the time of the hearing.

FINDING 11. Claimant has not returned to any form of gainful employment since April of 1981. Claimant has not sought any form of gainful employment or retraining.

FINDING 12. Rotational shoulder movements continue to cause right shoulder discomfort. Claimant and his treating physician doubt he can return to ham boning.

FINDING 13. Claimant is 34 years old.

FINDING 14. Claimant has a high school education. He completed only three months of chiropractic training due to a lack of funds.

FINDING 15. Claimant's employment history includes six months running a gas station, one year as a common maintenance mechanic at the arsenal, one year working for a car dealership, fourteen years with defendant and a few weeks part-time work sweeping floors and stocking the counters at a meat market.

CONCLUSION C. Claimant has sustained his burden of proving that as a result of the rotator cuff tear he suffered a 10 percent loss of earning capacity.

FINDING 16. Significant medical improvement was not anticipated as of November 30, 1981.

CONCLUSION D. Claimant is entitled to healing period benefits from August 26, 1980, the date the rotator cuff tear was documented, through Novemer 30, 1981 for those days he was off work for the right shoulder problem.

CONCLUSION E. Pursuant to Code section 85.38 defendant is entitled to credit for sick leave benefits paid to the claimant during the time period indicatd in Conclusion D.

FINDING 17. The earliest possible date claimant might have known he had a compensable claim would have been in late 1979.

FINDING 18. Claimant commenced the present action on June 15, 1981.

CONCLUSION F. Claimant's action is not barred by Code section 85.26.

ORDER

Defendant is hereby ordered to pay the claimant fifty (50) weeks of permanent partial disability at the weekly rate of two hundred forty-eight and 74/100 dollars ($248.74). In accordance with Code section 85.34(2), permanent partial disability benefits shall commence as of December 1, 1981.

Defendant is further ordered to pay claimant healing period benefits for August 26 and August 27, 1980, from September 12 through September 19, 1980, for a half day on October 3, 1980, from October 13 through November 21, 1980, from December 26 through December 30, 1980, from January 8 through January 23, 1981, for February 16 and February 17, 1981, for March 20, 1981, for March 24 and March 25, 1981, and from April 9 through November 30, 1981. Pursuant to Code section 85.38, defendant is entitled to credit for sick leave benefits paid on those dates.

Compensation has accrued and shall be paid in a lump sum.

Interest shall run in accordance with section 85.30, Code of Iowa, 1983.

Costs of the proceeding are taxed to defendant. See Industrial Commissioner Rule 500-4.33.

Signed and filed this 24th day of February, 1983.

No Appeal

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. SCHOEPF, Claimant, vs. SKIDMORE CRANE RENTAL, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	:	File No. 704025 A R B I T R A T I O N D E C I S I O N

This is a proceeding in arbitration brought by Kenneth L. Schoepf, claimant, against Skidmore Crane Rental, his employer, and United States Fidelity and Guaranty Company, the insurance carrier, to receive benefits under the Iowa Workers' Compensation Act by virtue of an alleged industrial injury which occurred "early" in 1982. This matter was heard on January 19, 1983 in the Woodbury County Courthouse and was considered as fully submitted at the conclusion of the hearing.

The primary issue requiring a ruling is whether or not claimant notified the defendants of the occurrence of the alleged industrial incident.

The record in this matter consists of the live oral testimony of the claimant and Patrick Pojar; claimant's exhibits 1 to 4 and defendants' exhibits A to E.

There is sufficient credible evidence to support the following statement of facts.

Claimant, age 34, married with two dependent children, has been an iron worker since 1971 with no accident history during the past twelve years.

On January 1, 1979, claimant and Patrick Pojar, foreman of this two-man crew, began to assist the maintenance crew at a Cargill Soybean Mill in an extensive renovation project. Early in 1982, claimant assisted in the removal of a 20-ton bailer. The removal process consisted in pulling the unit out of the factory by the use of jacks, timbers and come-a-longs. While assisting in the placement of these heavy mechanical assists, claimant began to experience low back pain.

Claimant sought medical assistance from G. L. Tapper, D.C., of South Sioux City, Nebraska, on February 24, 1982 and who reported his findings in part as follows:

> Hypertonic lower spinal muscles. Hyperesthesia at L3, L4, L5 & S1. Ambulation - fairly normal. Patient slightly antalgic. Dorsolumbar ranges of motion were all within the normal range of motion. Flexion and Extension resulted in a pulling sensation at L5 - S1. Deep tendon reflexes - normal. Weight distribution with bilateral scales indicated 20 lbs. more on the right leg than the left. DIAGNOSIS: Subluxation of the lower lumbar spine with radiculitis, and myositis, with resultant discopathy at L5-S1 disc. (Defendants' exhibit C.)

On April 29, 1982, claimant sought further assistance from Paul A. Fee, M.D., due to increased back pain. On May 20, 1982, claimant became a patient of John J. Dougherty, M.D., an orthopedic surgeon.

Claimant's immediate superior Patrick Pojar testified that while he saw claimant's physical limitations and back problem, at no time did the claimant tell him that his complaints were due to work connected activity.

Claimant paid the original charges incurred as the result of the treatment of Dr. Tapper.

Section 85.23, Code of Iowa, 1980, reads as follows:

> 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 applying the foregoing statutory provisions to the matter at hand, it is clear that the claimant failed to advise his foreman of the matter.

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

1. That this agency has jurisdiction of the parties and the subject matter.

2. That the claimant began to experience back pain in early January, 1982.

3. That the claimant sought chiropractic assistance on February 24, 1982.

4. That the claimant personally paid the cost of such chiropractic treatment.

5. That the claimant failed to notify his employer of said alleged injury until June 11, 1982.

6. That the claimant failed to give notice pursuant to §85.23, Code of Iowa, 1981.

THEREFORE, it is ordered that the claimant take nothing further as a result of this proceeding.

Costs, as provided in Rule 500-4.33, are charged to the defendants.

Signed and filed this 24th day of June, 1983.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD A. SCHOFIELD,	:	
Claimant,	:	
	:	File No. 483071
vs.	:	
	:	A P P E A L
IOWA BEEF PROCESSORS, INC.,	:	
	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Claimant was found to be eligible for permanent partial disability, healing period benefits, and medical expenses in an arbitration decision filed September 26, 1980. In so deciding, reference was made by the deputy to a companion case, Leonard Burmeister v. Iowa Beef Processors, Inc., decided February 2, 1978 wherein the claimant was given an award. In Burmeister it was found that Mr. Burmeister, who performed the same job at the same work station as claimant, but on an opposite work shift, was exposed to sodium hydroxide at work during October 1976. In the instant case, the deputy ruled that the doctrine of issue preclusion precluded defendant from relitigating the issue of claimant's exposure to sodium hydroxide. An appeal decision filed August 28, 1981 affirmed the deputy's decision insofar as finding that claimant was eligible for benefits and the application of issue preclusion, but modified the award of permanent partial disability from 80 percent to 50 percent. Defendant appealed to the district court, the single issue being "whether the doctrine of issue preclusion was improperly invoked as between nonmutual parties in an offensive fashion." The district court found that issue preclusion was not an incorrect doctrine of law to be applied in this case, but noted that between the issuance of the arbitration and appeal decisions the Iowa Supreme Court had delineated two additional factors to be considered in applying the doctrine. [See; Hunter v. City of Des Moines, 300 N.W.2d 121, 126 (Iowa 1981)]. The case is now remanded to the industrial commissioner for the purpose of making specific findings of fact and giving specific reasons for concluding that IBP is precluded from relitigating the sodium hydroxide exposure issue under the rules set forth in Hunter.

The record on appeal consists of the transcript of the hearing which contains the testimony of claimant, Leonard Burmeister, Juanita Schofield, Roger Rost, Robert Porth, Kenneth Egli, Warren DeGoler, and Kathleen Smith; the previously transcribed testimony of Carl George Werner and Charles Lenz (From Burmeister v. Iowa Beef Processors, Inc., Arbitration Decision file no. 15024); the deposition of Richard DeRemee, M.D., and two depositions of Paul Steinhauer, D.O.; claimant's exhibits A through M; defendant's exhibits 1 through 4; and the briefs and filings of all parties on appeal.

ISSUE

Whether defendant may be precluded from litigating the issue of claimant's exposure to sodium hydroxide.

REVIEW OF THE EVIDENCE

During the arbitration hearing claimant testified that he concluded his employment with defendant in December of 1976 after having been employed there for a number of years. He had worked as a box maker for the last seven years of his employment with defendant, and testified that he worked on an opposite shift from Leonard Burmeister who did the same job in the same work area. (Transcript, pp. 5-9)

Claimant testified that prior to October of 1976 he had not experienced respiratory problems, but that subsequent to that time he experienced temporary loss of his voice, a sore throat, and burning from the throat into the lungs. He was ordered to stay off work by Dr. Wilson (now deceased) and has not worked for defendant since December 26, 1976. (Tr., pp. 9-14)

The following findings are taken from the arbitration decision in Burmeister v. Iowa Beef Processors, Inc., filed February 2, 1978:

Leonard Burmeister was employed by defendant in October of 1976 where he worked as an opposite number in a shift rotation with Donald Schofield. Burmeister's primary duties were in the "box shop" where he worked approximately six hours per shift. He was responsible for making-up and filling with offal, boxes in this area which was adjacent to the "trolley wash tank room." Carl Werner, an employee of defendant, explained that the trolley wash tank contained chemicals diluted in hot water, and that it was used to wash hooks from which beef carcasses were hung. Burmeister testified that an exhaust fan located in the trolley wash room for the purpose of keeping steam from entering the box room did not work properly. In addition, the door between the two rooms did not close properly, and allowed excessive steam from the wash tank to enter into the box shop.

Carl Werner, whose duties include maintaining the trolley wash tank, testified that the cleaning mixture was maintained at 180 to 200 degrees and was agitated with an air line, creating a very humid environment in the wash room. Werner testified that the chemical used in the tank (described as CC-100) is stored in barrels in the box room. He further testified that in October of 1976 he placed a barrel in the normal position in the box room, but that it contained LD-60, a caustic soda, rather than CC-100.

Kenneth Egli, the plant superintendent, testified that the wash tank is drained weekly, and that on October 10, 1976 it was mistakenly filled with a mixture made up with LD-60.

Leonard Burmeister and Donald Schofield both testified that on October 11, 1976 the box room was "hot and steamy" and the floor was slippery. Both also testified to having experienced burning in the chest and breathing difficulties. Burmeister testified that the symptoms continued throughout the following two weeks, at which time he sought medical treatment. Charles Lenz, whose duties as a refrigeration maintenance worker included checking the wash tank periodically, testified that the fumes coming from the tank made his eyes burn and that he had sought medical attention for skin irritation caused by the fumes.

The findings of fact in the arbitration decision indicated that Burmeister sustained an industrial injury on October 11, 1976 when he inhaled droplets of sodium hydroxide (created by the LD-60/distilled water mixture), causing caustic damage to the lungs. (Leonard Burmeister v. Iowa Beef Processors, Inc., Arbitration Decision file no. 15024).

In a final agency decision regarding the instant case (Appeal Decision filed August 28, 1981) claimant was found, via the doctrine of issue preclusion, to have also been exposed to sodium hydroxide. It was further found that medical evidence presented at the hearing established that claimant had developed a permanent condition of chronic bronchitis as the result of such exposure, and is permanently disabled to the extent of 50 percent of the body as a whole.

APPLICABLE LAW

In Schneberger v. United States Fidelity & Guaranty Co., 213 N.W.2d 913, 917 (Iowa 1973) the Iowa Supreme Court set forth four basic requirements for the valid assertion of issue preclusion:

(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.

In Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971) the Iowa Supreme Court distinguished between defensive and offensive issue preclusion:

> The phrase "defensive use" of the doctrine of collateral estoppel is used here to mean that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.
>
> On the other hand, the phrase "offensive use" or "affirmative use" of the doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim.

In Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981) the supreme court considered whether the offensive application of issue preclusion should vary where mutuality of parties is lacking. The court concluded that to invoke the doctrine in such a manner it must be considered whether, in addition to the satisfaction of four traditional elements of the doctrine, it has been utilized in the fashion suggested by the Restatement (Second) of Judgments. The court stated:

> 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 (Tent. Draft No. 2, 1975) (footnote added).
>
> [4] Mindful of the foregoing, we conclude that offensive application of the doctrine of issue preclusion should not invariably be precluded where mutuality of parties is lacking. Rather, we adopt as ours the position taken by Restatement (Second) of Judgments § 88 with respect to the use of issue preclusion in this context.

ANALYSIS

The sole issue to be determined upon remand of this case from the district court is whether defendant will be precluded from litigating the issue of claimant's exposure to sodium hydroxide under the six factor test for the application of "issue preclusion" as deliniated in Hunter v. City of Des Moines. Issues concerning proof of an injury and its extent have not been framed as subjects of appeal and thus are not matters for our concern at this time.

At the time that the original arbitration decision was rendered in this matter the four factor test for the application of issue preclusion, as set forth in Schneberger v. United States Fidelity & Guaranty Co., was applied. The deputy's decision discussed each of the four factors which, at that time needed to be considered, and found that the issue of exposure to sodium hydroxide in the instant case was identical to the exposure issue in Burmeister. Claimant and Burmeister worked tandem shifts in the very same work area, and both would have been exposed to the same environmental hazards caused by the mistaken use of LD-60 in the trolley wash tank on October 11, 1976. The deputy found the issue of exposure not only to have been raised and litigated in the prior action, but to have been the main issue, the resolution of which was certainly essential to the judgment rendered. The specific findings of fact and reasons for applying the doctrine of issue preclusion stated by the deputy were adopted in the appeal decision concerning this matter filed on August 28, 1981. The two additional factors deliniated in Hunter v. City of Des Moines, which must, at this time, be considered before issue preclusion can be supported in this case are: (1) whether defendant was afforded a full and fair opportunity to litigate the exposure issue in the first action, and (2) whether any other circumstances are present which would justify granting defendant the occasion to relitigate the issue.

In considering whether defendant was afforded a full and fair opportunity to litigate the issue of claimant's exposure to sodium hydroxide in the Burmeister action, it is again noted that the issue in both cases was identical. Defendant's argument that at the time of the Burmeister hearing it was not foreseeable that the issue of claimant's exposure to sodium hydroxide would arise in a later action, thus depriving defendant to litigate the issue as it pertained to claimant, is not persuasive. The record establishes that on October 11, 1976 both Schofield and Burmeister was exposed to substantially the same environmental conditions in the "box room" at defendant's plant. Both men suffered from similar respiratory conditions shortly after having worked on that date and subsequently left the employment of IBP. Kenneth Egli, an IBP plant supervisor, admitted that he had notice of Burmeister's health problems as were related to the mistaken use of LD-60 in the trolley wash tank and further, that he was aware that claimant was experiencing similar problems. Finally, claimant's appellate brief acknowledges that under cross-examination by defendant's counsel in the Burmeister hearing, it was admitted by Schofield that he was considering bringing, a similar action himself. Given the totality of these circumstances we find it difficult to comprehend defendant not foreseeing this action by Schofield. There also appears to have been no lack of incentive on defendant's part to litigate the exposure issue, as pertaining to either Burmeister or Schofield, in the earlier action. The arbitration decision issued in Burmeister contains a summary of testimony from a number of experts who discussed various aspects of the exposure issue, indicating that defendant made use of all appropriate resourses in defending against the claim of Burmeister. We find that defendant was afforded a full and fair opportunity to litigate the exposure issue in the Burmeister action.

The remaining consideration which must now be addressed is whether any other circumstances exist which would justify granting defendant the opportunity to relitigate this issue. Defendant first contends that the manner in which claimant sought to employee issue preclusion was such as to prevent any meaningful response from defendant. We fail to see any impropriety in the assertion of issue preclusion by claimant. Claimant appears to have properly submitted the Burmeister arbitration decision as an exhibit for the specific purpose of asserting issue preclusion on the principle legal question involved. Defendant's objection to the introduction of the arbitration decision into evidence was heard and ruled upon by the deputy in the same manner as would be any other objection by counsel. In addition, defendant has been afforded ample opportunity to discuss the issue in appellate briefs at both this level and in the district court. It is also contended by defendant that it is in the public interest to determine whether or not a mistake such as using LD-60 in wash tanks can cause injury to employees of plants which use similar compounds. This public policy rationale does not justify granting defendant a new opportunity to litigate the exposure issue. The sole issue which claimant was precluded from litigating concerned whether or not claimant actually did come into contact with sodium hydroxide. Defendant was in no manner, however, barred from presenting any evidence which would have indicated that sodium hydroxide did not affect the health of claimant. Furthermore, the use of the chemical LD-60 in the wash tank appears not to have been a suggested use by its manufacturer, and was admittedly a mistaken use by defendant. Considering the isolated nature of this incident and the relative unlikeliness of a similar occurrence, the public policy argument of defendant loses most of its force. Upon review of the record we are unable to discern any circumstances which would justify relitigation of the exposure issue in this case.

FINDINGS OF FACT

The following findings of fact incorporate the findings from the August 28, 1981 appeal decision in this matter.

1. Donald Schofield and Leonard Burmeister were both employees of Iowa Beef Processors, Inc. (IBP) on October 11, 1976.

2. Schofield and Burmeister worked in the box room on opposite shifts.

3. On October 11, 1976 the chemical LD-60 was mistakenly used in a trolley wash tank in the proximity of Schofield and Burmeister.

4. Schofield and Burmeister both experienced respiratory ailments soon after working in the damp environment in the immediate proximity of the trolley wash tank, which was filled with the LD-60 chemical mixture.

5. IBP plant superintendent was aware of the fact that LD-60 had mistakenly been used in the trolley wash tank.

6. Burmeister has not been employed at IBP since October 25, 1976.

7. Burmeister filed a proceeding in arbitration, file no. 15024, alleging permanent injury as a result of his exposure to caustic chemicals during and following the October 11, 1976 incident.

8. Following a hearing on April 20, 1977 Burmeister was found to have been exposed to sodium hydroxide in his work environment on October 11, 1976.

9. Schofield stopped working for IBP in December 1976, at

which time the IBP plant superintendent was aware that Schofield and Burmeister were complaining about the same medical condition.

10. Schofield had no previous respiratory complaints.

11. Schofield was diagnosed as having permanent chronic bronchitis.

12. Schofield's chronic bronchitis was caused by his exposure to chemicals at IBP.

13. Claimant now works as a farmer, but is frequently unable to work at all.

14. Claimant is unable to perform farm work at full capacity.

15. Defendant was afforded a full and fair opportunity to litigate the exposure issue in Burmeister's action.

16. No circumstances are present which would justify granting defendant occasion to relitigate the exposure issue.

CONCLUSIONS OF LAW

Defendant is precluded from litigating the issue of claimant's exposure to sodium hydroxide.

Claimant sustained an injury arising out of and in the course of his employment on October 11, 1976.

Claimant has sustained a partial disability to the body as a whole to the extent of 50 percent.

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 togther 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 ordered to file a final report upon payment of this award.

Signed and filed this _____ day of June, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAY LEE SHANNON,
Claimant,
vs.
OAKVIEW CONSTRUCTION CO.,
Employer,
and
HALL RISK MANAGEMENT SERVICE,
Insurance Carrier,
Defendants.

File No. 686217

A R B I T R A T I O N

D E C I S I O N

This is a proceeding in arbitration brought by Ray Lee Shannon, against Oakview Construction Co., employer, and Hall Risk Management Service, insurance carrier, for benefits as a result of an injury on December 11, 1980. On March 30, 1983 this case was heard by the undersigned. This case was considered fully submitted at completion of the hearing.

The record consists of the testimony of claimant, Michael J. Gawley; claimant's exhibit A; and defendants' exhibits 1 through 11.

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, who was employed by defendant as a carpenter, testified that on December 11, 1980 he was injured as the result of a motor vehicle accident which occurred while he was driving from Red Oak, Iowa to a job site in Falls City, Nebraska. Claimant revealed that if he had arrived at defendant's office in Red Oak by 6:00 a.m. he could have ridden in defendant's truck to Falls City. Claimant stated he arrived at defendant's office after defendant's truck had already left, so he had to drive in his own vehicle to the job site. Claimant indicated he was under the impression he was paid for his travel to the job site. While on his way to Falls City, Nebraska, claimant incurred car problems and was delayed in Rock Port, Missouri. After passing through Brownsville, claimant decided he was thirsty, turned around and backtracked a few miles to purchase a soft drink. On his way back to Brownsville a car coming in the opposite direction hit claimant's car. As a result of his injuries, claimant was hospitalized.

On cross-examination, claimant revealed he wasn't paid for the day he was injured. Claimant has obtained a $100,000.00 judgment against the other driver.

Michael J. Gawley testified he was construction supervisor for defendant at the time of claimant's injury. Mr. Gawley testified that foremen and superintendents were paid from Red Oak to the job site, but workers in claimant's capacity were not. The fact that workers were allowed to ride in the company truck was just an accommodation to the workers. Mr. Gawley stated that carpenters were paid upon arriving at the job site.

Richard C. Bulkeley, who testified by way of deposition, indicated he is president of defendant employer, which is located in Red Oak, Iowa. Mr. Bulkeley revealed defendant employer has several out-of-town jobs. Mr. Bulkeley stated:

Q. In December of 1980, would you tell us whether or not there was a policy of this company as to payment for travel to and from job sites?

A. Yes, sir, there was such a policy.

Q. Now, the main office and perhaps the only office of Oakview is located here in Red Oak, is that correct?

A. Right.

Q. Now, for example, the job in Falls City in December of 1980, would you tell us what the procedure was as far as, first of all, foremen and superintendents and then laborers going to and from the job site?

A. We had a superintendent, Fay Timson, in charge of the Falls City power plant. We had a foreman, Ron Haas, reporting to Fay. Ron's duties were to coordinate the laborers and the carpenters on the job. We had some carpenters and laborers riding in a company vehicle to Falls City. They would report to work each Monday morning at, or during other days of the week, about six-thirty at the office and get in our company pickup and travel to Falls City.

Q. Would the pickup leave for Falls City from your office here in Red Oak?

A. Yes, that is correct.

Q. Was it mandatory in December of 1980 that laborers go in the truck from here to Falls City?

A. It was not mandatory at all. It was an option that if they wanted to ride down with our company pickup they are permitted to do so. If they wanted to report to the job in any other manner or if they wanted to move and live in Falls City, they could.

Q. In December of 1980, what was the job classification and position of Ray Shannon?

A. He was classified as a carpenter.

....

Q. Now, in December of 1980 would you tell us what the policy and practice of this company was so far as workers being paid wages or any meal or travel expenses going from Red Oak to the Falls City job

in the company pickup or a company vehicle?

A. For many years we've had the company policy that foremen and superintendents would be paid from the time they reported to work here at the home office to receive instructions, to discuss their job with -- with the project manager or myself here in the office and then load up their pickup and drive a company vehicle to that project, so foremen and superintendents would be paid what we call driving time because they reported to work here at the office prior to that. Anything below the foreman level, those -- those workers could choose to ride in a company pickup with no compensation. We could hire locally at that job site laborers, carpenters, lead men, so it was -- it would have been an extra expense for us if we were to pay the lower classification people driving time.

Now, we did pay for the living expenses only for any company personnel that chose to work on an out-of-town project.

Q. On the Falls City job for persons in the job category that Ray Shannon had at that time, when did wages start and where did wages start?

A. Wages started when the work started at the job site each morning.

Q. If there was testimony by Ray Shannon that on the Falls City job in December of 1980 that his wages started when he got in the pickup or company vehicle here at your headquarters in Red Oak and were paid until he got to the job in Falls City and that he was paid wages for one-half of the round trip, Red Oak, Falls City, and back, would you tell us whether or not that was known to you and recognized by you?

A. I see it in the testimony, yes, and it's incorrect.

Q. As far as you know, on the Falls City job was Ray Shannon ever paid wages traveling in a company vehicle from your office here in Red Oak over to the Falls City job or back?

A. No, he was not.

Q. What money would be paid to him, if any, for traveling in the company vehicle from Red Oak over to Falls City and back? Would there be anything, for example, for a motel or food?

A. Expenses. We would pay for the noon and evening meal and furnish the lodging.

Q. But not wages?

A. No wages.

Q. As far as you know, at any time had Ray Shannon been paid wages traveling to and from Red Oak to Falls City and back in a vehicle that was provided by the company?

A. No.

Mr. Bulkeley disclosed that on the day of the accident claimant's salary would have started when he arrived at the job site. This is true whether claimant went in his own car or the company truck.

APPLICABLE LAW

In order to receive compensation, claimant must prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. Musselman v. Central Telephone Co., 261 Iowa 362, 154 N.W.2d 128 (1967). Iowa Code section 85.61(6) provides:

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

An injury "arises out of" the employment when a causal connection between the conditions under which the work was performed and the resulting injury is established, i.e., it must be determined whether the injury followed as a natural incident of the work. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

"In the course of" the employment refers to time, place and circumstances of the injury. McClure v. Union County, 188 N.W.2d 283 (1971). "An injury occurs in the course of employment when it is within the period of employment, at a place where the employer reasonably may be performing his duties, while he is fulfilling those duties or engaged in doing something incidental thereto." Bushing v. Iowa Railway & Light Co., 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929).

The general rule is that, absent certain circumstances, an employee is not entitled to compensation for injuries occurring off the employer's premises on the way to and from work. Farmers Elevator Company, Kinsley v. Manning, 286 N.W.2d 174; Frost v. S.S. Kresge Company, 299 N.W.2d 646. This is known as the "going and coming" rule.

"[C]ases involving an injury from a highway accident suffered while enroute to or from work require a determination whether the employee was engaged in his employer's business at the time and whether there was a causal relation between the injury and such employment." Pribyl v. Standard Electric Co., 246 Iowa 333, 339, 64 N.W.2d 438 (1965).

In 1 Larson, Workmen's Compensation Law section 16.00, at 4-120 (1982) it states:

> Some outside and traveling workers have an identifiable point in time and space where their employment actually commences. If they are required to check in at a certain place in the morning, the journey to that place in the morning is not within the course of employment.

ANALYSIS

Claimant has failed to prove his injury arose out of and in the course of his employment. The greater weight of evidence indicates that claimant was not paid for the period he traveled to or from Falls City, Nebraska. Claimant's wages started upon arriving at the job site in Falls City. While driving, claimant was in no way engaged in defendant's business. Claimant was required to report to work at Falls City, Nebraska by a definite time. The greater weight of evidence also indicated that claimant was not paid for the expense of his traveling. Claimant argues that defendant instructed him to use his own car to make the trips, thereby, drawing him within the protection of the statutes. The greater weight of evidence indicates that claimant was instructed that he better get to the job site in some manner so that he could work. Such an instruction would not make the trip a part of claimant's duties.

Since claimant has failed to prove his injury arose out of and in the course of his employment, the other issues raised will not be discussed.

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 December 11, 1980 claimant was injured while driving to Falls City, Nebraska where he was to work as a carpenter.

FINDING 2. Normally, claimant rode in defendant employer's truck but was unable to because he arrived at defendant employer's office after the truck had left.

FINDING 3. Claimant was not paid for travel time to Falls City, Nebraska nor was he reimbursed for his expenses in making such a trip.

FINDING 4. Claimant was paid from the time he arrived at the job site in Falls City, Nebraska.

FINDING 5. Defendant employer allowed carpenters to ride in their truck only as an accommodation to them.

FINDING 6. Claimant was not in any way benefiting defendant employer while driving to the job site.

FINDING 7. Claimant was instructed by defendant employer's personnel that he better find some way to get to the job site.

CONCLUSION A. Claimant failed to prove his injury arose out of and in the course of his employment.

THEREFORE, claimant is to take nothing as a result of this proceeding.

Each party is to pay half of the costs of this action.

Signed and filed this 28th day of June, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. SHELTON,	:	
Claimant,	:	FILE NOS. 623410, 617212 & 483037
vs.	:	
TRANSCON TRUCK LINES,	:	R E V I E W -
Employer,	:	R E O P E N I N G
and	:	D E C I S I O N
TRANSPORT INDEMNITY COMPANY,	:	
Insurance Carrier, Defendants.	:	

Mr. Jon B. Schuster
Attorney at Law
535 Ins. Exchange Bldg.
Des Moines, Iowa 50309 For Claimant

Mr. Charles D. Hunter
Attorney at Law
2000 Financial Center
Des Moines, Iowa 50309 For Defendants

INTRODUCTION

This is a proceeding in review-reopening brought by Robert L. Shelton, claimant, against Transcon Truck Lines, employer, and Transport Indemnity, insurance carrier, defendants to recover additional benefits under the Iowa Workers' Compensation Act for injuries arising out of and in the course of his employment on December 8, 1977; August 3, 1978; and August 15, 1979. It came on for hearing on August 12, 1982 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted on August 20, 1982.

At the time of hearing the parties filed a stipulation regarding lost time, wage rate and disability benefits paid for each of the three injuries. A second stipulation was filed regarding trips to Dr. Reinwasser's office and claimant's bankruptcy proceeding.

Regarding the injury of December 8, 1977, the industrial commissioner's file shows a first report of injury received December 15, 1977, a memorandum of agreement received December 27, 1977 and a form 2 received May 5, 1981 showing the payment of twenty-six weeks and two days of healing period benefits, fifty weeks of permanent partial disability and $2,261.87 in medical benefits. Shown for the injury of August 3, 1978 are a first report of injury received December 20, 1979; a memorandum of agreement received January 24, 1980 and a final report showing the payment of thirty-eight weeks and five days of healing period benefits, fifty weeks of permanent partial disability and $3,555.80 in medical expenses. Relating to the injury of October 15, 1979 the file shows a first report of injury received December 20, 1979; a memorandum of agreement received January 23, 1980 and a form 2A recording payment of one hundred eight weeks of healing period and $20,758.00 in medical expenses.

The record in this matter consists of the testimony of claimant and of Jack L. Savage; joint exhibit 1, the medical records of claimant; claimant's exhibit 2, court records regarding claimant's dissolution and child support matters; claimant's exhibit 3, a record of child support payments made; claimant's exhibit 4, a record of payments made by claimant in his bankruptcy matter; claimant's exhibit 5, income tax returns from 1976, 1977 and 1979; claimant's exhibit 6, mileage expenses; defendants' exhibit A, a statement by claimant dated December 19, 1977; defendants' exhibit B, a bond application; defendants' exhibit C, an application for employment dated April 5, 1973; defendants' exhibit D, a statement dated November 13, 1979; defendants' exhibit E, an original notice and petition received August 8, 1977; defendants' exhibit F, a decree filed July 12, 1973; defendants' exhibit G, a summary of child support matters; defendants' exhibit H, an assignment of support payments; defendants' exhibit I, employee attendance card for claimant; and a portion of claimant's discovery deposition. Briefs were filed by the parties.

ISSUES

The issues in this matter are whether or not there is a causal connection between claimant's present disability and any of his injuries; whether or not claimant is entitled to permanent partial disability payments; the proper rate regarding each of claimant's injuries; whether or not claimant is entitled to benefits under Iowa Code Section 85.27; and whether or not defendants are entitled to a credit for the overpayment of benefits.

STATEMENT OF THE CASE

Thirty-seven year old married claimant testified regarding his marital status and children as follows: He is presently married to Linda. No children have been born to his current marriage.

He was married to Carmen in 1963. Issue of that marriage are Robert born in 1964 and Tammy born in 1969. This marriage was dissolved in about 1974. As a result of that dissolution, he was under court order to pay child support. In August of 1980 he owed in excess of $7,500.00. He has paid some support since that time, but he claims Carmen moves frequently and the children are not together.

In 1972 claimant married Linda Arleen. Three children Mark, Matthew and Elizabeth were born of that marriage. The marriage ended in divorce in 1980. He was unsure when Linda filed for the dissolution that resulted in the decree as she had filed on more than one occasion. He was ordered to pay support. He thought the decree had been written with the adjustment in payment amount in anticipation of his going back to work. In August of 1980 he owed more than $9,600.00. He has paid some support since than.

He dated Mary Lorey for a year and a half and was found to be the father of her child Tracy Lee in a paternity action. He was ordered to pay $15.00 per week in support.

As to his supporting his children he said that some payments have been made through the Friend of the Court. When he was off work he was unable to make payments. He said that from time to time he gives his children money and buys them clothes and food. In 1980 he filed a Chapter 13 bankruptcy to reorganize his debts. Since then his child support obligations have been paid through the trustee who provides him with an accounting every six months. At first he testified that no effort has been made to terminate his child support obligations. Later the parties stipulated that he has asked in the bankruptcy proceeding for a discharge of all past, present and future child support obligations.

Claimant's tax returns for 1976 and 1977 show five exemptions. His return for 1979 claims three. He indicated no return was filed in 1978, 1980 nor 1981 because he was getting workers' compensation.

A number of court documents were offered into evidence. A decree of dissolution filed July 12, 1973 shows claimant was granted a divorce from Carmen. Birth dates for Robert and Tammy are given as 1965 and 1968 respectively. Child support was ordered at the rate of $15.00 per week per child for eighteen months and $20.00 per week per child thereafter. Claimant was ordered to pay $20.00 per week to a trust fund for his son. Records show claimant paid Carmen $265.00 in 1971, $60.00 in 1973, $65.00 in 1976, $460.00 in 1977, $255.00 in 1978, $580.00 in 1979 and $420.00 in 1980. No payments were made through Friend of the Court in 1972, 1974, 1975, 1980 or 1982. Carmen apparently got A.D.C. until January 31, 1981.

An original notice and petition was filed by Linda Arleen Shelton on August 8, 1977. The petition states that the parties were married on August 10, 1976 and lists children born of their marriage as Mark and Matthew in 1973 and Elizabeth in 1975. A decree of dissolution was entered February 21, 1978. After initial payments of $45.00 per week, claimant's support obligations were to increase to $25.00 per week per child. Claimant was to maintain a life insurance and a major medical policy. In March of 1978 Linda assigned her right of support payments to the department of social services. Records from Friend of the Court show payment of $165.00 in 1978 and $50.00 in 1980. No payments were made in 1979, 1981 or 1982. Money orders and checks totaling $110.00 in 1978, $500.00 in 1979, $300.00 in 1980 and $25.38 in 1981 were paid to Linda who was receiving A.D.C. benefits at least to August 3, 1981.

A judgment was entered on September 20, 1973 finding claimant the father of Tracy Lee Shelton born November 12, 1972. Claimant was ordered to pay child support in the amount of $15.00 per week. Records from Friend of the Court show no payments in 1973, 1974, 1980, 1981 and 1982. Payments were $30.00 in 1975, $15.00 in 1976, $385.00 in 1977, $150.00 in 1978 and $60.00 in 1979. Mary Lorey received A.D.C. benefits until February 1, 1981.

On October 29, 1980 an order was filed in the Polk County District Court adopting a stipulation entered by claimant with his former spouses and Mary Lee Lorey. The parties agreed that in June of 1981 claimant would commence payment of $163.83 to cover his arrearages. An agreement was also reached as to a recovery of workers' compensation.

Although claimant testified in a discovery deposition he graduated from high school in 1961, he said at the hearing he did not complete twelfth grade and that his last year in school was 1963. He attributed the discrepancy to nervousness. The year 1964 was filled in on an employment application as a date of graduation. Statements taken December 19, 1977 and November 13, 1979 also indicate he is a high school graduate.

After high school claimant did casual work until he obtained his first steady job with Rock Island Motor Transit. He left that work because of marital problems. He went to Oregon to join his family. He claimed that he had a card to sell vacuum cleaners there. The card was effective for a year, but he canvassed only three to six weeks. When he returned to Des Moines he again did casual work until he commenced work for defendant employer in April of 1973.

His job included being dispatched to different companies to load trucks. He unloaded freight that came to the terminal. He drove both straight trucks and semis. He asserted that he seldom had help with a job that meant driving for an hour and a half to two hours and lifting for five. Cargo ranged from white rats to tires.

Claimant acknowledged a foot injury at Rock Island. At first he said that he had no off the job injuries. Later he admitted that he had a non-work related fall. He said that he and his spouse were doing some Christmas shopping in February of 1978 when he fell in a Target store. He recalled that he hit his shoulder and head, that he hurt all over, that he did not injure his back, that he was off work and that he missed no work. He recollected a fall at a dock in a trailer on February 10, 1978. Later he admitted he was not working in February. He also told of an auto accident in September of 1978 for which he missed three days work. He denied any injury to his spine. In July of 1979 he was riding on a motorcycle which turned over. He stated that he skinned his right arm and leg and that he was treated for contusions, sprains and bruises. His statement to the insurance carrier on December 19, 1977 records no previous back trouble.

Claimant testified relating to his December 8, 1977 injury: He was in a trailer breaking freight. He was pinned by a forklift. He had an injury above his waist almost to his ribcage and into his buttocks. He was sent to the hospital by Dr. Reinwasser for traction. He was paid compensation for his time off work. No permanency was paid. He was married with six children at that time.

As to his August 3, 1978 injury he said: He and another worker were getting a two wheeler under a crate. He lost his footing and was hit by the crate. He had therapy and was off work. He was told by Dr. Kelley he could return to work on September 1, 1978. His days were "terrible". He had pain all the time including pain into his right leg and in back of his ears. Eventually surgery was done. His medical expenses and healing period were paid. He also was paid permanency. He had six children.

Regarding his final injury of October 15, 1979, he stated: It was early in the morning. Two trailers had come in. He pushed the flaps up on the door. The freight spilled out on top of him. He saw several doctors. His fusion broke down. He went to Mayo Clinic were he was told he must lose weight before surgery could be done. He stayed home and laid around. He was treated with therapy, pain pills and a brace. He was unable to get his weight down. Surgery was performed in Des Moines. He was single at this time with six children. He returned to work in January 1982 although he was released in November of 1981. He said that his reason for not going back to work before January was not medical.

Claimant recalled that prior to his injuries he was an active person who engaged in sports including semi-professional baseball. He said his work is going "pretty good," but he does have pain six to eight times a day at his surgery site. The pain is sharp in the right side to the middle back. He is untroubled by driving. He stated that it does not hurt him to lift nor does he have limitations on motion as he is able to bend, stoop and reach. His employee attendance card shows five days of absence due to sickness since his return to work. At present he takes Tylenol 3 three times a day and Metromate, an anti-depressant three times daily. He is not seeing any doctor currently. He attributed a portion of his feeling better now than after his first fusion to his change in marital status.

Claimant alleged that he had followed the instructions of his employer regarding injury and treatment. He was questioned about statements made to an insurance adjuster. He remembered the adjuster put words in his mouth. He insisted December 8, 1977 was his first back trouble. More specifically he denied admission to the hospital following the grocery shopping incident. He first attributed the problem to his shoulder and not to his back. Later he testified that his back hurt and then quit.

As justification for not going to the hospital until eleven days after his injury, claimant offered that his first alternative was to have treatment in the office; the second was to go to the hospital. He denied that Dr. Rosen took a history and that he had pain in the right back before. As reasons for leaving the hospital claimant asserted that it was Christmastime, that the doctor was not looking at him, and that he was ready to go home.

He declared that he was not requested to go back to the hospital in January. In explanation of why he had not given Dr. Kelley a complete history he vowed that he was in too much pain and that he had not been asked. He did not remember being told by Dr. Kelley to reduce.

He agreed that he first saw Dr. Fellows in January of 1981. He was unsure what history he gave. His release by Dr. Fellows in November of 1981 was not encumbered by restrictions.

Neither had Dr. Summers been given a "life history".

He asserted unpaid mileage expenses. He concurred with defendants' counsel that some mileage occurred before his injury, that some related to his baseball, motorcycle and auto accident, and that trips to Dr. Hayne were duplicative.

Thirty-six year old Jack L. Savage, terminal manager for defendant employer since June of this year who prior to that time served as a superintendant of operations testified that it is his duty to oversee the whole terminal. He recalled that he first met claimant a few days prior to claimant's return to the job in 1982. He verified claimant's seniority status and salary and said that he has had an opportunity to talk to claimant and observe his work. He pronounced claimant's attendance good. He had not heard claimant complain. He was unaware of any restrictions being placed on claimant and found him capable of doing what the other drivers do.

Claimant was seen by William L. Reinwasser, M.D., on March 27, 1974 for an injury to his upper dorsal area when he fell off a tractor step. On November 12, 1974 claimant had edema and ecchymosis following being hit in the right leg by a chain.

Other medical diagnoses recorded prior to the time of the injuries in the matter sub judice include pneumonia, acute frontal sinusitis, an abcess of the forehead associated with acute sinusitis, fracture of the right lateral maleolus, facial injuries, contusion of the anterior chest wall, pulmonary irritation and conjunctivitis secondary to chemical fumes, a left ankle sprain, pucture wound to the right foot, and a right inguinal hernia.

A history and physical dated October 22, 1977 records an incident which occurred while claimant was grocery shopping and resulted in his falling on his right hip and buttocks. He had mild tenderness at the L5, S1 interspace. His knee and ankle jerks were absent bilaterally. There was decreased sensation. X-rays showed a spondylolisthesis of L5 on S1 with a mild slip of L5 on S1.

On December 8, 1977 claimant told Dr. Reinwasser that he had slipped inside a trailer and landed on his back. He complained of pain on palpation particularly in the right inguinal area and an inability to walk on his right leg. The following day his range of motion was limited. By December 13 the pain had shifted to the middle of the back. His motion remained limited and he dragged his right leg. The next day a cane was prescribed. The day after claimant attained instant relief with a rib belt. The doctor's diagnosis was rib contusion. Later that day claimant called with pain and hematuria. Dr. Reinwasser told him to go to the hospital, but apparently his fear of hospitals kept him away. On December 19, 1977 he still had loss of motion, pain and a pelvic tilt to the right. He was admitted to the hospital by H. Rosen, M.D. X-rays of the lumbar spine showed a narrowing at L4,5. There was minimal spondylolisthesis of L5 upon S1. On examination pain was elicited on palpation over the right lower rib cage, in the right and left lumbar areas and in the right loin area. Sacroiliac sites were hypertonic. Lasegue's test was positive on the right. Heel and toe walking was accomplished with difficulty due to a pulling sensation in the right leg. There was a definite pelvic tilt to the right. Claimant was treated with medication and therapy. Claimant was given a return to work date. However he called the doctor when he experienced sharp pains and severe spasms. Plans were made for claimant to be re-admitted to the hospital on January 4 but those were cancelled by claimant.

Willard W. Hayne, M.D., reported seeing claimant on January 5, 1978. His diagnosis was injury to the muscles of the right flank and back.

Claimant was seen in the emergency room on February 10, 1978 following a fall at Target. He complained of a mild headache and of discomfort in the lumbosacral spine area. He denied prior injury to his neck or back. He reported his only hospitalization in 1972. An X-ray of the lumbosacral spine was normal.

Dr. Hayne saw claimant regularly throughout January and February. In March Dr. Hayne found him unable to work because of pain and weakness.

Claimant was admitted to Iowa Methodist by John H. Kelley, M.D., on April 17, 1978 for a chronic low back strain. He gave a history of an injury in January of 1978. A myelogram was essentially negative. Claimant was instructed to get a lumbosacral brace, to undergo weight reduction and to walk to build up his legs. Physical therapy was started as well.

Ann L. McColley, L.P.T., treated claimant from April 21, 1978 through August 28, 1978. During that time claimant missed several appointments.

Claimant was released to return to work in June.

On July 4, 1978 claimant was seen for back pain.

On July 24, 1978 claimant sprained his ankle and foot while playing baseball.

On August 3, 1978 Dr. Kelley saw claimant following a sudden sharp pain which came on as he was throwing tires. Straight leg raising was limited to eighty degrees on the right. By August 31, 1978 claimant was found ready to return to work in ten days. Dr. Kelley recommended a conditioning program.

Claimant was seen as an outpatient on September 10, 1978 after a car accident. His complaints related to his right shoulder and neck. X-rays were taken of the chest and cervical spine.

Claimant sought out Dr. Kelley to ask him about back surgery on October 12, 1978. Dr. Kelley admitted claimant on October 31, 1978 and a posterolateral L5, S1 and a posterior L4-5, S1 fusion was performed. No past history of injuries was recorded.

On May 17, 1979 Dr. Kelley wrote to the insurance carrier that claimant had a twenty percent permanent partial impairment of his back.

In July of 1979 claimant was admitted after flipping a motorcycle. He had contusions, sprains and bruises and a hematoma on the left hip.

Claimant was seen in the emergency room on October 15, 1979. At that time he gave a history of opening the back of a truck and having freight fall on top of him. He complained of pain in the right shoulder, elbow, hand and mid-back. X-ray suggested a defect bilaterally. Repeat x-rays revealed hypertrophy about the facets of L5-S1 which E. T. Sersland, M.D., was uncertain whether to attribute to degenerative disease or to surgical intervention.

Claimant was seen in consultation by J. Kimelman, D.O., who found some limitation on range of motion. Deep tendon reflexes in the seated position in the knees and ankles were symmetrically depressed. Straight leg raising was positive in the supine position at seventy degrees on the right. The Patrick's test was also positive on the right with pain in the hip. Dr. Kimelman's diagnosis relating to the back was acute lumbosacral strain. Electromyography was nondiagnostic for radiculopathy but suspicious for early right L-5 irritation. Claimant was treated with therapy and medication. Final diagnoses included acute lumbar myofascitis secondary to acute lumbar strain and sprain and a possible herniated lumbar disc. Claimant was released to continue therapy on an outpatient basis. Plans were made for additional studies. The discharge summary noted the claimant had developed a non-specific low grade exogenous depression.

Claimant was readmitted on October 31, 1979. Claimant had no pain or paresthesias in the lower extremities. Straight leg raising was positive at forty degrees on the right. Claimant recounted his injury of October 15, his continuing to work from October 16 through October 29 and his pain persisting and intensifying. Pain radiated into the interior right thigh to the level of the knee. Electromyography was done on November 6, 1979 which was interpreted as nondiagnostic for radiculopathy.

Claimant complained of pain to Dr. Reinwasser throughout the month of December.

On December 10, 1979 claimant was at the emergency room for a shot for back pain. That situation recurred in April of 1980.

In March of 1980 claimant went to the Mayo Clinic. Claimant reported incidents injuring his back in November of 1976 and in August of 1979. On examination claimant favored his right leg. Mild exophoria was present. Muscle stretch reflexes were generally hypoactive, but symmetrical. Plantar responses were flexor. Claimant gave way on muscle testing of the right lower extremity. Decreased range of motion in the lumbar spine was assessed at mild to moderate. Straight leg raising produced discomfort in the right interior thigh on elevation to seventy degrees. Electromyography revealed motor unit potential changes in some of the right L5 muscles. The studies were interpreted as showing no evidence of active or on going radiculopathy. X-rays showed bilateral interruption of the pars interarticularis at L5 with slight interior subluxation of L5 on the sacrum. A Minnesota Multiphasic Personality Inventory evidenced abnormalities. Claimant was seen by a psychiatrist whose impression was hypomanic behavior and type A personality with chronic anxiety. Claimant was instructed to lose weight.

When claimant returned on May 15, 1980 the orthopedic surgeon continued to find his weight too high for consideration of surgery.

Claimant was hospitalized in May. Straight leg raising was positive at forty degrees on the right. Claimant was placed on a diet in an attempt to get his weight to the level suggested by Mayo. He was given analgesics for pain. Diagnoses in the discharge summary are "acute recurrent lumbar myofascitis, exogenous obesity, and mild hepatic dysfunction." Claimant was dismissed in moderately improved condition.

He was seen at least monthly by Dr. Reinwasser who recorded the same problem.

Claimant returned to the hospital on August 28, 1980 with a continuing complaint of low back pain with parathesia to the right buttock and to the posterior right thigh. Straight leg raising was moderately positive at forty-five degrees on the right. The diagnoses of mild hepatic dysfunction was deleted and one of possible lumbar neuropathy was added.

The frequency of claimant's visits to Dr. Reinwasser increased in late September and October.

Robert Hayne, M.D., admitted claimant to the hospital on November 23, 1980. Claimant gave a history back to 1978 when he was hit by a forklift. He also told of another injury when he was hit by freight. Limitation of motion was found in the low back region. Lumbar myelography showed narrowing at the lumbosacral junction with a suggestion of spinal stenosis. There was evidence of reabsorption of the bone graft.

Joe Fellows, M.D., admitted claimant to the hospital on February 10, 1981. Claimant gave a history of an original injury in January of 1978 which happened as he lifted a crate. A second injury took place in October of 1979 when claimant was hit with freight. On physical examination claimant had mild flattening of the normal lordotic curvature. Range of motion was diminished and straight leg raising was positive at forty-five degrees bilaterally. Reflexes were diminished but symmetrical. There were no apparent sensory changes. X-rays showed an unstable spinal fusion.

On February 11, 1981 surgery was carried out; a refusion was accomplished at the L5 S1 level on the left; and an exploration of the fusion mass on the right was done. Claimant was discharged on February 22, 1981 with a back brace.

Dr. Fellows found claimant capable of returning to work on November 16, 1981. On November 13, 1981 he wrote to claimant's attorney: "I would estimate Mr. Shelton's permanent physical impairment as a result of the previous back surgery as well as the present surgery to be 30%, relating the back to the body as a whole." In a subsequent letter he explained: "You will note that Dr. Kelley had arrived at a 20% physical impairment rating after the first surgery, and I am adding a 10% physical impairment rating on the basis of the necessity for repeat spinal fusion and some persistent symptoms in the lower back at the present time."

Claimant was examined by Thomas B. Summers, M.D., neurologist on April 14, 1982. Claimant told the doctor of an incident with a crate in October, 1978 and of another occurrence in November of 1980 when freight fell out of the truck and on top of him. He described no other injuries. Claimant told the doctor that he had completed twelfth grade and used alcohol in moderation. On examination straight leg raising was negative. Stength and coordination in the extremities were within normal limits. Diffuse tenderness was produced with light palpation of the operative sites. There was loss of extension of the lower spine. Tendon reflexes were absent in the lower limbs.

Dr. Summers reviewed claimant's medical history and concluded: "I am in agreement with Dr. Fellows' conclusions and physical impairment rating. On the other hand, it is my own personal feeling that the accidental injury suffered on October 22, 1977, February 10, 1978, September 8, 1978, and July 23, 1979, were contributing factors to the symptomatology in the case of Mr. Shelton."

APPLICABLE LAW AND ANALYSIS

The first issue to be resolved is whether or not there is a causal connection between claimant's injury and his present disability. The claimant has the burden of proving by a preponderance of the evidence that the injury of October 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, 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).

Claimant has had a number of injuries and conditions for which he has been treated. His medical history is lengthy and complex. Claimant might have been able to keep his medical history in order had his life not been further complicated by an intricate social and financial history. The record establishes that claimant has been less than candid from time to time. Concerning the matter of causation it is important to keep in mind that the search is not for the only cause. The claimant in Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971) sustained a back injury in April of 1967 for which he was paid compensation. Thereafter he was employed by other employers doing the same type of work. In January of 1969 he had back pain. Surgery was performed in March of that year. His physician testified that claimant's condition when surgery was performed was "in all probability initiated by the strain on his back . . . some two years before." The doctor acknowledged that incidents in 1969 were also producing causes. The Iowa Supreme Court held at 670 that requiring claimant to show his accident in 1967 was the sole proximate cause placed on the claimant a greater burden than the law imposed. More recently in Blacksmith v. All American, Inc., 290 N.W.2d 48 (Iowa 1980) at 354 the court reiterated: "A cause is proximate if it is a substantial factor in bringing about the result. . . .It only needs to be one cause; it does not have to be the only cause."

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).

Claimant has had three employment incidents. He has also had a fall in a grocery store on October 22, 1977; a fall in a department store on February 10, 1978; an auto accident on September 10, 1978; and a motorcycle accident in July of 1979. With these happenings in mind an analysis of the medical evidence will be undertaken.

That evidence shows that claimant fell in a grocery store on October 22, 1977. His complaints were related to his hip and his buttocks. X-rays showed a mild spondylolisthesis. X-ray findings remained the same when claimant was seen following his December 8, 1977 injury. Claimant fell in the department store on February 10, 1978, he had discomfort in his lumbosacral spine and reported a hospitalization in 1972 as his only one. An x-ray of the lumbosacral spine was normal. When claimant was seen on August 3, 1978 he gave a history to Dr. Kelley of a sharp pain which came on as he was throwing tires. Only slightly more than a month later he was involved in a car accident. His complaints related to his right shoulder and neck. When claimant was admitted to the hospital for surgery in October of 1978 no past history of injuries was recorded. However, Dr. Kelley was aware of an incident in August of 1978 and had seen claimant in April of 1978 regarding a January injury. In May of 1979 Dr. Kelley gave claimant a twenty percent impairment rating. Claimant had a motorcyle accident in July. In October he was again hospitalized. When claimant went to the Mayo Clinic he reported back injuries in November of 1976 and August of 1979. Claimant gave Dr. Hayne a history of being hit by a forklift. He told Dr. Fellows he had an original injury in January of 1978 as he lifted a crate and a second injury reportedly took place in October of 1979 when he was hit with freight.

None of these treating or examining physicians have provided a statement of causation with the exception of Dr. Fellows who is claimant's last treating physician.

Dr. Fellows added a ten percent impairment rating on the basis of need for a repeated spinal fusion. Dr. Summers, the evaluating physician, agreed with Dr. Fellows' conclusion but he viewed the claimant's fall in the grocery store, his fall in the department store, his auto accident, and his motorcyle accident as contributing factors. Injuries from the car accident appear to have been confined to claimant's shoulder and neck. Neither was there apparent injury to claimant's back following his motorcyle accident. All of these incidents occurred prior to claimant's 1979 injury and those resulting in back complaints were before his first fusion. Claimant has been fairly consistent in his reporting of his most recent injury. The record read as a whole is sufficient to carry claimant's burden of establishing that there is a causal connection between his work injuries and his present 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. 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 said many times:

> 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 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.

Defendant properly points out that claimant does not have a reduction in actual earnings. Of course, it is not a reduction in actual earnings with which we are here concerned. Rather, it is the loss in earning capacity. Defendants are correct in their analysis that claimant is able to do the things which he did before. His testimony is that he has no restrictions on motion and little limitation on other physical activity. His major residual is pain. Claimant has an increase in functional impairment. Dr. Summers, who is the only physician with a fairly complete medical history, agrees with Dr. Fellows' rating, but points out that there are other contributing factors. Cases such as claimant's are relatively rare. Fusions often result in more limitation and higher impairment ratings. Claimant is obviously a young man who has a good result from his surgery. He is also fortunate to have an employer who is willing to keep him working. This is an ideal circumstance. Claimant has a job; defendant employer has an experienced worker.

After reviewing the Iowa case law, the findings set out below and the factors considered in this portion of the decision the undersigned has reached a determination of a seven and one-half percent industrial disability attributable to claimant's injury of October 15, 1979. Claimant has the protection of a review-reopening should his condition change in the future.

The next issue to be considered is the proper rate of compensation for each of claimant's injuries.

Iowa Code Section 85.61(10) provides:

> "Payroll taxes" means the following:
> a. 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
> b. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, 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
> c. An amount equal to the amount required on July 1 preceding the injury by the Social Security Act of 1935 as amended to July 1, 1976, to be deducted or withheld from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which he was injured.

Rate of compensation in workers' compensation matters is based on a claimant's gross weekly wages, marital status and number of exemptions. Defendants contest the allowance of exemptions for claimant's children as his support of those children has been erratic.

The Industrial Commissioner addressed a similar problem in Biggs v. Charles Donner, Appeal Decision filed April 22, 1982. In Biggs claimant was living with his second wife and her two children. He had three biological children from a previous marriage who he was under court order to support although he was not doing so. The Commissioner found claimant could claim his natural children as exemptions for rate purposes.

Claimant herein is under court order to support all of his children. With Biggs as a precedent, benefits will be awarded at a rate which allows exemptions for all of claimant's children. It is agency practice to assume the ideal situation when counting exemptions. It is assumed fathers under court order to support children will do so. Claimant was married at the time of his first injury. He would have eight exemptions at that time for a compensation rate of $218.94. Claimant was single at the time of each of the other injuries and therefore entitled to only seven exemptions. His rate for the 1978 injury is $227.90; the rate for the 1979 injury is $253.12.

Claimant should be paid an additional amount for his 1977 injury as he was paid at an incorrect rate. Defendants are entitled to a credit for overpayment of benefits regarding claimant's 1978 injury. That credit will be allowed against the award made in this decision. See, Wilson Food Corporation v. Cherry, 315 N.W.2d 756 (Iowa 1982).

The fourth issue in this matter relates to claimant's entitlement to benefits under Iowa Code Section 85.27. That section 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 and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Also relevant is Industrial Commissioner Rule 500-8.1(2):

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

Claimant makes claim for a number of trips to hospitals, to doctors and to therapy. His exhibit claims mileage that is not always consistent with the mileage to which he testified. His testimony and the exhibit were averaged to determine the number of miles traveled. The parties stipulated to the number of trips made to Dr. Reinwasser in the various years. The undersigned has reviewed the records of Dr. Reinwasser and finds that claimant is entitled to at least that number of trips. Not all trips have been allowed to either Methodist or Lutheran Hospital.

Claimant seems to seek an award for future medical benefits. No perspective order can be entered. However, defendants are responsible for medical expenses causally related to claimant's injuries. Should a dispute arise, the parties can resort to this agency for resolution.

The final issue is whether or not defendants are entitled to credit for the overpayment of benefits. That issue has been dealt with in conjunction with the rate issue.

FINDINGS OF FACT

That claimant is thirty-seven years of age.

The claimant is the father of six children and had six children at the time of each injury.

That claimant was married at the time of his December 8, 1977 injury.

That claimant was single at the time of his August 3, 1978 and October 15, 1979 injuries.

That Mary Lorey received A.D.C. until February 1, 1981.

Carmen Elizabeth got A.D.C. until January 31, 1981.

That Linda Arleen collected A.D.C. at least through August 3, 1981.

That claimant left school in twelfth grade.

That claimant's work experience has included casual work and brief experience as a vaccumn cleaner salesperson.

That most of claimant's work experience has been as a pickup and delivery person for defendant employer.

That claimant was injured while working in a trailer on December 8, 1977.

That as a result of his injury on December 8, 1977 claimant was paid medical expenses, healing period and a ten percent permanent partial disability.

That claimant's gross weekly earnings at this time were $340.00 per week.

That on October 22, 1977 claimant fell in a grocery store injuring his right hip buttocks.

That x-rays in October, 1977 showed spondylolisthesis.

That on February 10, 1978 claimant fell in a store and then experienced discomfort in his lumbosacral spine.

That an x-ray of the lumbosacral spine was normal.

That claimant was injured at work on August 3, 1978 when he was hit by a crate.

That as a result of this injury on August 3, 1978 claimant was paid medical expenses, healing period benefits and a ten percent permanent partial disability.

That claimant's gross weekly earnings at this time were $375.20 per week.

That claimant was involved in an auto accident on September 10, 1978 which resulted in complaints related to his right shoulder and neck.

That on October 31, 1978 claimant had a posterolateral L5, S1 and a posterior L4-5, S1 fusion.

That on May 18, 1979 Dr. Kelley gave claimant a twenty percent permanent partial impairment rating.

That in July of 1979 claimant was involved in a motorcycle accident.

That claimant was injured on October 15, 1979 as he began to unload freight from a trailer.

That as a result of his injury on October 15, 1979 claimant was paid medical expenses and healing period benefits.

That claimant's gross weekly earnings at this time were $426.80 per week.

That claimant sought medical treatment at the Mayo Clinic.

That claimant had additional surgery on February 11, 1981.

That claimant continues to have pain and to take Tylenol 3 three times a day.

That claimant is able to lift, bend, stoop, reach and drive and has no limitation on motion.

That the terminal manager for defendant employer who has observed claimant and talked with him was unaware of any restrictions on claimant and found him capable of doing what the other drivers do.

That Dr. Fellows who performed claimant's surgery in February of 1981 added a ten percent physical impairment rating to that made by Dr. Kelley.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant had proved by a preponderance of the evidence that his injury of October 15, 1979 is a cause of the disability on which he now bases his claim.

That claimant has an additional seven and one-half percent permanent partial disability resulting from his injury of October 15, 1979.

That the proper rate for claimant's injury of December 8, 1977 is $218.94.

That the proper rate for claimant's injury of August 3, 1978 is $227.90.

That the proper rate for claimant's injury of October 15, 1979 is $253.12

That claimant is entitled to mileage expenses pursuant to Iowa Code section 85.27 and Industrial Commissioner Rule 500-8.1.

That defendants are entitled to credit for overpayment of benefits relating to claimant's 1978 injury.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant permanent partial disability benefits for thirty-seven and one-half (37½) weeks at the rate of two hundred fifty-three and 12/100 dollars ($253.12) per week.

That defendants pay unto claimant an additional three hundred fifty-nine and 64/100 dollars ($359.64) in healing period benefits.

That defendants be allowed a credit of seven hundred ninety-four and 88/100 dollars ($794.88) against this award for overpayment of benefits relating to claimant's 1978 injury.

That defendants pay unto claimant an additional one hundred forty-six and 47/100 dollars ($146.47) for his 1977 injury.

That defendants pay unto claimant the following mileage expenses:

Lutheran Hospital	10 Miles	2 Trips	@ $.15 per mile
Lutheran Hospital	10 Miles	6 Trips	@ $.18 per mile
Methodist Hospital	11 Miles	2 Trips	@ $.15 per mile
Methodist Hospital	11 Miles	1 Trip	@ $.18 per mile
Methodist Hospital	11 Miles	2 Trips	@ $.20 per mile
Dr. Reinwasser	10 Miles	7 Trips	@ $.15 per mile
Dr. Reinwasser	10 Miles	13 Trips	@ $.18 per mile
Dr. Reinwasser	10 Miles	8 Trips	@ $.20 per mile
Dr. Hayne	13 Miles	1 Trip	@ $.20 per mile
Therapy	10 Miles	5 Trips	@ $.15 per mile
Therapy	10 Miles	7 Trips	@ $.18 per mile
Dr. Kelley	13 Miles	2 Trips	@ $.15 per mile
Dr. Kelley	13 Miles	4 Trips	@ $.18 per mile
Dr. Fellows	13 Miles	2 Trips	@ $.20 per mile
Dr. Fellows	13 Miles	3 Trips	@ $.22 per mile
			$123.12

That defendants pay interest pursuant to Iowa Code Section 85.30.

That defendants pay cost pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 8th day of September, 1982.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY ANN SHOWMAN, WIDOW OF GERALD L. SHOWMAN, Claimant, vs. IOWA CITY COMMUNITY SCHOOL DISTRICT, Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	FILE NO. 680820 C O M M U T A T I O N D E C I S I O N

This matter came on for hearing at the Linn County Juvenile Court Facility in Cedar Rapids on October 27, 1982 at which time the case was fully submitted.

A review of the commissioner's file reveals that an employer's first report of injury was filed on September 11, 1981. A memorandum of agreement was filed on September 29, 1981 calling for the payment of $145.73 in weekly compensation. The record consists of the testimony of the claimant, Bruce Huston and Stan Harlan.

ISSUE

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

STATEMENT OF THE EVIDENCE

Claimant, age 55, is the surviving spouse of Gerald L. Showman, who died as a result of injuries sustained arising out of and in the course of his employment on August 28, 1981. Claimant has been receiving $145.73 in compensation and seeks commutation of this amount. There is some dispute as to the commuted value of the case inasmuch as the discount rate was increased on July 1, 1982, thus lessening the commuted value of benefits.

Claimant testified that she is a second grade teacher and has been so for 14 years. She has no minor children or dependents. She has a Master's Degree from the University of Iowa. Her teaching income is in excess of $22,000 per year, not

including fringe benefits. She does not anticipate remarriage at present. Her living expenses are $1,100 a month and has an equity value on her dwelling of $52,000. She has invested all of the proceeds from insurance on her husband's life. She has not invaded principal. She has done her own income taxes for ten years and has handled family finances for many years.

Bruce Huston, an actuary, testified on behalf of claimant. He proposed that claimant spend $71,555.19 to purchase an annuity yielding $145.33 per week. The testimony of Stan Harlan indicates that nearly $400 per month of the weekly benefit would be taxable as income. The payments would continue for claimant's lifetime (as they would under compensation).

APPLICABLE LAW

1. Sections 85.3 and 85.30, Code of Iowa, provide for jurisdiction by this agency over workers' compensation matters.

2. Section 85.45, Code of Iowa, allows for the commutation of all payments due a claimant. Section 85.48, Code of Iowa, provides for the payment of a portion of a potential claim. The Code was amended as of July 1, 1982 to increase the discount rate to ten percent in commutations.

3. 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 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.

ANALYSIS

Despite the general rule that supports a more restrictive view of the commutation of compensation benefits, the Diamond guidelines still prevail in Iowa.

Section 85.45, Code of Iowa, provides for the commutation of future compensation benefits 1) when the period during which compensation is payable can be definitely determined and 2) that the commutation is in claimant's best interests.

In order to determine whether it would be in claimant's best interest, it is necessary to determine what would be realized if a full commutation were granted. If the commutation is granted at the 10 percent discount rate in effect after July 1, 1982, the gross commutation will be about $88,000, whereas if the amount is commuted at the rate in effect before July 1, 1982, it would be about $102,000. As regards to the discount rate, it is noted that both the interest on awards of compensation and the discount rate were increased as parts of the same legislative package. This agency has been following the policy that interest at the rate of 10 percent applies only to decisions rendered after July 1, 1982. The compensation act does not have a time of enforcement contained within it, as does section 535.3, Code of Iowa. The prefactory language of section 85.45, Code of Iowa, refers to commutation "to a present worth lump sum payment." Since the present value or worth is dictated by the legislature, it would appear that the present value rather than the value at date of death is the appropriate method of calculation. Therefore, the rate of commutation allowed after the amendment in effect on July 1, 1982 will apply.

The undersigned is at a loss to understand why a commutation is sought by claimant other than relieving her of the remarriage penalty present if she continues under compensation (if claimant remarries, compensation ceases, whereas the annuity will continue paying). This, coupled with the taxable incident, requires the undersigned to find that commutation by the means sought is not in claimant's best interest at this time.

FINDINGS OF FACT

1. Claimant's decedent was employed by defendant-employer on August 28, 1981.

2. Defendants filed a memorandum of agreement.

3. Defendants have been paying compensation since decedent's death.

4. The period during which compensation is payable can be definitely determined.

5. The commutation as presented is not in claimant's best interest.

CONCLUSION OF LAW

The commutation sought by claimant should not be granted.

ORDER

THEREFORE, IT IS ORDERED the commutation sought by the claimant be denied.

Costs of witnesses at the hearing are to be paid by the party calling the witness, and the cost of the court reporter at the hearing is taxed to defendants.

Signed and filed this 20th day of December, 1982.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALETTE E. SHULL, Widow of CHARLES F. SHULL,	:	
Claimant,	:	
vs.	:	
L & L INSULATION AND SUPPLY CO.; IOWA ASBESTOS COMPANY, and CENTRAL ASBESTOS SUPPLY CO.,	:	File No. 542092
Employers,	:	A P P E A L
and	:	D E C I S I O N
NORTHRIVER INSURANCE CO., WESTCHESTER FIRE INSURANCE CO., WESTERN CASUALTY AND SURETY COMPANY, EMPLOYERS MUTUAL CASUALTY COMPANY, and CRUM & FORSTER INSURANCE COMPANY,	:	
Insurance Carriers, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from the proposed arbitration decision filed March 9, 1982 wherein claimant was denied death and burial benefits as surviving spouse of Charles F. Shull.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Richard C. Wooters, M.D., Terry Curry, Donald G. Curry, Donald K. Curry, Carl Eldon Prince, Willard Robert Brown, John David Young, Homer Thompson, Dennis Donaldson, Charles P. Shull, Ernest Ashdown, and Phil Mathis; claimant's exhibits 1 through 7 inclusive; defendants' exhibits A through H inclusive; the evidentiary depositions of Richard C. Wooters, M.D. and Paul From, M.D.; claimant's answers to interrogatories; a request for admissions filed September 13, 1979 and the response thereto; and the briefs of all parties on appeal with the exception of Central Asbestos and Employers Mutual Casualty.

ISSUES

On appeal, the issues are as follows:

I. Did the hearing deputy err in receiving a post-hearing medical deposition.

II. Did the hearing deputy err in not having stricken the trial brief of defendants Iowa Asbestos and Westchester Fire Insurance filed January 21, 1982.

III. Whether the subject matter of the above entitled action falls within the intent of the Workers' Compensation Act, Chapter 85, Code of Iowa, or The Occupational Disease Law, Chapter 85A, Code of Iowa.

IV. Whether claimant's decedent died the result of a disease or injury arising out of and in the course of his employment.

REVIEW OF THE EVIDENCE

Claimant's decedent, Charles F. Shull, was employed by defendant L & L Insulation on May 12, 1978 and had been employed by this employer for about six years. Prior to this period, claimant's decedent had been employed by each of the defendant employers for various periods of time.

During his career as an insulator, decedent had been exposed to asbestos, first in its application as an insulating substance and then in its removal as new insulation was applied. Although the use of asbestos as an insulator had been curtailed in about 1970, decedent was still exposed to asbestos when refittings were made.

On June 28, 1979 claimant filed a petition in arbitration seeking death benefits and alleging, among other things, that:

> Exposure as an insulation worker to asbestos, fiberglass, and other insulation materials during the years with employers, injury from same being diagnosed and determined, by physician's review of autopsy and other medical findings as being a definite contributing factor to said employee's death, same not being made known to the surviving widow and claimant herein until receipt of physician's letter dated May 23, 1979.

Claimant testified at hearing that decedent died at home on May 12, 1978 prior to reporting to work. Claimant testified that she and the decedent were sitting in their home on the afternoon of May 12, 1978 when decedent suddenly stood up and left the room. (Tr., p. 201) A short time later, the decedent was found dead in a family trailer home parked a short distance from the house. (Tr., p. 201)

Claimant indicated that decedent had smoked for sometime, but had quit about six months prior to his death. (Tr., pp. 214-215) She further indicated that decedent had developed a persistent cough at least a year prior to his death, but otherwise appeared to be in good health. Claimant testified she witnessed several of decedent's coughing spells at home (Tr., p. 201) and heard that decedent had experienced a coughing spell while at work the night before his death that brought him to his knees. It remains unclear whether decedent was coughing just prior to his death. (Tr., pp. 217-219) Claimant indicated that it was decedent's custom to isolate himself during coughing attacks. (Tr., p. 19)

Claimant's son, Charles P. Shull, testified that when he found his father dead in the trailer on May 12, 1978, his father was holding a handkerchief in his hand that was moist with mucus. Mr. Shull stated that there was no indication that the decedent had been working in the trailer at the time of his death. (Tr., pp. 179-180)

Terry Curry testified that he worked with the decedent in the period prior to May 12, 1978. Curry stated that the decedent had been a heavy smoker but that he began to cut down about six or seven months before his death. (Tr., pp. 115-116) The witness also stated that the decedent had experienced coughing attacks for two to three years prior to May 12, 1978. (Tr., p. 114) According to Curry, the decedent would experience a coughing attack when in small, enclosed areas where the air was filled with dust. (Tr., p. 104)

R. C. Wooters, M.D., the Polk County Medical Examiner, was called to investigate the circumstances of the decedent's death on May 12, 1978. Dr. Wooters testified at the hearing and also by way of deposition. Dr. Wooters testified that he briefly inspected the body and the surrounding area. The doctor does not mention having found a handkerchief at the scene nor finding any other indication of a violent coughing attack prior to death. Dr. Wooters remembered finding hand tools inside the trailer, but stated that he was not certain of this fact. (Wooters dep., p. 37)

Dr. Wooters subsequently ordered an autopsy by E. Q. Lacsina, M.D., a pathologist. Dr. Wooters stated that he did not participate in the autopsy or further examine the decedent. (Tr., pp. 92-93; Wooters dep., p. 39) He further stated that he was not provided with any prior medical records of the decedent. (Wooters dep., p. 42) Dr. Wooters testified to Dr. Lacsina's findings:

> The autopsy was done at Northwest Hospital on the 13th of May, beginning at 9:00 a.m., and the findings were as follows: Hypertensive cardiovascular disease with cardiomegaly, which is enlargement of the heart, diffuse subarachnoid and interventricular hemorrhage. The other findings--This was certainly the principal finding.
>
> The other findings included coronary atherosclerosis or hardening of the arteries in the heart; pulmonary edema and congestion, severe, bilateral; pulmonary fibrosis; dense fibrous pleural adhesions; generalized acute passive congestion, moderate atherosclerosis of the aorta and main branches; cholelithiasis, which is simply gallstones; and another incidental notation was the surgical absence of the appendix.
>
> The probable cause of death was listed by Dr. Lacsina as diffuse subarachnoid and interventricular fresh hemorrhage as a result of hypertensive cardiovascular disease. (Tr., p. 41)

Dr. Wooters indicated further that Dr. Lascina's examination of the decedent's lungs failed to reveal the presence of asbestos bodies. (Wooters dep., p. 56)

Approximately one year after her husband's death, claimant wrote the following to Dr. Wooters:

> Enclosed you will find copies of two letters. One is the one I wrote to Dr. Selikoff of The Mount Sinai Medical Center in which I asked if he believed pulmonary asbestosis was a contributory factor in my husband's death. His reply is stated in the second letter. Thus my reason for writing this letter.
>
> At the time of my husband's death I requested an autopsy be performed. I was told I would receive a copy of the autopsy report but to date have never received such.
>
> As stated in the enclosed letter, I may be eligible for a pension if there is evidence that pulmonary asbestosis was a factor in my husband's death. My husband did have severe coughing spells. (The evening before his death I was told he had one so severe as to bring him to his knees.) I believe these coughing spells were caused from asbestos fibers in his lungs, thus the cerbral [sic] hemorrhage.

> Please send me a copy of the autopsy report and please state that if in your opinion pulmonary asbestosis played a part in my husband's death. (Def. ex. B)

Dr. Wooters replied by way of a letter dated May 23, 1979 in which he wrote:

> I have reviewed the autopsy report submitted by E. Q. Lacsina, M.D., Pathologist, and a member of my staff. I have also read the findings of Dr. Selikoff of the Mount Sinai Medical Center and also noted the description you gave regarding the severity of your husband's cough. It is my opinion that pulmonary asbestosis, which was found conclusively in your husband's lungs, was a definite contributing factor to his death.
>
> Asbestosis is a common cause of chronic cough. Severe coughing can certainly precipitate cerebral hemorrhage in an individual with cerebral aterio-sclerosis [sic].

Dr. Wooters indicated that he felt that a coughing attack was the likely precipitating event of the decedent's death given a history of prior attacks supplied by the claimant. (Wooters dep., pp. 79-80) Dr. Wooters further opined that the condition of asbestosis was the most likely cause of any coughing attacks that the decedent may have undergone. Dr. Wooters concluded that it was a violent coughing attack that caused decedent's fatal cerebral hemorrhage. (Tr., p. 84) Dr. Wooters was not provided with a history of the decedent's smoking habits. (Wooters dep., p. 18)

As to the likely cause of the decedent's cerebral hemorrhage, Dr. Wooters testified:

> A. Yes. I feel that the actual cause of death, the immediate cause of death, which was cerebral vascular accident or stroke, very possibly was induced by coughing, which very likely was induced by the asbestosis.
>
> Q. Is it equally likely it could be induced by any other factor?
>
> * * *
>
> A. As I indicated, it's possible the man could have had a stroke without having had these other problems which certainly increased the likelihood of this having happened in the manner that I've described. I can't say with certainty that this was the train of events. (Wooters dep., pp. 15-16)

On cross-examination, Dr. Wooters' conclusions became somewhat more qualified: Dr. Wooters was asked:

> Q. Possible, referring to a 50-50 chance or less and probable, referring to more than a 50-50 chance. When you use the words possible and probable, are you using them in those contexts?
>
> * * *
>
> A. Yes. Now let me think about my answer. I don't believe I'm in a position to say, in terms of proportions, 50-50 or better or less. With the scheme of things that I've presented here, it seems to me a very possible, entirely conceivable, entirely reasonable conclusion.
>
> To say that this is without a doubt the most likely or is, you know, certain, I would have difficulty, you know, saying whether it was. To narrow it down to probable or possible, I think, as far as my feelings are concerned, it's a very likely possibility that if a man coughed strenuously it could have caused the hemorrhage. (Wooters dep., pp. 50-51)

On further cross-examination, Dr. Wooters was asked:

> Q. I just have a couple questions, Doctor. In order to sort of sum up what Mr. Hoffmann and the rest of them have been discussing with you today, is it a fair statement that in light of the many possible precipitating factors in a cerebral vascular accident, that you cannot state with medical certainty as to what caused the cerebral vascular accident in this case?
>
> A. Absolutely.
>
> Q. There would be no objective way for you to be able to prove that at this point in time?
>
> A. That's correct. (Wooters dep., p. 57)

Dr. Wooters testified that he had no special training in the field of pneumoconiosis which includes the condition of asbestosis (Tr., p. 77) and that his conclusion that asbestosis contributed to decedent's death was by implication. (Tr., p. 71) Dr. Wooters went on to state, however, that were it not for the decedent's preexisting hypertensive coronary problems, he would not have suffered the fatal stroke. (Tr., p. 82) Coughing alone would not have been sufficient to precipitate a cerebral hemorrhage according to Dr. Wooters. (Tr., p. 85) A cerebral vascular accident, or CVA, commonly occurs without an activity or precipitating event, Dr. Wooters testified. (Wooters dep., pp. 61-62) The doctor further indicated that given the decedent's preexisting coronary problems, the risk of stroke would be high and would not require a precipitating event. (Wooters dep., pp. 44, 46) Dr. Wooters characterized the decedent's coronary disease as "moderately severe." (Tr., p. 91)

Lung sections from the autopsy performed on claimant's decedent were sent to the Mount Sinai Medical Center in New York at the direction of the claimant. Irving J. Selikoff, M.D., who was involved in researching pneumoconiosis in the insulation industry, ordered Y. Suzuki, M.D., of the Pathology unit to examine the lung sections. In a letter to claimant dated February 20, 1979, Dr. Selikoff reports the findings of Dr. Suzuki. He writes:

> There was definite evidence of pulmonary asbestosis, characterized by parenchymal fibrosis and many asbestos bodies.
>
> Thus, the direct answer to your question is, yes, there was pulmonary asbestosis present. However, only your husband's medical attendant could evaluate whether or not it played a role in his death. (Cl. ex. 7)

Apparently, a copy of Dr. Lascina's autopsy report was sent to Dr. Selikoff after the above letter was written. In another letter of November 22, 1978, Dr. Selikoff writes: "We have reviewed the autopsy findings in your husband's case. They entirely confirm what has been told you; that your husband died of a cerebral hemorrhage." (Def. ex. A)

Paul From, M.D., testified by way of deposition that he is a specialist in internal medicine and serves as the director of the cardiopulmonary section at Mercy Hospital. He testified that his practice involves the treatment of occupational diseases such as asbestosis.

Dr. From testified as to relationship between coronary diseases and strokes:

> Q. Doctor, what is the relationship between hypertensive cardiovascular disease in such conditions as severe coronary atherosclerosis and a stroke or cardiovascular accident?
>
> * * *
>
> A. The term "hyptertensive [sic] cardiovascular disease" indicates that the basic problem has been hypertension; an elevation of blood pressure above normal for probably a considerable period of time. This pathognomonically then causes the cardiovascular system, the heart and blood vessels--and this basicaly means arterial levels, not venous levels--to undergo disease process, hastened and caused by that hypertension.
>
> The terminology would connote that it's widespread throughout the entire heart and arterial system of the body. Functionally, it may be important only in certain areas. For example, it may be in the heart muscle itself straining against the high blood pressure and causing failure of the left side of the heart. It may be in the coronary vessels and cause hastening of an occlusion there, which would then lead to myocardial infarction, or what lay people would call a heart attack.
>
> It may mean it's happening within the blood vessels of the neck or brain, and that changes in blood flow come about because of this even to the point of occlusion of a blood vessel or rupture of a blood vessel or an embolic phenomenon from an irritative area within the heart muscle causing a clot to form and break loose to go to the brain or some other part of the body and cause ischemia at that point. That we call an embolus.
>
> But the entire term means hypertension was the basic cause, and whether or not that hypertension had a known cause or not is unimportant. There is hypertension there, and that then produced disease in the heart and arterial system of the body.
>
> If then a stroke comes about, it simply happens in the brain portion of the arterial system. (From dep., pp. 10-11)

Dr. From indicated that he had not examined the decedent's body, but had reviewed the autopsy findings, the reports of Dr. Selikoff, and the testimony of Dr. Wooters. (From dep., pp. 20-23) While Dr. From agreed with Dr. Wooters that the decedent died from a cerebral hemorrhage, Dr. From stated a coughing attack could not have been the precipitating event. Dr. From went into detail as to this conclusion:

> A. I do not believe there is any connection between a person having a severe cough, no matter what magnitude, and a cerebral hemorrhage.
>
> Q. Now, Doctor, you have reviewed all the exhibits in this case; and in addition to talking generally, I am talking about this specific case.
>
> Is that your opinion with respect to this specific case?
>
> A. Yes, sir, it is.
>
> Q. Would you explain the reasons for that opinion, Doctor?
>
> A. In general, if a person has a severe cough, a number of things happen because of that cough.
>
> Now, you can raise the pressure about the neck and subcutaneous tissues of your face. I have known people who have coughed hard enough that their eyes get red and they have little blood flecks about their eyes, and this and that; but

when basically one has a cough, which is taking in a deep breath, closing the glottis and epiglottis, contracting the muscles of the chest and the diaphragm, raising the pressure then within the chest, a number of events have to physiologically come about. One is that during the time there is a cough, the diaphragm is in a spasm--or at least in a non-usable position as far as descending and ascending, which is its function. It's that ascent and descent of the diaphragm which helps suck in and bring along blood from the periphery of the body into the thoracic cage. So if that doesn't happen, the first thing is that there is no blood getting into the venous system, really, of the thoracic cage, which is a large reservoir or capacitance of the thorax.

That blood in the venous system has to get into the heart--into the right side of the heart, go through the lungs, come back into the left side of the heart, and be pumped out into the periphery in order to make room for the next flood of blood that comes in and to maintain the cardiac output.

The blood pressure of the body depends upon the amount of blood put out by the heart with each beat--and we will call that the cardiac output--multiplied by the heart rate of the body, how fast it's going. Obviously the more blood it puts out per beat and the faster it is beating, the greater the blood pressure is going to be.

Conversely, if either one of the parts of that product or equation goes down, the blood pressure goes down.

It's the blood pressure which gives us profusion of body tissue; that is, the column of blood which is an organ system of the body is given a certain pressure by the pumping action of the heart. There is muscular tissue within the arterial system which helps milk the column of blood, or that organ system of blood, throughout the body; but its greatest impetus to flow comes from the force given to it by the heart.

We call that force the vis a tergo. That's the vital force that makes it flow. Veins have no muscles in them; they simply can't even milk the blood along, so it's this force, or vis a tergo, that the blood has that pushes it on to the venous system back to the heart to be recirculated throughout the body.

So if blood pressure then is what determines profusion of the body, if there is no blood pressure, if it develops, then the brain, which is a very vital part of the body, is not going to be profused with blood adequately, so that when one coughs, you are going to drop the pumping action of the heart, get less blood into the thorax, have less blood going out into the body, certainly have less blood going out to the brain with a lowered pressure.

Another thing also happens at that time, in that certain reflexes are set up, depending upon the pressure inside the lung and the great vessel of the chest and the nervous system and the pulmonary and cardiac systems of the spinal cord, and so forth, in which heart rate and coronary blood flow, and so forth, are regulated; and it all comes about from the fact that if the pressures go down and you need less blood, the heart rate begins to go down so that you don't get into trouble from an imbalance. As it goes down and pumps out less blood, also the blood pressure goes down and the profusion of the brain becomes less.

Therefore, with all of these factors operating, the loss of the pumping action of the diaphragm, which is really what we call the Valsalva's maneuver, with the reflex changes to slow the heart rate, and so forth, there is less blood being put out of the heart to go to the brain, less profusion of the brain, and if we are talking about a cerebral hemorrhage, certainly less chance for a hemorrhage, because the blood vessel must rupture to give us a hemorrhage; that is, the blood has to come out from the vascular system, and it won't rupture through a normal vessel unless the pressure just expanded terrifically all at once to where it lost, you know, its mechanical advantage.

If the blood pressure is diseased through atherosclerosis, it simply can't withstand as much pressure as before, so it ruptures when the pressure is up. It may do this naturally; just might rupture. This happened, I think, to President Roosevelt during World War II. He just blew, you know. It can happen with many activities which raise blood pressure, but it certainly would be less likely to happen if the blood pressure dropped, and that's what should happen with coughing.

Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether a coughing spell one hour prior to the death of Mr. Shull from a cerebral hemorrhage would have any causal relationship with his death?

A. Yes, I have an opinion.

Q. What is that opinion?

A. I don't believe there could be any connection between a coughing spell, no matter what severity, one hour before his death and his death which was due to a cerebral hemorrhage, in any way. Not only do I think that because I think there is no relationship between coughing and a cerebral hemorrhage, but the time interval is so great that, you know, unless in some-- I mean it's just physiologically impossible.

But ignoring that, if what happened an hour ago was taken care of 58 minutes ago, I think the body compensation would be that fast. There simply wouldn't be anything that would happen now and 60 minutes later another event happen on account of that. I think that's impossible. (From dep., pp. 24-29)

On cross-examination by claimant's counsel, Dr. From continued to distinguish his conclusions from those of Dr. Wooters. Dr. From testified:

A. Here, Mr. Shull is a man who is found dead lying on his back, maybe with handkerchief in his hand, and the handkerchief is wet with mucus. Mr. Shull had smoked for many years. He had stopped smoking about six months before he died. He was still having paroxysms of coughing toward the time of his death. Whether or not he had a paroxysm of coughing at the time of his death, or within an hour to an hour and a half of his death, is really not certain.

"Asbestosis is a common cause of chronic cough." I object to that. I think asbestosis possibly can be a rather-- I will put it the other way around. Cough can be a possible symptom of asbestosis. Asbestosis is not very common if one really goes by the definition of what is asbestosis. I therefore take objection to that statement, "Asbestosis is a common cause of chronic cough." It should be the other way around, I think. A cough might be a symptom of asbestosis.

Now, "severe coughing can precipitate cerebral hemorrhage." I take objection to that because, myself, in my own reasoning, nor in five other physicians whose opinion and whose reasoning physiologically and whose experience in smoke syndromes I would value, none felt that cough could precipitate a cerebral hemorrhage even in an individual with severe cerebral atherosclerosis.

Now, if you want me to conjecture, here is a man who had an autopsy in 1978; in 1979 begins to get other information; says he reviews it; says that he has--now agrees that there is asbestosis, when the original autopsy did not in any way say that he had asbestosis, and now he says these other things. . . .

So my statement then is, I don't how he got that because I don't agree with the second paragraph in the first place. (From dep., pp. 51-53)

Despite the discovery of asbestos bodies by Dr. Suzuki, Dr. From considered the effects of cigarette smoking to explain the decedent's coughing attacks. The doctor detailed the different impacts that cigarette smoking and asbestos inhalation have on the lungs. Dr. From testified:

A. Okay. Tobacco smoke would exert most of its problems in the peripheral, so to speak, portion of the lung; that is, in the trachea, the large bronchial tubes, the one going to the right and main stem bronchus, and a lot of the ramifications, the second, third, fourth and fifth generation branching off of these bronchial tubes, because the tobacco smoke is a fairly large particulate matter in comparison with these tiny, tiny fibers of asbestos, and so they can't go far; they keep getting trapped, and they don't get out to the far confines of the lung.

The small asbestos bodies are so small, they just waft on through, and they are often in such great concentration that the lung, the mucous blanket, and everything, couldn't filter them out or protect against them, so they go out as far as they can; they lodge in the pleura and subpleural space.

So the asbestos would be expected to be in the far confines of the lung, in the pleura and subpleural space, in the peribronchial area, around the respiratory lobule; and the tobacco smoke would be more in the trachea, the bronchi, the main stem bronchi, and the large branches.

Q. With that understanding, which is most likely to produce a chronic cough?

A. Tobacco smoke. That's where all the muscular fibers are that are going to be able to move material. Not all of the respiratory tract has muscle in it. (From dep., pp. 19-20)

Dr. From stated further that the effects of long term cigarette smoking are such that once chronic coughing begins, even the cessation of smoking wouldn't alleviate the cough. (From dep., p. 16) Based on the above, Dr. From reinforced his previous testimony on cross-examination that smoking was the probable cause of the decedent's chronic cough. He testified:

Q. Oh, you think-- You have never examined him, and you think that smoking is a probability,

although you have never actually seen the man and you have never examined his remains?

A. That is true, yes, sir.

Q. Okay. Now, a person who has an asbestosis situation, is it a probability that they would develop a coughing situation, too?

A. A possibility.

Q. Is it a probability?

A. No, sir, I think it's a possibility.

Finally, Dr. From indicated that asbestosis frequently leads to cardiac and pulmonary disabilities. (From dep., p. 57) However, Dr. From declined to conclude that the decedent had asbestosis. Dr. From testified:

> I think that one other thing has to be taken into account here, and that's is [sic] what really is asbestosis? I think this is extremely important, and I don't think that Mr. Shull really, you know, academically could have been said to have asbestosis. He had asbestos bodies in his lung. He had pulmonary fibrosis; not a classical description by Selikoff, or the pathologist who did it there in Chicago, [sic] that it was peribronchiolar fibrosis, and at no time were we ever given a pulmonary function study.
>
> I don't think simply because you have got asbestos bodies in your lung, do you have asbestosis. To have that problem, you have to have a fibrogenic process in the interstitium of your lung which is interfering with gas exchange; and unless you prove that--or with ventilation at the minimum--you can't say you have got asbestosis. You can say that you have got asbestos or ferruginous bodies in your lung, and you can say you have got fibrosis, but you can't say without that that you have really got asbestosis, or really that you don't--you ruled out other kinds of causal pulmonary fibrosis, nor did we have an X-ray here which showed us the findings of asbestosis by X-ray. (From dep., pp. 47-48)

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 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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

Iowa Code section 85A.3 states in part: "All employees as defined by the workers' compensation law of Iowa employed in any business or industrial process hereinafter designated and described and who in the course of their employment are exposed to an occupational disease as herein defined are subject to the provisions of this chapter." Iowa Code section 85A.8, defines occupational disease:

> 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.

Iowa Code section 85.61(5):

> 5. The words "injury" or "personal injury" shall be construed as follows:
>
> a. They shall include death resulting from personal injury.
>
> b. They shall not include a disease unless it shall result from the injury and they shall not include an occupational disease as defined in section 85A.8.

Iowa Code section 85A.13 states in part:

> 1. Pneumoconiosis defined. Whenever used in this chapter, "pneumoconiosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust particles.
>
> 2. Presumptions. In the absence of conclusive evidence in favor of the claim, disability or death from pneumoconiosis shall be presumed not to be due to the nature of any occupation within the provisions of this chapter unless during the ten years immediately preceding the disablement of the employee who has been exposed to the inhalation of dust particles over a period of not less than five years, two years of which shall have been in employment in this state.

Iowa Code section 85A.8 states that an occupational disease must "arise out of and in the course of employment," a phrase exactly the same as that used in Chapter 85.

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, 246 Iowa 402, 68 N.W.2d 63. 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 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 ommitted.] 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.

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). 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. Id. at 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 (1965). See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

Iowa Code section 85A.7(4) states:

> Where such occupational disease is aggravated by any other disease or infirmity not of itself compensable, or where disability or death results from any other cause not of itself compensable but is aggravated, prolonged or accelerated by such an occupational disease, and disability results such as to be compensable under the provisions of this chapter, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease was the sole cause of the disability or death, as such occupational disease bears to all the causes of such disability or death. Such reduction or limitation in compensation shall be effected by reducing either the number of weekly payments or the amount of such payments as the industrial commissioner may determine is for the best interests of the claimant or claimants.

Iowa Code section 85A.10 states:

> Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, shall be liable therefor. The notice of injury and claim for compensation as hereinafter required shall be given and made to such employer, provided, that in case of pneumoconiosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of not less than sixty days.

The provisions of this section allow a claimant to show that a 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. Once the claimant has proven that he has a disease caused by the hazards

of his occupation, a narrow presumption of causation by a particular period of employment is, in effect, created by section 85A.10 to aid claimant's in meeting their burden of proof. Section 85A.10 must be read in consort with section 85A.13(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188, 189 (Iowa 1980).

Iowa Industrial Commissioner Rule 500-4.31 provides:

> 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 required grounds are based.

In McSpadden, 288 N.W.2d 181, the court discussed conflicts between the Iowa Industrial Commissioner Rules and the Iowa Rules of Civil Procedure. The court stated:

> The fact that section 4.31 conflicts with Iowa R.Civ.P. 144(c) is of no consequence. Section 17A.14(1) of The Code indicates that rules of evidence governing jury trials do not necessarily apply to contested case proceedings before administrative agencies. Furthermore, as previously indicated, both sections 86.18(2) and 17A.14(1) endorse the admission of depositions in proceedings of this kind, with none of the limitations given in Iowa R.Civ.P. 144(c). We can but conclude from these statutory provisions that the legislature intended that rule 144(c) should have no application here. See also 500 I.A.C. § 4.35 ("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." (Emphasis added.)).

ANALYSIS

The issues in this case remain quite complex. This portion of the appeal decision will be divided according to the stated issues on appeal so as to facilitate and clarify the analysis.

I

DID THE HEARING DEPUTY ERR IN RECEIVING A POST HEARING MEDICAL DEPOSITION?

The defendants in this matter sent notice of their intention to depose Dr. From on October 28, 1981; the first such notice filed on October 5, 1981. The deputy's order of August 11, 1981 had set down a hearing date of November 16, 1981. Claimant's attorney did not appear for the deposition but requested that it be rescheduled. Accordingly, defendants set another date of December 9, 1981 for Dr. From's deposition; the earliest possible date according to the defendants. Because the deposition was now scheduled for after the hearing date, the defendants applied for an extension of time, filed October 29, 1981. On November 2, 1981, claimant's attorney resisted defendants' application asserting ignorance of the original October 28, 1981 deposition date because "formal" notice had not been served upon him. On November 5, 1981, all defendants filed a motion for continuance until after the December 9, 1981 deposition. The motion for extension of time had not yet been ruled upon at that time. On November 9, 1981, claimant's attorney filed a resistance "strenuously" objecting to any continuance. In the deputy's ruling of November 10, 1981 a continuance was denied upon the granting of an extension of time to take the post-hearing deposition of Dr. From. At hearing on November 16, 1981, claimant's attorney acknowledged notice of the December 9, 1981 deposition date without complaint. At the deposition of December 9, 1981, claimant's attorney objected to deposing Dr. From because the deposition did not preceed the hearing, citing Iowa R.Civ.P. 191. In a lengthy post-hearing brief filed December 31, 1981, claimant states in part:

> Further, Dr. From's testimony is not admissable in these proceedings, in that by rule the testimony of medical experts after a trial may be introduced only through Rule 500-4.18. But that rule is not applicable because Rule 500-4.18 allows examination subsequent to the hearing only to the party against whom a report may be used. Reports of Dr. From were not presented at the hearing by Claimant. Rule 500-4.18 does not allow a party to examine their own witness subsequent to the hearing. Due process of law under the 14th Amendment of the U. S. Constitution would again be violated if this state agency would allow such tactics on the part of the Defendants and consider the belated From deposition for any purpose.

See Iowa Code section 86.18. The deputy's proposed arbitration decision filed March 9, 1982 allowed the inclusion of Dr. From's deposition into the record thus overruling claimant's request for sanctions pursuant to Iowa Industrial Commissioner Rule 500-4.36.

Claimant's attorney misreads Rule 500-4.31, applicable on November 16, 1981. Where the hearing is set in advance of 60 days or more, a deposition may be taken up to 30 days after hearing provided that notice of the post-hearing deposition is made. Such is the case here. The second part of Rule 500-4.31 requires a sworn statement only for the admission of evidence based on a post-hearing examination. Dr. From was not required to examine the decedent, no such sworn statement was required here. Defendants have properly complied with Rule 500-4.31. Nor does Rule 500-4.18 bar Dr. From's testimony. Rule 500-4.18 is intended to give parties an opportunity to respond to narrative reports. Here, Dr. From was deposed with claimant's attorney present for cross-examination. The deputy properly allowed the inclusion of Dr. From's testimony.

Moreover, the fact that Rule 500-4.31 conflicts with Iowa R.Civ.P. 191 is of no consequence. See Iowa Industrial Commissioner Rule 500-4.34, Iowa Code section 17A.14, McSpadden, 288 N.W.2d at 196.

II

DID THE HEARING DEPUTY ERR IN NOT HAVING STRIKEN THE TRIAL BRIEF OF DEFENDANTS IOWA ASBESTOS AND WESTERN CASUALTY FILED JANUARY 21, 1982?

At hearing on November 17, 1981, the deputy ordered that all parties submit post-hearing briefs by December 31, 1981. Defendants Iowa Asbestos and Western Casualty filed their brief on January 21, 1981. Claimant's attorney wrote to the deputy on January 25, 1981 demanding that this brief be striken. No formal motion was made. On July 13, 1982, claimant filed an affidavit stating in part:

> I, Alette E. Shull, being first duly sworn on oath, do make this Affidavit pursuant to §17A.17(4), asserting personal bias in the making of the proposed or final decision in this case, stating that the Deputy allowed ex parte communication subject to §17A.17 without notice and opportunity for me or my counsel to participate, same being the Defendants' Brief filed under date of January 21, 1982, designated "Reply" brief. That same was not striken despite timely Motion filed by my counsel, but was relied upon in issuing the decision, despite the fact that the Deputy's post trial Order of 11-17-81 required that all breifs [sic] be filed by 12-31-81, and that the brief filed on my behalf was couched in such terms, the usual reply brief for a proponent of a cause not being allowed. Because I was not allowed the usual reply brief, it is indeed unusual that the Commission [sic] would allow a reply brief by the other side. Further, it is all the more unusual for the Deputy to rule as he did, denying me benefits, in a case in which the official Polk County Medical Examiner, an unbiased public official, has found that the death was due to work related causes.

Claimant does not object to any other brief.

In his proposed decision of March 9, 1982, the deputy stated that he regarded the case fully submitted on January 7, 1982 even though there were briefs submitted after that date. Thus, the deputy indicates that any brief filed after January 7, 1982 was not considered when the decision was written. Because the brief of Iowa Asbestos was not considered by the deputy in making his findings of fact and conclusions of law, claimant has suffered no prejudice warranting reversal nor has claimant been denied any due process rights.

III

WHETHER THE SUBJECT MATTER OF THIS ACTION FALLS WITHIN THE INTENT OF THE WORKERS' COMPENSATION ACT, CHAPTER 85, CODE OF IOWA, OR THE OCCUPATIONAL DISEASE LAW, CHAPTER 85A, CODE OF IOWA.

In an original petition filed June 28, 1979, claimant alleges that the inhalation of asbestos was a contributing factor in the decedent's death. Claimant does not allege that decedent sustained an injury which brought about the asbestosis nor does claimant allege any other injury arising out of and in the course of the decedent's employment. Rather, the essence of claimant's action is that the decedent inhaled asbestos which damaged his pulmonary and coronary systems; this damage to the pulmonary system in turn caused claimant to undergo a violent coughing attack which in turn resulted in a fatal cerebral hemorrhage.

Iowa Code section 85.61(5)(b), provides that an "injury" for purposes of Chapter 85 does not include a disease unless the disease resulted from an injury. Further section 85.61(5)(b) excludes a disease from constituting an "injury" if it is an occupational disease as defined by Iowa Code section 85A.8.

Section 85A.13 defines "pneumoconiosis" as the fibrotic condition of the lungs caused by the inhalation of dust particles thus characterizing the condition as an occupational disease. Claimant's petition asserts that decedent's death was contributed to by the inhalation of asbestos particles.

Despite the above, claimant asserts that the district court ruling of July 1, 1981 is dispositive of this issue. At page five of the court's ruling, the court states in part:

> Therefore, if in fact the condition resulting in the accident occurred before the 1977 amendment but was not discovered until afterwards, if such disputed fact is the case, then there could be recovery from such earlier employers if the disputed facts herein show the conditions leading to such injury. Again, such disputed factual matters are not subject to proper determination by a Motion for Summary Judgment.

Claimant zeros in upon the word "accident" to creatively assert that the court found the case should be properly determined only under the Workers' Compensation Act. Such is not the case. Rather, the court states at pages three and four:

> The Court notes that the Petitioner claims that the injury could have been that as defined in §85.61(5), the Code. Without passing on such, it is observed that death is included in the definition of injury per §85.61(5). Disease and occupational disease are excluded. But injury caused by disease from the employment, as here, is not excluded. Adequate consideration has not been given as to whether it is a Chapter 85 injury by statutory definition, and it is inappropriate to dispose of such issue by Summary Judgment precluding Chapter 85 consideration. The ruling below and of this Court earler did not address itself precisely to such issue, and Summary Judgment is not the proper mode to do so under the record appearing herein.

Claimant's brief also cites Jacques v. Farmers Lumber & Supply, 47 N.W.2d 236 (Iowa 1951) and McSpadden, 288 N.W.2d 181, for the proposition that injury is not limited solely to "accident". But the concepts of injury and occupational disease cannot be used interchangeably. Id. at 190.

Apparently, claimant's primary difficulty in having this matter judged under The Occupational Disease Law lies in the limitations of Iowa Code section 85A.13. Clearly, the amount of compensation due to the claimant if an award were found under section 85A.13(3) does not equal that which would be due if an award were founded upon Chapter 85 of The Code. Claimant argues that the distinguishing provisions of 85A.13 are obsolete and violative of equal protection.

This agency is unable to substitute its will for that of the legislature, and has long stated that questions of constitutionality do not properly lie here. Legislative acts are presumed to be constitutional until they are held otherwise.

Given the above, the deputy was correct in finding that the provisions of The Occupational Disease Law applied to this action rather than the provisions of the Workers' Compensation Act. Claimant has always asserted that asbestos inhalation contributed to the decedent's otherwise non-work related death. The fibrotic condition of the decedent's lungs caused by asbestos inhalation is the corner stone of this action. Pulmonary fibrosis is the whole focus of Iowa Code section 85A.13.

However, whether the subject matter of this action properly lies under The Occupational Disease Law or the Workers' Compensation Act is ultimately of no consequence. As will be seen below, claimant is unable to causally relate the decedent's death with either an employment induced disease or injury.

IV

WHETHER CLAIMANT'S DECEDENT DIED AS A RESULT OF A DISEASE OR INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

In division III of his decision, having found the issues of notice and statute of limitations in the claimant's favor, the deputy went on to find that greater weight was due to the opinions of Dr. From and that the decedent's death did not arise out of his employment. Whether or not claimant's decedent suffered from asbestosis as a result of this employment is not the ultimate issue before us. Rather, claimant has the burden of proving that the disease of asbestosis contributed to decedent's death.

Again, the essence of claimant's action is that decedent inhaled asbestos which damaged his pulmonary and coronary systems; this damage to the pulmonary system in turn caused claimant to undergo a violent coughing attack which in turn resulted in a fatal cerebral hemorrhage. The evidence, however, does not establish the foregoing sequence of events.

It is not wholly clear that claimant's decedent suffered from asbestosis. Neither Dr. Wooters nor Dr. Lacsina found any asbestos fibers. Dr. Wooters' conclusion that the decedent suffered from asbestosis hinges upon Dr. Suzuki's findings of asbestos fibers. While Dr. Selikoff states that there was evidence of pulmonary asbestosis, he declines to state whether or not it played a part in decedent's death. As Dr. From points out, there were no other tests to confirm whether the presence of asbestos fibers constituted the condition of asbestosis.

But even if it is assumed that the decedent did suffer from asbestosis, claimant's evidence fails to prove that asbestos contributed to the decedent's death. Dr. Wooters testified that the decedent had severe cardiovascular disease, a greatly enlarged heart and hardening of the major heart arteries in addition to pulmonary fibrosis. It was Dr. Wooters' conclusion that the major cause of decedent's death was a cerebral hemorrhage. He opined that asbestosis contributed to decedent's fatal cerebral hemorrhage only after he was supplied with a history of coughing attacks by the claimant and with evidence of asbestos fibers from Dr. Selikoff. Even given this, Dr. Wooters repeatedly refused to go farther than to say that it was a possibility that coughing attacks caused by asbestos could result in a cerebral vascular accident or cerebral hemorrhage.

It is undisputed that asbestosis, if present, may cause coughing. Therefore, the assertion that a cerebral hemorrhage may be precipitated by a coughing attack is pivotal. While Dr. Wooters opined that it was possible that a coughing attack could precipitate a stroke, Dr. From was unequivocal in testifying that such a scenario was physiologically impossible. Dr. Wooters admits that he cannot state with medical certainty what caused claimant's fatal cerebral hemorrhage and gives no explanation for his conclusion that a coughing attack might precipitate a stroke. On the other hand, Dr. From gives a detailed explanation of the interrelationship of the pulmonary and cardio vascular systems such that violent coughing attack could not precipitate a cerebral hemorrhage. Claimant's objection to Dr. From's deposition appears to be based upon the substantial weight of his testimony compared to that of Dr. Wooters.

Claimant makes much over the fact that Dr. Wooters is the Polk County Medical Examiner. The credibility of Dr. Wooters cannot be doubted. However, even Dr. Wooters qualifies his own testimony in admitting that he has no special training or experience in the field of pneumoconiosis. Moreover, Dr. Wooters' only examination of the decedent was the limited inspection of May 12, 1978. Dr. Wooters did not perform the autopsy upon the decedent. His opinions are based upon the findings of Drs. Lacsina, Suzuki, and Selikoff as well as the history provided by the claimant.

On the other hand, Dr. From is a specialist in internal medicine with considerable experience in the field of pneumoconiosis. His opinions are founded upon the claimant's history of the decedent's coughing attacks, the findings of Drs. Lacsina, Selikoff and Suzuki as well as the autopsy report and testimony of Dr. Wooters. The testimony of Dr. Wooters does not preponderate for the claimant in the face of Dr. From's detailed and unequivocal testimony.

While the claimant characterizes Dr. From's testimony as speculative, the testimony of Dr. Wooters is founded upon possibility and second hand information that does not meet her burden of proof. In this case, we have an individual who is found dead after allegedly suffering an unwitnessed coughing attack. The decedent had severe cardiovascular difficulties complicated by pulmonary fibrosis impliedly caused by asbestos inhalation and smoking. We do not know the cause of the decedent's coronary problems. Both Drs. From and Wooters indicated that an individual with coronary problems to the degree of the decedent's would be candidates for stroke without any precipitating event at all. Given the testimony of Dr. From that a violent coughing attack could not precipitate a cerebral hemorrhage and decedent's preexisting health problems this agency cannot assume that not only did decedent experience a violent coughing attack because of asbestosis, but that he would not have died were it not for the asbestosis. While the law is to be interpreted liberally, it is this agency's experience that speculation and conjecture does not meet a claimant's burden of proof on the facts.

It is therefore concluded that whether claimant's action is to lie under The Occupational Disease Law or the Workers' Compensation Act, claimant has failed to meet her burden that the decedent's death arose out of his employment. Given the above, it is unnecessary to further determine where liability would properly lie among the defendants in the event of an award.

FINDINGS OF FACT

1. That claimant's decedent was employed as an insulator by defendant L & L Insulation on May 12, 1978 and had been similarly employed by each of the defendant employers for various periods of time.

2. That in his employment, claimant's decedent had been exposed to asbestos for at least ten years.

3. That claimant's decedent had smoked for sometime, but had begun to quit six months prior to his death.

4. That claimant's decedent suffered periodic coughing attacks.

5. That claimant's decedent died on May 12, 1978 the result of hypertensive cardiovascular disease.

6. That activities just prior and during his fatal cerebral hemorrhage were unwitnessed.

7. That claimant's decedent had the preexisting conditions of hypertensive cardiovascular disease, enlargement of the heart, coronary athrosclerosis, pulmonary edema and congestion, and pulmonary fibrosis.

8. That a violent coughing attack did not precipitate decedent's cerebral hemorrhage.

9. That given the preexisting coronary problems of claimant's decedent, no precipitating event would be necessary to bring about a cerebral hemorrhage.

10. That decedent's death was not caused, contributed to, or precipitated by the inhalation of asbestos.

CONCLUSIONS OF LAW

That the subject matter of this action lies under The Occupational Disease Law, Chapter 85A, Code of Iowa.

That the claimant has failed in her burden to prove that decedent's death arose out of his employment as contemplated by either The Occupational Disease Law or the Workers' Compensation Act.

That the hearing deputy properly admitted the evidentiary deposition of Paul From, M.D.

That the hearing deputy did not improperly consider the brief of defendants Iowa Asbestos and Western Casualty filed January 21, 1982 to the prejudice of the claimant.

WHEREFORE, the findings of fact and conclusions of law of the deputy's proposed decision of March 9, 1982 are proper.

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

Costs of these proceedings are to be divided equally among the defendants.

Signed and filed this 9th day of September, 1982.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM SIGLIN,	:	
	:	File No. 646916
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
JOHN DEERE COMPONENT WORKS,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed November 30, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, to issue the final agency decision on appeal in this matter. Defendant appeals from an adverse review-reopening decision.

On the appeal the record consists of the transcript; joint exhibits 1 through 11 and claimant's exhibit 12; and the depositions of James Cafaro, M.D.,; and Donald C. Zavala, M.D., all of which evidence was considered in reaching this final agency decision.

The result of this final agency decision will be the same as that reached by the hearing deputy, although there will be some changes in the findings of fact.

SUMMARY

Claimant, a man of 41 at the time of the hearing, was injured in an industrial accident at John Deere Component Works in Waterloo on July 7, 1980, when he fell and somehow lay for one to four minutes with his head in quenching oil. From this episode, he suffered a case of aspiration pneumonia and subsequent permanent lung damage due to his lungs' inability to make the proper transfers of carbon dioxide and oxygen.

ISSUES

The hearing deputy awarded 60% permanent partial disability to the body as a whole for industrial purposes. Defendant states the issues on appeal: (1) Whether the claimant's current drug abuse activity may be causally connected to the claimant's injury; (2) Whether the claimant is unemployable outside of defendant's organization; and (3) Whether the claimant has sustained a sixty (60%) percent industrial disability of the body as a whole.

APPLICABLE LAW

Claimant's disability is industrial, reduction of earning capacity, and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and his inability because of the injury to engage in employment for which he is fitted. Olson v. Goodyear Services Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); 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).

ANALYSIS

Although defendant must prevail on the first two issues raised on appeal, the claimant's disability is severe and will not be lowered from the proposed agency decision by the hearing deputy.

With respect to the question of claimant's problems with alcohol, there is evidence on the record of episodes of heavy drinking prior to the injury. (Joint exhibit 3) Also, claimant concedes that no doctor has ever connected his drinking episodes after the injury to the accident. (Trans., p. 55)

Even though claimant's increased drinking is not connected to the injury, there was no showing in the record that this drinking lowers his ability to work. Therefore, the drinking is seen as a neutral fact that does not affect the compensation matter one way or another.

The second issue, whether claimant is unemployable outside of defendant's organization, is, of course, a part of the whole question of industrial disability. However, since it is separated as a single issue, it can be discussed, briefly, for its own sake. The hearing deputy found that claimant was in fact unemployable outside the defendant's organization. Such a finding is speculative in that claimant is ambulatory and not in intractable pain. Further, there is no evidence in the record that claimant has even looked for work at other places.

The main question, of course, is the extent of claimant's industrial disability. This disability is founded upon his permanent impairment which is a loss of lung capacity. Claimant, a high school graduate, has worked as an automobile mechanic, as an automobile salesman and sales supervisor and service station owner-manager. In 1973 he began to work for John Deere as a mechanic which involved repairing foundry equipment. He continued to work in the foundry as a mechanic until his injury.

According to Dr. Zavala, a full professor in the Department of Internal Medicine at the University of Iowa, and a qualified specialist in internal medicine and pulmonary disease, claimant's permanent impairment is caused by the lessening of his lungs' diffusing capacity, which is the ability of oxygen and carbon dioxide to be exchanged in the breathing cycle. (Dep., p. 15 et seq.) (Although defendant's issue is not phrased in terms of a causal relationship question the cause of claimant's problem is the injury, as is established by the testimony of Dr. Zavala. [dep., p. 23]) Further, there has been a deterioration of claimant's condition, although Dr. Zavala could not predict the course of claimant's future. (Zavala, p. 29) Claimant's impairment of 50 to 60% will not improve (Zavala, p. 29-30)

Dr. Zavala's opinion is epitomized in one very revealing answer: "No. Let me say this: this case is unusual. We have no particular standards by which we can measure in terms of disability. But I for one would not give one-million dollars to have his condition in cold-hard cash. I would turn it down in a minute." (Zavala, p. 36) From Dr. Zavala's testimony, one can assume that claimant has a very serious lung condition which will not get any better.

The testimony of James Cafaro, M.D., who is certified in internal medicine and pulmonary medicine, is less conclusive as to disability. Dr. Cafaro was the treating physician and his opinion is important. He testified that claimant should refrain from any activity which has respiratory irritants and that he would not do well in work which required moderately heavy exertion most of the time. (Cafaro dep., pp. 18-19) Dr. Cafaro opined that claimant's condition would either stay the same or deteriorate as time went on. Dr. Zavala's estimate of 50-60% permanent partial impairment is accepted, although it is not felt his opinion differed greatly from that of Dr. Cafaro.

Aside from claimant, there were several lay witnesses: Robert Allen Morris, Calvin Brown, Lawrence Jirak who were fellow workers; Billie Cheney and Lester Cheney were claimant's mother and step-father; Ronald H. Hansen, Gerald V. Shaffer, and Gerald W. Federspiel were supervisory people at Deere. In the main, the testimony of claimant's lay witnesses, the fellow workers, his mother and step-father, tended to show that claimant became easily tired and weakened when he tried to conduct such work as mowing a lawn or performing his work at John Deere. The supervisory personnel all opined that claimant's work was satisfactory after the injury. It should be noted that claimant's job was changed somewhat when he returned to work for Deere to an area of the plant where he would not be exposed to lung irritants.

Considering these facts in the light of the considerations of industrial disability, it is clear that claimant's disability is severe. He might be able to work elsewhere but he might not. Except for some aptitude for sales work, his talents lay in areas which require exertion. He is able to do his work now but it is work which insulates him from more vigorous work or work which might irritate his lungs.

Defendant has done a good job in attempting to keep claimant as an active, productive worker. However, one cannot ignore claimant's disability, which is felt to be the 60% found by the hearing deputy.

FINDINGS OF FACT

1. That claimant sustained an admitted industrial injury of July 7, 1980 which arose out of and in the course of his employment.

2. That as a result thereof, the claimant has been paid in his healing period entitlement.

3. That claimant has sustained a functional impairment of fifty to sixty (50-60) percent to the body as a whole related to his lung abnormality only.

4. That as a result thereof, claimant has sustained a sixty (60) percent industrial disability of the body as a whole due to claimant's inability to transfer the carbon dioxide (CO2) and the oxygen (O2) within his lung function.

ORDER

WHEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant for a period of three hundred (300) weeks for the permanent partial disability at the rate of two hundred eighty-eight and 86/100 dollars ($288.86) per week, beginning November 8, 1980, accrued payments to be made in a lump sum together with interest at the rate of ten (10) percent per year, less any amounts heretofore paid.

Defendant is to be given credit for any and all benefits previously paid under §85.38.

Costs of this action are charged against defendant and shall include an expert witness fee of one hundred fifty dollars ($150) to Donald C. Zavala, M.D.

Defendant is ordered to file a final report upon completion of payments.

Signed and filed at Des Moines, Iowa this 28th day of March, 1983.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID M. SILLS, Claimant, vs. AMERICAN CAN COMPANY, Employer, and EMPLOYERS INSURANCE OF WAUSAU, Insurance Carrier, Defendants.	:	File No. 605350 A R B I T R A T I O N D E C I S I O N

This is a proceeding in arbitration brought by David M. Sills, the claimant, against American Can Company, his employer, and Employers Insurance of Wausau, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act by reason of an alleged exposure to injurious noise at his place of work during August 1978. This matter was heard in Fort Dodge, Iowa on July 6, 1982 and considered as fully submitted at the conclusion of the hearing.

The record in this matter, according to the undersigned's notes, consists of the testimony of the claimant, his spouse and Ardin Peterson; claimant's exhibits 1 through 5; defendants' exhibit A; and the evidentiary depositions of Robert R. Updegraff, M.D., and Roma Johnson, clinical audiologist.

Based upon claimant's allegation that he now has a hearing loss, the issue requiring a ruling is whether or not claimant has a hearing loss, and if he does, whether or not such loss arose out of the circumstances which occurred out of and in the course of claimant's employment duties.

The parties stipulated that claimant has lost no time from gainful employment as a result of his alleged exposure and that his claim is limited to one of permanent partial disability as contemplated by §85.34(2)(r), Code of Iowa (1980). They further stipulated claimant's weekly rate of entitlement to be $221.94 in the event of recovery.

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

Claimant, age 42 and married, has been employed by the defendant employer for 12 years. His duties were that of a "general inspector" in an area described as one having a high noise level. Claimant testified that on July 10, 1978 his ears "popped." He reported this occurrence to Louis Springborg, his foreman, and sent thereafter to the local hospital first aid room. On August 7, 1978, following an audiogram performed by Roma Johnson, clinical audiologist employed by Richard C. Tripp, M.D., the following report was received on October 9, 1978 by the defendant employer (claimant's exhibit 5):

> Your employee, David Sills, was examined in this office recently and found to have a permanent, or sensorineural hearing deficit, representing a 40% loss of hearing bilaterally. A copy of our audiogram is enclosed.
>
> To prevent further loss of hearing, the patient should wear protective head band and ear cups while working. In addition, he would benefit, from a hearing aid off work.

It should be noted that an examination of the Iowa Industrial Commissioner's files fails to reveal that an employer's first report of injury report had been filed, clearly in violation of §86.11, Code of Iowa, 1977.

Claimant testified that he had been using ear plugs as a noise protective device prior to the injury date in question. This testimony is confirmed by an entry on defendant's first aid log, where under the date of May 8, 1978, the following entry is found: "3:30 p.m. ear plugs."

Claimant further testified that he underwent annual physical examinations beginning in 1970. This examination included an audiologic examination. It should be noted that none of the results of the annual examinations, including the audiograms with the exception of the 1976 examination, were produced and made a part of these proceedings.

Claimant filed his petition before this agency on January 28, 1980.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 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).

Defendants now produce the testimony of Robert R. Updegraff, M.D., whose curriculum vitae was as follows (depo., p. 5, l. 10):

> Polk County Medical Society, Iowa State Medical Society, American Medical Association, Fellow of American College of Surgeons, American Academy of Facial Plastic and Reconstructive Surgery, American Neurotology Society, American Academy of Otolaryngology-Head and Neck Surgery, American Board of Otolaryngology, Medical Library Club, Iowa Methodist Hospital-Executive Council, and that's Chief of the Otolaryngologists' Section from 1960 to 1979, California Medical Association-Certification in Continuing Medical Education, from July of 1977 to June of 1980 [and American Medical Association]?

Dr. Updegraff practices otolaryngology and head and neck surgery and has been so engaged since 1952.

The doctor saw the claimant on December 19, 1980; December 29, 1980; and January 12, 1981.

The doctor reported on February 4, 1981, in part, as follows (depo. exhibit A):

> We feel there is some degree of difference in the testing results between our office and Dr. Tripp's and I am wondering if it might not be appropriate and best if we would all get together for at least a preliminary discussion and review of our findings and reports.
>
> In essence we are of the opinion Mr. Sills is hearing close to or essentially within normal limits. We have the report from Roma Johnson, Clinical Audiologist, with Dr. Tripp indicating Mr. Sills' threshold levels being rather different than ours.

I am sending a copy of this letter to Mr. Cady and since our records are rather voluminous perhaps we might all have a chance to discuss such and will be happy to send on my complete records for your mutual evaluations.

For your records we also enclose copies of Mr. Sills' audiometric studies dated December 11, 1980, December 19, 1980 and January 12, 1981, copies of his two Bekesy studies dated December 11, 1980, and copy of his tympanogram dated December 11, 1980. We also enclose copies of Mr. Sills' laboratory studies (4) and a copy of his Brainstem Auditory Evoked Response study from Iowa Methodist Hospital dated January 12, 1981, and also copies of our office dictations dated December 11, 1980 to February 5, 1981. Also I believe for your clarification we enclose the audiometric review as outlined by our Audiologist, Miss Julia Shirk.

Dr. Updegraff described in great detail the types of audiologic evaluations including a tympanogram which determined the status of the motion of the tympanic membrane. (Depo., p. 13, l. 11.) The doctor's tests failed to discover any specific illness which would give rise to claimant's complaints. (Depo., p. 21, l. 16.)

In essence, Dr. Updegraff concludes that claimant has a minimal binaural hearing loss of .625 percent. (Depo. exhibit B; depo., p. 23, l. 4.)

Roma Johnson, a certified audiologist, began to test claimant's hearing in 1976 as part of the employer's annual physical examination program. She had been an employee of Richard C. Tripp, M.D., whose practice was limited to eye, ear, nose and throat, prior to the retirement. On the basis of his examination and the audiograms taken by Roma Johnson, Dr. Tripp concluded in a report dated October 9, 1978 (claimant's exhibit 5) that the claimant sustained a permanent hearing deficit of 40 percent binaural.

Ms. Johnson continues to test the claimant's hearing as part of the defendant's continuing medical program. Where using the A.A.0.0. formula to calculate the claimant's hearing impairment, she testified that based on her data claimant has a 19.6 percent binaural hearing impairment.

Dr. Tripp agreed that claimant has a hearing loss at the present time. (Updegraff depo. exhibit F.) The cutting edge of this matter then requires the resolution of the extent of claimant's hearing impairment.

Based upon the conflicting medical evidence presented by the parties, it is concluded that claimant has a ten percent hearing impairment.

WHEREFORE, after having seen and heard 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 industrial injury on July 10, 1978.

2. That the said foregoing injury resulted in a ten (10) percent binaural reduction in hearing ability thereby entitling the claimant to statutory entitlement of seventeen point five (17.5) weeks as contemplated by §85.34(2)(r).

THEREFORE, IT IS ORDERED that defendants pay the claimant a permanent partial disability of seventeen point five (17.5) weeks at the stipulated rate of two hundred twenty-one and 94/100 dollars ($221.94) per week beginning on August 11, 1978.

Accrued benefits are payable in a lump sum.

Interest on the foregoing award shall be ten (10) percent per annum and shall be computed beginning on August 11, 1978.

Defendants are further ordered to pay Richard C. Tripp, M.D., one hundred thirty dollars ($130), less credit for those amounts previously paid.

Costs are charged to the defendants in accordance with Industrial Commissioner Rule 500-4.33 and shall include an expert witness fee of one hundred fifty dollars ($150) payable to Robert R. Updegraff, M.D., and seventy dollars ($70) payable to Roma Johnson, clinical audiologist.

Defendants are further ordered to file a final report within twenty (20) days from the date that this decision becomes final.

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

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONNIE L. SLOAN,	:	
Claimant,	:	
vs.	:	File No. 642856
GREAT PLAINS BAG CORP.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
AMERICAN MOTORISTS,	:	
Insurance Carrier, Defendants.	:	

Defendants appeal from a deputy's rehearing decision. This appeal presents the question as to when the applicable statutory interest for unpaid compensation, as provided under section 85.30 of the Code of Iowa, accrues in cases where this agency determines an injured worker has sustained a greater degree of permanent partial disability than has otherwise previously been voluntarily paid by the employer according to some reasonable measure.

The facts are not in dispute. Claimant was injured at work on July 22, 1980. A memorandum of agreement was filed August 7, 1980 calling for the payment of $104.63 in weekly compensation. Defendants paid healing period compensation until October 29, 1980. Claimant filed a review-reopening petition on November 3, 1980. Subsequently, on November 17, 1980 the defendants paid unto claimant 50 weeks of permanent partial disability compensation after they became aware of a medical evaluation estimating a ten percent permanent partial disability rating to claimant's body as a whole.

Upon review-reopening, the deputy determined the claimant's earning capacity was impaired to the extent of 15 percent of his body as a whole. An order was entered for the defendants to receive credit for the prior ten percent permanent partial disability compensation already paid unto claimant. Defendants promptly paid the additional five percent permanent partial disability representing 25 weeks of compensation at $104.63 per week. However, the defendants refused to pay any statutory interest under section 85.30.

On rehearing on the question of whether statutory interest was due, the deputy held the interest under 85.30 accrued for this case "from the date permanent partial disability compensation would have been payable" had such compensation "been commenced immediately following the cessation of healing period compensation," citing Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979) and Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982).

The deputy recognized the earlier Iowa Supreme Court case of Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957), awarded interest on the amount of additional permanent partial disability compensation, over that which was previously paid, as of the date this agency found the claimant to be entitled to such compensation.

Nevertheless, the deputy on rehearing stated the cases of Farmers Elevator Co., Kingsley, 286 N.W.2d 174, and Wilson Food Corp., 315 N.W.2d 756, indicate a trend by the Iowa Supreme Court to provide prompt compensation.

In contrast to the case sub judice, Farmers Elevator Co., Kingsley, 286 N.W.2d 174, involved a situation where the employer from the beginning denied the compensability of the claim. In the present case on appeal, the defendants accepted the claim as compensable and paid compensation for healing period and permanent partial disability to the extent of functional impairment estimated by a physician.

The facts of Wilson Food Corp., 315 N.W.2d 756, are readily distinguishable from the present case. In Wilson Food Corp., the court allowed an employer to recoup mistaken overpayments of healing period benefits as a credit against its obligation to pay permanent partial disability benefits, under a public interest rationale encouraging employers to freely pay injured employees, even though a subsequent credit would cause inconvenience to a claimant by an earlier cut off of benefits. The case of Wilson Food Corp., correctly stands for the principle of prompt compensation, however, in that case it was based upon credit to be allowed for payments made in excess of the amount later determined to be due rather than interest on additional amounts later determined to be due.

For determination of an injured worker's industrial disability to the body as a whole, various factors are considered by the agency fact-finding process. These factors are outside the realm of a medical evaluator's determination of functional impairment alone. Some of the factors are the age, education, prior work experience and inability of the claimant, because of the injury, to engage in gainful employment for which the claimant is fitted. If the degree of industrial disability cannot be agreed to by the parties, then it becomes the duty of this agency in a contested case proceeding to make that determi-

nation. Until that is done, the amount due is unknown.

The cases of Farmers Elevator Co., Kingsley, where the employer does not admit the compensable nature of a claim, and Wilson Food Corp., calling for prompt compensation, may support a finding that section 85.30 interest should accrue when the employer becomes aware of a claimant's claim for such compensation. However, this case does not fall within the Farmers Elevator Co., Kingsley or Wilson Food Corp., senario. Here the defendants admitted some degree of permanent disability and paid benefits accordingly, thus, the case falls squarely within the parameters of Bousfield, 249 Iowa 64, 86 N.W.2d 109.

Therefore, on the basis of Bousfield, where the employee makes permanent partial disability payments before the proposed determination and such payments were made in good faith, based upon a reasonable measure, the statutory interest on any increase in degree of permanent partial disability accrues on the date the amount is determined by the proposed award. It is determined, the defendants in the case sub judice have satisfied this criteria.

THEREFORE, it is ordered:

Claimant is entitled to statutory interest on unpaid amounts under section 85.30 from the date of the deputy's proposed review-reopening decision awarding such amounts. As that amount has apparently been paid, no additional interest is due.

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

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WARREN C. SMITH,	:	
Claimant,	:	
vs.	:	File NO. 456459
FEGLES POWER SYSTEMS, INC.,	:	R E V I E W -
Employer,	:	R E O P E N I N G
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Linn County Juvenile Court Facility in Cedar Rapids on November 4, 1982 and was fully submitted on December 1, 1982.

A review of the commissioner's file reveals that an employer's first report of injury was filed on August 16, 1976 along with a memorandum of agreement calling for the payment of $174 in weekly compensation ($160 is the permanent partial disability rate). The record consists of the testimony of the claimant, Don Falkiner, James Bark and Thomas Smith; claimant's exhibits 1-9 (includes deposition of Arnold H. Menezes, M.D.) and defendants' exhibits A and B (includes deposition of Robert Rice Updegraff, M.D.).

ISSUES

The issues for resolution are:

1) Whether there is a causal connection between the injury and the disability.

2) The nature and extent of disability.

STATEMENT OF THE EVIDENCE

Claimant, presently age 63, has been involved in construction labor for most of his adult life. A significant period of his working life has been in the highly skilled jobs of carpenter and millwright. For approximately ten years prior to the injury in 1976, claimant was employed as a millwright at the journeyman, master and foreman levels. As a master millwright claimant had to know of all the precision settings involved in installing machinery. By necessity, this involved a certain amount of ability to read blue-prints and possession of a considerable "hand/eye" coordination.

On August 2, 1976, while claimant was employed he fell from scaffolding (about ten feet). He was taken to the Mercy Hospital Trauma Center in Cedar Rapids, where x-rays were taken. X-rays of the skull showed a fracture extending down through the frontal bone into the superior orbital rim with disruption of the orbital rim superiorly. The lateral aspect was inferior to the medial aspect by seven to eight mm. Claimant was transferred to the University of Iowa Hospitals and Clinics in Iowa City on the same day. Although another physician treated claimant initially (the doctor died of a heart attack), the primary treating physician was Arnold H. Menezes, M.D., a neurosurgeon, and he kept claimant hospitalized through August 7, 1976. On his arrival at the University, claimant was lethargic with swelling in the left temporal region and had a palpable depression over the left side extending to the supraorbital region. His biparietal fractures crossed the sagittal suture and extended from one temporal region to the other. Claimant had a subconjunctival hemorrhage on the left. Bilateral periorbital hematomas were also noted and the claimant moved his extremities well. A suggestion of a right Babinski response was seen. Claimant improved on conservative management and at the time of discharge on August 7, 1976, he was alert, well oriented and without neurological deficits. Claimant had preexisting left hearing loss. The left subconjunctival hemorrhage appeared to be retrobulbar in origin. A right Battle sign (retromastoid bruising) was noted though no hemotympanum was visible.

Claimant saw Dr. Menezes again on September 15, 1976. At that time he was complaining of mild headaches and dizzy spells. He complained that he was unsteady on his feet when he got up from a lying position. Claimant had a bilateral mild appendicular dystaxia with mildly decreased alternating motion in both arms. Claimant exhibited a broad-based gait and claimant fell with his eyes closed during the Romberg test. In July 1977, Edward F. Kopecky, M.D., the Cedar Rapids physician who originally saw claimant on August 2, 1976, stated that claimant had Labyrinthine disease (the earlier [November 1976] report of the University Otolaryngology Department]). Claimant's general complaints were that he would "walk like a drunk." Claimant has been detained by police for suspicion of OMVUI. However, he has not been arrested since he has not been under the influence. He has exhibited a problem in "walking the line." Claimant has not returned to work.

In August 1978, claimant went to the Veterans Administration Hospital. Much of the writings are unreadable but it is fair to conclude that claimant was being treated for the dizziness which he experienced from the date of injury.

On September 18, 1978, the insurer caused claimant to be examined by Robert Updegraff, M.D., a Des Moines otolaryngologist, who testified by deposition. He also saw claimant on September 4, 1980 and October 8, 1982. He testified that his involvement with the claimant has been for the purposes of examination (as opposed to treatment).

His testimony is enlightening as to the tests he performed:

By Mr. Gearhart:

Q. Following the history, would you relate examinations you performed on and tests that you performed?

A. We tested Mr. Smith's hearing on 18 September, 1978, and 9-4, 198 [sic] and 10-8, 1982. And in those tests we found absence of hearing on the left side consistent wih the three tests. And we found what we call an inner ear change or a sensorineural change on the right with a slight inner ear or sensorinural change in the low middle pitches on the right and a rather precipitous high frequency drop in the higher pitches on the right at 4,000, 6,000 and 8,000 cycles.

His further studies were done in several ways. In 1978 we did an ENG study or electronystagmography study, and that test was also repeated on 10-8-1982. Those two tests showed essentially the same findings and demonstrated a fairly minimal activity or response on the right side, but lack of response on the left side, which is somewhat similar to the findings evidently in 1967 or so, although they reported a little bit better response on the right side than we reported, but we still found activity on the right; but the main finding being the lack of activity on the left side with both our two examinations and the one of 1967.

The examination clinically--ears, nose and throat then--was done during those periods and showed, for one, his fracture of the left cheekbone or left zygoma with a little flattening of the left zygoma and a little drooping of his left eyelid area, and we noted he was edentulous and there was no particular bite-type problem. We mentioned or recorded that palable fracture where he has a little drop off from the floor of the orbit of the injury. And he reported no particular visual problems watching television and reading satisfactorily, except wearing glasses.

The remaining specific examinations of his ears, nose and throat, other than those findings, were fairly non-contributory.

The examination then also included tests such as past-pointing, finger-nose test, Romberg and tandem walking tests.

We found that with his tandem, one foot in front of the other foot--and this was by the first examination in 1978--that he did that fairly poorly; but that when he would walk, he seemed to be able to walk without too much or any difficulty--period.

He testified that his observation was that claimant could walk normally in the hallway at the office.

His findings were as follows:

A. Well, my findings would be a complete loss of hearing with his left ear and a mild to perhaps slightly moderate inner ear sensorineural hearing change with his right ear.

Our second finding would indicate that he does have evidence--by his electronystagmography study, some evidence of peripheral vestibular inner ear change, more markedly on the left side. And I say presumably that this is a peripheral vestibular change.

We found also evidence of the fracture of his left zygoma. We also found, as mentioned, some evidence suggestive of central cerebellar brain stem frontal lobe changes by the history and examinations, but some of those, to some degree, subjective more than completely objective; but in the findings and chartings, some objective changes as recorded in all the records.

We did not find evidence of other specific peripheral or central changes such as nausea, vomiting, headache, tinnitus or, two, objective or subjective peripheral labyrinthi disorder or disorders, but we did find evidence of peripheral residual--probable peripheral labyrinthi changes on the left side particularly.

Q. Now, do these findings that you've just recited result in an impairment?

A. Yes.

Q. And would you tell the Deputy Commissioner what impairment you found Mr. Smith to have, and, particularly, as a result of your final diagnosis in October of 1980?

A. The impairment, by my examination, would be primarily his inner ear hearing change and his peripheral vestibular findings. The other changes would be those noted in the records and chartings and as substantiated, as best as I am able to do so, with my ear, nose and throat neurological evaluation of his possibly so-called post-traumatic or more loosely called post-concussion syndrome.

He testified that claimant would not be able to engage in the occupation of millwright again (Updegraff dep., p. 19, ll. 21-22; p. 20, ll. 10-12). He further testified that claimant could engage in some employment (within limitations). He reviewed the fact that claimant had sustained another skull fracture in 1967 (also at work) which apparently caused his left hearing loss and compensated for loss of balance at that time as evidenced by the claimant's return to work.

On cross-examination, the doctor testified as to causation:

Q. Are the findings that you described, based upon the testing and history that you obtained, are they consistent with the kinds of injuries that Mr. Smith received on August 2, 1986 [sic]?

A. Yes.

Q. Do you believe they were caused by that fall?

A. Well, I have no reason to think that they were not caused by the fall.

Dr. Menezes also testified by way of deposition. Most of his findings were set forth above. He also did not feel that claimant could return to his former occupation (Menezes dep., p. 15, ll. 10-11; p. 18, l. 15; p. 23, ll. 1-2). He felt that claimant's problems were related to the injury. He thought claimant could do a "desk job" (Menezes dep., p. 23, ll. 19-22).

Don Falkiner, a supervisor of claimant prior to the injury, testified that claimant has an excellent reputation as a millwright and did not observe claimant as having any disabilities prior to the injury. It is noted that this witness only worked with claimant for about a month. However, the testimony of James Bark essentially corroborates Falkiner's testimony and Bark has known claimant for a significant period of time.

Thomas V. Smith, a vacational rehabilitation expert testified that he examined claimant and found that claimant's performance IQ was scaled at 80. He testified that he thought that this IQ function would have to be significantly higher in order for claimant to perform the duties of a millwright. He thought that claimant could be employed in a sheltered workshop or could be trained in simple assembly. He said claimant could be a security guard if he could be in a stationary position, as in a guardhouse.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon this agency in workers' compensation cases.

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

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of August 2, 1976 is causally related to 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 (1955). 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).

4. All claimant need prove is that his disability is directly traceable to the injury. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971).

5. 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).

6. Section 85.34(3), Code of Iowa, provides for the payment of compensation in cases of permanent and total disability.

7. Section 85.27, Code of Iowa, provides for the payment of medical expenses.

ANALYSIS

Based on the principles enunciated above, it is apparent that claimant has sustained his burden of proving that he sustained permanent disability because of the August 2, 1976 injury. The problem is the degree of the permanent disability.

Although claimant had a previous skull fracture and total loss of hearing in his left ear following a similar incident at work in 1967, he returned to work in his highly demanding occupation. Although there was some testimony to indicate that claimant's gait appears normal (see Updegraff dep.), claimant's run-ins with the law show that claimant cannot "walk the line" satisfactorily. At the hearing claimant showed gait problems when arising from his seat to testify. The conclusion is that claimant has a significant amount of disability.

Claimant is 63 years old and a high school graduate. He worked for the CCC, was employed in a window/sash manufacturing concern, was a laborer, construction caterpillar driver, construction laborer, carpenter and millwright. It would appear that claimant cannot engage in the construction pursuits he did in the past. The only possible jobs mentioned in the record are impractical for claimant to handle. The record fairly supports the finding that claimant has a lessened intelligence since the injury-whether this is caused by the injury or its results (under a "lose it if you don't use it" reasoning) is immaterial. It is also noteworthy that defendants have figuratively set claimant adrift as far as work or retraining is concerned. It is the impression of the undersigned that claimant is desirous of working but because of having his "brains scrambled" (either by injury or not using his considerable talents) he cannot do so. This man has much to offer as evidenced by his excellent motivation but he is unable to work. Because of this, the undersigned is compelled to find that claimant is permanently and totally disabled.

FINDINGS OF FACT

1. Claimant was employed by defendant-employer on August 2, 1976.

2. Defendants filed a memorandum of agreement on August 16, 1976.

3. Claimant has not worked since the injury.

4. Claimant is permanently and totally disabled because of the injury.

5. The medical expenses submitted are related to the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant sustained an injury arising out of and in the course of his employment on August 2, 1976.

3. Claimant is to be paid permanent total disability compensation from the date of injury during the period of his disability pursuant to section 85.34(3).

4. The medical expenses submitted should be paid (except Exhibit 9).

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred seventy-four dollars ($174.00) per week in permanent

total disability compensation pursuant to section 85.34(3), Code of Iowa.

IT IS FURTHER ORDERED that the defendants pay the following medical expenses:

12-11-81	Dr. Ronald Miller, M.D.	$ 17.00
8-13-82	University of Iowa Hospitals & Clinics	22.00
8-17-82	Mercy Hospital	13.00
10-11-82	Mercy Hospital	26.00
10-19-82	Mercy Hospital	26.00
2-3-82	Prescription-Drug Town	16.74
2-8-82	Prescription-Drug Town	16.74
	Veterans Administration	1401.00

Mileage

1055	Miles at $.15	$158.25
200	Miles at .18	36.00
440	Miles at .20	88.00
50	Miles at .22	11.00
340	Miles at .24	81.60

Costs, including those annotated on Exhibit 6, are taxed to defendants.

Signed and filed this 27th day of January, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL SNYDER,
Claimant,
vs.
SIOUX TRANSPORTATION,
Employer,
and
GREAT WEST CASUALTY,
Insurance Carrier,
Defendants.

File No. 606581
A P P E A L
D E C I S I O N

By order of the industrial commissioner filed December 29, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, to issue the final agency decision on appeal in this matter. Defendants appealed and claimant cross-appealed a review-reopening decision of September 30, 1982.

The record on appeal consists of the transcript; claimant's exhibits 1 through 11 and 13 through 15 (exhibit 12 was not introduced); defendants' exhibits A, B, C and D; the depositions of Albert D. Blenderman, M.D., William F. Blair, M.D., and Roland Gunsch, all of which evidence was considered in reaching this final agency decision.

The result of this final agency decision will be the same as that reached by the hearing deputy and his findings of fact and conclusions of law are adopted herein.

First, defendants claim that claimant's disability should not be measured industrially and that it is restricted to the schedule for an arm. Our Supreme Court recently reconfirmed the concept that scheduled injuries do not entitle injured workers to industrial disability in Graves v. Eagle Iron Works, ___ N.W.2d ___ (Filed March 16, 1983). Of course, if the impairment extends beyond the arm and into the shoulder, the disability is measured as loss of earning capacity. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). The evidence showed that the impairment extended into the right acromion which is on the body side, not the arm side, of the shoulder. Claimant's brief points out numerous references which substantiates that the impairment extends beyond the humerus and into the shoulder.

Cases like this arise, in part, because the physicians rate shoulder impairment as impairment to the arm. See Guides to the Evaluation of Permanent Impairment, American Medical Association, pp. 16-22. The law, however, recognizes the situs of the impairment, not the peculiarity of the rating system.

Here it is clear that the impairment is in the shoulder and the Alm case dictates recovery for industrial disability. Defendants do not contest the amount of the industrial disability. Therefore, the finding by the hearing deputy will not be changed.

Claimant raises a point about the healing period. Defendants paid 55 3/7 weeks of healing period, whereas the deputy who heard the case ruled that claimant showed only a healing period of 39 4/7 weeks. The hearing deputy ordered a credit in favor of defendants for the difference. Wilson Food Corporation v. Cherry, 315 N.W.2d 756 (Iowa 1982) provides for a credit for overpayment of healing period. (Section 85.34(4), Code of Iowa, 1982, does likewise, but it did not go into effect until July 1, 1982.) Claimant argues that (1) the issue of a credit for overpayment of healing period was not a part of the pre-hearing order and was not an issue discussed at the beginning of the hearing; and (2) that the evidence shows the healing period should not be reduced anyway.

The pre-hearing order, dated October 7, 1981 says that there "might be an issue regarding termination of healing period." Prior to the hearing, the deputy said that an issue was whether or not claimant "is entitled to benefits for healing period and permanent partial disability." (Trans., p. 3) Although the pre-hearing order is phrased somewhat restrictively, the hearing deputy's remark and his decision show that he clearly thought the issue was before him and that finding will not be changed.

The record shows the following testimony by Dr. Blenderman:

> Q. Doctor, following your surgery in March of 1980, at what point do you feel he reached his maximum physical improvements?
>
> A. Oh, I think he should have reached maximum improvement at about three months post-surgery.
>
> Q. All right. I noticed in your notes that in July you told him--I think the note says--to get with it and to start lifting more weights. Why were you saying that?
>
> A. Well, because he said that he was quite adamant he didn't want to do any other type of work. He said he wanted to go back to work as a truck driver. And I said, "Well, if your're going to try to go back to work as a truck driver, you have one alternative, and that's to build up the muscles in the arm so you can do the job." He said he could not get in the cab. He had to open the door, grab hold of the pull rail, pull himself in the cab. He could not do that, because the arm felt weak and it hurt, and he couldn't drive because it was too hard to turn the big steering wheel, it put too much stress on the shoulder.
>
> I said, "If you don't do these things and build up the shoulder, if you think you're ever going to return to trucking, you better get with it."
>
> Q. When was the last time you saw Mr. Snyder?
>
> A. December 15, 1980. (Blenderman dep., pp. 18-19 11. 18-25 and 1-25)

This evidence shows clearly that claimant would have recuperated from the surgery by June 21, 1980, which was three months after the surgery, and that any contemplated muscle building would have gone beyond the actual healing. The hearing deputy's findings and conclusions with respect to healing period will therefore be adopted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDING 1. On September 13, 1979 claimant was injured while working for defendant employer.

CONCLUSION A. Defendants, by filing the memorandum of agreement, have admitted that claimant's injury arose out of and in the course of his employment.

FINDING 2. Claimant's injury was to his shoulder.

FINDING 3. As a result of his injury, claimant has permanent impairment to his body as a whole.

FINDING 4. Claimant's permanent impairment rated to his upper extremity is twenty-five (25) percent.

FINDING 5. Claimant is fifty-four (54) years old and prior to his injury had only an eight grade education.

FINDING 6. Since his injury claimant has received a GED.

FINDING 7. Claimant has worked in potato fields and has cut wood.

FINDING 8. Claimant has worked for roofing companies, shipyards, dairies and lumber companies.

FINDING 9. Claimant has worked for tool companies and has served in the armed services.

FINDING 10. Claimant has worked for trucking companies and started with defendant employer in 1961.

FINDING 11. Claimant has driven a truck for defendant employer as well as worked on the dock.

FINDING 12. Claimant is well motivated.

FINDING 13. If claimant would put up with a little pain while trying to strengthen his arm, his pain would probably decrease.

FINDING 14. Claimant should not continue working as a truck driver.

FINDING 15. Since his injury claimant is not physically well suited for any of his former positions.

FINDING 16. There are jobs which claimant could do.

FINDING 17. Claimant has had a reduction in grip strength.

CONCLUSION B. Claimant has an industrial disability of forty (40) percent.

FINDING 18. Claimant missed work from September 14, 1970 until February 10, 1980 and from February 15, 1980 to the date of hearing.

FINDING 19. Claimant reached maximum recovery on June 21, 1980.

CONCLUSION C. Claimant is entitled to healing period benefits from September 14, 1970 until February 10, 1980 and from February 15, 1980 to June 21, 1980.

FINDING 20. Defendants had a rating of claimant's permanent impairment prior to claimant's seeking an independent rating.

FINDING 21. Claimant, in his petition, applied for §85.39 benefits.

CONCLUSION D. Claimant complied with §85.39 prior to his examination by Dr. Clemens.

THEREFORE, defendants are hereby ordered to pay compensation benefits unto claimant for a period of thirty-nine and four-sevenths (39 4/7) weeks at the rate of two hundred sixty and 31/100 ($260.31) per week for the healing period and to pay weekly compensation benefits for a period of two hundred (200) weeks at the same rate for the permanent partial disability, accrued payments to be made in a lump sum together with interest at the rate of ten (10) percent per year, less a credit for those payments heretofore made.

Costs are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report upon completion of the payment of this award.

Signed and filed at Des Moines, Iowa this 29th day of March, 1983.

Appealed to District Court;
Remanded for Settlement

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANK L. STARR,	:	
Claimant,	:	
vs.	:	
GLESS BROTHERS, INC.,	:	File Nos. 636045/636046
Employer,	:	A P P E A L
and	:	D E C I S I O N
AID INSURANCE SERVICES,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant brought separate arbitration actions against defendants as a result of injuries alleged to have occurred on February 22, 1979 and April 23, 1979. Evidence pertaining to both injuries was heard in a single hearing, and an arbitration decision filed October 28, 1982 denied claimant any benefits as a result of the proceeding. Claimant filed an appeal as to both claims on November 17, 1982.

The record on appeal consists of the hearing transcript, which contains the testimony of claimant; claimant's exhibits 1 through 4; defendants' exhibits A through F; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether claimant received injuries arising out of and in the course of his employment on February 22, 1979 and April 23, 1979 which aggravated a preexisting condition.

2. Whether there is a causal relationship between the alleged injuries and disability upon which claimant bases his claim.

REVIEW OF THE EVIDENCE

At the time of the hearing it was stipulated by the parties that the applicable workers' compensation rate, in the event of an award, is $183.10 per week. It was also stipulated that claimant was off work from February 22, 1979 until April 17, 1979 and from April 24, 1979 until June 11, 1979. The parties agreed that all medical expenses were fair and reasonable. (Transcript, pp. 3-5)

Claimant began working for defendant employer as a truck driver in 1976. While helping to unload a delivery in Rock Falls, Illinois on January 31, 1979, claimant suffered an injury to his back when he was struck by two 40 pound bags of salt which fell from the top of a semitrailer which was being unloaded. Claimant was hospitalized from February 1, 1979 through February 8, 1979 where he was treated for an injured lumbar spine. He was released to return to work on February 19, 1979 with a 15 pound weight restriction. Claimant denied having experienced back problems prior to the January 31, 1979 accident. Claimant filed a workers' compensation claim in Illinois which eventually resulted in a lump sum settlement on March 10, 1980. (Tr., pp. 3-5; Defendants' Exhibit E)

Claimant returned to work on February 22, 1979 and was immediately dispatched to Madison, Wisconsin. On the way to Madison claimant noticed that his truck's oil pressure had dropped, and pulled onto the shoulder of the road to investigate. Claimant testified that as he lifted the hood of the truck he heard a cracking noise in his back and experienced pain in the lower back and into his left hip. He also experienced a tingling sensation in his left leg. Claimant testified that he suffered the greatest pain after he began walking toward the next town. He was eventually picked up by another truck driver who dropped him off at a garage from where defendant employer could be called. Claimant was picked up that evening by another employee of defendant employer. (Tr., pp. 7-15)

Claimant testified that he called defendant employer the following day and was told that he could see his own doctor. Monty McClellan, M.D., treated claimant on an outpatient basis and employed heat treatments, electric therapy treatments, and whirlpool treatments. Claimant was released to return to work at his former position on April 17, 1979 with a continuing weight restriction of 15 pounds. (Tr., pp. 16-21)

Claimant did return to work on April 17, 1979 in his capacity as a truck driver. On April 23, 1979 claimant picked up a load of rock salt to be delivered in Newton, Iowa and was unloading the cargo with two hoses when a clamp connecting the hoses came loose. Claimant crawled under the trailer where the hoses were coupled and tried to pry them together. During this process claimant again heard the cracking noise in his back and experienced pain in his back, left hip, and leg. He was able to finish unloading the rock salt, but testified that the next day he was unable to get out of bed to go to work. Claimant was hospitalized from April 24, 1979 through April 28, 1979. He was released to return to work on June 11, 1979 but was informed by defendant employer that there was no further work available for him. (Tr., pp. 21-36)

Following June 11, 1979, claimant also sought medical attention from a Dr. Nelson, chiropractor, and William D. Reinwein, M.D. (Tr., p.37)

In a letter dated September 25, 1979 and addressed to claimant's counsel, Monty P. McClellan, M.D., reported:

> Regarding my patient, Frank Starr, about whom I received a inquiry dated 9/24/79. Mr. Starr stated he was injured 2/1/79 when two 40 pound bags of rock salt struck him while he was unloading a truck at work. He was seen that day and admitted to Mercer County Hospital. I believe you have adequate records providing the necessary information on that hospitalization. He had no prior back injury to my knowledge other than a minor muscular strain in 1975, which resolved with no significant treatment beyond rest and local heat. He did reinjure his back after demonstrating progressive improvement on 4/24/79 again while working pulling on some heavy hoses from a truck. I do not believe that any other health problem other than his injuries have contributed to his back pain. He currently has some minor discomfort in the back but has recovered to the extent that he is currently looking for work but has been advised that he would most probably not tolerate truck driving or work requiring repetitive or heavy lifting. This would certainly

preclude the employment in which he was engaged at the time of his accident. I feel that his case history clearly demonstrates that his back injury of 2/1/79 and the exacerbation 4/23/79 is a direct result of his activities while employed. Any rehabilitative treatment to provide him with another vocation in which he could work around his activity limits would certainly be indicated. This type of back injury is commonly chronic and does permanently restrict the patient's activity. At the current time treatment recommended to the patient includes continuing William's Flexion exercises, heat application and analgesics with acute pain. (Claimant's Ex. 4)

In a letter dated November 8, 1979 and addressed to claimant's counsel, William D. Reinwein, M.D., reported:

This 35 years old truck driver was seen on 10-9-79 for evaluation of an injury to the low back that he sustained on January 31, 1979.

History reveals that at that time, while at work, he sustained an injury to the low back when two bags of salt fell approximately 12 feet off a semi trailer [sic] striking him in the low back and across the shoulder. As the result of this injury, he developed pain in the low back radiating to the left leg with some paresthesia and numbness of the left foot. He described the pain in the low back as sharp, stabbing, pulling and constant, whereas the pain in the leg is described as shooting and numbing. The symptoms are aggravated by coughing, straining, bending, stooping, lifting, twisting, prolonged standing, sitting, riding and driving a car. He developed a limp in the left leg.

Further history reveals that he received conservative management as well as low back exercises and had had some chiropractic treatments; this only temporarily improved his symptoms but the pain recurred on activity.

Clinical examination discloses that the man stands in moderate discomfort. He presents large scars on both chests from previous chest surgery, otherwise, he is well developed and somewhat quiet individual; he moves slowly and is guarded.

He demonstrated a restricted range of motion of the back and ironing out of the normal lordotic curve of the back with bilateral straight leg raising sign positive. Examination of the thoracic spine revealed no evidence of any pathology. Radiological examination of the lumbar sacral spine did show some early hypertrophic spurring.

In view of the patient's history and relatively positive findings, clinically with inability to resolve his symptoms under conservative treatment, I felt that a myelogram was indicated; this was carried out on 10-16-79. On the lateral view, the patient demonstrated a defect of the amypaque column at the L4-L5 level. He is to [be] evaluated periodically; I do not think that surgery is indicated at this time and further conservative treatment will be attempted.

The patient's disability is causally related to the accident that this patient sustained at work on 1-31-79. (Def. Ex. D)

Claimant was also examined for evaluation purposes by F. Dale Wilson, M.D., at the request of claimant's counsel. Dr. Wilson's report of September 22, 1980 included the following:

This man was injured on January 31, 1979; he was stooped over unloading a truckload of salt. In his stooped over position, a 40 lb. bag of salt fell off the truck about 11 feet, hit him across the shoulders and before he could change his position, a similar sack landed across the lumbosacral portion of his back. He was immediately disabled and was taken to the Mercer County Hospital where he stayed until the 8th of February, 1979. X-rays were negative for changes of his bones; he had muscle spasm in the lumbosacral region and he responded satisfactorily to physio-therapy and relief of pain. He was discharged with a diagnosis of lumbosacral strain and hypertrophic spurring was noticed on his lumbosacral vertebral bodies. The X-ray of his left shoulder was within normal limits. He was returned to work with a 15 lb. weight lifting restriction as of February 20, 1979.

He had an exacerbation of his back problem at work on February 23, 1979 when he was out on the road; he was returned to the Mercer County Hospital on April 24, 1979, following a sudden exacerbation of his back while doing yard work. He stayed in the hospital for four days. Repeated X-rays of his thoracic and lumbar spines revealed no changes except a possible slight narrowing of the disc spaces from T9 to T12.

....

He was seen by Dr. Reinwein, a Moline orthopedist, November 9, 1979 and was evaluated for his injury. The history agrees with that of previous record; he had pain in the back radiating to the left leg with some paresthesia and numbness of the left leg and foot. His symptoms had been aggravated by coughing, straining, bending, stooping, lifting, twisting, prolonged standing, sitting or riding or driving a car and he had developed a limp in the left leg. He had not shown improvement with conservative treatment since the beginning of his injury. Dr. Reinwein demonstrated a restricted motion of the back, positive bilateral straight leg raising test, and he found radiological evidence of hypertrophic spurring of the lumbar spine.

Because his symptoms had not abated and because he was in considerable stress, Dr. Reinwein recommended and completed a myelogram of his spine on October 16, 1979; he interpreted this as showing a defect of the amypaque column at the L4-5 level. He suggested that conservative treatment was probably not adequate and that the man would need surgical treatment. The patient deferred surgical treatment and preferred to see if he could get along on conservative management for an interval of time.

Symptoms at this time are: Pain, which is in the left side of his neck, left shoulder across his back. He has to drive with alternate arms; he can use the left arm for driving only for a short interval. His weight lifting limit is about 25 pounds for that arm. He can't sleep with this arm under his head. There is some difficulty in the upper part of his neck, it won't turn to the right. This motion is most uncomfortable. He finds it very difficult to arrange his pillows at night; his neck, arm and shoulder hurts to [sic] much that he will wake up.

He has no particular problems concerning his upper back.

In the lower back, he has constant pain, worse at night when he tries to get comfortable. He avoids stooping; he can stand for about an hour if he will twist, turn and change his place. His weight lifting limit has been limited to 25 lbs. and he stays under that carefully. His sitting time is about 15 to 20 minutes only. When he can drive, he can go 40 or 50 miles; then it is necessary to stop and walk around and about and rest his back.

Left leg: He gets pain from his back down into the hip into the left leg and down like a hot iron into his calf. The left foot goes to sleep involving all the toes. He has had some groin pain on the left side and this seems to occur after he has been riding about an hour and is associated with aggravation of the back pain. His left leg is weak at all times. He tries not to use the left leg; he does not use it in driving a car; the leg "buckles" under him. The left big toe is weak in both flexion and extension. There is no direct shooting pain with pressure, but after a hard cough, his back hurts worse.

....

The injury sustained on January 31, 1979, aggravations on February 20, and April 23, 1979, are the causative factors with respect to the symptoms, pathology and disability found on this examination. (Cl. Ex. 3)

Claimant's deposition was taken on behalf of defendants on October 13, 1980, at which time he was questioned as to his physical condition immediately prior to returning to work following the January 31, 1979 accident. He testified that he limped while walking, experienced terrible buring pains in his left hip while sitting down, and had great difficulty sleeping. (Def. Ex. F, pp. 26-28) Claimant discussed his ability to work following the January 31, 1979 accident:

Q. All right. You got back to work, and you were -- had constant pain?

A. Yes.

Q. All right. And that, I suppose -- you tell me if I'm wrong -- affected your ability to work?

A. Well, yes, sir.

Q. Tell me how it affected your ability to work, if you would, in terms of and relating to me, you know, things that you couldn't do that you wanted to do or the job required you to do.

A. Okay. I couldn't drive for any distance. It was hard for me to walk. I couldn't lift anything. It was hard to bend over, stoop down. Like I say, the bouncing in the truck made it hurt worse.

Q. Were you ever free from this pain?

A. No, sir.

....

Q. Would -- let's try and focus on just an hour of your activities. You know, you're back to work and you're driving a truck. You have the constant pain. Tell me, if you would, during an hour, if you would have occasion to have this sharp, striking pain, and on what occasions you would.

A. If the truck was bouncing a lot -- presuming I'm driving, if the truck was bouncing a lot over a rough road, yes, then it would come back, and it would be sharper than that. If I did any lifting --

Q. Then you were required as a truck driver to do some lifting, were you not?

A. Yes, sir, we had hoses in the truck that we had to lift.

Q. And that would always give you a sharp pain?

A. Yes, sir after the accident it did.

Q. You could almost count on it, couldn't you, I suppose, if you had to lift something, you knew you were going to get that sharp pain?

A. I never really counted on it, in that sense. I knew I got it.

Q. That was the wrong question. You would anticipate the pain?

A. I knew I was getting it. I knew I got it.

Q. Were there any activities that would not cause you this increased pain?

A. Not really.
(Def. Ex. F, pp. 28-31)

Claimant also testified at the hearing as to his condition at the time he returned to work following the January 31, 1979 accident. Claimant testified that upon first returning to work he had soreness, but not constant pain. When questioned about the discrepancy between his deposition testimony of October 13, 1980 and his testimony at the hearing, claimant stated that although the deposition testimony was given at a time closer to the accident, he had been taking pain pills and muscle relaxant at the time of the deposition, and might have been wrong with his answers at that time. Claimant also asserted that he did not understand the questions or meanings of the questions put to him at the deposition. (Tr., pp. 77-84)

With regard to his condition at the time he returned to work in April of 1979, claimant stated in his deposition his condition had improved, but the familiar pain still occurred while doing exercises (William's Flexion exercises) prescribed by his doctors. Claimant did not suffer steady pain as long as his activities were strictly limited, but did experience steady pain upon his return to work. (Def. Ex. F, pp. 54-56) At the hearing claimant described himself as being in a state of steady discomfort rather than pain when he resumed working in April of 1979. He indicated the pain and discomfort are not synonymous, and that pain is an intensified discomfort. (Tr., pp. 88-91)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on February 22, 1979 and April 23, 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 injuries of February 22, 1979 and April 23, 1979 are causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732. 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. Id. at 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, 257 Iowa 516, 133 N.W.2d 867. See also Musselman, 261 Iowa 352, 154 N.W.2d 128 (1967).

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. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

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., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

ANALYSIS

Claimant has brought separate claims for injuries alleged to have occurred on February 22, 1979 and April 23, 1979, which are said to have aggravated a condition which had resulted from an injury of January 31, 1979. It is noted that claimant was injured on January 31, 1979 and did not return to work until February 22, 1979, the date that the first aggravation is alleged to have occurred. Claimant was off work again from February 23, 1979 until April 17, 1979, and worked only four days before the second aggravating injury occurred. Claimant's cause of action for the January 31, 1979 injury had been set for hearing before the Illinois Industrial Commission, but was settled in March of 1980. Due to the relatively brief time span during which the initial injury and the alleged aggravations occurred, we believe it necessary to review each occurrence in light of its chronology with the others.

As was inferred by the deputy, it is difficult to reach a decision, based upon the medical reports contained in the record, as to the aggravating effect of claimant's mishaps of February 22, 1979 and April 23, 1979 upon his preexisting condition. The purpose for which the reports were prepared appear to vary and the histories contained therein are lacking in consistency. The report of Dr. McClellan concludes that claimant's back injury of January 31, 1979 and the "exacerbation" of April 23, 1979 were work related, but fails to so much as mention the alleged injury of February 22, 1979. Such omission from the history provided by Dr. McClellan seems somewhat incredulous in view of the fact that he treated claimant on that date and afterwards. The report of Dr. Reinwein appears to have been prepared solely for the purpose of proving the merit of the Illinois claim and as a result does not even acknowledge the injuries alleged to have occurred February 22, 1979 and April 23, 1979. As noted by the deputy, the report of Dr. Wilson, which stated that claimant's January 31, 1979 injury was aggravated on February 22, 1979 and April 23, 1979, contains a history which indicates claimant has had physical problems not supported elsewhere in the record. In addition, Dr. Wilson's report indicates that surgery had been advised by Dr. Reinwein when, in fact, the report of Dr. Reinwein discouraged surgery.

While the histories and conclusions in each of the medical reports seem to be suspect to some degree, the veracity of claimant's testimony concerning his physical condition at the times he returned to work on February 22, 1979 and April 17, 1979 is equally suspect. In the deposition taken in October of 1980 claimant essentially testified that he had experienced substantial pain from the date of his injury in January of 1979 right up until the April 23, 1979 incident. Claimant made reference to experiencing sharp pains and burning sensations through his back, hip, and leg whenever he walked, sat, drove, or did exercises prescribed by Dr. McClellan. While testifying at the arbitration hearing in May of 1982, however, claimant denied suffering constant pain continuously from January 31, 1979 through June 11, 1979, rather characterized himself as having been subject to moderate periods of discomfort. Such polar changes in claimant's testimony are not easily explained away by the assertion that claimant was under the influence of pain pills at the time of the deposition and did not understand the meaning of the questions being asked of him.

Having reviewed all of the testimony and medical evidence contained in the record, it is concluded again today that claimant did not receive injuries arising out of and in the course of employment on either February 22, 1979 or April 23, 1979 which aggravated a preexisting condition. In so deciding, the medical reports of Doctors Wilson, Reinwein, and McClellan are given little weight for the hereinbefore mentioned reasons. It is believed that the testimony taken from claimant's October 1980 deposition is the more reliable source as compared to claimant's hearing testimony. The hearing took place over three years after both of the alleged injuries while claimant's deposition was taken one and one-half years earlier. While the discrepancies in claimant's testimony might possibly be explained by his use of pain pills, we find them more likely to be the result of claimant's desire to build a record more favorable to his case. When claimant returned to work on February 22, 1979 he immediately had to take disability absence again on the following day. Based upon claimant's deposition testimony that had never really ceased to experience pain prior to that date, we must conclude that he simply returned to work too soon after his January 31, 1979 injury. We cannot find that claimant's pain from the lifting of the semi-truck hood on February 22, 1979 was a material aggravation of a preexisting injury, rather it was merely a continued manifestation of the earlier injury. The same must be said for the pain which occurred on April 23, 1979, merely four days after claimant again returned to work. Having determined that claimant's preexisting condition was not materially aggravated on February 22, 1979 or April 23, 1979, the issue of causal relationship need not be addressed.

FINDINGS OF FACT

1. Claimant's back was injured in an industrial accident in Illinois on January 31, 1979.

2. Claimant was hospitalized from February 1, 1979 through February 9, 1979 while he was treated for an injury to the lumbar spine.

3. Claimant was released to return to work on February 22, 1979.

4. Claimant negotiated a settlement for an Illinois workers' compensation claim, pertaining to the January 31, 1979 injury, on March 10, 1980.

5. Claimant returned to work on February 22, 1979 at which time he experienced pain in his back, hip and leg while lifting the hood of a truck.

6. The pain experienced by claimant on February 22, 1979 was a continuing manifestation of his January 31, 1979 injury.

7. Claimant was again off work from February 23, 1979 through April 16, 1979.

8. Claimant returned to work on April 17, 1979.

9. Claimant experienced pain in his back, hip and leg on April 23, 1979 while adjusting the coupling of hoses used to unload grain trailers.

10. The pain experienced by claimant on April 23, 1979 was a continuing manifestation of his January 31, 1979 injury.

11. Claimant has suffered no material aggravations to the injury he sustained on January 31, 1979.

CONCLUSIONS OF LAW

Claimant has not met the burden of proving an injury arising out of and in the course of employment on February 22, 1979.

Claimant has not met the burden of proving an injury arising out of and in the course of employment on April 23, 1979.

WHEREFORE, the deputy's decision filed October 24, 1982 is affirmed.

THEREFORE, it is ordered that claimant is to take nothing as a result of these proceedings.

Claimant and defendants are each to pay one-half of the costs of the arbitration proceedings. Claimant is to pay the costs of appeal.

Signed and filed this 30th day of June, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD A. STROHMEYER,	:	
Claimant,	:	File No. 613827
vs.	:	R E V I E W -
DUBUQUE PACKING COMPANY,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Richard A. Strohmeyer, claimant, against his self-insured employer, Dubuque Packing Company, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on August 1, 1979. It came on for hearing on October 20, 1982 at the Dubuque County Courthouse in Dubuque, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received August 14, 1979. A memorandum of agreement was received on the same day. A form 5 shows the payment of eight weeks and five days of healing period totalling $2,582.37.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, records from Finley Hospital relating to an admission of August 1, 1979; claimant's exhibit 2, a letter from David S. Field, M.D., dated August 28, 1981; defendant's exhibit 1, clinical notes from Drs. Buckwalter and Lindenfeld from October 8, 1981; and defendant's exhibit 2, an excerpt from the Lawyers' Medical Cyclopedia referring to the AMA Guides 1965 edition. The parties ask that the most recent edition of the AMA Guides be substituted.

ISSUE

The sole issue in this matter is claimant's entitlement to permanent partial disability for a scheduled member.

STATEMENT OF THE CASE

Fifty-year-old married claimant testified to thirty-one and six-tenths years of employment with defendant. Some portion of that time was spent in the offal department, but his last twenty-five years have been as a ham boner. He stated that ham boning entails defatting the ham, taking the H bone out of the butt by cutting around it, turning the ham, removing the shank bone, slicing through the center and discarding the center bone. He used a knife in his right hand and used the left hand which was gloved in mesh to hold the ham and to pull the meat apart.

Claimant described the circumstances surrounding his injury of August 1, 1979 as follows: He was cutting around the H bone using a knife. The knife penetrated an area at the base of his left thumb. He took off his equipment. The foreman took him to the nurse. He was hospitalized. A surgical repair was done to connect a severed cord to his thumb. He was off work for eight weeks during which time he had whirlpool treatments and therapy. The latter was painful to him. He returned to his job as a ham boner on October 1, 1979.

Claimant recalled that initially on his return, he experienced loss of strength and difficulty removing the H bone. He also noted trouble cutting off knuckles as he could not get a proper hold with his thumb. He remembered that he could not grip as well, that his thumb tired in a short period of time and that he had to relax his thumb which became cold and stiff. Pain occurred in an hour with exertion.

Claimant continues to have loss of mobility and trouble with fine motor movements. He states that his condition has been substantially the same since his return to work. He reported difficulty with some household tasks such as nailing up weather stripping, picking up a needle and tying on fish hooks. Claimant said he is troubled by changes in the weather with cold bringing on stiffness. He alleged a sensation of his thumb being pulled back.

Claimant denied prior or subsequent injuries to his thumb. He acknowledged an injury to his left arm when a knife entered it at the bend in his elbow. He said that he was treated with a bandage and had no loss of work. In another incident, claimant stuck a knife in his wrist area which resulted in a half inch scar. Claimant attributed all his present problems to his August 14, 1979 injury.

Although claimant's surgery was done by Dr. Faber, claimant elected to see Dr. Field who performed a half hour examination and used an instrument to measure claimant's range of motion. He did not recollect whether or not he had been questioned by the doctor about difficulties at home.

Claimant was sent by the company to Iowa City where he was examined by two physicians. It was claimant's understanding that he was being sent because of the variation in findings by Dr. Faber and Dr. Field. He stated that one physician saw him for less than five minutes; the second for fifteen minutes. Claimant did not recall that either used any instruments to measure range of motion; however, they did observe his moving his thumb and test his sensation.

Hospital records show claimant was admitted on August 1, 1979 for repair of a lacerated flexor pollicus longus on the left. The surgery was reported by L. C. Faber, M.D., as follows:

> Following satisfactory Xylocaine block of the left arm, an incision was made over the thenar eminence and at the wrist. At the wrist medial to the carpi radialis the pollicus longus tendon was isolated and found to be severed at about the mid thenar eminence.
>
> An incision was made at the interphalangeal space and flexor tendon was isolated here and its end was found. It was brought through the flexor tunnel with a dull probe and the incision was made in the thenar eminence muscles at their origin opening up the flexor canal so that the tendon could be approximated with a pulley stitch of 2-0 Vicryl and the peripheral approximation with interrupted 4-0 Vicryl.

David S. Field, M.D., orthopedic surgeon, saw claimant and reported his findings in a letter to Dr. Faber. He found range of motion in the interphalangeal joint at from zero to thirty degrees and in the metacarpal-phalangeal joint at fifteen to sixty degrees. Dr. Field recorded some numbness on the ulnar side of the thumb. No bony abnormalities were seen on x-ray. The doctor assessed claimant's impairment at forty-six percent of the thumb, eighteen percent of the hand, eighteen percent of the upper extremity or eleven percent of the whole man.

Drs. Lindenfeld and Buckwalter of the Orthopedics Department at the University of Iowa Hospitals and Clinics saw claimant on October 8, 1981. Range of motion in the interphalangeal joint was zero to fifty-five degrees; in the metacarpophalangeal it was minus ten to sixty-five degrees. Claimant was able to oppose his thumb and his small finger and to abduct. Good power was found in the abductor brevus. Two point discrimination was sixteen mm on the radial side and thirteen mm on the ulnar side of the thumb.

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is claimant's entitlement to permanent partial disability for a scheduled member.

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).

Where the result of an injury causes the loss of a foot, or eye, etc., the loss, together with its ensuing natural results upon the body, is a permanent partial disability and is entitled only to the prescribed compensation. Barton v. Nevada Poultry Co., 253 Iowa 285, 290, 110 N.W.2d 660, ___ (1961). The schedule fixed by the legislature includes compensation for resulting reduced capacity to labor and earning power. Schell v. Central Engineering Co., 232 Iowa 421, 425, 4 N.W.2d 399, ___ (1942). The claimant has the burden of showing that his ailment extends beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964).

Larson in 2 Workmen's Compensation §58 at 10-28 (Desk ed. 1976) 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 related to loss of earning capacity and not to physical injury as such." The theory, according to Larson, is unchanged with the only difference being that "the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience."

Claimant argues that he should be awarded a forty-six percent impairment of the thumb. Defendant argues claimant's impairment is not more than seventeen percent of the thumb. The parties seem to be in agreement regarding the use of the AMA Guides to assess claimant's impairment. At the time of hearing, portions of the 1965 edition were offered into evidence. The parties indicated they wished the undersigned to use a more recent version if one was available.

There is a conflict in the medical evidence between the assessments made by Dr. Field and those made by Drs. Lindenfeld and Buckwalter. No evidence from the treating surgeon as to claimant's degree of impairment was offered. Claimant, a credible witness, testified that Dr. Field used an instrument to measure his range of motion and that no instrument was used by the doctors at Iowa City. Because of the greater accuracy in assessing the impairment afforded by use of a measuring device, greater weight is being given to the opinion of Dr. Field.

Dr. Field concluded claimant had a forty-six percent impairment of his thumb. The undersigned has applied the AMA Guides and has reached a different percentage. While the basic tables now a part of the AMA Guides are unchanged from those offered into evidence at the time of hearing, the current tables refer to lost and retained motion. Dr. Field found the range of motion in the interphalangeal joint to be from zero to thirty degrees resulting in a twenty-eight percent impairment. That assessment is correct. The orthopedist found the range of motion in the metacarpophalangeal joint from fifteen to sixty degrees. Claimant has lost fifteen degrees of motion. Dr. Field apparently used the next higher figure, or twenty degrees lost to obtain an eighteen percent rating. This deputy industrial commissioner concludes a fourteen percent rating would be more accurate.

Flexion from neutral position (0°) to:	Degrees of Joint Motion LOST	RETAINED	
0°	60	0	55%
10°	50	10	46
20°	40	20	37
30°	30	30	27
40°	20	40	18
50°	10	50	9
60°	0	60	0

Having found impairment to those two joints, the doctor apparently added twenty-eight and eighteen to obtain his total of forty-six percent. That method is not the one recognized by the AMA Guides which provide, in part:

> 1. Calculate separately and record impairment of the thumb contributed by each joint.
>
> 2. Combine impairment values, using combined values chart, to ascertain impairment of thumb contributed by all joints.
>
> ....

Example--Restriction Motion:

Interphalangeal joint: 40 degrees flexion from neutral position (0°) OR from maximum extension =	23%
Metacarpophalangeal joint: 50 degrees active flexion from neutral position (0°) OR from maximum extension ..... =	9
Carpometacarpal joint: 10 degrees active flexion and 20 degrees active extension..... =	10
(23 combined with 9=30; 30 combined with 10=37)	37%

The undersigned has used the values of twenty-eight percent and fourteen percent and has consulted the combined value chart which gives a total impairment of thirty-eight percent.

Iowa Code section 85.34(2)(a) provides that loss of a thumb will result in sixty weeks of weekly compensation. As claimant's impairment has been assessed at thirty-eight percent, he is entitled to twenty-two point eight weeks of compensation.

FINDINGS OF FACT

That claimant is a credible witness.

That claimant is fifty years of age.

That claimant has been employed by defendant for thirty-one and six-tenths years with his last twenty-five years as a ham boner.

That on August 1, 1979 as he was deboning a ham, his knife penetrated the base of his left thumb.

That claimant underwent hospitalization and surgery related to his thumb.

That claimant has been paid healing period as a result of his injury.

That claimant has experienced loss of strength and restriction of motion in his thumb.

That claimant has changed the manner of peforming his job.

That claimant had no prior or subsequent injuries to his thumb.

That claimant has had other injuries to his left upper extremity.

That claimant has some loss of sensation in his thumb.

That range of motion in his thumb was found to be zero to thirty degrees in the interphalangeal joint and fifteen to sixty degrees in the metacarpophalangeal joint by Dr. Field.

That range of motion in the thumb was found to be zero to fifty-five degrees in the interphalangeal and minus ten to sixty-five degrees in the metacarpophalangeal joint by physicians at Iowa City.

That Dr. Field's measurements are more reliable than those of Iowa City.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

That claimant has a thirty-eight (38) percent impairment to his left thumb as a result of an injury arising out of and in the course of his employment on August 1, 1979.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant permanent partial disability benefits at a rate of two hundred ninety-six and 34/100 dollars ($296.34) for a period of twenty-two and eight-tenths (22 8/10) weeks.

That defendant pay this award in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendant file a final report in thirty (30) days.

Signed and filed this 29th day of October, 1982.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES D. SUMNER, Claimant, vs. VARIED ENTERPRISES, INC., doing business in the name PRIVATE CARRIER PERSONNEL and THE QUAKER OATS COMPANY, Employer, and SAFECO INSURANCE COMPANY OF AMERICA, Insurance Carrier, Defendants.	File No. 618350 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a proposed arbitration decision. On arbitration the deputy determined the claimant's myocardial infarction did not arise out of his employment as a semi-truck team driver. The deputy stated the "greater weight of medical evidence" indicated claimant's atherosclerotic coronary artery heart disease was the "most important contributory factor" to the onset of the infarction. Additionally, the deputy found the claimant's continuing to drive his semi-truck after "encountering pain" did not aggravate his condition. Both sides have filed extensive briefs in this matter.

The record on appeal consists of the entire record of the arbitration proceeding which includes the transcript of the hearing; claimant's exhibits 1 through 21; claimant's answer to interrogatory number 5; defendants' exhibits A, B, C, D, F, G, H and I; and the depositions of the claimant, Liberato A. Iannone, M.D., Donald Brown, M.D., Paul From, M.D., Floyd Buffington, Elverna Wimer, Howard Alfred Hilton, Jr., and John L. Mentzer, Jr.

ISSUES

The claimant's stated issues contained within his appeal brief are quite lengthy and argumentative in scope rather than a proper framing of the particular legal and factual issues. For the sake of brevity and clarity within this complex case, regarding causal relation of employment to a myocardial infarction, the claimant's issues on appeal may be framed as:

(1) Whether the deputy incorrectly relied upon defendants' medical experts' opinions which are supposedly based upon inferences drawn contrary to Iowa case law regarding a necessity of showing unusual stress?

(2) Whether the deputy incorrectly applied a "single unusual occurrence or unusual incident test" and did not give credence to claimant's analysis of Iowa case law that such a showing is not necessary when there is a period of ongoing mental or physical stress?

(3) Whether claimant needs only to show that his heart was damaged by continuing work exertions after the onset of his infarction in order to establish a causal relationship?

(4) Whether claimant is correct in contending his atherosclerosis did not manifest itself into a required preexisting condition in order to bring him within the so-called "Littell" rule or Larson's "personal contribution" doctrine?

(5) Whether the claimant satisfied the burden of "Littell" (i.e., heavy exertions superimposed on an already defective heart) by showing emotional and physical stress in his employment that is greater than found in non-employment life?

(6) Whether the claimant is permanently and totally disabled?

Defendants contend the evidence compels the following findings of fact made by the deputy: That the claimant has not proven his infarction was caused by any unusual activity or heavy exertion aggravating his underlying severe coronary artery disease; and the continuing to drive did not aggravate the damage caused by the infarction.

REVIEW OF THE EVIDENCE

Claimant is a 46 year old man. He suffered a myocardial infarction while driving a semi-truck in the course of his employment on October 11, 1979. (Transcript, p. 14) A myocardial infarction is often called a heart attack which, technically speaking, means the death of a section of the myocardial (i.e., heart) muscle caused by an interruption of blood supply to the particular section of the myocardial muscle. (Brown deposition, p. 16)

Claimant began his employment as a "team driver" on September 17, 1979, approximately 3 1/2 weeks before the infarction. (Tr., p. 15) He described team driving as essentially a non-stop two man driving operation which stops only for fuel, meals and one shower per day. While one driver operates the semi-truck, the other driver either sleeps in the sleeping berth which is attached to the truck cab, or simply sits and waits for his turn to drive. (Tr., pp. 29-31) Claimant's co-driver during his employment, Floyd Buffington, testified on deposition that team driving was a 23 hour, 4 to 6 day per week job. (Buffington dep., p. 17)

On the day of his infarction the claimant began his driving shift at 4:00 a.m. He had just finished eating breakfast in a truck stop while his co-driver slept within the sleeping berth. Prior to breakfast he had just finished sleeping 6 to 7 hours within the sleeping berth. When he started driving, his co-driver remained sleeping. The team was hauling a trailer southward upon the interstate system to a warehouse located in Atlanta, Georgia. The record establishes that the road conditions were dry, the weather was clear, and the air was cool. (Tr., pp. 57-61; Buffington dep., pp. 17, 105-106)

Within 15 to 20 minutes of driving, claimant said he started feeling chest pains, but believed it was only heartburn. He decided to continue to drive onward to Atlanta where he would stop to get some bicarbonate of soda. (Tr., pp. 61-62) Within one hour and 15 minutes later, the pain supposedly became "virtually unbearable." (Tr., p. 62, ll., 19-20) Due to this higher degree of pain, the claimant stated he decided to turn off at a smaller truck stop before Atlanta, however, he missed the appropriate exit, so he then proceeded to drive on to Atlanta. (Tr., p. 63) He said the pain "hurt bad" and he had to slow down in order to concentrate on driving. (Tr., p. 64) He said he could have exited onto a smaller highway, however, he did not do so because he was not sure what he would find. (Tr., p. 64) There was an adequate beam strip along the highway, but he did not pull over. (Tr., p. 65)

Buffington testified he was awakened by being "jarred around" in the sleeping berth which was caused by claimant's driving. (Buffington dep., p. 115, l. 12) He said the claimant pulled the truck over and told him he had indigestion, but he wanted to continue driving up to the next exit where he would stop to get bicarbonate of soda. (Buffington dep., pp. 115-117) Claimant testified he does not recall this incident or conversation. (Tr., p. 66)

Claimant stated that nothing unusual happened to him after the chest pain started. He stated he arrived at the truck stop 2 1/2 hours after he started to drive. When pulling into the truck stop, he said he had to maneuver the semi-truck, which does not have power steering, through three 90 degree angle turns. He said he had to "lay right into the wheel" in order to turn the vehicle. (Tr., pp. 66-67)

He stopped in front of the restaurant truck stop in a no-parking zone and went to consume bicarbonate of soda. After consuming the soda with water, he laid his head down on the counter, went to the washroom, had another bicarbonate and then began to feel worse. At this time he decided he needed a doctor. Claimant went outside and awoke his co-driver who called for emergency help. Claimant rapidly received ambulance treatment which included oxygen and rest. He was admitted to emergency care with a diagnosed acute myocardial infarction. He remained hospitalized for 14 days in Atlanta. (Tr., pp. 67-72)

A subsequent coronary arteriogram performed on December 6, 1979 showed the presence of an atherosclerotic cardiovascular disease. (Claimant's Exhibit 1) Claimant stated he had no prior knowledge of his diseased condition. (Tr., p. 18) Both of his experts postulated that he suffered a coronary occlusion episode (i.e., a blood clot) at the time he started to experience chest pains approximately 15 to 20 minutes after he started his turn to drive. At this time his experts opined his heart muscle started to die. (Iannone dep., pp. 41, 53; Tr., pp. 254, 260)

Both defendants' and claimant's medical experts also agree that atherosclerosis is a progressive and irreversible disease and claimant's atherosclerosis probably began to form during his teenage years. (Tr., p. 281; Iannone dep., pp. 54-55; Brown dep., pp. 21, 34; From dep., p. 7)

However, the experts disagree as to whether claimant's compromised circulatory function due to the presence of his atherosclerosis was further compromised by his alleged job related physical and mental stress and whether this stress could have triggered the infarction. These medical opinions are reviewed later.

Claimant described himself as being in excellent health with no history of chest pain prior to working for the defendant employer. (Tr., pp. 15, 18) Before going to work for the employer, claimant worked primarily as a solo semi-truck driver during 1974 to 1978 and part of 1979. (Cl. Answer to Interrogatory No. 5, entered; Tr., p. 12) During this time claimant drove as a team driver in only six or eight situations. (Tr., p. 31)

Under the employ of the defendant the claimant was placed on a 30 day probationary period wherein he could have been terminated without showing cause. He testified that he had emotional stress because of this "unnerving" probationary period in relation to his alleged difficulty with required paperwork as a semi-truck driver, as well as fear of employer criticism in response to vehicle break downs, and his alleged inability to adapt to sleeping conditions within the sleeping berth while the semi-truck was in constant motion which created a failing ability to stay awake while driving. (Tr., pp. 44-56)

Claimant stated his progressive fatigue supposedly caused by his inability to sleep caused him to be physically unable to fulfill his equal share of the team driving. Claimant stated his co-driver actually drove more miles than as indicated on his driver's daily log book. (Defendants' Ex. C) The driving team was not required to unload any trailers. Claimant implied that his previous experience as a solo driver did not cause him any difficulty. (Tr., p. 33)

Claimant said he was completely exhausted by the time he arrived home after his team driving trips. Nevertheless, he said despite becoming progressively tired he continued to work in order to keep the relatively high paying job. (Tr., p. 54) He said he had increased stress toward the end of his probationary period. (Tr., p. 54) Additionally, claimant alleged he had increased stress regarding his required paperwork because he did not receive a training course on policy and procedures which the

company said was to be provided. (Tr., p. 42) Claimant stated the required paperwork was dissimilar to his previous truck driving employment. (Tr., pp. 42-43) On the night of his infarction, claimant described becoming emotionally upset when his co-driver did not awaken him while driving up and over a particularly steep mountain located in Tennessee. (Tr., p. 49-50)

On cross-examination, claimant admitted he did not receive any threats or warnings during his probationary period and that he could have asked his supervisors any questions regarding his paperwork during a safety training meeting. (Tr., p. 125) Claimant stated he did not have any domestic emotional pressure during the course of employment even though his son's family recently moved into his residence after his son's house was destroyed by fire. (Tr., p. 115) Claimant stated he did not recall whether his house payments or pickup truck payments were delinquent because his wife handled these matters. (Tr., p. 114)

On redirect-examination, claimant said the most strenuous part of his employment was completing the paperwork because he was not sure he was properly doing the work. (Tr., p. 142) Claimant stated that his home activities of planting and gardening were more strenuous than his driving. He said as a solo driver, he was able to stop his semi-truck and receive a good night's sleep as opposed to his team driving experience with the employer. He said he was criticized by one of his supervisors when he had a truck break down. (Tr., pp. 141-148)

Floyd Buffington, the claimant's co-driver, has 20 years experience as a semi-truck driver with 8 years of team driving experience. He stated that team driving is not difficult if the driver knows how to get to sleep. He stated that some drivers can "never adjust to it." (Buffington dep., p. 14, l. 19) He said the claimant came to work on the first day of employment for the defendant employer in a fatigued state and was unable to drive more than two hours at a time. (Buffington dep., p. 66) Buffington attributed claimant's condition to claimant's statement that he drove 5,000 miles in five or six days immediately prior to going to work for the employer. (Buffington dep., pp. 24-26)

Buffington stated that the claimant's driver's daily log book does not accurately reflect the number of hours claimant drove. (Buffington dep., p. 21) He said he unlawfully drove 75 percent of the team driving (Buffington dep., p. 50), because the claimant was always too tired to drive and he wanted to help him get beyond the probationary period (Buffington dep., p. 70). Buffington said he assumed the share of team driving would eventually balance out, however he said the claimant became progressively worse. (Buffington dep., p. 26)

Sometime during the final week of employment, Buffington told the claimant that they were going to split up as a team due to claimant's inability to drive. (Buffington dep., p. 66-69) Buffington characterized claimant's expressed concern over his probationary status as what "[e]very man" does under the same status. (Buffington dep., p. 75) He dismissed claimant's paperwork complaints as "just normal" (Buffington dep., p. 80, l. 15), and stated the paperwork was "self-explanatory." (Buffington dep., p. 83, l. 23) He stated the company's paperwork was "easier" than other similar companies and contended the paperwork was similar to claimant's prior paperwork experience in another driving position. (Buffington dep., pp. 81-83)

Elverna Wimer, a payroll clerk and account analyst with the team driving lessee company testified by deposition on behalf of the defendants that claimant's and Buffington's paperwork was a "fair job" for being new drivers. (Wimer dep., p. 8, l. 19) This witness could not recall whether she ever spoke to the claimant. (Wimer dep., p. 11)

John L. Mentzer, Jr., supervisor for the team driving lessee company, testified by deposition on behalf of the defendants that there were no complaints regarding claimant's and Buffington's paperwork which was "pretty near perfect from the beginning." (Mentzer dep., p. 53, l. 5-6) He stated the team was doing well; however he could not recall whether the claimant was made aware of his success in doing the paperwork. (Mentzer dep., pp. 53-54)

Claimant's medical expert opinions were rendered by Liberato A. Iannone, M.D., who testified by way of deposition and Robert Kreamer, M.D., who testified at the hearing.

Dr. Iannone is a board certified cardiologist. His practice consists of diagnosis of cardiac diseases. (Iannone dep., pp. 4-5) He is claimant's current treating physician and according to the record, he has personally examined the claimant on three separate occasions: December 6, 1979, April 1980, and September 1980. Dr. Iannone's examination of December 6, 1979, which included a coronary angiography, found the claimant suffered a "large anterior wall myocardial infarction with residual compensated congestive heart failure" and "significant left ventricular dysfunction which means the pumping power of the ventricle was significantly deteriorated because of the heart attack." (Iannone dep., p. 11, l. 2-8) In short, Dr. Iannone believes one-half of claimant's heart was destroyed whereby the amount of blood flow is reduced to half of its normal capacity. (Iannone dep., p. 12) Dr. Iannone feels the claimant's condition is "most assuredly" permanent. (Iannone dep., pp. 13-15) A treadmill test performed in April 1980 showed "minimal capabilities." (Iannone dep., p. 18, l. 14) A subsequent treadmill test performed in September 1980 showed the alive parts of claimant's heart are now showing evidence of ischemia, which means the claimant's condition is getting progressively worse. (Iannone dep., p. 19)

Dr. Iannone postulated that the day before the infarction, the anterior decending artery had a 90 percent blockage caused by atherosclerosis, then on the day of the infarction the artery became totally blocked which started the myocardium to die. (Iannone dep., p. 32) Subject to defendants' objection that a hypothetical question was contrary to the record on the basis that the record shows the claimant beginning his employment in a tired state, Dr. Iannone opined there is a "material causal relationship between the events preceding the heart attack and the heart attack itself in that they were directly related." (Iannone dep., p. 46, ll. 5-8)

Dr. Iannone believes that driving a semi-truck is more stressful than elective non-employment activity, because:

> I feel that the nonwork activity is elective, can be terminated at will; whereas, the work activity is not elective, cannot be terminated at will, and there is a superimposed demand of not only the physical activity but the mental need to continue the work and both of these things in my opinion increases the work load of the heart and will in that way jeopardize the heart muscle itself when the heart attack starts. Demands are still being placed on the heart far above the nonwork activity that have been described. (Iannone dep., p. 74, ll. 2-12)

Regarding causal relationship between claimant's alleged stress and infarction, and myocardial damage caused by his continual exertion after onset of infarction symptoms, Dr. Iannone testified as follows:

> Q. And when you're talking about disease, are you talking about the atherosclerosis?
>
> [Defendants' objection on grounds of irrelevancy omitted]
>
> A. Yes. I have no problem in saying that once the disease is present, that stress, be it physical, emotional or physical may be the straw that breaks the camel's back in precipitating the heart attack, so that is what I'm trying to clarify, that I cannot find where stress as such is necessarily a prerequisite toward developing this disease.
>
> Q. But, again, it's your opinion that in this particular case stress under which he was placed precipitated?
>
> A. Helped in precipitating.
>
> [Defendants' objection on grounds of irrelevancy omitted]
>
> Q. Doctor, I guess I'm trying to clarify the difference between risk factors that deal with atherosclerosis and risk factors that deal with clinical coronary heart disease in which you have actual ongoing heart damage occurring, and do you have an opinion in this particular case as to whether the prolonged stress would have an effect on the second of those, the coronary heart disease of a clinical level?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> [Defendants' objection on basis of not sufficient foundation omitted]
>
> A. I feel that both the physical and mental and emphasis stress of the situation as we have described here as a significant mitigating factor in precipitating and worsening the overall myocardial heart damage.
>
> ....
>
> Q. And in particular, that part of the driving that occurred after the onset of pain, what is your opinion as to that particular factor where does it fit in the picture.
>
> [Defendants' objection on grounds of irrelevancy omitted]
>
> A. The continued driving, the continued stress, the continued work load that the driver, Mr. Sumner had to undergo and did undergo after the onset of the symptoms was a factor in worsening and progressing the extent of damage that occurred.
>
> Q. There's a question as to the effect of eating prior to starting his driving. Do you have an opinion as to what the effect of eating a meal prior to starting driving might have upon the coronary function?
>
> A. It would make the heart have to work even harder. It's another load that the heart has to work with in addition to the work of driving. (Iannone dep., p. 74, l. 2 - p. 77, l. 24)

On cross-examination, Dr. Iannone agreed with defense counsel that it is an accepted practice among cardiologists to locate an unusual event in close proximity to the onset of symptoms in determining causation; however, this expert added that a heart attack can occur at rest, "so it is not necessary that the activity may have a relationship to this disease." (Iannone dep., p. 59, ll. 9-10)

Dr. Iannone testified:

> A. I feel there is a causal and material connection between the factors involved with continuing the moderate to severe, heavy activity that he was doing at the time the heart attack was going on. The ideal thing at the first onset of this man's pain was that he should have been in a hospital. (Iannone dep., p. 47)

Claimant's additional expert is Dr. Kreamer, who is board certified in cardiology and whose practice is limited to cardiology. Dr. Kreamer has not personally examined the claimant. Based upon the record of the case, it seems Dr. Kreamer has reviewed all pertinent medical records.

Dr. Kreamer testified that there are studies which show that stress and strain aggravates coronary heart problems. He stated a causal relationship exists between levels of oxygen demand and supply and cardiac pain in patients with compromised coronary circulation. He suggested a normal individual with underlying atherosclerotic disease would have increased stress and an increased heart rate while driving a vehicle; therefore he stated the claimant had more physical or emotional stress as a truck driver as opposed to an individual in non-employment life, which thereby must have resulted in an increased heart rate whereby his atherosclerosis would have prevented his myocardium from receiving needed oxygen. (Tr., pp. 269-271)

On cross-examination, Dr. Kreamer admitted he did not possess knowledge of claimant's day to day activity prior to his infarction. (Tr., pp. 301-302) Dr. Kreamer also admitted that it is usual to consider whether a stimulus occurred in attempting to find causation, but he stated that the particular person's bodily function must be considered from moment to moment and what is normally usual may become unusual, and that pain itself causes an increased demand for nutrients and oxygen to the heart. (Tr., pp. 285-287)

Dr. Kreamer testified that continuing to work after the onset of symptoms caused an aggravation of the myocardial damage, epecially in consideration of the increased oxygen demands upon turning a semi-truck's steering wheel which does not have power steering. (Tr., p. 261)

Dr. Kreamer believes that if rest and oxygen would have been instituted earlier, claimant's infarction may have been less severe (Tr., p. 262); however, he cannot indicate how much less damage would have occurred if claimant was put to rest sooner (Tr., p. 289).

Defendants presented the testimony of Donald Dirl Brown, M.D., a board certified cardiologist, and Paul From, M.D., a board re-certified internist.

Dr. Brown examined the claimant at the request of the defendants. The examination was held December 15, 1980 and its purpose was for recommendation to Dr. Iannone as well as preparation for his testimony. (Brown dep., pp. 4, 40)

Dr. Brown opined there is no relationship between emotional stress and a myocardial infarction. (Brown dep., p. 16) He stated claimant's atherosclerotic coronary artery heart disease was the primary reason for the infarction; he stated if the claimant had "not had the atherosclerosis he would not have had the infarct." (Brown dep., p. 21, ll. 16-17) Furthermore, he said the amount of physical activity the claimant performed "would not approach what I would call undue physical activity" to produce "the rare infarct which occurs under undue physical stress." (Brown dep., p. 22, ll. 7-10) Dr. Brown stated the demand on a heart due to driving a truck "would be less in an individual accustomed to doing the activity" (Brown dep., p. 32, ll. 23-24); and generally "pain causes higher heart rate and blood pressure." (Brown dep., p. 33, l. 18) Dr. Brown testified he could not say "with any medical certainty that the overall extent of (claimant's myocardial) damage would have necessarily been less had he had it in the truck versus...right in the emergency room." (Brown dep., p. 38, ll. 18-22)

On cross-examination Dr. Brown seemed to distinguish between a personality proto-type known as "Type A" which is classified as a "hard driving, rather competitive, goal-oriented individual" (Brown dep., p. 15, ll. 4-5), which has been found to have a higher degree of risk to develop a coronary event and stress which may cause artery disease. (Brown dep., p. 45) Dr. Brown contends that the claimant may have had angina due to a transient imbalance of demand of oxygen and nutrients in the blood stream because of emotional or physical activity, but this was not the trigger to the infarct, as he explained:

> What appears to cause a heart attack, particularly the kind of heart attack that this individual had, a transmittal myocardial infarction, is a sudden interruption of blood flow itself related, one, to the underlying atherosclerotic narrowing, and frequently with a superimposition of that narrowing of a clot or thrombosis. (Brown dep., p. 59, l. 24 - p. 60, l. 4)

Dr. Brown repeatedly disagreed with claimant's counsel on interpretation of medical journal articles discussing the relation of personality types with mental and physical stress as being connected to coronary artery disease. Dr. Brown contends the studies merely show a rise of coronary disease, such as atherosclerosis, with certain personality types and such studies do not relate mental or physical stress to the precipitation of an infarction, even in the presence of a coronary disease. (Brown dep., pp. 62-71)

Dr. Brown, questioned further on cross-examination, stated it would be fair to speculate that the longer heart pain is unrelieved, "the heart's work load would be greater and that the damage might be slightly greater." (Brown dep., p. 64, ll. 10-11) He said "[o]ne can only speculate" on whether there would have been lessened cardiac damage had treatment been instituted earlier. (Brown dep., p. 73, l. 7)

Dr. From has apparently never examined the claimant; however, he reviewed the pertinent records within this matter. He also reviewed a lengthy hypothetical question immediately prior to his testimony.

Dr. From, on direct-examination stated he could not predict when the infarct started other than within a two to three hour period. (From dep., pp. 19-23) On whether claimant's continued exertions after onset of symptoms either caused or aggravated the myocardial infarction, Dr. From answered:

> (The claimant) liked his job, you know, and this was early in the morning, very little traffic at that time. It was something he had been used to for many, many years, to do this, and he didn't drive very far, and I don't see that that could have aggravated that particular thing, any infarctions he might have been having. (From dep. p. 24, ll. 10-16)

Dr. From went on to say that in a "puristic sense" rest should be instituted as soon as possible. (From dep., p. 24, l. 17)

Dr. From responded to a hypothetical question which purports to contain relevant facts to this case that the claimant did not experience more physical or mental stress during the period he was driving as opposed to what an individual in nonemployment life would experience. The following direct quote reflects the basis of Dr. From's opinion:

> I don't think that he did because I know that in this hypothetical question it's alluded that a number of things have been taking place, you know. I mean he didn't sleep well. His codriver said to him that, you know, if he didn't straighten out and do his share, they'd have to split up and so forth. He had not been working with that fellow very long, anyway, and to me that is not a great deal of what we now in our society call stress. Now, it's true that it is stress to some degree and it's true that the blue-collar worker is the man that gets the stress, but I don't think that the lack of sleep is that kind of stress. When we talk about stress what we're talking about is a situation in which a person finds himself in a light or situation which is distasteful to him, often because his basic values in life are being threatened. For example, I could tell you about one myself. In younger days when I was president of some organizations which were really money-raising organizations I was asked to go out and collect money for these organizations and I always felt this was very distasteful. I never did like to ask anybody for money and I could think of all sorts of reasons why I ought not to go that day. Well, that was stress to me because I knew that when I put myself in that situation I wasn't going to feel good and I did not want to not feel good, so I'd refuse to go, so I'd come up with these elaborate mechanisms like, "By gosh, I just remembered I've got this other thing and I can't get out of it." That kind of situation is stress. Missing some sleep, sure, that might not make you feel so good, but that's not stress, really. The guy saying, "Listen, fellow, if you don't straighten up, we're going to split up," that might be stress, but he only said it once and they had only been together a month. They didn't have any deep-down relationship, I'm sure, so, to me, I don't think he was under a great deal of what we really think of as stress that comes out in diseases that we call migraine, asthma, the production of atherosclerosis, or the aggravation of it, the causes of myocardial infarctions, hypertension, peptic ulcer, skin rashes of various kinds. Those are the diseases we associate with stress, and I don't think that that fellow had enough stress to really aggravate his atherosclerotic process, which he had to have for many years or he wouldn't have gotten up to this point.

On further questioning, Dr. From stated the claimant "probably was subjected to more stress than if he had not been in that particular situation, but what he had could not have meant anything to him." (From dep., p. 35, ll. 9-12)

On cross-examination, Dr. From admitted that he "firmly" believes there is a cause and effect relationship at times between job related stress and a myocardial infarction. (From dep., p. 37) He distinguished "stable" angina pain from "unstable" angina, which will often be followed by an infarction. (From dep., p. 40) He said angina pain is generally brought on by physical activity or stress and removal of the stress would relieve the episode, but the angina, if not removed would not result in an infarction unless it was unstable angina. (From dep., pp. 45-46) Nevertheless, Dr. From stated the treatment for angina, without differentiating between stable or unstable, should be rest to "reduce his activity to the point were his heart is not demanding more oxygen than the blood vessels will allow." (From dep., p. 47, ll. 16-18) He said emotional stress does cause the heart rate to increase and the amount of stress is determined by the emotional makeup of the individual, and emotional stress may precipitate a myocardial infarction. (From dep. pp. 50-52) Dr. From said preexisting atherosclerosis and a physically demanding or emotionally stressful job may affect the "end" of an atherosclerotic condition which is the "occlusion." (From dep., p. 61, ll. 24-25) He said driving creates more heart demand for oxygen. (From dep., p. 82)

On redirect-examination, Dr. From stated that nonwork activity such as gardening may place a greater workload on the heart than driving and that the heart will adapt to accustomed activity because a person's heart can be trained to respond to certain activities. (From dep., pp. 85-87)

Dr. Kreamer, Dr. Iannone, and Dr. From agree that claimant's nonrecollection of the erratic truck driving episode as described by Buffington is, indicative of a person undergoing an infarction. (Kreamer, Tr., p. 273; Iannone dep., p. 52; From dep., p. 75)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury arising out of and in the

course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976).

A claimant is not entitled to compensation for the results of a preexisting injury or disease. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756 (1956). However, if the claimant has a preexisting condition that is aggravated, accelerated, worsened, or "lighted up" by claimant's work activities which results in a disability, the claimant is entitled to compensation to the extent of the disability found to exist. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962), Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974), the Iowa Supreme Court discussed various concepts whereby a heart injury may be found to have arisen out of employment even though the employee had a preexisting circulatory or heart condition.

Under the first concept, the claimant must show the work "ordinarily requires heavy exertions which superimposed on an already defective heart, aggravates or accelerates the condition, resulting in compensable injury." Id. at 905 [citing Littell v. Lagomarcino Grupe Co., 235 Iowa 523, 17 N.W.2d 120 (1945)]. Under this concept, often referred to as the "Littell" rationale, claimant is accorded the liberal rule permitting compensation even though the injury does not arise out of an "accident," "special incident," or "unusual occurrence," See: Sondag, 220 N.W.2d 903, 905, and citations. In Sondag the court indicated the "Littell" rationale is parallel to a portion of 1A Larson's Workmen's Compensation Laws §38.83 (1973), p. 7-172. The court cited approvingly:

> "But when the employee contributes some personal element of risk--e.g., by having * * * a personal disease--we have seen that the employment must contribute something substantial to increase the risk. * * *
>
> "In heart cases, the effect of applying this distinction would be forthright:
>
> "If there is some personal causal contribution in the form of a previously weakened or diseased heart, the employment contribution must take the form of an exertion greater than that of nonemployment life. * * * Note that the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person." (Emphasis by treatise as reproduced within Sondag, 220 N.W.2d at 905.)

The second concept under the Sondag case is where compensation is allowed despite a preexisting circulatory or heart condition when the medical testimony shows an "instance of unusually strenuous employment exertion," imposed upon a preexisting diseased condition, resulted in a heart injury. 220 N.W.2d at 905 [citing Guyon v. Swift & Co., 229 Iowa 625, 295 N.W. 185 (1940)].

In addition to the above theories of proving a heart injury arising out of employment, the court in Sondag stated "[i]t has long been legally recognized that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable." 220 N.W.2d at 906, (citations omitted). Referring to this statement, the court cited approvingly from 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." Sondag, 220 N.W.2d at 906.

After setting forth the above language from Larson's Workmen's Compensation Law §38.64(c), the court in Sondag stated "[t]he common knowledge that complete rest and immobilization are ordinarily prescribed for persons who are undergoing a heart attack has been judicially noticed." 220 N.W.2d at 906 [citing Johnson v. Aetna Casualty & Surety Company, 174 F.Supp. 308 (E.D.Tenn.1959); Dwyer v. Ford Motor Co., 36 N.J. 487, 178 A.2d 161 (1962)]

ANALYSIS

I

Claimant contends he only has to prove a heart injury arising out of his employment as a "natural incident" of his work, instead of a heart injury arising out of a preexisting condition, because the record indicates he did not have any "actual health impairment" prior to his infarct. In support of this argument, claimant alleges he did not have any manifestation of heart problems nor prior knowledge of his advanced state of athrosclerotic disease. Claimant relies on language contained in Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980) where the Iowa Supreme Court stated:

> To be a preexisting condition under our cases, an actual health impairment must exist, even if it is dormant. See, e.g., Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974) (atherosclerosis); DeShaw v. Energy Manufacturing Company (spondylolisthesis); Merchant v. SMB State Lines, 172 N.W.2d 804 (Iowa 1969) (atherosclerosis); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960) (prior back injury); Rose v. John Deere Ottumwa Works (osteoarthritis). See generally 1 A. Larson, The Law of Workmen's Compensation §12.20 (1978).

The claimant's reading of the Blacksmith language is too narrow. Blacksmith dealt with the question of whether an employee's job transfer to a lower paying job following a compensable work related phlebitis attack was causally related to a prior attack not connected to his employment. The court in Blacksmith held that a physician's report containing an inference of susceptibility to phlebitis attacks did not support an inference of an aggravation of a preexisting health impairment. In Blacksmith, according to the court, there was no actual health impairment, rather there was only an inference of susceptibility to a vascular disease, but in the case sub judice claimant actually possessed an active disease and there is strong evidence the disease contributed to the onset of his infarct.

Assuming arguendo the claimant did not possess any knowledge of a heart problem, this is not determinative on the application of the preexisting condition rule. A review of the cases cited above in the Blacksmith opinion shows the court applied the preexisting rule in both a situation where a claimant did have prior knowledge of an underlying atherosclerotic disease, Sondag, 220 N.W.2d 903, and where claimant's decedent did not have prior knowledge of an atherosclerotic disease, Merchant, 172 N.W.2d 804.

II

Since the evidence establishes atheroclerosis at least contributed to claimant's onset of myocardial infarction, the claimant, under the precepts of Sondag, must prove either his employment "ordinarily require[d] heavy exertions" which aggravated his atherosclerosis and caused the onset of the infarction, or he must show an "instance of unusually strenuous exertions" imposed upon his atherosclerosis which resulted in the onset. 220 N.W.2d at 905.

Claimant contends the deputy "applied a single unusual occurrence or unusual incident test, giving no credence to the same rule that holds that such proof is not necessary but allows recovery if there is a period of ongoing stress, emotional or physical. (Claimant's brief, p. 17) Here the claimant is implying the deputy adhered to the second concept listed in Sondag, where the Iowa Supreme Court stated compensation is allowed for a heart injury when medical testimony shows an "instance of unusually strenuous employment exertion," 220 N.W.2d at 905 [citing Guyon v. Swift, 229 Iowa 625, 295 N.W. 185 (1940)].

Claimant argues his case falls solely under the first concept of Sondag, where the Iowa Supreme Court stated compensation is allowed when the work "ordinarily requires heavy exertions which superimposed on an already defective heart, aggravated or accelerates the condition." 220 N.W.2d at 905 [citing Littell v. Lagomarcino Groupe Co., 235 Iowa 523, 17 N.W.2d 120 (1945)]. The claimant is correct in asserting that he does not need to show existence of a "special incident" or "unusual occurrence" since he is attempting to prove a heart injury arising out of "heavy exertions superimposed on an already defective heart." Sondag, 220 N.W.2d at 905. The record does not support a finding that the claimant was involved in any heavy exertions during the period of the onset of the infarction. Evidence attempting to show heavy exertions connected with the driving, such as the difficulty with the turns without power steering, were of incidents after the onset of the infarction.

Even though the deputy applied the additional and independent test of "unusual strenuous employment exertions," a close reading of the deputy's proposed decision reveals a consideration and denial of recovery under both Sondag theories.

Although claimant's allegation of a failing ability to adapt to life as a team truck driver was fully corroborated by Buffington's testimony, and allegations of increasing emotional stress toward the end of his probationary period was partly corroborated by Buffington, it cannot be said, upon a review of the whole record, that the onset of the infarction was caused by employment related physical and mental stress accelerating his atherosclerosis.

Although claimant's medical experts, Dr. Iannone and Dr. Kreamer suggest claimant's infarct arose out of the employment, Dr. Iannone's testimony does not provide any basis as to why he believes claimant's physical and mental stress was a "significant mitigating factor in precipitating" the infarct. Additionally, Dr. Kreamer's testimony is highly conjectural. Dr. Kreamer opines that since normal individuals with atherosclerosis have increased heart rates while driving, the claimant must have had greater physical or emotional stress as a truck driver as opposed to an individual in non-employment life. Utilizing this distinction, Dr. Kreamer believes truck driving caused claimant's heart to demand additional oxygen and that the presence of atherosclerosis prevented the heart from receiving the needed oxygen. Dr. Kreamer's opinion seems to apply generically to all persons who possess atherosclerosis and applies only by conjecture to the claimant's situation. It should also be noted that driving a motor vehicle is a part of a good deal of normal adult non-employment life.

Defendants' medical expert opinions on this question are also nonpersuasive. Contrary to Dr. Brown's opinion, a showing of emotional stress under proper circumstances may cause, at least in part, a heart injury arising out of employment. Defendants' additional expert, Dr. From, inappropriately applied his personal subjective view of whether the claimant experienced more stress as opposed to an individual in non-employment life when he stated that "missing some sleep" is not stress and that claimant did not have a stressful reaction to Buffington's desire to stop driving as a team because "[t]hey didn't have any deep-down relationship." Claimant, as alleged, may have possessed a high degree of mental stress in relation to his co-driver's feelings. Such an assessment is for the fact-finder.

On review of the case in its entirety, it is evident that claimant failed in his burden to show the infarction was precipitated by ordinary or unusual heavy exertions as opposed to the natural results of his advanced state of atherosclerotic coronary disease. However, this finding does not end the inquiry into

whether claimant sustained a compensable injury when he continued driving the semi-truck after onset of infarction symptoms.

III

The Iowa Supreme Court in Sondag expressly stated "that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable." 220 N.W.2d at 906. Implementing the reasoning contained in Professor Larson's treatise, which was cited approvingly by Sondag opinion, this agency finds a causal connection between claimant's employment and his disability. This decision is made despite the above analysis which concludes that the onset of claimant's myocardial infarction resulted from natural causes not connected with the employment.

As indicated in the applicable law division of this decision, the Sondag opinion seemingly took judicial notice that "complete rest and immobilization are ordinarily prescribed for persons who are undergoing a heart attack." 220 N.W.2d at 906. The Supreme Court of Iowa, in citing Larson's treatise, implied that a causal connection is found (1)"if the workman [who is under a heart attack] for some reason, feels impelled to continue with his duties," and (2)"when, but for these duties, he could and would have gone somewhere to lie down at once." Sondag, 220 N.W.2d 903. The claimant's evidence satisfies these elements by a preponderance of the evidence. In addition it is found that the continued exertions "more than slightly aggravated" Ziegler v. U.S. Gypsum Co., 252 Iowa 613, 670, 106 N.W.2d 591, 1961) or "materially aggravated" Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961) his ongoing myocardial infarction when he continued driving for 1 1/2 hours after the onset of the infarct.

The medical experts, with the exception of Dr. From, agree that claimant's infarct started 15 to 20 minutes after he commenced driving. Claimant testified he thought he was only experiencing indigestion and chest pain. The medical experts agreed that this is a common misconception of persons who are undergoing an infarction. Nevertheless, starting at this time, as testified by the medical experts, claimant's heart muscle had begun to die.

It is a reasonable inference that the claimant felt impelled to continue with his duty because of the deteriorating relationship with his team driver and his increasing fear of being discharged before he reached non-probationary status. Buffington's testimony supports claimant's assertions of being somewhat emotionally upset and worried about his work ability and relations. Defendants' witness' testimony does not reflect a total stress free situation for the claimant, thus claimant's contention of being placed under emotional stress is considered trustworthy.

Furthermore, the claimant must have felt impelled to continue to drive in order to try to fulfill at least some part of his team driving responsibility. The record establishes that the claimant experienced a decreasing ability to drive due to increasing fatigue from his inability to adapt to the sleeping berth. Despite his failing ability, the claimant continued to try to succeed. Prior to the particular driving shift on which his heart attack occurred, claimant had just completed seven hours of attempting to sleep within the berth. The infarct started shortly after he started to drive, meanwhile his co-driver was sleeping since he just completed his full driving shift. Both claimant and Buffington testified they were placed under implied employee pressure to deliver their hauls within a reasonable time frame. Thus, it is logical to presume the claimant felt impelled to continue to drive rather than awake his co-driver who had just finished his driving duty. The claimant expressed a desire to keep his position, and the only means of doing so was to try to drive.

It can be inferred that if not for his duties occurring at the time of the onset, the claimant "would have gone somewhere to lie down at once." Sondag, 220 N.W.2d 903. He felt impelled to continue driving and he did not consciously realize that he needed medical help until after he consumed the bicarbonate of soda at the truck stop restaurant.

Regarding whether the continuing to drive aggravated the myocardial infarction, the weight of the medical testimony suggests the infarction was aggravated. Although claimant's expert witnesses are not exact on the amount of damage incurred as a result of the continuing exertions, the testimony establishes that there would have been less damage if rest and oxygen had been instituted earlier. Dr. Iannone broadly stated that the "ideal" response to the infarction was for the claimant to have been placed in a hospital, and Dr. Kreamer stated he did not know how much less damage would have occurred if rest had been instituted earlier. Defendants' expert testimony by Dr. Brown is quite equivocal. At one point on direct testimony, Dr. Brown stated the damage may not have been less even if the infarct occurred within an emergency room, while on further cross-examination he admitted that there was at least speculation of less damage had treatment commenced earlier. Dr. From, the additional defense expert, did not confine his testimony to the record and assumed the claimant "didn't drive very far" so as to aggravate his infarct.

On the basis of the medical testimony, a presumption for increased damage due to continuing exertions is warranted. Furthermore, Buffington's description of erratic driving by the claimant is indicative of increased exertions in trying to control the semi-truck while experiencing infarction symptoms.

IV

As it is found that the claimant "more than slightly aggravated," Ziegler, 252 Iowa 613, 106 N.W.2d 591, or "materially aggravated," Yeager, 253 Iowa 369, 112 N.W.2d 299, his myocardial infarct by his continued exertions after onset of symptoms, the causal connection of the employment to the degree of damage caused by the infarct has been established. The defendants state that a determination must be made of the extent of the aggravation and that the record is devoid of any evidence of damage caused by the continuing exertions as opposed to damage caused by claimant's atherosclerosis. (Defendants' appeal brief, p. 10) However, since the employer takes the employee as he finds him, and causal connection has already been established, the claimant is entitled to compensation to the extent of the disability found to exist. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962). A claimant is not entitled to be compensated for the results of a preexisting condition, Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956), however, where an injured employee is compelled to continue exertion after the onset of the infarction the employer takes the employee subject to the impaired status and the injury is the aggravation of this preexisting condition and the employer is liable for damage resulting therefrom.

Since the medical opinions could not differentiate between the amount of damage caused by the continued exertions, this agency cannot interject or speculate on the apportionment of damage between the onset of the infarction and the aggravation caused by continued exertions. The claimant is also entitled to a determination of his industrial disability absent consideration of any reduction for the results of a preexisting atherosclerotic condition.

Dr. Iannone's examination of December 6, 1979, which included a coronary angiography, found the claimant suffered a "large anterior wall myocardial infarction with residual compensated congestive heart failure" and "significant left ventricular dysfunction which means the pumping power of the ventricle was significantly deteriorated because of the heart attack." (Iannone dep., p. 11, l. 2-8) In short, Dr. Iannone believes one-half of claimant's heart was destroyed whereby the amount of blood flow is reduced to half of its normal capacity. (Iannone dep., p. 12) Dr. Iannone feels the claimant's condition is "most assuredly" permanent. (Iannone dep., pp. 13-15) A treadmill test performed in April 1980 showed "minimal capabilities." (Iannone dep., p. 18, l. 14) A subsequent treadmill test performed in September 1980 showed the alive parts of claimant's heart are now showing evidence of ischemia, which means the claimant's condition is getting progressively worse. (Iannone dep., p. 19)

Dr. Kreamer stated that studies have shown that a patient with the three coronary vessel disease, ventrical aneurysm and congestive heart failure, all of which the claimant possesses, will probably die in one to two years. (Tr., p. 279) Defendants' medical testimony suggests possible surgery potential, however, this testimony is not based upon the most recent medical records and is speculative.

The defendants' private investigator's testimony regarding claimant's operation of a dog breeding operation located at his residence does not rebut claimant's testimony of an inability to pursue physical activity of any significance.

On the basis of the record, it is determined the claimant is permanently and totally disabled.

FINDINGS OF FACT

1. On the date of the hearing claimant was a 46 year old man with a high school education. Claimant's work experience has primarily been unskilled labor occupations, with the exception of semi-truck driving.

2. On October 11, 1979 claimant had a myocardial infarction while driving a semi-truck in the course of his employment.

3. Claimant's coronary vessels contained an advanced stage of atherosclerosis at the time of the infarction.

4. The atherosclerosis did not arise out the claimant's employment.

5. The onset of the infarction occurred aproximately 15 to 20 minutes after the claimant began his driving shift as a part of a two-man team driving operation.

6. Claimant continued to drive after the onset of infarction symptoms for approximately 1 1/2 hours.

7. Claimant's team driver was asleep during the above time period.

8. Claimant did not realize he was suffering an infarction until he drove approximately 1 1/2 hours after the onset. Medical assistance was immediately requested after claimant's realization of a serious health problem.

9. When claimant began working for the employer on September 17, 1979, he was exhibiting an exhaustive state of health.

10. Claimant's exhaustive condition became progressively worse during his employment.

11. Claimant did not adapt to sleeping conditions within the sleeper berth which is attached to the semi-tractor because of constant movement of the semi-truck during most of his sleeping periods.

12. Claimant felt compelled to continue driving after symptoms surfaced due to concerns of employment termination before completion of a mandatory probationary period and to his failing ability to drive his share of the driving team's work.

13. Claimant's continuing to drive after the onset of the myocardial infarction more than slightly and materially aggravated his myocardial infarction.

14. Findings on age, education, prior work experience, and inability because of injury to perform work for which claimant is fitted indicate that claimant is permanently and totally disabled.

CONCLUSIONS OF LAW

The onset of claimant's myocardial infarction resulted from natural causes not related to his employment.

Claimant's continuing employment exertions of driving the semi-truck after onset of symptoms satisfies the causal connection requirement between employment and an injury under the precepts of Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974).

Causal connection is established because his continuing exertions "more than slightly aggravated." Ziegler v. U.S. Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1961), or "materially aggravated." Yeager v. Firestone tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961) his preexisting condition consisting of an ongoing myocardial infarct.

Claimant is permanently and totally industrially disabled.

WHEREFORE, the deputy's proposed arbitration decision is reversed.

ORDER

THEREFORE, it is ordered that the defendants pay the claimant permanent total benefits during the period of his disability as provided in Code of Iowa, section 85.34(3), as in effect at the time of the injury at the stipulated rate of three hundred fifty-two and 00/100 dollars ($352.00) per week.

Defendants are to reimburse claimant for the following medical expenses:

Grady Memorial Hospital, Atlanta, GA	$1,022.78
Iowa Lutheran Hospital	610.65
Grady Memorial Hospital, Ambulance Serv.	30.00
Emory University Clinic, Atlanta, GA	227.00
L. A. Iannone, M.D.	660.00
Tharp Pharmacy, Grinnell, IA	105.75

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

Credit is to be given to defendants for the amount of voluntary benefits paid by them in this matter. Section 86.20, Code of Iowa.

Costs of the proceedings are taxed to the defendants pursuant to Industrial Commissioner Rule 500-4.33.

Interest shall accrue pursuant to section 85.30, Code of Iowa, as amended by SF 539, section 5, Acts of the Sixty-ninth G.A., 1982 Session.

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

Signed and filed this 30th day of December, 1982.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FLOYDEANE SUMNER,	:	
Claimant,	:	File No. 530404
vs.	:	A P P E A L
CITY OF SIOUX CITY, IOWA,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision filed June 25, 1982 wherein claimant was awarded permanent partial disability benefits of 77 weeks and healing period benefits through May 7, 1980 as a result of an industrial injury of March 5, 1979.

The record on appeal consists of the hearing transcript which contains the testimony of claimant; claimant's exhibit A (consisting of parts A-1 through A-10); defendant's exhibit 1 (the oral deposition of claimant); the oral deposition of Albert D. Blenderman, M.D.; and the briefs of all parties on appeal.

ISSUES

The issues on appeal are as follows: 1) What is the proper length of healing period benefits? 2) Whether claimant's injury is sufficient to merit an award based on industrial disability? and 3) If only the functional disability of claimant is considered, what is the proper functional disability rating?

REVIEW OF THE EVIDENCE

The record establishes that at the time of the review-reopening hearing the parties stipulated the applicable workers' compensation rate in the event of an award to be $132.82 per week. There was no stipulation as to the time off work. It was indicated that all medical bills had been paid. (Transcript, pp. 3-5) The deputy's findings as they relate to the above are uncontroverted.

Claimant was 52 years old at the time of the hearing. She graduated from high school in 1947 and her additional education has been limited to a shorthand course and instruction on the operation of a comptometer. (Tr., pp. 7-8) Between 1952 and 1972 claimant held a number of jobs, all of which paid minimum wage. During this period claimant worked as a cashier, clerk, cook, waitress, and comptometer instructor. In June of 1972 claimant became a full time municipal employee of Sioux City. At the time of her accident in 1979 claimant was classified as a maintenance worker and earned $5.50 per hour. (Tr., pp. 9-15)

On March 5, 1979, while acting in the course of her employment with defendant, claimant slipped off a curb approximately six to seven inches in height. She landed flat on her knees in the gutter, with her ankles on the curb. The accident was reported shortly thereafter, on the same day, to the secretary at the City Park and Recreation Office. (Tr., pp. 19-20)

Claimant testified that she visited R. J. Meylor, D.C., on the following day, and was informed that her knee caps were out of place. Dr. Meylor realigned the left kneecap and attempted to adjust the right kneecap. He suggested that claimant remain off work for two weeks due to the pain she was experiencing. In April 1979, following several additional examinations of claimant's right knee, Dr. Meylor suggested that claimant visit an orthopedic doctor. (Tr., pp. 20-21)

Albert D. Blenderman, M.D., testified in these proceedings by deposition and indicated that he is an orthopedic doctor. He first examined claimant on April 30, 1979. On direct-examination the following ensued:

> Q. Did you conduct a physical examination of Miss Sumner at that time?
>
> A. Of the knee alone, yes.
>
> Q. What examination did you conduct at that time?
>
> A. She had a physical examination and X rays. The physical examination revealed a crepitant sensation or a grating underneath the patella with flexion and extension of the knee, although she did not really have too much pain on the hooking the fingers under the edge of the patella.
>
> The cruciate and collateral ligaments were intact, and stressing the medial collateral ligament produced pain medially at the joint line; but stressing the remaining ligaments was not painful.
>
> The patient has pain on pressure immediately at the joint line over a distance of about two inches, located halfway between the front and back of the joint. She had no other areas of pain on pressure

throughout the remainder of the joint.

Her X rays showed osteoarthritis with narrowing of the joint space medially, spurring of the medial femoral condyle and the upper edge of the medial side of the tibial plateau and some spurring of the edges of the patella. Diagnosis was, therefore, made of an osteoarthritis to the right knee.

....

Q. Upon examination on that date, did you prescribe a course of treatment for Miss Sumner?

....

She was also advised that ultimately she might require a total knee replacement, although at the time I saw her I thought she was much too young to do it, unless her pain became worse. In the meantime, we told her that we could try a kneecage brace locked in extension to prevent motion of the knee and have her use this while up and about during the day. But she was told that she could leave this off in the evenings and at night. I also started her on some Motrin, a medication for arthritis, 400 milligrams, taking two tablets four times daily for a week, and then cut her back to one four times daily for a month. And she was then advised to return for reevaluation. (Blenderman dep., pp. 5-7)

Claimant was fitted with a kneecage brace in April 1979 which she wore throughout the summer; however, the pain in her right knee continued. (Tr., pp. 22-23) In October 1979 an arthrogram was performed which disclosed a tear of the medial semilunar cartilage of claimant's right knee. (Blenderman dep., p. 10) On October 22, 1979, Dr. Blenderman removed cartilage from claimant's knee. (Blenderman dep., p. 11)

Following the cartilage removal, claimant was examined periodically by Dr. Blenderman. Improvement of the knee was demonstrated until March 13, 1980, at which time claimant began having pain underneath the kneecap again. By May 7, 1980 claimant had not improved. Dr. Blenderman testified as follows:

At this time I told her that I had nothing further to offer from any further conservative standpoint. I told her that we could consider doing a patellectomy; in other words, removal of the patella, but I could not guarantee that this would totally relieve her pain because of the known arthritis involving the medial femoral condyle. I also told her that we could consider doing a total knee replacement, but I was reluctant to do this because of her young age, and the fact that with further time she might very well loosen the components put in the knee.

So the patient decided she wanted to think about this and decide whether or not she wanted to have surgery or live with it. So we then saw her from time to time after that. And she did not really seem to improve, but, on the other hand, didn't seem to get any worse, either. (Blenderman dep., pp. 13-14)

On cross-examination Dr. Blenderman also related a September 1981 conversation he had had with claimant:

However, even at that time, I told her if she wanted to have the surgery, we would do it. At that time, as at the present, she doesn't know whether-- At that time she did not want to do it. At the present time, she is thinking about it. But I've gone back through all of the same things I did before. I told her that if we did this at her age, which is relatively young, that the components may very well loosen. We've been doing these now for five or six years in the knees; and, fortunately, I have not had any loosen up that I have done. But there is no question but what as time goes on I'm going to see some of this. And in the literature that has been reported by people who have been doing them for a longer period of time. (Blenderman dep., pp. 22-23)

On cross-examination, Dr. Blenderman disclosed that he last examined claimant on November 16, 1981 at which time she complained of pain in her hip as well as in her knee. With regard to that office visit Dr. Blenderman stated:

Patient returned for reevaluation after an interval of approximately one year....Patient stated she had been unable to return to work since that date because of her continuing discomfort in the right knee as well as some pain in the back of the right hip.

....

She had no pain on pressure directly over the hip joint, either in the front or back of the hip. The discomfort seemed to be in the region of the trochanteric bursa, just posterior to the posterior edge of the upper four inches of the trochanter.

....

With regard to the hip, the patient has a trochanteric bursitis, which has probably resulted as a result of her unusual walking pattern while trying to protect the knee; however, there is no evidence of any specific damage in the right hip joint nor in the bones around the right hip.

....

Q. All right. Now, the final point: Did you, if I under [sic] understood your--what you read from your report, you did place a relationship between the pain she's having in her hip and the trouble with her knee?

A. Yes. The pain is not in the hip joint. It's in a bursa, which is a--somewhat difficult to explain, but the muscles and ligaments slide over the upper end of the femur. And in order to do this, there is a so-called space between the ligaments and the bone, and it is not uncommon, if you place some undue stress on the knee or foot or some other part of the leg, that you can develop an irritation in this bursa. (Blenderman dep., pp. 17-24)

On redirect-examination Dr. Blenderman was further questioned as to claimant's hip pain:

Q. Now, I believe the term you've used in relation to the hip portion of the body when talking about trochanter bursa; is that correct?

A. Yes.

Q. Now, could you describe in relation to the hip joint what we're talking about?

A. Well, it's in--not in the hip joint at all. It has nothing to do with the hip joint. As a matter of fact, it's four inches or so away from the hip joint. In other words, the pain she has is not coming from the hip joint, per se, it's coming from this balloon-like structure which lies on the outer side of the femur at the upper end, which is about four inches away from the hip joint.

Q. So we're talking about a portion-- Would it be a correct statement to say that we're talking about a portion of the leg four inches below the hip joint? Is that what we're talking about?

A. On the outer side, yes.

Q. Now, in relation to the hip joint itself, I believe when you were going through your medical report there you commented on examination of the hip joint itself.

Now, the examination of the hip joint itself, what did that reveal again?

A. It's normal. She didn't have-- Her pain is not originating from the hip joint. (Blenderman dep., pp. 28-29)

With regard to claimant's permanent functional impairment Dr. Blenderman opined that she had a 35 percent disability of the lower extremity. (Blenderman dep., p. 15)

Claimant introduced two additional reports concerning her functional impairment rating. In a report dated August 17, 1981, James H. Walston, M.D., stated:

In my opinion, she is about 50% disabled as a result of the arthritis in her knee. She is unable to carry on a gainful occupation, and she is unable to carry on her housework at the present time. It doesn't look to me like she is going to get much better in the future either. [Claimant's exhibit A (part A-10)]

In a May 6, 1981 impairment rating report, John P. McCarthy, D.C., submitted the following:

RATING: The following impairment rating has been given to Ms. Floydeane Sumner after a complete orthopedic and neurological examination on 5-1-81.

Range of Motion (ROM)

Right Knee 1. Extension 0° = 0% L.E.
2. Flexion 100°/150° = 18% L.E.

Motor Impairment Rating (MIR)

		NERVE	VALUE	GRADE	
1.	Extension	Sciatica	75%	(4)25%	= 18%
2.	Flexion	Femoral	30%	(4)25%	= 7%

Nerve value X grade % = percent impairment lower extremity

Sensory Impairment Rating (SIR)

			GRADE	
1.	Tibia nerve	15%	Severe 75%	= 9%

Nerve value X grade = percent impairment low extremity.

ROM 18% LE = 7% whole man
MIR 18%C 7% = 24% LE = 10% whole man
SIR 9% = LE = 4% whole man
19% wole man combined

(LE = Lower Extremity)

19% wole man is rounded to 20% permanent impairment of whole man.

The above figures are based on the A.M.A.'s committee on "Rating of Mental and Physical Impairment" and can be found in the Guide to the Evaluation of Permanent

Impairment, copyright 1977, A.M.A. [Claimant's exhibit A (part A-8)]

APPLICABLE LAW

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

Section 85.34(1), Code of Iowa, states:

Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period,...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 85.34(2)(o), Code of Iowa, states:

The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall equal the loss of a leg, and the compensation therefor shall be weekly compensation during two hundred twenty weeks.

Rule 500-2.4(85), IAC, states:

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. 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.

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).

Permanent total disability, as we have said, may be caused by some scheduled injury, even though no other part of the body except the scheduled member be affected. This may happen because of lack of training, age, or other condition peculiar to the individual. Such injury, though causing permanent total disability, is arbitrarily compensable according to the schedule. But where there is injury to some scheduled member, and also to parts of the body not included in the schedule, the resultant "permanent total disability," if established, is compensable under Code section 1395 [§85.34(3)]. Dailey v. Pooley Lumber Co., 233 Iowa 758, 765, 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).

"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. Id. at 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 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128 (1967).

ANALYSIS

Claimant's initial issue on appeal concerns the duration of healing period benefits awarded. It was held by the deputy commissioner that healing period benefits would extend to May 7, 1980 when Dr. Blenderman stated he had no more conservative treatment to offer. This tribunal finds no basis for extending healing period benefits past May 7, 1980. Claimant contends that her maximum medical recovery has not yet occurred because Dr. Blenderman has suggested that further surgery may alleviate the pain in her knee. The facts indicate that on May 7, 1980 claimant was informed that the only further treatments available for her knee would involve further surgery. Dr. Blenderman stated that a patellectomy could be performed, but that the pain may not be totally relieved by this procedure. The other option was a total knee replacement which Dr. Blenderman did not recommend due to claimant's young age and the possibility that the replacement components could possibly loosen, making additional surgery necessary. The same options were presented to claimant during her September 1980 visit with Dr. Blenderman. In both instances, claimant deferred any decision as to the performance of further knee surgery. At the time of the review-reopening hearing claimant still had not decided whether to undergo further surgery in the near future. Because claimant knowingly has chosen to forego surgery which could possibly improve her condition, healing period benefits may not extend beyond the point where conservative treatment ceased to be effective. In addition, there remains the possibility that further surgery might cause the knee to get worse, not better. Claimant also contends that because Dr. Blenderman has not released claimant to return to her work and defendant has not offered other types of work, McSpadden, 288 N.W.2d 181, mandates an extended healing period. Claimant apparently misinterprets McSpadden. While that case may have developed factors to consider in determining disability awards, it does not govern the length of healing periods. Claimant has, in fact, been awarded permanent partial disability as was contemplated by the court in McSpadden.

The second issue on appeal is whether claimant's injury was sufficient to justify an award based on industrial disability. The deputy commissioner found that claimant's injury was limited to a scheduled member, thus precluding an award based on industrial disability. For an award of industrial disability claimant had the burden of proving her injury extended beyond a scheduled loss. Claimant contends that the pain she has experienced in her hip is sufficient to extend her ailment beyond the scheduled lower extremity. Code section 85.34(2)(o) provides scheduled compensation for the loss of two-thirds of a leg between the hip joint and the knee joint. While it is clear that an injury to the knee or leg which extends into the hip joint creates a basis for an industrial disability rating, the facts of this particular case do not indicate claimant's injury extends into the hip joint. Dr. Blenderman testified that the pain in claimant's hip was due to trochanteric bursitis, which probably developed because of an unusual walking pattern developed to protect the injured knee. It was clearly indicated by Dr. Blenderman that the trochanteric bursa is approximately four inches below, and in no way connected with the hip joint. When questioned about the condition of claimant's hip joint itself, Dr. Blenderman stated that it was normal. Because the inflamed trochanteric bursa lies between the hip joint and knee joint, an industrial disability rating is not proper. The deputy's holding that claimant's injury is limited to the lower extremity and results in a scheduled loss is affirmed.

The final issue on appeal concerns the proper functional disability rating in the event an industrial disability rating is not awarded.

The deputy commissioner, based solely upon the opinion of Dr. Blenderman, found claimant to have a permanent functional impairment of 35 percent of the right lower extremity. Claimant contends that the functional disability rating would more properly be set at 55 percent, based upon the reports of Dr. Walston and Dr. McCarthy. The report of Dr. Walston must be disregarded as a basis for determining the functional disability rating. The 50 percent disability rating used in that report appears to report the overall impairment of claimant, and has not been limited to functional impairment. The report of Dr. McCarthy, however, provides a specific basis for determining the functional impairment of claimant's lower extremity, and is properly weighed in establishing the functional disability rating to be awarded. The impairment rating method used by Dr. McCarthy, which separately establishes percentages for lost range of motion, motor impairment of the sciatica and femoral, and sensory impairment of the tibia, are in accord with the procedure established by the A.M.A. and found in the Guide to the Evaluation of Permanent Impairment, copyright 1977. Dr. McCarthy did not, however, combine these percentages in order to determine the total functional impairment to the lower extremity, as is required by under the A.M.A. guidelines. In addition, the report of Dr. McCarthy appears to contain mathematical error in determining unilateral nerve impairment rating. Based upon the measurements of loss in the report of Dr. McCarthy, the following ratings are deemed to have been submitted:

	McCarthy rating	Proper AMA Guides rating
RANGE OF MOTION		
Right Knee	18%	18%
MOTOR IMPAIRMENT RATING		
Sciatica (extension)		
25% of 75%	18%	19%
Femoral (flexion)		
30% of 25%	7%	8%
SENSORY IMPAIRMENT RATING		
Tibia Nerve		
75% of 15%	9%	11%

The individual ratings are then combined by using the combined values chart in the A.M.A. guide to establish the total functional impairment rating. The combined value of the above ratings (19%, 18%, 11%, and 8%) result in a functional impairment of 46 percent to the lower extremity. This tribunal will afford equal weight to the 35 percent rating submitted by Dr. Blenderman and the 46 percent rating based upon measurements submitted by Dr. McCarthy.

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. On March 5, 1979 claimant was injured while working for defendant.

2. As a result of her injury claimant has had surgery and been unable to return to her work.

3. As a result of her injury claimant has a permanent

functional impairment of 40.5 percent of the right lower extremity.

4. Claimant's permanent impairment does not extend beyond the right lower extremity.

5. Claimant reached maximum recovery from her injury on May 7, 1980.

CONCLUSIONS OF LAW

Claimant has failed to meet the burden of proving her injury extended beyond a scheduled loss, such as to justify an industrial disability rating.

Claimant has met the burden in proving a permanent partial disability of the right lower extremity to the extent of 40.5%.

The healing period ended on May 7, 1980.

THEREFORE, defendant is to pay unto claimant eighty-nine and one-tenth (89.1) weeks of permanent partial disability benefits at a rate of one hundred thirty-two and 82/100 dollars ($132.82) per week.

Defendant is also ordered to pay unto claimant healing period benefits at a rate of one hundred thirty-two and 82/100 dollars ($132.82) per week for the days missed from the date of her injury until May 7, 1980.

Defendant is to be given credit for benefits previously paid.

Costs of this action are taxed to defendant.

Defendant is to file a final report upon final payment of this award.

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

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD SUNDBLAD,	:	
Claimant,	:	File No. 618253
vs.	:	REVIEW -
GARY REESE TRUCKING,	:	REOPENING
Employer,	:	DECISION
and	:	
FARM BUREAU MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

Mr. Gregory Racette
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Ms. Claire F. Carlson
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INTRODUCTION

This is a proceeding in review-reopening brought by Richard E. Sundblad, the claimant, against his employer, Gary Reese Trucking, and their insurance carrier, Farm Bureau Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on October 24, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Buena Vista County Courthouse in Storm Lake, Iowa on April 26, 1982. The record was considered fully submitted on May 5, 1982.

An examination of the industrial commissioner's file indicates that a first report of injury was filed November 26, 1979. A notice of voluntary payment was filed January 18, 1980. A form 2A was filed May 5, 1982 indicating that the claimant has been paid 29 weeks of temporary total disability benefits for the period October 24, 1979 through May 13, 1980. An examination of the commissioner's file does not reveal that the defendants have at any time filed a memorandum of agreement with respect to this case. It is noted that at the time of hearing counsel for the defense stipulated that there was no issue concerning arising out of and in the course of employment.

The record consists of the testimony of the claimant, Elmer Sundblad, Brian Helms, Retta Sundblad and Gary Reese; and claimant's exhibits 1 through 9 inclusive. An objection was lodged as to defendants' exhibit A on the grounds that it had not been exchanged. An examination of the industrial commissioner's file does not indicate that this surgeon's report was exchanged according to the commissioner's rules and therefore it will not be considered and the claimant's objection is sustained. Any objections to defendants' B, C and D are overruled and will be considered for whatever probative value they may contain.

ISSUES

The issues to be determined in this matter are whether there exists a causal relationship between the claimant's present disability and his work injury of October 24, 1979; the extent of disability; the length of healing period; and the appropriateness of certain medical charges under section 85.27, The Code.

REVIEW OF THE EVIDENCE

At the time of hearing the parties did not stipulate as to the applicable rate in the event of an award nor was there a stipulation as to the length of time off work. There was a stipulation concerning the fairness of medical bills involved in this case.

The claimant herein, Richard Sundblad, is 31 years of age. He is five feet, two inches tall and at time of hearing weighed 230 pounds. He is presently a resident of Waterloo, Iowa. On the date of injury, October 24, 1979, he was a single individual with no dependents. As of the date of hearing, he was, however, married.

The record establishes that Mr. Sundblad graduated from high school in 1969. He attended the Spartian School of Aviation from 1970 through 1973 and completed the prescribed course at that institution in aircraft mechanics. In 1973 he received a his certificate enabling him to perform airplane mechanics. The record reveals, however, that Mr. Sundblad has not pursued a career along as an auto mechanic. In 1976 this gentleman attended one semester of bible college.

The record establishes that the claimant has worked at a variety of positions as an auto and heavy equipment mechanic. Upon graduation from aviation school, he worked for Spencer Ford Tractor as both a mechanic and service manager. Later he worked for Dudley Implements in the service department. Subsequent to his employment with Dudley Implements, he was self-employed as a service station operator doing mechanical work on automobiles. After operating the service station on a self-employed basis, he began work for the defendant in approximately March 1979.

With respect to prior injuries, the claimant acknowledged that he "pulled muscles" in his middle back in July or August 1978. Claimant's exhibit 8 indicates that he was examined and treated by Dr. Richard J. Jones, a chiropractor, in July and August for mid-back pain. Claimant denied any further problems as a result of this incident. Additionally, in November 1978 the claimant injured his left shoulder and neck and was again treated by Dr. Jones, the chiropractor. This is again confirmed generally on claimant's exhibit 8. Claimant denied any continuing physical difficulties as a result of this incident. There are also indications of an ankle and wrist injury on claimant's exhibit 8, neither of which appear to be of any consequence in this proceeding. In general, the claimant indicated that he has had no problems doing any physical activities prior to the date of injury.

With respect to the specific incident occurring on October 24, 1979, it is undisputed by the defense that on that date the claimant was an employee as that term is defined under the Iowa Workers' Compensation Act, of Gary Reese Trucking. It is also undisputed by the defense, via their stipulation at time of hearing, that on that date he sustained a personal injury which both arose out and in the course of his employment with the defendant employer. Claimant's testimony concerning the specific facts of the incident are generally corroborated by the first report of injury on file in this case and marked defendants' exhibit C. Generally speaking, the claimant was following a standard procedure and was checking his truck prior to beginning the actual driving for the defendant. In the process of checking the engine, he was standing on the front bumper and proceeded to fall off the bumper and land on the ground. At the time of this fall, the claimant weighed in excess of 300 pounds. Claimant indicated that at the specific time of this incident, he was living with his parents and that the incident itself occurred on his parents' farm where he was permitted to keep Mr. Reese's truck. Claimant felt pain in his sides, neck and back. The pain persisted through the date of injury. The following day he came under the care of Dr. Robert J. Jones, D.C. There is some minor discrepancy on exactly what date claimant initially saw Dr. Jones after the injury. Dr. Jones' records indicate October 29, 1979 and the claimant indicated it was the day after his injury. This discrepancy is of no consequence in the final disposition of this matter. In a report contained in claimant's exhibit 1, Dr. Jones recited that his diagnosis of claimant's medical problem is as follows:

> Richard Sundblad suffered from an acute traumatic hyperflexion-hyperextension neck injury with deep and superficial muscle spasm, myofascitis and radiculitis radiating the tragectory bilaterally into both arms. This involved the cervical-thoracic vertebra along with both vertebral misalignment. I found multiple spinal misalignment of the lumbar vertebrae including sacrum and pelvis with protrusion of intervertebral disc occluding intervertebral foramina, producint lumbar nerve root compression associated with sciatica.

Dr. Jones expressed the opinion that the claimant will need chiropractic care for the rest of his life and further that the claimant has sustained a 15 percent permanent disability to the body as a whole as a result of the industrial accident of October 1979.

Mr. Sundblad continued under the care of Dr. Jones through January 12, 1981 as reflected in claimant's exhibit 7. Dr. Jones reported that the claimant has made steady progress with each chiropractic treatment administered. The claimant also acknowledged that some relief was experienced due to the chiropractic involvement. Mr. Sundblad, however, did note difficulties in sitting for extended periods of time and standing and walking any distance. Physical difficulty was also noted in bending over.

The record revealed that on April 17, 1980 the claimant underwent a gastric bypass procedure at the direction of S. D. Porter, M.D. Dr. Porter provided a report which has been submitted as claimant's exhibit 3. In that report he indicated:

> Part of the problem in recovering from a back injury is excess weight, in patients who are in fact overweight. I therefore feel that the weight loss following the operation would have a good effect on his recovery, rather than any ill effect. When I saw him on September 16, 1980, he had lost approximately 100 pounds, his blood pressure was normal, and his hemoglobin was good.

Claimant acknowledged in his testimony that after the operation performed by Dr. Porter and after the loss of nearly 100 pounds, he was able to move around much easier. He still had back and neck pain, but noted some relief post surgery.

The record establishes that the claimant was examined by William Follows, an orthopedic specialist, at the request of the defendants. Dr. Follows' report has been submitted as claimant's exhibit 2 in this proceeding. With respect to his examination, Dr. Follows reports:

> Examination shows a very obese, rather short man of 29, who moves around without too much difficulty. He has full range of motion of his neck, including 60 degrees of forward flexion and extension and rotation in both directions without apparent pain, no tenderness in his neck, has slight tenderness of palpation in his lower thoracic spine and down into his lumbar spine. He has full range of motion of his lumbosacral spine. Neurologic exam and straight leg raising exam appear to me to be normal. X-rays of the cervical spine do not show C-7, but what I can see are normal on the lateral. AP and lateral of his thoracic spine and five views of the lumbar spine all appear normal.

With respect to his final diagnosis and impression, Dr. Follows reports:

> Impression: Lumbosacral strain, caused by the injury and aggravated by his obesity. I have told him that he should limit his activity somewhat for a couple more months, do some low back exercises, I have given him a book on the Industrial Back and I think that when he loses a little more weight, this will also help. I don't believe there will be any permanent disability involved and since he is working now as a singer, he should be able to function at the present time.

As noted, Dr. Follows does not, in his opinion, believe that there is any permanent disability involved as a result of the work injury.

Claimant indicated that in January 1981 he moved to Waterloo, Iowa and worked as an assistant in a church overseeing the youth department. He also made home and hospital visits to parishioners and was involved in maintaining the buses for the church. He had assistance in performing some of his cleaning functions at the church. He was able to work approximately 30 or 40 hours per week, but is of the opinion that any physical activity aggravated his back. In June 1981 the claimant left the church activity and indicated that he attempted to return to truck driving and in fact made applications at some concerns. He indicated, however, that due to the poor economy, he was unable to secure a position. He indicated that he stated on his job applications that he had a back injury. Eventually he secured a position at the Rolleen Construction Company as a truck driver. He indicated that this position required extensive physical activity and that this activity seemed to aggravate his back. He soon voluntarily terminated his employment.

Mr. Sundblad then became a gospel singer traveling around the state of Iowa with his family. He pursued this activity until approximately October 1981 and then was forced to cease this activity because of an inability to earn any money.

Subsequent to this position, he secured a job as an auto mechanic and noted some difficulty in doing this work. He was subsequently laid off due to the poor economy. The claimant expressed the opinion that he does not believe he can do mechanical work in the future because of the physical efforts involved. In December 1981 the claimant secured a position as an electronics technician at Show Biz Pizza. His job was to maintain the mechanical show and various video games. He indicated that there was some bending and lifting involved in this procedure. He works 40 hours per week at this position and earns $3.75 per hour.

The claimant acknowledged that in approximately November 1981 he went to Dr. John R. Walker for an examination pursuant to the direction of his counsel. Dr. Walker provided a series of reports marked claimant's exhibit 4. In an initial report dated November 20, 1981, after reciting both a lengthy history and the course of his examination, Dr. Walker expressed the following opinion:

> The patient has suffered sprains in the region of the lumbar spine as indicated, as well as a neck sprain. The neck sprain appears to be coming along very nicely, but he appears to have some instability in the general region of the lumbo-dorsal spine. We should also call your attention to the fact that he has wedging at T-12, which could well represent a healed compression fracture of the body of T-12. This, of course, could have occurred at the time of his fall and slip under the 9500 GM truck.
>
> At the present time I would recommend that he continue with his diet regime and try to get down another 75 lbs. at least and would advocate and have prescribed for him some physical therapy, including daily heat and massage and back extension exercises. We will see this man back in about two months.

In a followup report dated December 7, 1981 and contained as part of claimant's exhibit 4, Dr. Walker expanded on his earlier report and indicated:

> It is my impression that this patient has a cervical spine sprain, an aching in the dorsal spine due to a sprain in the dorsal spine region and a sprain in the low back region. As far as the wedging of T-12 is concerned, there is no way that I can tell exactly at what date this occurred. It is possible that this is developmental, but I truly feel that this is a traumatic thing, although again, I cannot give you the exact date that this would have occurred.
>
> It is my feeling that this man's healing period would have ended at least by one year following the original accident.
>
> Any treatment that I would give him in the form of therapy, would give him temporary relief only. As you know, he has been treated by a chiropractor friend of his and he has had previous back and neck trouble. In his first history he stated that he had had these treatments perhaps six times a year. However, it appears that he has suffered increased or aggravated problems in these areas that I have indicated. It is my feeling that he should end up with a permanent partial disability amounting to 6% of the body as a whole.

In a follow-up report from Dr. Porter dated April 28, 1980 and which concerns the discharge from claimant from the hospital after gastric bypass surgery, Dr. Porter reached a discharge diagnosis of "morbid obesity, early degenerative arthritis of his back."

The record establishes that in February 1982 the claimant was examined by the Medical Occupational Evaluation Center at Mercy Hospital in Des Moines. This examination was at the direction of the defendant insurance carrier. The synopsis of the evaluation center indicates, in part:

> As a result of the back strain, he has sustained functional impairment amounting to about 14% of the whole body. However, if he does enter into a program where his symptoms tend to improve, this may be reduced in the future.
>
> It may be that he can even return to truck driving in the future, although there would still be a limitation placed upon him in lifting. This lifting would be to lift objects on and off the truck and would be especially true if he did have a discogenic syndrome.

> His functional impairment seems to have been brought about because of prior to his injury he was able to perform heavy lifting and prolonged driving.

The claimant indicated that his present difficulties involve a popping and pulling sensation and stiffness in his neck. He does not "trust" his back. He has difficulties lifting, walking any distances and sitting for extended periods of time and standing. He is able to lift approximately 20 pounds maximum. The record indicated that prior to the date of injury the claimant was apparently active physically and participated in various sports activities. He indicates an inability to do any of these activities at this time. He is also unable to assist in any farming activities which he did prior to the date of injury. He denied any intervening injuries since the date of this work incident of October 1979. Claimant acknowledged that he was released in December 1980 by Dr. Jones, but with limitations.

Elmer Sundblad, the claimant's father, testified on his behalf. He confirmed the claimant's testimony with regard to the fact that the claimant assisted his father in the farming operations and was also physically active without any physical problems. He confirmed generally the claimant's recitation of the facts post injury. This witness did not observe the incident in question. He confirmed that the claimant saw Dr. Jones from October 1979 through January 1981 when the claimant moved to Waterloo.

Brian Helms testified on behalf of the claimant. Mr. Helms is 17 years of age and unemployed at this time. He testified under subpoena. He indicated that from June through October 1981 he worked with the claimant as the sound equipment man for the gospel singing group. He indicated that claimant had difficulty climbing and lifting and a difficulty in bending over. The claimant complained of discomfort to the witness.

Retta Sundblad, the claimant's spouse, testified on his behalf. She is 25 years old and indicated that she and the claimant were married on December 22, 1980. Prior to this witness' marriage to the claimant, he visited her regularly while she was serving a term for stolen checks at the woman's reformatory in Rockwell City. She observed the claimant's physical condition during these visits and indicated that he confirmed his testimony with respect to an inability to sit for an extended period of time. She also indicated he has difficulty in walking any distance and complains of stiffness. She confirmed that she met the claimant in the fall of 1980 and does not know his status prior to that date.

Gary Reese testified on behalf of the defense. Mr. Reese was the employer of the defendant on the date of injury. He indicated that he knew the claimant prior to the employment relationship. Mr. Reese runs a travel hauling business. He acknowledged that he learned about the injury when the claimant's father called and reported it on October 24, 1979. The claimant never worked for the defendant after the date of injury. He indicated that the claimant was paid $3.75 per hour and time and a half for overtime. Normally the claimant would work a 50 hour week. The base pay was $140 for a 40 hour week and overtime based on 50 hours was $196. It appears that the insurance company figured the rate in this case by using the straight time rate for 40 hours and using the premium time paid for the extra ten hours of work, thus arriving at a gross wage of $196. This witness indicated that the claimant was paid on a weekly basis and described him as a good worker.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 24, 1979 is the cause of the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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 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 ommitted.] 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.

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).

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."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, ___, cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . 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 earning capacity of the general work force is affected by poor economic conditions and high unemployment. Such restrictions on employment opportunities do not entitle claimant to additional consideration when assessing his particular loss of earning capacity based on the work injury. See, Webb v. Lovejoy Construction Company and Bituminous Insurance Company, Appeal Decision filed October 20, 1981.

ANALYSIS

There is no dispute in this case that on the date of injury, October 24, 1979, the claimant was an employee of the defendant. Defendants conceded at time of hearing that the claimant on that date sustained a personal injury which arose out of and in the course of his employment with the employer Gary Reese Trucking. The record is clear that other than a few minor incidents prior to October 24, 1979, the claimant was in relatively good health. Specifically, he had never registered any complaints concerning back and/or neck discomfort. The record is also clear that the claimant has traditionally had a severe weight problem. The physicians involved described his condition as morbid obesity. The record is clear that he underwent a gastric bypass procedure in April 1980 in order to rectify this condition.

The medical testimony, particularly in the opinion of Dr. Follows, indicates that the claimant's physical size at least aggravates the back situation, and, specifically, his size delays the healing of any injury. This opinion is remarkably consistent with that of Dr. Roland, an orthopedic specialist, who examined the claimant in conjunction with the Medical Occupational Evaluation Center report. He notes, in part, that he does not feel the claimant has suffered any functional impairment. With respect to the T-12 thoracic vertebra wedging, he agreed with the report of Dr. Walker that this may be evidence of an old compression fracture.

The record is clear that there has been no surgical invasion of the claimant's body with respect to his back situation. The record does not reveal that he has undergone any myelographic studies of any type. An examination of the neurologist's report contained in the Mercy Hospital Evaluation indicates that there is no neurological deficit. The neurologist is of the opinion that the claimant can return to gainful employment and believes that there has been no functional impairment sustained.

It is only Thomas W. Bower, a licensed physical therapist who examined the claimant in conjunction with the Mercy Hospital proceeding, who expressed the opinion of a 14 percent permanent disability. The highly specialized and well qualified medical practitioners involved in this case appear to disagree with that finding. The other opinions clearly outweigh the position of this therapist. Greater reliance will be placed on the specialist in general. Dr. Walker examined the claimant at the request of his counsel and expressed the opinion that there exists a six percent permanent partial disability to the body as a whole. Dr. Walker's report is unclear, however, as to what function the obesity played in the entire overall medical situation.

The various psychological and sociological reports contained in the medical occupational evaluation study indicate that the claimant is motivated. An examination of his testimony on both direct and cross-examination indicate that he has a talent towards things mechanical. The record is clear that he has training as an airplane mechanic and has received a certification in this field, but has never pursued it. Claimant is presently able to use his mechanical talents at the Show Biz Pizza. Based

upon Dr. Jones' testimony as well as the testimony of the claimant, it appears that the healing period terminated as of January 12, 1981. He appears to have been released by Dr. Jones and began working in Waterloo.

Based upon the record as a whole and based upon the industrial disability considerations previously outlined, it is determined that claimant has sustained an industrial disability of 15 percent of the body as a whole as a result of the October 1979 work injury.

FINDINGS OF FACT

That on October 24, 1979 the claimant was an employee of the defendant.

That on October 24, 1979 he sustained an injury which both arose out of and in the course of his employment with the defendant.

That the claimant is 31 years of age and has a high school education.

That the defendant has extensive training in the field of airplane mechanics, but has not pursued a career in that direction.

That the claimant has significant experience in various forms of auto and heavy equipment mechanics and now, through his present position, displays a talent in both electrical and mechanical work.

That the claimant, at the time of injury, was "morbidly obese."

That the obesity tended to aggravate his condition and delay his overall recovery from the work injury.

That the claimant has not returned to work with the defendant employer.

That the claimant has pursued his interests in gospel singing since the date of injury.

That the claimant has been employed by Show Biz Pizza as a mechanical technician.

That the claimant appears to be motivated.

That the healing period extends from the date of injury through January 12, 1981.

That at the time of injury, the claimant was single with no dependents. He was working 40 hours per week plus ten hours of overtime on a regular basis. His straight time rate was $3.75 per hour.

That based upon the record as a whole, it is determined that claimant has sustained an industrial disability of 15 percent of the body as a whole.

CONCLUSIONS OF LAW

That the claimant has sustained is burden of proof and has established by a preponderance of the evidence that there exists a causal relationship between the work injury of October 24, 1979 and his present disability.

That the claimant has sustained a permanent disability of fifteen (15) percent of the body as a whole.

That based upon the testimony in the record, the claimant had a gross weekly wage of one hundred eighty-seven and 50/100 dollars ($187.50). This has been determined by taking a forty (40) hour week plus ten (10) hours of overtime at the straight time rate of three and 75/100 dollars ($3.75) per hour. Examination has been made of claimant's exhibit 9 and it is found to be unintelligible in terms of determining the precise rate. Therefore, based upon a gross weekly wage of one hundred eighty-seven and 50/100 dollars ($187.50) and a single status at the time of injury, the applicable rate of workers' compensation benefits is found to be one hundred fourteen and 07/100 dollars ($114.07).

THEREFORE, IT IS ORDERED:

That the defendants shall pay the claimant healing period benefits for the period October 24, 1979 through January 12, 1981 at the rate of one hundred fourteen and 07/100 dollars ($114.07) per week.

That the defendants pay the claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of one hundred fourteen and 07/100 dollars ($114.07) per week.

That the defendants shall pay unto claimant the following medical expenses:

Richard J. Jones	$787.00
Orthopaedic Specialists	$243.00

That defendants be given credit for all benefits previously paid.

That interest shall accrue pursuant to Section 85.30.

That 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 31st day of August, 1982.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD DEAN TAYLOR,	:	
Claimant,	:	File No. 618119
vs.	:	A P P E A L
OSCAR MAYER & CO.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

By order of the industrial commissioner filed September 9, 1982 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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; claimant's exhibits A through U; and defendant's exhibits 1 and 2, all of which evidence was considered in reaching this final agency decision.

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

SUMMARY

Claimant had had back problems prior to the compensation injury of Noveber 21, 1978 in which he hurt his right knee. That particular injury did not cause any further back problems. On August 19, 1980, pursuant to a stipulated agreement for a settlement, the undersigned deputy industrial commissioner signed an order which found claimant sustained 20% permanent partial disability to his lower right extremity as a result of the compensation injury of November 21, 1978. The order did not impair claimant's right to reopen his claim and on May 5, 1981 he filed a review-reopening petition which claimed that, while claimant was walking in a grocery store, his right knee "gave out" which resulted in disability to claimant's back.

ISSUES

The hearing deputy found a causal relationship between the knee injury and the grocery store incident and awarded claimant a running healing period. On appeal, defendant states (1)there is no causal relationship between the knee and back conditions; (2)there was no notice of the grocery store incident; and (3)healing period benefits should not be awarded.

ANALYSIS

Although the legal precedents cited, findings of fact, and conclusions of law are adopted, defendant's brief raises the issues which certainly deserve discussion.

(1) Defendant claims that claimant has not shown the requisite causal connection between the compensation injury and the right to benefits. They state, inter alia, that the grocery store incident was not in the course of the employment. However, the only injury that need be in the course of the employment is the original injury; thereafter, the question is one of causation. The injury, in the compensation sense is the incident of November 21, 1978 and its consequences. Causally, the medical evidence clearly shows a connection between the knee injury and the back problem. The record contains the following:

> Q. Doctor, what is that opinion? Do you feel that the knee giving way in the store was a contributing or causal factor in the back complaints you found him to have on that day?
>
> A. Yes, based both on the information that you have given me with regards to the exhibit and what you have dictated into the record today, and yes based on my record which is an emergency room note dictated by myself dated 1-27-81. (Jerome G. Bashara, M.D., dep., p. 11)

"There is some question about the knee causing the back problem, and I advised the patient that he did aggravate his back problem with the knee problem." (Claimant's exhibit R, Peter D. Wirtz, M.D., report of January 13, 1982)

Althought Dr. Wirtz's remark is not very detailed, there can be little question but that Dr. Bashara, who saw claimant just three days after the grocery store incident, firmly opines that the causal connection is present.

Further, considering that claimant had not had any back trouble since 1976 (Tr. 20, 11. 20-22), the 1981 grocery store incident appears to be a substantial contributing factor to claimant's current back troubles.

(2) The issue of notice of the January 24, 1981 grocery store incident was adequately discussed and decided by the hearing deputy. One would only emphasize, that even if notice of the incident were required by the law, strong evidence of such notice is in the record. Just one month after claimant's January 24, 1981 grocery store incident, claimant's attorney wrote a letter to defendant's attorney which contained these sentences:

> Because I assume that the position of your client regarding the compensability of the back disability has not changed since I previously spoke to you, I have told Mr. Taylor that I see no problem with Dr. Bashara performing the laminectomy. If I am mistaken in this latter conclusion, please contact me promptly. (Claimant's exhibit T)

Such language gives rise to the inference that defendant through its lawyer knew of claimant's back claim within a month. Defendant has the burden of proof to show a lack of notice. Delong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). Considering the above evidence and defendant's burden, defendant cannot be said to preponderate.

(3) In cases of permanent partial disability, §85.34(1) provides for a period of recuperation, a healing period. Defendant states:

> At page 15 of the Deputy's Decision in this case, the statement is made that there was no evidence that Claimant was unable to work at the time of his examination in November of 1980, prior to the supermarket incident in January of 1981. This is an incorrect statement of the record in this case. In his letter of October 21, 1981, Dr. Bashara stated that as far as he was concerned, Mr. Taylor was totally disabled when seen on November 14, 1980, and that he had been continuously disabled since that time....The claimant was questioned about this and admitted that this was Dr. Bashara's opinion. (Record, pg. 37) Claimant's other disabilities are outlined in Defendant's Exhibit 1 and his testimony regarding these other disabilities appears in the Record at pages 48 through 50. It is also undisputed that he had made application prior to the 1981 supermarket incident for total disability benefits under social security, so it was obviously his contention as well that he was totally disabled before the supermarket incident.
>
> It is urged that since he apparently was totally disabled from an industrial standpoint prior to the supermarket incident in January of 1981, he was obviously in the same condition according to the doctors after the incident and, thus, should not be awarded healing period benefits since his ability to work was the same after the incident as it was before. (Defendant's brief, p. 4)

Defendant's recital of the evidence is correct, but the weight and interpretation thereof is a matter for the industrial commissioner. In November 1980, claimant had been compensated for a scheduled injury. His recovery being limited to the schedule, he was free to work as his abilities permitted and Dr. Bashara's opinion that the condition of claimant's right knee "prevented him, at the time, from any gainful employment" surely cannot be construed to include light or sedentary work. That is, claimant must have had some ability to earn a living, whether or not he was actually employed. A slip in the grocery store, caused by the compensable knee injury, in turn caused a back condition from which claimant must recuperate and which entitles him to healing period benefits.

FINDINGS OF FACT

That claimant is 41 years of age.

That claimant fell on his employers' premises on November 21, 1978 and injured his right knee.

That claimant had no injury to his back at this time.

That claimant had surgery to his knee and then returned to work for a brief period.

That claimant had a second surgery to his knee.

That claimant was released to return to work.

That claimant entered a settlement agreement which allowed him a 20 percent disability to his lower extremity as well as a healing period, medical and vocational benefits.

That claimant continued to have knee complaints and was seen by Dr. Bashara in late 1980.

That Dr. Bashara believes more surgery is necessary.

That claimant had some swelling and pain in his knee prior to the November 1978 incident which was related to a childhood injury.

That claimant had a slip on ice after his November 1978 injury.

That on January 24, 1981 while claimant was shopping in the grocery store, his right knee gave way and he experienced pain in his back, right buttocks, knee and left leg.

That claimant's counsel called defendant's counsel to inform him of the incident on January 24, 1981.

That claimant had prior back complaints in 1972 following an on the job injury.

That claimant had a myelogram, but neither Dr. Bakody nor Dr. Misol recommended surgery.

That claimant hurt his back in November 1976 when he slipped on meat at Defendant's plant.

That claimant worked from 1976 to 1978 at jobs requiring standing and lifting.

That claimant had some back complaints during this period.

That x-rays of the lumbar spine in September 1977 were interpreted as normal.

That claimant is an alcoholic.

That claimant has pulmonary complaints and a hiatal hernia.

That claimant had surgery for a right ulnar neuropathy.

That claimant has a foot brace.

That claimant has been hospitalized, had tests as an outpatient and undergone four back surgeries.

That claimant takes Tylenol 3.

That claimant is receiving social security disability payments.

That claimant incurred a number of medical expenses.

That claimant has not returned to work nor reached medical recuperation.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

That claimant's back condition is causally related to an injury to his knee on November 21, 1978.

That claimant is entitled to healing period benefits from January 24, 1981 until such time as he either returns to work or medical evidence shows that he has reached maximum recuperation.

That claimant is entitled to medical and transportation expenses.

That defendant has not established the affirmative defense of notice.

ORDER

THEREFORE, IT IS ORDERED.

That defendant pay unto claimant healing period benefits from January 24, 1981 until such time as claimant meets the test found in §85.34(1) for the termination of healing period at a rate of one hundred seventy-two and 53/100 dollars ($172.53).

That defendant pay unto claimant the following medical expenses:

Iowa Methodist Medical Center	$24,039.11
Associated Anesthesiologists, P.C.	1,591.00
Jerome G. Bashara, M.D.	6,524.50
Robert A. Hayne, M.D.	900.00
Thomas B. Summers, M.D., P.C.	115.00

That defendant pay mileage expenses totalling four hundred eight dollars ($408)

That compensation accrued shall be paid in a lump sum.

That interest shall run pursuant to Iowa Code section 85.30.

That costs be taxed to defendant pursuant to Industrial Commissioner Rule 500-4.33.

That defendant file an updated claim activity report.

Signed and filed at Des Moines, Iowa this 16thday of December, 1982.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLEN THOMAS,

Claimant,

vs.

WILLIAM KNUDSON & SON, INC.,

Employer,

and

AETNA CASUALTY & SURETY COMPANY, a/k/a AETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

File No. 660000

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision filed July 23, 1982 wherein claimant was awarded permanent partial disability benefits of 200 weeks pursuant to Iowa Code section 85.34(2) and healing period benefits through December 31, 1980 pursuant to Iowa Code section 85.34(1) as a result of an admitted industrial injury of October 25, 1979. Defendants take exception only to the length of healing period benefits awarded.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Tom Walter, Marion Eppright, Ernestine Thomas, and Kate Benson; claimant's exhibits 1 through 10 and 12 through 15; defendants' exhibits A through P inclusive; the oral depositions of claimant, James Leroy Blessman, M.D. (marked as claimant's exhibit 11), and William R. Boulden, M.D.; and the trial briefs of all parties on appeal.

ISSUES

The sole issue on appeal is whether the deputy industrial commissioner erred in concluding that claimant is entitled to healing period benefits from the date of injury through December 31, 1980.

REVIEW OF THE EVIDENCE

The record establishes that at the time of the review-reopening hearing the parties stipulated the applicable workers' compensation rate in the event of an award to be $273.54 per week. There was no stipulation as to the time off work. It was indicated that all medical bills had been paid. (Transcript, pp. 3-4) The deputy's findings as they relate to the above are uncontroverted on appeal.

Claimant, 53 years old at the time of the hearing, graduated from high school in 1946. He served in the United States Marine Corps during 1946 and 1947, functioning primarily as a clerk and mimeograph operator. (Tr., pp. 9-10) Claimant has had no formal education or training since ending his military duties. During the ensuing ten years claimant held jobs as an upholstery apprentice, a punch press operator, a metal shop hand, and a tire builder at Firestone. (Tr., pp. 12-16)

Claimant left his job at Firestone in 1957. He entered the construction field and began learning the bricklaying trade. Claimant worked exclusively as a bricklayer from 1957 through October 1979. He has developed no other specialized skill. (Tr., p. 17)

Claimant testified that on October 25, 1979 he sustained an injury to his back while working for William Knudson & Son, Inc., at the Bishop Drumm Home building site in Johnston, Iowa. The injury occurred as claimant stooped beneath a "steel stringer" while carrying two five gallon concrete buckets (the buckets were partially filled and were described as "very heavy"). Claimant experienced severe pain in his back when his feet became stuck in several inches of mud. The injury was immediately reported to the employer. (Tr., pp. 22-25)

On February 17, 1981 defendants filed a memorandum of agreement in this case, acknowledging claimant to have been their employee on October 25, 1979 and that on that date he did sustain an injury arising out of and in the course of employment.

William R. Boulden, M.D., testified by deposition in these proceedings. It was stipulated between the parties that Dr. Boulden is a board certified orthopaedic surgeon licensed to practice in Iowa. Dr. Boulden testified that he had treated the claimant since November 1979, and had last examined him on September 29, 1981. After performing a myelogram, Dr. Boulden diagnosed claimant to be suffering from a herniated disc at the L4, L5 region, and centered on the left side. Dr. Boulden confirmed his diagnosis as being compatible with claimant's symptoms. (Boulden deposition, pp. 4-6)

With respect to claimant's occupational impairment due to his injury, Dr. Boulden expressed the following opinion: "The functional impairment for a ruptured disk with occasional sciatica symptoms is 10 percent of the spine. That's based on the Orthopaedic Guidelines for Evaluations and Determinations of Disability." (Boulden dep., p. 8)

With respect to the restrictions placed upon claimant's activity, Dr. Boulden testified as follows:

> Basically, his restrictions are no repetitive lifting, no repetitive bending, no prolonged sitting; but he can sit as long as he alternates with standing and walking, and such. So I'm basically saying no prolonged sitting; and I'm saying more than two hours at a crack, so to speak, because any of these maneuvers will tend to aggravate a disk. (Boulden dep., p. 8)

On March 5, 1980 Dr. Boulden released claimant to return to sedentary work. Dr. Boulden's October 19, 1981 testimony concerning the release was as follows:

> Q. Doctor, as of March 5, 1980, did you release Glen Thomas to return to sedentary work?
>
> A. I felt that he could go back to a sedentary type work, yes.
>
> Q. And the limitations that you placed on him were no bending, stooping, or lifting that would increase symptomatology of the herniated disk; is that correct?
>
> A. Yes. No bending, stooping, or lifting, yes.
>
> Q. And are those the same restrictions that are on Mr. Thomas today?
>
> A. Basically, yes.
> (Boulden dep., p. 13)

In addition to treatment by Dr. Boulden, claimant underwent treatment at the Northwest Hospital Pain Center in Des Moines. James Leroy Blessman, M.D., who is involved in the study of pain or dolorology, was the medical director of the pain center at that time. Dr. Blessman testified by deposition that he first examined claimant on May 12, 1981, and that claimant was admitted to the center as an inpatient on June 15, 1981. Dr. Blessman diagnosed claimant to be suffering from a disc disease of the lumbar spine. He stated that his diagnosis was consistant with Dr. Boulden's diagnosis of a herniated disc at the L4-L5 level. (Blessman dep., pp. 10-11)

With respect to restrictions he imposed upon claimant's activities following treatment at the Northwest Pain Center, Dr. Blessman testified:

> Q. Doctor, on his discharge from the Center, were any recommendations made as to what he could do and what he could not do?
>
> A. Yes.
>
> Q. Do you feel that he could continue to do the kind of work he was doing as a bricklayer in October of 1979?
>
> A. No. I did not feel that.
>
> Q. Did you place restrictions on what he should do and should not do?
>
> A. Yes.
>
> Q. What were those restrictions?
>
> A. He was advised that he should avoid repetitive lifting, bending, and stooping; and he should be restricted from lifting over 40 pounds.
> (Blessman dep., pp. 16-17)

Following a prolonged job search, claimant began working for Polk County on August 19, 1982 as an Account Clerk 2. Claimant's

work duties are mostly sedentary, and include doing office payrolls, phone answering, opening and time stamping mail, and errand running. (Thomas dep., pp. 7-8)

In testimony with regard to the time at which claimant had achieved maximum medical recuperation, Dr. Boulden first stated March of 1981, but amended his testimony under cross-examination to December 1980 or early 1981. (Boulden dep., pp. 12-13) Dr. Boulden indicated that he usually allows a year's time for a herniated disc to stabilize one way or another before concluding whether maximum recuperation has been achieved. (Boulden dep., pp. 18-19) Further questioning of the witness, however, evoked the following testimony concerning the date at which claimant's condition had ceased to improve.

On cross-examination:

Q. Are we looking at any medical or functional change in Mr. Thomas from March 1980 to December 1980, with the exception of the temporary aggravation as the result of the treatment at Wilden Clinic?

A. There's been no increase in functional disability, no.

Q. Has there been any decrease, or are we looking at the same condition?

A. Same functional.

....

Q. Does the letter dated March 11, 1981, with regard to your statement concerning his permanent partial disability as of May 1980 refresh your recollection with regard to your opinion at that time?

A. No. His disability hadn't changed from May of 1980.

Q. Did his medical status change or improve from May 1980 until the time of this letter in March of 1981?

A. Really not.

Q. Would it be safe to say that essentially he got as good as he was going to get as of May 1980?

A. As it turned out, it was.

....

Q. So in retrospect, as it turns out, he had reached that level and stabilized as of May 1980?

A. In retrospect, yes.
(Boulden dep., pp. 17-19)

On redirect-examination:

Q. (By Mr. Harrison) Please answer however you think--

A. In trying to clear this out and clarify it, the way I usually handle them is that it's about a one year's time. So I would say that in--according to what we were progressing along, I would say in December of 1980 that he got as good as he was going to get. In retrospect, I could have said May of 1980, but I didn't know that in May of 1980.

Q. You find that medicine is a lot easier to practice in retrospect than it is to the future?

A. Hindsight is a hundred percent.
(Boulden dep., pp. 22-23)

On recross-examination:

Q. Is your opinion at this time, using your 20/20 hindsight, that Mr. Thomas reached his maximum medical benefit in May of 1980.

Following objection:

A. If you want me to look retrospectively, yes, May of 1980 he had not changed until December. But I didn't know that in May of 1980 he would not change, so I can't state that May of 1980 his maximum healing occurred. Retrospectively, I can; but that's not a fair judgment to anybody.
(Boulden dep., pp. 24-25)

On further recross-examination:

Q. Okay. Was there in fact medical improvement in Mr. Thomas's condition from May 1980 until December 1980?

A. Overall, no.
(Boulden dep., p. 29)

Dr. Boulden's clinical notes were entered as evidence by claimant, and provide a periodic report on claimant's condition and medical improvement:

4-10-80: Follow-up of herniated nucleus pulposus. His symptoms remain status quo except he had a cold not too long ago and had a lot of coughing and this aggravated his symptoms somewhat....So, therefore, his status quo has remained the same. He is to follow-up with us in another month.

5-8-80: Follow-up of herniated nucleus pulposus. He remains status quo except for the last three days he has had some increasing pain in his lower back and his left gluteal area.

7-15-80: Follow-up of herniated nucleus pulposus of L4-5 on the left with no internal change. There is still the same restrictions. Follow-up with us in two months.

9-9-80: Follow-up of herniated nucleus pulposus of L4-5 on the left. Basically his symptoms have been the same except now he has had some dizziness problem that his local family doctor is taking care of.

I have recommended still the same restrictions....We will re-evaluate with him in three months. No change on my restrictions.

12-23-80: Follow-up of herniated nucleus pulposus of L4-5 on the left. He has been doing about the same....We will re-evaluate him in three months. (Cl. ex. 6)

In a March 11, 1981 letter to Aetna Life & Casualty, Dr. Boulden stated: "As far as I am concerning [sic], he was permanent partially disabled in May of 1980 with a rating of 10 percent of his lumbar spine." (Cl. ex. 6)

APPLICABLE LAW

If an employee has suffered a personal injury causing permanent partial disability...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. Iowa Code section 85.34(1).

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. Iowa Industrial Commissioner Rule 500-8.3(85).

The Iowa court most recently addressed the issue of healing period duration in Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). 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. 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."

That a person continues to receive medical care does not alone indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond the point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period, particularly when the treatment does not, in fact, improve the condition. Castle v. Mercy Hospital, Appeal Decision of the Industrial Commissioner, filed August 26, 1980.

ANALYSIS

Iowa Code section 85.34(1) coupled with Iowa Industrial Commissioner Rule 500-8.3(85), contemplates three distinct points at which healing period benefits extinguish: 1) When the employee returns to his job; 2) when medical evidence indicates that the employee is capable of returning to substantially similar work; or 3) when medical evidence indicates no further improvement is anticipated from the injury. Defendants do not, and never have contended that claimant is able to return to his former job as a bricklayer. The evidence is uncontroverted that claimant's physical impairment has limited him to doing work of a sedentary nature. Defendants do, however, take issue with the deputy's finding as to the date at which maximum medical recovery was deemed to have occurred.

Defendants' claim upon appeal is based upon evidence which indicates that claimant's condition did not improve beyond May 1980 and hence, that healing period benefits should have ended at that time. Defendants' position finds support in the testimony of Dr. Boulden and in claimant's exhibit 6, which includes Dr. Boulden's clinical notes concerning claimant's progress and a letter from Dr. Boulden to Aetna Life & Casualty. Despite adhering to his "usual" policy of allowing a one year "watch period" to permit herniated disc conditions to show signs of stabilization, Dr. Boulden repeatedly indicated that claimant did not, in fact, show signs of improvement past May 1980. When asked if May 1980 was the date that claimant "had got as good as he was going to get," Dr. Boulden replied: "As it turned out, it was." Also, in a March 11, 1981 letter to Aetna Life & Casualty, Dr. Boulden stated his opinion that the permanency of claimant's disability relates back to May 1980 at which time functional disability was set at 10 percent of the lumbar spine. In his October 1981 testimony Dr. Boulden stated that the 10 percent disability rating still held. Finally, clinical notes recorded by Dr. Boulden following each of claimant's office visits substantiates testimony that May 1980 was the point at which medical improvement ceased. Those notes indicate that

claimant's condition stabilized by May 1980 and subsequent evaluations by Dr. Boulden, at two to three month intervals, resulted in a continuance of the same physical restrictions with no new therapy prescribed.

Claimant argues that despite a finding that maximum medical recovery occurred in May 1980, such determination was not possible until December 1980 after Dr. Boulden had had sufficient time to determine whether the herniated disc had stabilized. Because Dr. Boulden prefers to allow a one year "watch period" in cases similar to claimant's in order to determine the full extent of the injury, claimant maintains that the healing period extends throughout that watch period.

This tribunal has held in the past that continued medical treatment does not necessarily indicate the continuation of healing period benefits. In Castle it was held that treatment which does not improve a patient's condition, rather which is maintenance in nature, does not extend the healing period past the point when the patient actually stopped improving. The treatment claimant received from Dr. Boulden after May 1980 appears to be purely maintenance in nature. Such conclusion finds support in that 1) Dr. Boulden did not prescribe any new or different modes of treatment after May 1980; 2) the physical restrictions imposed on claimant's activities remained unchanged; 3) claimant's physical evaluation visits became less frequent after May 1980, and; 4) claimant's functional disability rating did not change after May 1980.

Under the facts and circumstances of this particular case, it is improper to hold that December 1980 was the date of maximum medical recovery. Simply because the treating physician opted to observe claimant's progress over a one year period before making any final recommendations as to release or further treatment does not mean the healing period will continue for a minimum of one year. No matter how long Dr. Boulden felt it necessary to observe claimant's progress, the fact remains that maximum medical recovery occurred in May 1980. While Dr. Boulden apparently treated his patient in the "usual" manner of treating persons with similar injuries by allowing a substantial period for observation, it is noted that not all patients will require the "usual" observation period to complete their own recovery. Some may require more and some may require less. Claimant in this case required only seven months to recover as fully as he would. We see no basis for an award of healing period benefits beyond the time claimant realized the full extent of his recovery. The fact that claimant did and does continue to experience physical discomfort is not a basis upon which the healing period is extended. The continued disability of claimant is the very basis upon which permanent partial disability benefits were awarded.

FINDINGS OF FACT

1) That there exists a causal relationship between the work injury of October 25, 1979 and the claimant's present disability.

2) That the claimant has sustained a permanent functional impairment of ten percent of the body as a whole.

3) That the claimant has medical restrictions in place which prohibit repetitive lifting, repetitive bending, eliminate prolonged sitting and a weight lifting restriction.

4) That claimant is not able to return to his former occupation as a bricklayer.

5) That claimant was treated for his injury by William R. Boulden, M.D., from November 1979 through September 1981.

6) That claimant's physical condition did not improve after May 1980.

7) That medical evidence indicates claimant reached his maximum medical recovery in May 1980.

8) That the claimant returned to work for Polk County on August 19, 1981.

9) That the claimant has returned to work as an accounting clerk and is being paid $5.05 per hour.

10) That the claimant earned $9,104.90 in 1977, $16,486.30 in 1978 and $15,039.73 in 1979.

11) That it is expected the claimant will earn in the vicinity of $9,000 in his present job at Polk County.

12) That the claimant has sustained an industrial disability of 40 percent of the body as a whole.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and established a causal relationship between the work related injury of October 25, 1979 and the resulting disability.

That claimant is entitled to healing period benefits from October 25, 1979 through May 8, 1980 pursuant to Iowa Code section 85.34(1).

That the claimant has sustained an industrial disability to the extent of forty percent (40%) of the body as a whole.

WHEREFORE, the findings of fact and conclusions of law in the deputy's proposed decision of July 23, 1982 are modified.

THEREFORE, it is ordered:

That defendants shall pay the claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated rate of two hundred seventy-three and 54/100 dollars ($273.54) per week.

That defendants shall pay the claimant healing period benefits from the date of injury through May 8, 1980 at the stipulated rate of two hundred seventy-three and 54/100 dollars ($273.54) per week.

That defendants are given credit for benefits previously paid.

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

That interest shall accrue pursuant to Iowa Code section 85.30, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

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

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

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

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLEN THOMAS, Claimant, vs. WILLIAM KNUDSON & SON, INC., Employer, and AETNA CASUALTY & SURETY COMPANY, a/k/a AETNA LIFE & CASUALTY, Insurance Carrier, Defendants.	:	File No. 660000 P A R T I A L C O M M U T A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding for a partial commutation brought by Glen Thomas, claimant, against William Knudson & Son, Inc., employer, and Aetna Casualty & Surety Co., insurance carrier, defendants. It came on for a hearing on March 30, 1983 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted on April 1, 1983.

The record in this matter consists of the testimony of claimant.

ISSUES

The issues in this matter are whether or not a partial commutation should be granted to claimant and whether, if that commutation is granted, the amount commuted should come from the first part of the remaining period or the last part.

STATEMENT OF THE CASE

It is necessary to set out some of the history of this case before discussing the issue here presented.

An appeal decision was filed on November 18, 1982 which awarded claimant healing period benefits from October 25, 1979 through May 8, 1980 and an industrial disability of 40% of the body as a whole. Claimant appealed solely on the healing period issue.

On February 7, 1983 claimant filed an original notice and petition seeking a partial commutation. At the same time the parties filed a stipulation agreeing that claimant's injury of October 25, 1979 arose out of and in the course of his employment; that a deputy commissioner awarded benefits for a healing period from October 25, 1979 through December 30, 1980 and 40% industrial disability; that defendants appealed on the healing period issue; that the commissioner modified the healing period and that claimant has filed for judicial review on the issue of healing period which is the only dispute before the district court.

Fifty-five year old divorced claimant who is presently employed by Polk County as an account clerk I with various office duties, testified to gross earnings of $10,672. Since his prior hearing of October 19, 1981 claimant's status has

changed from part-time worker on a full-time schedule to a full-time worker. He has had two grade increases since he started to work. He has moved within the general services department to the buildings and grounds section. His job allows him some freedom in being able to change positions. He acknowledged being low person in his section and he agreed he had no way of knowing what the department budget would be as of July 1, 1983 and that he had no indication his job will end.

He admitted having some pain on weekends and occasional pain from tension. He has not been to see William F. Boulden, M.D., or any other doctor. He exercises when he can and calls Dr. Boulden's office when he is in need of a prescription.

Claimant testified that his reason for seeking a partial commutation is to pay attorney fees relating to his action before the Industrial Commissioner. He said that no fees have been paid. He stated that he has a contingent fee contract for one-third of the additional amount obtained as a result of his action. He indicated that he believes the fee is reasonable for the work that has been done for him. He expressed his understanding that his benefits will stop for a period and then start at a later time so that the statute of limitations will be kept open.

Claimant reported that he has no other resources with which to pay fees. As to his current financial status, he said that he will be making his final house payment very soon thereby ridding himself of an $89 per month obligation. His car apparently is paid for as well. His other bills are current. He testified that he wants the commutation to be granted as he has always paid his bills and that he desires to be rid of this indebtedness as well.

Claimant proposed that life styles are adjusted to the amount of money earned. He agreed that he will need to get along on his salary from his job. Although he said he has been using all his workers' compensation to survive, he later testified that he has about $2,000 saved since the November appeal decision. A small amount of the $2,000 was in savings before. Claimant believed he could have made payments to his attorney had that been the arrangement which they agreed.

APPLICABLE LAW AND ANALYSIS

Iowa Code sections 85.45(1)(2) and 85.48 are applicable to this matter. Section 85.45(1)(2) states:

> 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 therefor.

Section 85.48 says:

> 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 at the rate provided in section 535.3 for court judgments and decrees, with provisions for the payment of weekly compensation not included in the commutation, subject to the law applicable to such unpaid weekly payments; all remaining payments, if any, to be paid at the same time as though the commutation had not been made.

Applying those statutes to the matter presented, the undersigned finds that the period during which compensation is payable can be definitely determined. The second requirement of 85.45 requires some discussion.

Claimant seeks the commutation. He must show the commutation is in his best interests. Claimant testified that he wants the partial commutation to rid himself of an obligation for paying attorney fees. He reported that he is current on his other bills and that he has no car payments and in all probability by the time of this decision will have no house payments. Claimant is single with no dependent minor children. Although specifics of his monthly maintenance requirements were not explored, claimant said that he has been able to save the greater part of $2,000 since November. That accomplishment is certainly an indication that claimant, a mature man, is capable of good money management. He expressed cognizance of the human frailty of living to the extent of one's money.

The Iowa Supreme Court in Diamond v. The Parsons Co., 256 Iowa 915, 928-29, 129 N.W.2d 608, ___ (1964) recognized the use of a commutation to pay bills as "a commendable purpose." The court also cautioned that the desires of the claimant cannot be disregarded with the court (industrial commissioner) acting as an unyielding conservator. Based on the claimant's desires and all the surrounding circumstances here presented the partial commutation will be allowed.

The parties are also in disagreement as to whether the commutation should be taken from the first part of the remaining period or the last part of the remaining period. Claimant's position at the time of hearing was to commute from the first part in order to lengthen the statute of limitations. Defendants wished to commute from the last part of the remaining period. The Iowa Supreme Court repeatedly has held that the Iowa Workers' Compensation Act where possible should be liberally construed for the benefit of the employee. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, ___ (1961); Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 73 N.W.2d 27, ___ (1955); Haverly v. Union Construction Co., 236 Iowa 278, 282, 18 N.W.2d 629, ___ (1945). Claimant's testimony regarding the statute of limitations leads this deputy industrial commissioner to conclude that the commutation should be taken from the beginning of the remaining period.

The computation for taking the amount from the first part of the remaining period is found in Chapter 500-6.3(2), I.A.C. The value of 47 weeks is 44.9544. The commuted value therefore is 44.9544 weeks times $273.54 which equals $12,296.83. After 47 weeks have expired, defendants will pay the remainder of two weeks.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was awarded healing period benefits and permanent partial disability as a result of an injury on October 25, 1979.

That claimant has an appeal in district court relating to the issue of healing period only.

That claimant is single.

That claimant is 55 years of age.

That claimant is employed at a job with gross earnings of $10,672 per year.

That claimant has neither house payments nor car payments.

That claimant is current on all his bills.

That claimant has saved money since November of 1982.

That claimant has no other resources available with which to pay his attorney fee.

That claimant is a good money manager.

That claimant wishes to rid himself of his obligation for attorney fee.

That claimant agreed that his attorney fee was reasonable for the work which had been done for him.

That claimant is aware that his benefits will stop for a period and then start again at a later time.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That the period during which compensation is payable is definitely determined.

That a partial commutation will be in the best interests of claimant.

That a commutation of forty-seven (47) weeks from the beginning of the remaining period should be granted.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant a partial commutation of twelve thousand two hundred ninety-six and 83/100 dollars ($12,296.83).

That following the expiration of forty-seven (47) weeks defendants pay unto claimant the two (2) remaining weeks of permanent partial disability.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 5th day of April, 1983.

No Appeal

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CORA TUTTLE,	:	
Claimant,	:	File No. 672377
vs.	:	D E C I S I O N
THE MICKOW CORPORATION,	:	O N
Employer,	:	M O T I O N
and	:	F O R
GREAT WEST CASUALTY,	:	P R O T E C T I V E
Insurance Carrier, Defendants.	:	O R D E R

This is a proceeding on a motion for protective order which was filed in the above-entitled action on January 28, 1983 by the defendants. The claimant filed a resistance and a hearing was held on February 1, 1983. The matter was considered fully submitted upon completion of the hearing.

On January 24, 1983 claimant filed a notice of taking deposition. Claimant designated the subject of the examination as follows:

1. Reasons for denial of workers' compensation benefits to the claimant and reasons for not filing a memorandum of agreement.

2. All facts known by Great West Casualty which bore upon its decision to deny benefits to the claimant and upon its decision not to file a memorandum of agreement.

One of the reasons that defendants objected to the proposed deposition is as follows: "(a) The insurance carriers [sic] reasons for denial of the claim are not relavent to the subject matter involved in the pending action and therefore are not discoverable. I.R.C.P. 122(a)."

The claimant, on the other hand, contends that she is entitled to discovery where the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The information which claimant indicates she intends to obtain by deposition is clearly irrelevant to the issues which are framed by the pleadings. Although claimant may be entitled to depositions to discover other information, the undersigned is unable to order depositions when the only information sought is not relevant to the issues before this agency.

Although claimant's attorney argued at the time of hearing that defendants' knowledge at a particular time or event is what he is attempting to determine by use of the deposition, that is not what the notice of taking deposition indicates.

WHEREFORE, as the notice of taking deposition is presently phrased, the defendants are entitled to a protective order and claimant's notice is hereby quashed.

Signed and filed this 17th day of February, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARGARET JOANNE UTSLER, Claimant, vs. CARLISLE COMMUNITY SCHOOL, Employer, and CONTINENTAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 666680 C O M M U T A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding for a commutation of benefits brought by Margaret JoAnne Utsler, claimant, against Carlisle Community School, employer, and Continental Insurance Company, insurance carrier. As the result of a decision in review-reopening dated December 17, 1982 claimant was awarded benefits based on an industrial disability of 45 percent. Claimant is now seeking to have those benefits commuted.

The record consists of the testimony of claimant and claimant's exhibits 1 through 4.

FACTS PRESENTED

Claimant testified that she and her husband have incurred many debts since her injury on October 15, 1980. In the statement of need, filed by claimant, she stated: "Although I have been paid workers' compensation benefits, the amount of weekly benefits has not kept pace with the rising energy costs, food expense, and the cost of living in general, causing us to fall behind in our standard of living." Claimant indicated she and her husband owe on a mortgage on the trailer in which they are living. Claimant also disclosed that they owe on a pickup truck, a consolidated loan and a loan on a swimming pool. Claimant testified that the swimming pool was purchased because of her back problems. Claimant indicated that they are having problems meeting their monthly obligations and are even having problems meeting their daily living expenses on her husband's income and her workers' compensation benefits.

On cross-examination claimant revealed that her husband makes around $25,000 a year and that she has not been employed. Claimant disclosed that she has worked for a family fun center owned by one of her children but did not receive an income. Claimant indicated that since the previous hearing she and her husband have taken a vacation to Missouri; a trip to Nashville, Tennessee; and a trip to Dallas, Texas. Claimant also revealed that her husband inherited six or seven thousand dollars which was used as a partial payment for a 1983 Dodge van which they purchased in October or November of 1982 for approximately $13,000.

APPLICABLE LAW

As indicated by section 85.45 of the Code, two conditions must be met before claimant is entitled to have benefits commuted; the period during which compensation is payable must be definitely determined, and the commutation must be in the best interest of the claimant.

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.

ANALYSIS

There is no question but that claimant has met the first condition under which a commutation can be made. The period of time during which claimant is entitled to compensation is definitely determined.

Claimant has shown that she had debts and under most circumstances seeking to pay off those debts is a proper reason for awarding a commutation especially when the interest rates which are owed on the debts are so great. Based solely on the facts as brought out on direct examination the undersigned would have awarded claimant a commutation.

However, the facts brought out on cross-examination reveal that it is not in claimant's best interest that she have a commutation. Claimant and her husband had money in the form of an inheritance which they could have used to decrease the amount of their debts. Rather than decrease their debts, claimant and her husband bought a van and increased their debts. Furthermore, the record fails to indicate that claimant and her husband needed the van or considered it a necessity. The record only indicates that claimant and her husband bought such a vehicle and increased their debts with the knowledge that they already had debts which were giving them problems.

Upon receiving a commutation there would be nothing stopping claimant and her husband from using the same poor judgment with the money they would receive from the commutation. Claimant's poor financial judgment is also evident by her comments about renting out her pool and later statements that she wouldn't charge much for friends. It would not appear that claimant has thought of her increased liability and the other factors relevant to such an enterprise.

Although claimant testified that after her benefits run out she and her husband will just live on his salary, it is evident that the greater part of her testimony would indicate her husband's salary will not be, by itself, enough to make ends meet.

As indicated in the prior decision, it is unrealistic to think claimant will find any work when considering her husband's attitude regarding claimant having full-time employment and claimant's own contentment to spend more time with her family.

Although the undersigned cannot be an unyielding conservator of claimant's benefits, it is determined that claimant has failed to show that it would be in her best interest to have her benefits commuted.

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 December 17, 1982 the undersigned entered a decision finding that claimant has an industrial disability of forty-five percent (45%) and awarding claimant two hundred twenty-five (225) weeks of permanent partial disability benefits.

CONCLUSION A. The period of time during which claimant is entitled to compensation is definitely determined.

FINDING 2. Claimant has debts which she wishes to pay off.

FINDING 3. The interest rate on claimant's debts are high.

FINDING 4. Claimant and her husband received money which could have been used to pay off debts, but claimant and her husband went out and bought a new van which increased their debt obligations.

FINDING 5. At the time claimant and her husband bought the new van they knew they had the debts which they now wish to pay off and were causing them financial difficulties.

FINDING 6. Claimant intends to rent out her swimming pool but

has not determined what she will charge and indicates she does not really want to charge friends.

FINDING 7. Claimant's husband's salary by itself will not be enough to pay the mounting expenses that claimant and her husband incur.

FINDING 8. Claimant is not pesently employed and it is unrealistic to think that claimant will be reemployed.

FINDING 9. Claimant and her husband do not have good financial judgment.

FINDING 10. It would not be in claimant's best interest to have a full or partial commutation.

CONCLUSION B. Claimant's request for commutation is denied.

THEREFORE, claimant's request for commutation is denied.

Defendants are to pay the costs of this action.

Signed and filed this 15th day of April, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARNOLD K. VAN BLARICOME	:	
Claimant,	:	File No. 629607
vs.	:	A P P E A L
ALUMINUM COMPANY OF AMERICA,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Claimant has appealed from a proposed review-reopening decision filed June 22, 1982 wherein claimant was awarded 10 percent permanent partial disability to the body as a whole pursuant to Iowa Code section 85.34(2)(u).

The record on appeal consists of the hearing transcript which contains the testimony of claimant and Emil Stimac, claimant's exhibits 1 through 4, employer exhibit A, and the briefs of all parties on appeal.

At the time of the review-reopening hearing the parties stipulated the applicable workers' compensation rate in the event of an award to be $319.34 per week.

ISSUE

The sole issue presented by claimant on appeal is whether the deputy was correct in his finding as to the extent of industrial disability.

REVIEW OF THE EVIDENCE

Claimant suffered an injury to his back on December 31, 1979, which arose out of and in the course of his employment with defendant. Claimant had been associated with defendant for over 19 years, working as a pipe fitter a majority of that time. (Transcript, pp. 11-13) As a result of his injury claimant has had a laminectomy and a disc removed from his lower back. Claimant was able to return to his job in April 1980 with an unspecified restriction concerning heavy lifting. A short time after returning to work claimant reported substantial pain in his back following three days of swinging a sledgehammer. At that time E. M. Stimac, M.D., defendant employer's company physician, placed stricter lifting restrictions on claimant and told him not to bend over. Claimant also testified that in July 1981 he slipped on a grease puddle, and required several months of physical therapy. (Tr., pp. 16-20)

Claimant testified that despite having undergone physical therapy, following his July 1981 mishap, he has worked steadily since April 1980 after his surgery. Claimant often works overtime hours, and admitted that only once was he denied the opportunity to work when such hours were available. (Tr., pp. 28-29) According to the records of defendant, claimant worked 2,466.7 hours in 1979 (with the injury occurring December 31, 1979), 1810.8 hours in 1980 when he was partially disabled, and 2406.2 hours in 1981. While there was no indication of how many of these hours represented overtime in 1979 and 1980, approximately 543 hours of the 1981 total were overtime. (Tr., p. 46) Claimant also testified that his work supervisors have generally abided by the restrictions placed upon him by Ralph Congdon, M.D., (claimant's personal physician) and Dr. Stimac. (Tr., p. 36) When questioned as to his job security, claimant indicated that he ranked high in company seniority and that short of defendant going out of business in the Davenport Works he would have a job. At the time of his injury and at the time of the review-reopening hearing claimant was paid at grade 26, the top pay grade available to union pipe fitters. (Tr., pp. 26-30)

Dr. Congdon, who testified by way of deposition, indicated that he performed a laminectomy on claimant and last examined claimant on April 23, 1982. Dr. Congdon opined that claimant's physical impairment as a result of his injury is 10-20 percent of the whole man. Dr. Congdon stated that it was unrealistic to ask claimant to do heavy laboring work in the form of repetitive activity or carrying over fifty pounds. (Claimant's exhibit 1, p. 5)

During the review-reopening hearing, when questioned as to how his body feels following overtime work, claimant replied: "Oh, I hurt all the time. There is nothing excrutiating where you can't bear the pain, but you are in pain. It hurts. If you take a week's vacation, you feel better. If you take the weekend off, you feel better."

APPLICABLE LAW

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).

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."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) at 1121, cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . 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

Following an initial period of reduced earning capacity immediately subsequent to his injury, claimant appears to have settled into an employment routine substantially similar to that which he realized prior to the injury. Despite experiencing some periods of increased pain during and after he works overtime hours, it does not appear that there has been any material aggravations to his condition. Claimant has returned to the position he held prior to his injury and appears to have substantial job security with defendant. In addition, claimant now works approximately the same number of hours on an annual basis as he did prior to his injury, and has continued to be paid at the highest pay grade available as a pipe fitter. All of these factors indicate that claimant has not suffered a significant reduction of earning capacity.

While the testimony of Dr. Congdon that claimant has a 10-20 percent impairment to the whole man as a result of his injury, functional impairment is only one of the factors to consider in determining a person's industrial disability. The factors previously listed have a balancing effect upon Dr. Congdon's assessment of functional disability.

WHEREFORE, the findings of fact, conclusions of law, and holdings stated in the review-reopening decision, and as set forth below, are adopted as the final decision of this agency.

FINDINGS OF FACT

1. As a result of his injury with defendant on December 31, 1979 claimant has a functional impairment of ten to twenty percent (10-20%) of the whole man.

2. Claimant is forty-one (41) years old and has a high school education.

3. Prior to working for defendant, claimant only worked in heavy labor.

4. Since starting to work for defendant in 1960, claimant has become a certified pipe fitter.

5. Claimant has also obtained experience with defendant as a welder and millwright.

6. Upon returning to work with defendant after his injury, claimant returned to the same position and works as many hours.

7. Claimant has job security.

8. Claimant does have some restrictions as a result of his injury and has undergone a laminectomy.

9. Defendant has accommodated claimant's restrictions and provided employment commensurate with these restrictions.

10. Claimant has not suffered an actual loss of wages as a result of his injury.

CONCLUSION OF LAW

Claimant has met his burden in proving an industrial disability of ten percent (10%) of the body as a result of his injury.

THEREFORE, defendant is to pay unto claimant fifty (50) weeks of permanent partial disability benefits as a rate of three hundred nineteen and 34/100 dollars ($319.34) per week.

Defendant is to be given credit for any permanent partial disability benefits previously paid.

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

Defendant is to pay the costs of this action.

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

Signed and filed this 28th day of December, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERVIN V. VAN DER WILT,

Claimant,

vs.

SHERMAN PRODUCE COMPANY,

Employer,

and

CHUBB GROUP OF INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 608095

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision filed June 9, 1982 in which claimant was awarded permanent total disability benefits as a result of an injury sustained October 4, 1979. Defendants' appeal was filed June 22, 1982.

A request for taking additional evidence was filed by defendants on June 21, 1982 prior to the appeal, but apparently was contemplated to be joined with the appeal. Claimant filed a resistance to the request for additional evidence on June 28, 1982. A ruling denying the request for additional evidence was filed July 9, 1982. On July 30, 1982 defendants filed an application for suspension of benefits which claimant resisted August 2, 1982. A ruling, filed August 30, 1982, denied defendants' application for suspension of benefits.

The record on appeal consists of the transcript of the review-reopening proceeding together with claimant's exhibits 1, 2, 3, 4, 5, 6, and 9; commissioner's exhibit 1; and the interrogatories submitted by claimant and defendants. Claimant's exhibits 7 and 8 were offered and impliedly received subject to the limited objection. Claimant's exhibit 10 was objected to and the objection was sustained. Defendants' exhibit A was objected to. Although the objection was not ruled on, the colloquy that followed the objection would indicate that the objection was well taken and inferentially sustained.

On September 1, 1982 defendants filed a notice of service and intent to offer medical reports of Harold A. Ladwig, M.D., dated July 18 and July 22, 1982. These reports are untimely and are not considered in the appeal of this matter.

ISSUES

1. Whether the deputy made insufficient review of the record by stating that there was sufficient credible evidence contained in his notes to support the statement of facts.

2. Whether the defendants are entitled to credit for payments made by the employer in addition to those made by the insurance carrier.

3. Whether the deputy erred in rejecting evidence and opinions reflecting lack of motivation.

4. Whether the deputy erred in making his own evaluation of the disabling effect of claimant's pain, rejecting medical evidence to that effect.

5. Whether the deputy erred in awarding permanent total disability when the functional impairment rating was not greater than 13 percent.

REVIEW OF THE EVIDENCE

Claimant, age 56 at the time of the hearing, is married and raised five children all of whom were over age 18 at the time of his injury. Claimant was raised on a farm and discontinued his formal education after completing ninth grade, when he quit school to assist with work on the farm. (Transcript, pp. 4-7) Claimant spent two years in the infantry after which he returned to Sibley, Iowa in 1947 to work as a driver for a creamery. In 1952 claimant moved to Oregon and worked in munitions followed by a move to Minnesota to work for another creamery, a period of farming, and finally another move to Sioux City where he worked for Flavorland Industries for over twenty years. (Tr., pp. 8-13) Claimant commenced working for defendant employer in 1977 doing generalized maintenance. (Tr., pp. 16-18) On October 4, 1979 claimant sustained the injury which is the subject of this appeal when he fell from a scaffold while installing insulation. (Tr., pp. 18-19)

Claimant was admitted to St. Joseph Hospital where he remained until October 18, 1979. He received care for broken toes on his right foot and a broken back. (Tr., pp. 20-21). Claimant was initially treated by William M. Krigsten, M.D., and Albert D. Blenderman, M.D., and was seen by Walter W. Eckman, M.D. All of these doctors eventually concluded that they did not have further treatment to offer claimant. He was also examined by Horst G. Blume, M.D., despite the employer and insurance carrier not having authorized those examinations. (Tr., pp. 24-25)

Dr. Krigsten reported his findings on November 2, 1979, in part, as follows:

> The patient was treated symptomatically for the fractures of the right foot and of the 2nd lumbar vertebra....He was treated by gastric suction and hyperextension and pressure dressings were applied to his foot.
>
> On 10-10-79, under general anesthesia, the fractured spine was treated by hyperextension and a body plaster cast. At the same time, the fractures of the right foot which consisted of fractures of the distal ends of the 2nd, 3rd, 4th and 5th metatarsal bones associated with dislocations were treated by open reduction with internal fixation using metallic pins. A copy of the surgery report of 10-10-79 is enclosed.
>
> ....
>
> The prognosis is guarded. The final diagnosis is: 1) FRACTURE, COMPRESSION, BODY OF 2ND LUMBAR VERTEBRA AND 2) FRACTURE, DISLOCATIONS, DISTAL ARTICULAR ENDS 2ND, 3RD, 4TH AND 5TH METATARSAL BONES, RIGHT. (Claimant's exhibit 1)

On August 6, 1980, Dr. Krigsten reported, in part, as follows:

> Since our report of January 2, 1980, we have not given you a narrative report. On January 28, 1980 the patient was examined and the following note made in his record: "Injured October 4, 1979. Good deal of back pain. More severe when lying down. Right foot becomes cold rapidly."
>
> ....
>
> Re-examined April 21, 1980 with the following note: "Injured October 4, 1979. Wears back brace part time because still has a good deal of back pain. Some pain in back but improving slowly. Can walk well with crutches. Some tenderness medial side right knee. Foot and toes are stiff. Back is tender T10 thru lumbar area."
>
> ....
>
> We have high hopes in returning this man to some type of work in a short time, however, he will not be able to do much lifting or bending because of the fracture of his spine and he will have some difficulty walking long distances. (Cl. ex. 1)

Dr. Krigsten's report of October 8, 1980 read, in part, as follows:

> He was examined August 18, 1980 with the following note made in his chart: "Injured October 4, 1979. Having a good deal of low back pain and left greater trochanter. Injection didn't help and it made him dizzy. Some residual pain in right foot."
>
> ....
>
> He was re-examined September 19, 1980 with the following note: "Injured October 4, 1979. Pain in left gluteal area radiating into back of leg and funny feeling in 3-4-5th toes."
>
> ....
>
> It now appears that the patient will probably have to be retired from his position at Sherman Produce Company and given a percentage of permanent impairment. The degree of this impairment cannot be determined at this time but when he has reached maximum recovery we will summarize his case and give the final facts. (Cl. ex. 1)

On November 12, 1980 Dr. Krigsten reported:

> I doubt if this patient will ever return to work at his original occupation and I think that within a short time I will close his case and estimate his degree of permanent impairment. (Cl. ex. 1)

In a June 16, 1981 letter to Carol McCrohan (of Chubb/ Pacific Indemnity Group) Dr. Krigsten wrote:

> Since our letter of December 26, 1980, we have made every effort to return this patient back to work but have been unsuccessful.
>
> ....
>
> It is my opinion that the patient cannot be rehabilitated. On my desk today is a letter from the department of public instruction requesting information regarding this patient because he has applied for Social Security Benefits.
>
> Therefore, it is my opinion the patient has

reached maximum recovery and is being discharged from our care as of June 15, 1981. He has a permanent impairment of the body of 10% as a result of a fracture of the 2nd lumbar vertebra and a permanent impairment of 25% of his right foot. This is equal to 18% of the leg and 7% of the body as a whole. By using the American Medical Association Guide to the evaluation of permanent impairment of the extremities and back, this is equal to 13% of the whole man. It is also my opinion that the patient could do light work if properly motivated. (Cl. ex. 1)

On September 22, 1981 Dr. Krigsten reported, in part, as follows:

(1) Nature of sickness or injury. (Describe complications if any)	1)Fracture, compression, body of the second lumbar vertebra. 2)Fractures, multiple right foot. 3) Fixed urine specific gravity, probably secondary to arteriosclerotic vascular disease.

....

(8) Is he prevented from engaging in each and every occupation or employment for wages or profit for which he is reasonably qualified by education, training or experienced? Yes-at this time
(Cl. ex. 1)

Finally, in a November 18, 1981 follow-up letter to Chubb Group Insurance Co., Dr. Krigsten wrote:

On June 16, 1981, I wrote to your office about the permanent impairment of the above patient. I am enclosing a copy of that letter for your information.

You will note in this letter that it was my opinion that the patient reached maximum recovery and was discharged from our care on June 15, 1981. The degree of impairment was outlined in that letter and it was also stated that the patient could do light work if properly motivated. If he did seek employment, he would be limited in the amount of lifting he could do without great discomfort and walking long distances would be rather difficult. (Cl. ex. 1)

Horst G. Blume, M.D., in a letter dated August 31, 1981 wrote:

I agree with Doctor Krigsten's evaluation in which he stated that the patient has a permanent impairment of the body of 10% as a result of a fracture of the second lumbar vertebra and a permanent impairment of 25% of his right foot. This is equal to 18% of the leg and 7% of the body as a whole. By using the American Medical Association Guide to the evaluation of permanent impairment of the extremities and back this is equal to 13% of the whole man.

We know now from the CT scan done on July 22, 1981, which was not available to Dr. Krigsten, that he had a mild compression fracture of the vertebral body L2, but it is very difficult to assess as to when that fracture occurred. In addition, he has a mild centrally bulging disc L3/4 and from reviewing the CT scan myself, I agree this is of no significant pathology except to say this can intermittently compress the sinuvertebral nerves of the intervertebral discs and can cause back pain rather than leg pain. I do not think these findings would require any surgical intervention at this time. No other disc pathology at the level of L4/5, L5/S1 was encountered, which would go along with my clinical findings as well.

Since I do think the pain originates from the rami dorsalis of the posterior nerve roots of the intervertebral joints, at least L3/4, L4/5, L5/S1 on both sides, the patient would require to have nerve blocks to the nerve structures of these joints in order to see if one can alleviate all the back pain, at least temporarily, and if this is the case, the patient would be a good candidate for the denervation or neurotomy of the above mentioned segments. (Cl. ex. 1)

In another letter dated December 16, 1981, Dr. Blume reported:

I re-examined the patient today (12/15) and there seems to be no doubt that the patient has back pain with radicular pain into the left leg, where we have no definite gross motor deficit, but the largest circumference of the left thigh was about 1½ cm. less in comparison to the right. The foot jerk with reinforcement was barely 1+ on the left, where on the right it was 2+. The straight leg raising test was possible to about 70 degrees with pain in the low back with radicular pain into the left posterior thigh. There was considerable local tenderness over the entire lumbar spine centrally and paravertebrally left and at L5/S1 centrally and bilaterally.

....

I came to the conclusion from the clinical appearance that the patient does have an irritation of the rami dorsalis of the posterior nerve roots of the intervertebral joints of the lumbar spine from L1 to S1, on the left side in particular, and at L5/S1 on the right side. We do have evidence of a centrally ruptured disc at L3/4 and a compression fracture L2. There is suspect of lateral disc pathology at L4/5, left. The neurological examination is indicative of irritation and compression syndrome related to the S1 nerve root, left. I do not want to get involved with the pain problem related to the fracture he sustained of the right foot. (Cl. ex. 1)

A social services disability examination conducted by Keith McLarnan, M.D., produced the following impression as to claimant's condition in September 1981:

Impression: 1. Chronic low grade lumbo sacral [sic] strain. 2. There is equivocal change in the gait that might be related to upper lumbar root disturbances. 3. Distribution of the pain and the numbness in the left leg is more in the lower lumbar-upper sacral distribution, but there is no evidence of loss of muscle strength or reflexes, only equivocal changes in sensation. 4. Hypertension.

Addendum: The carotid pulsations by palpation are not equal - left diminished compared to right; no bruit. (Cl. ex. 1)

In a December 15, 1981 report to Dr. Blume, Gerald K. Newman, L.P.T, stated, in part, as follows:

This 56 year old man is seen for evaluation with primary complaint of continued back pain and radiation into the left lower extremity. We are familar with his history in that he sustained a fall suffering compression fracture of L2 and multiple fractures of the right foot which have been previously described.

....

This patient is seen for physical therapy examination at the office today. He remains acutely point tender across the low back region greater on the left than the right and also in the mid line of the L2/3 area. He complains of radicular pain into the left lower extremity. He has had no definitive care for his presenting symptomology over the last year. He shows no muscle atrophy. He complains of sensory deficit especially in the left L4/5 territory. He presents himself in acute distress in the office today and is quite point tender to palpation over the lumbar paraspinal area and different maneuvers of the left lower extremity aggravate the left low back and hip pain cycle. Needless to say he has had continued significant pain cycle which effect [sic] all of his activities of daily living at home not to mention any work activities which have not been tried over the last two years. With the chronic pain situation that he presently shows it would seem logical that he would need further definitive care for these complaints before any type of work activity could be assumed. I think that this type of care would be in the realm of further definitive treatment of his back condition and one would not rule out the possibility of "Back School" or chronic pain treatment of his current pain cycle. If no definitive medical care can alleviate the pain cycle, there is the possibility of further instruction in back care and exercise regiment [sic] incorporated with treatment using Transcutaneous Electrical Nerve Stimulation. Rather than pain surrounding the territory of the right foot or pain surrounding the L2 it is the left low back pain extending into the left hip region and left lower extremity which are limiting his activities of daily living at the present time. (Emphasis added.) (Cl. ex. 1)

At the review-reopening hearing claimant testified that his physical condition has continued to worsen since he stopped receiving medical attention. Claimant complains that he often loses his balance and is unable to walk more than one block before pain starts in his toes and goes up through his leg and back. He is unable to stand more than five or ten minutes, or stoop, without pain developing in his back and left leg. Claimant was restricted to lifting only 25 pounds, but testified that even that amount of weight caused pain in his back, leg, and foot within a few minutes. Claimant also stated that he is unable to sleep at night and usually wakes up feeling "just dog tired." (Tr., pp. 26-30)

Claimant testified that he spent four days testing with the Iowa Department of Education Rehabilitation Office in Des Moines. Although he did everything he was asked to do, the department has had nothing further to offer claimant. (Tr., pp. 33-34)

Soon after his accident, claimant began receiving $50 every two weeks directly from Stan Sherman of Sherman Produce Company in addition to the workers' compensation benefits he was receiving. The $50 payments continued for 40 weeks. With regard to the purpose of these payments and the intentions of the parties thereof, claimant testified as follows on cross-examination:

Q. Did you ever tell the insurance company that you were receiving those payments directly from Mr. Sherman?

A. No.

Q. Why were you receiving those payments?

A. He gave that to me so the wife could hire a cab, hire people to do the yard work and stuff like

that.

Q. Did you understand it to be a replacement for the wage you weren't earning because you were off work?

A. He really never said what it was for.

Q. What was your understanding of what it was for?

A. Well, like he said, it was for my wife to get a cab and hire the work around the place because I couldn't do it.

Q. Money because you weren't making a wage?

A. The work that I do otherwise, I couldn't do.

Q. All right. Do you know why he stopped making those payments?

A. No, I don't.
(Tr., pp. 48-49)

On redirect examination:

Q. Do you feel you were doing anything wrong in taking the $50 a week [sic]?

A. No.

Q. Wasn't there taxes withheld from that amount too?

A. Yes, there was.

Q. So you didn't get that $50 every two weeks, isn't that right?

A. Yes.

Q. And why did Mr. Sherman offer to pay that to you?

A. He said my wife could hire a cab and take her around town, mow the lawn, sidewalks, hire people to do that kind of work.

Q. That's what you had understood the money was for?

A. That's what he told me.
(Tr., pp. 67-68)

Cross-examination of claimant established that he would be eligible for a pension from Flavorland Industries starting in 1984. It was also established on cross-examination that claimant's house mortgage payments had been paid by National Old Line Insurance Company from the date of the accident until two months prior to the hearing, pursuant to an insurance policy he held with that company. (Tr., pp. 46-50)

Claimant has not returned to work of any nature since his injury occurred. He did, however, approach Stan Sherman about the possibility of light work after receiving permission to do so from Dr. Krigsten. Claimant's testimony concerning a subsequent job offer from Mr. Sherman went as follows:

Q. And what did Mr. Sherman have to offer to talk about that you might be able to do?

A. Washing trucks.

Q. Okay. And did you report back to Dr. Krigsten after that conversation with Mr. Sherman?

A. Yes.

Q. Did you tell Dr. Krigsten what Mr. Sherman had offered?

A. Yes.

Q. And what did Dr. Krigsten have to say in response to that?

A. He said I shouldn't go back to Sherman because it was do [sic] damp and too cold for me.

Q. Did Dr. Krigsten ever tell you that he didn't think you were properly motivated to return to work?

A. No, he didn't.

Q. Anybody ever accuse you of that?

A. No, not to me.
(Tr., p. 66)

Claimant testified that he is currently receiving social security benefits. (Tr., p. 51)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 4, 1979 is causally related to 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 (1955). 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 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).

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."

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 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.

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 discussing an overpayment of healing period benefits by an employer to the injured employee and its decision to allow credit for such overpayment, the Supreme Court of Iowa stated: "It is probably true that he will be seriously inconvenienced by the earlier cutoff of his benefits. Yet, under the district court ruling, he would receive every bit of the awards to which he was properly and legally entitled." Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982).

"It has been the settled law of this state for over seventy years that where money is paid voluntarily, without any compulsion and without any promise to repay, it cannot be recovered by the payor." Gronstal v. Van Druff, 219 Iowa 1385, 261 N.W. 638.

ANALYSIS

The first issue raised by defendants is whether the deputy made insufficient review of the record by stating that his notes contained sufficient credible evidence to support the statement of facts as set forth in the proposed decision. A review of the statement of facts set forth by the deputy reveals an accurate and extensive review of the medical evidence introduced and an adequate summary of the hearing testimony. The deputy's reference to his notes apparently was based upon the fact that he did not have available to him a transcript of the hearing. Whether review was based upon the deputy's hearing notes, hearing transcript, hearing exhibits, or any combination thereof, the statement of facts set forth in the proposed decision appears to be in accord with the complete record, as reviewed by this tribunal, and is deemed to be sufficient.

The second issue raised is whether payments made by the employer to claimant in addition to those made by the insurance creditor should be credited to defendant as an offset against the disability award. During the period between the injury and claimant's initial action herein, Stan Sherman paid $2,000 to claimant in bi-weekly installments of $50 each. Under Wilson Food Corp., 315 N.W.2d 756, defendants are clearly entitled to a credit for any payments made in accordance with a legal obligation under the workers' compensation laws. It has, however, been a long standing rule that any money paid voluntarily, without compulsion or promise of repayment, cannot be recovered. The hearing testimony indicated that Sherman made these payments voluntarily, never indicated if they were to be viewed as a replacement for earned wages, and never discussed the issue of repayment with claimant. Claimant testified that he understood the payments were to provide money for his wife to hire a cab for errands and to have yard work done. The circumstances surrounding these payments indicate to this tribunal that Stan Sherman did not intend that the $50 payment to claimant fulfill any legal obligation, rather they were to be viewed more as an act of generosity. It is not uncommon in some industries to have supplemental benefits which are payable in addition to workers' compensation benefits payable. As such, the $2,000 shall not be credited against defendants' obligations.

The third issue raised on appeal concerns the failure of the deputy to consider evidence relating to lack of motivation on the part of claimant for returning to work. Defendants point to several factors which might indicate a possible lack of motivation to return to work on the part of claimant, including: 1) An early pension from Flavorland Industries; 2) weekly compensation payments of $177.06; 3) claimant's house payments were paid through a disability insurance policy; and 4) the $50 bi-weekly payments from Stan Sherman. It is contended that the aggregate of these benefits permitted claimant to enjoy a standard of

living which was comparable to that which he enjoyed while working, and that the result was a total lack of motivation to return to work. The deputy's opinion, in discussing claimant's motivation to work, noted that claimant has had only two noninterrupted positions of employment since 1957 and has not previously shown a desire not to work. On September 22, 1981 Dr. Krigsten reported that claimant was, at that time, prevented from engaging in each and every occupation or employment for wages and profit which he is reasonably qualified by education, training, or experience. The inability of the Iowa Department of Education Rehabilitation Office to refer claimant to satisfactory employment following extensive testing is indicative of the lack of marketability of the limited skills and capabilities he possesses. Testimony at the hearing also indicated that claimant did, in fact, contact his former employer concerning the possibility of employment. While Stan Sherman did offer claimant a job washing trucks, claimant did not accept the job on the advise of Dr. Krigsten because of the cold and damp working environment. In making his findings and drawing his conclusions the deputy has the duty to weigh and consider all of the evidence, but may assign greater weight to one factor than another. This tribunal finds no error in the deputy's decision to give additional weight to the employment history of claimant, and further finds the deputy's conclusions regarding claimant's motivation to work to be reinforced by evidence showing a lack of employment skills and capabilities due to educational and physical limitations.

The fourth issue raised on appeal is whether the deputy erred in making his own evaluation of claimant's pain, rejecting medical evidence to that effect. A reading of the review-reopening decision makes it obvious that the deputy has not ignored the medical evidence concerning claimant's pain. On the contrary, several pages of quoted statements from medical reports were set forth in the deputy's decision. Review of the evidence finds no comment from any of the physicians who treated claimant as to the prospects of minimizing his pain in the future. The deputy has the duty to weigh all of the evidence presented, including his own observations at the hearing. The medical evidence recited by the deputy, along with the observations made at the hearing, substantiate the findings and conclusion that claimant is permanently and totally disabled by his injury.

The final issue raised on appeal is whether it was proper to award a permanent total disability when claimant's functional impairment rating was not greater than 13 percent. The medical evidence presented clearly indicates that an industrial disability award is proper because claimant's injury extends beyond the scheduled lower extremity into his back. It is contended, however, that because the functional disability of claimant is only 13 percent that the industrial disability award should bear some relationship to that percentage. An award of industrial disability is not necessarily computed in terms of percentages of physical and mental ability of a normal man. Those factors may be considered, 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. All of these factors, when taken together, justify an award of industrial disability, particularly when an actual reduction of earnings has occurred. The evidence and testimony have indicated that claimant's age and educational background limit employment opportunities available to him. The evidence set forth in medical evidence and by rehabilitation experts indicate claimant to be unable to engage in any type of employment for which he might have the requisite background. Such limitations which have a direct impact on claimant's earnings merit an award of industrial disability, despite the fact that his functional capacity to earn has only been diminished by 13 percent as compared to a normal man.

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. On October 14, 1979 claimant sustained an admitted industrial injury.

2. As a result of his injury claimant has been treated for a broken back and broken toes on his right foot.

3. Claimant has a ninth grade education.

4. Claimant is unable to walk long distances, stand for more than a few minutes, or stoop without experiencing pain through his leg and into the lower back.

5. Claimant is restricted from lifting in excess of 25 pounds.

6. Claimant's functional impairment rating is equal to 13 percent of the whole man.

7. Due to his educational and physical limitations claimant has been unable to secure employment.

8. Claimant has exhibited a motivation to return to work.

9. Bi-weekly payments made by Stan Sherman to claimant during the 40 weeks following the injury were not intended as workers' compensation payments.

10. The deputy's review of the record was sufficient to support the findings of fact and conclusions of law as set forth in the review-reopening decision.

CONCLUSIONS OF LAW

Claimant has met the burden of proving his injury extended beyond a scheduled loss, such as to justify an industrial disability rating.

Claimant's entitlement is governed by the provisions of section 85.34(3), Code of Iowa.

THEREFORE, it is ordered:

That the defendants pay the claimant weekly benefits in accordance with the provisions of section 85.34(3), Code of Iowa, at the agreed weekly rate of one hundred seventy-seven and 06/100 dollars ($177.06).

That the parties are directed to the provisions of section 86.14, Code of Iowa, which provides for an application by the defendants should a change in claimant's condition warrant such activity.

That interest on the foregoing shall be computed in accordance with the provisions of section 85.30, Code of Iowa, as amended by SF 539 section 5, Acts of the Sixty-ninth G.A., 1982 Session.

That costs are charged to the defendants in accordance with Iowa Industrial Commissioner Rule 500-4.33.

That defendants are to file an updated claim activity report.

Signed and filed this 28th day of December, 1982.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILMA VAN GUNDY,	:	
	:	File No. 605349
Claimant,	:	521774
	:	
vs.	:	A R B I T R A T I O N
	:	
MEREDITH CORPORATION,	:	A N D
	:	
Employer,	:	R E V I E W -
	:	
and	:	R E O P E N I N G
	:	
INSURANCE COMPANY OF NORTH AMERICA,	:	D E C I S I O N
	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines, Iowa, on December 16, 1982, at which time the case was fully submitted.

This case involves two files:

1. File No. 521774 concerns a back injury which occurred on October 13, 1978. An employers first report of injury was filed on October 20, 1978 along with a memorandum of agreement calling for the payment of $115.16 in weekly compensation. Claimant has been paid 158 1/7 weeks of healing period compensation and 103 weeks of permanent partial disability compensation (see statement of counsel).

2. File No. 605349 concerns an alleged foot injury of June 12, 1979. An employers first report of injury was filed on October 9, 1979.

The record consists of the testimony of the claimant, Clarence E. Van Gundy, Matt Pedersen, Louise See and Leona Lewis; the depositions of Michael David Adelman, D.P.M., D.O., Thomas Carlstrom, M.D., Sinesio Misol, M.D., Martin S. Rosenfeld, D.O., and John T. Bakody, M.D.; claimant's exhibits 1 - 26; and defendants' exhibits A, B, C, D and E.

ISSUES

1) The nature and extent of disability for the October 13, 1978 injury.

2) Whether claimant sustaind an injury arising out of and in the course of her employment on June 12, 1979.

REVIEW OF THE EVIDENCE

Claimant, age 42, testified that she became employed by Meredith Corporation in September 1975. After a short period she was transferred to the shipping department, where invoices were dispatched in boxes weighing about 35 pounds. The job involved twisting and lifting. In the latter part of 1976, claimant testified that her feet started hurting her and she treated the condition with pain pills, soaks and massages.

On October 12, 1978, claimant testified that while employed she lifted a container when her back "popped." She notified her supervisor and was seen by the company doctor for a period of about six weeks. The treatment consisted of pain pills and muscle relaxers.

Claimant was referred to Sinesio Misol, M.D., who first saw claimant on November 24, 2978. At that time, he diagnosed claimant's condition as degenerative arthritis of the lumbar spine with right sciatica. Dr. Misol referred claimant to the YMCA back program. Claimant testified that she told Dr. Misol that she was having foot problems at this time (Dr. Misol did nothing about this). On February 2, 1979, claimant saw Dr. Misol and he forcasted that claimant may be reevaluated for return to work in March 1979. At about this time, claimant had some gynecological and urological problems (seemingly unrelated).

Claimant saw Dr. Misol on March 2, 1979. At that time, claimant was complaining that she had severe sharp pains in the middle of her low back, and a sensation of giving out of both lower extremities after walking. He recommended that claimant return to work on March 12, 1979. Claimant did return to work and was placed back on compensation on April 2, 1979. Claimant's symptoms were consistent with those related before -- backache, sensation and tingling down the left leg (examination of May 10, 1979). On June 13, 1979, claimant saw Dr. Misol and reported a bump on the medial aspect of the left foot. This proved to be an accessory navicular bone. Claimant reported pain which did not leave, so the claimant was admitted to the hospital where the bone was removed. Claimant saw Dr. Misol On November 23, 1979. He noted "a little swelling." Claimant had been fitted with a special insole and was released to return to part-time work on November 26, 1979. Dr. Misol's note of December 13, 1979 indicates that claimant had seen the company physician and that claimant should not engage in employment for three or four months.

On February 12, 1980 claimant reported to Dr. Misol that she hurt her back while bending over to pick up a cigarette butt. Claimant reported acute back pain, radiation to both legs down to the knees, and numbness of the left side of the face. Examination showed limited range of motion of the lumbosacral spine, negative straight leg raising, normal reflexes and sensation motor strength in the leg. Dr. Misol's impression was that claimant had degenerative disc disease without extrusion.

Claimant was seen by Michael David Adelman, D.P.M., D.O., April 28, 1980. He examined claimant and found tenderness inferior to the posterior tibial tendon, and also pain proximally along the course of the posterior tibia. He diagnosed claimant's condition as pronation with plantar fascial strain. He strapped her foot. On May 5, 1980 claimant exhibited a positive Tinel Sign on the medial side of her foot and ankle. He recommended that claimant return to Dr. Misol. Claimant did so and saw Dr. Misol on May 8, 1980. He diagnosed claimant's condition as tarsal tunnel syndrome. Dr. Misol caused nerve conduction tests to be taken by Alfredo Socarras, M.D., a neurologist. These tests were interpreted as normal. Claimant was seen by Dr. Misol's associate, Marvin Dubansky, M.D., following a fall where she skinned her heel. Dr. Dubansky released claimant to return to work on July 17, 1980 (claimant had been off from June 24, 1980 through July 16, 1980).

Claimant saw Dr. Adelman again on August 11, 1980, and he referred claimant to Martin S. Rosenfeld, D.O, an orthopedist. Claimant saw Dr. Rosenfeld on August 26, 1980. Neither Dr. Adelman nor Dr. Rosenfeld had the benefit of Dr. Soccaras' tests and diagnosed claimant's condition as tarsal tunnel syndrome with pain in the heel and possible irritation of the posterior tibial nerve. He injected the posterior tibial insertion into the navicular with Marcaine, Xylocaine and Decadron LA. He recommended that claimant's shoes be refitted. He examined claimant again on September 5, 1980 and found her condition to be improved.

Claimant was placed on sick leave on December 15, 1980 and has not returned to work. Claimant had previously been off from November 16, 1978 through March 11, 1979, from March 30, 1979 through May 20, 1979, and from June 12, 1979 through May 5, 1980.

Claimant was seen by John T. Bakody, M.D., a neurosurgeon, on January 12, 1981 complaining of low back pain with aching of the hips and legs. Dr. Bakody admitted claimant to the Mercy Hospital Medical Center on January 22, 1981. A lumbar myelogram was conducted on January 23, 1981 showing that the fifth lumbar nerve root on the right side was not visualized. A laminectomy was conducted on January 28, 1981, and claimant was released from the hospital on February 5, 1981. Claimant again saw Dr. Bakody on February 24, 1981, reporting that she was continuing to have pain in the low back and right leg. In March, claimant reported aching and swelling of the right lower leg. Claimant continued to be treated by Dr. Bakody and a repeat myelogram was conducted in May 1982. Dr. Bakody did not recommend surgery, but thought that surgery might be required in the future. Claimant complains of back pain at present and Dr. Bakody has not released claimant to return to work.

Clarence Van Gundy, claimant's spouse, testified that claimant does not engage in avocational activities as before. He also testified as to expenses incurred.

Matt Pedersen is Meredith's employee relations manager. He stated that claimant was terminated on March 3, 1982 because she had been on leave for over a year. He testified that claimant would be eligible for rehire, but would have to complete the application process.

Louise See was manager of the "Data Input Section" at all relevant times. She stated that claimant was required to lift materials and carry them from place to place.

Leona "Lee" Lewis testified that she saw claimant dancing in November 1980. The witness stated that this was a country-western dance of a fast beat. Claimant testified that it was slow, and her husband testified that after the dance claimant complained of hip pain.

As regards causation, and the nature and extent of disability, we will consider the back before we consider the leg.

Dr. Misol testified as follows:

A. I believe that if this lady had -- and she did have -- a preexisting degenerative arthritis of the back; and if she did have -- and she had -- poor muscle abdomen support, poor posture, that a job that involves lifting and bending and twisting heavy objects, like she reported she had been doing, would have aggravated.

I would also like to remind all of you that that's what she was doing on the 13th of October of 1978 at work, apparently, that did aggravate her condition, the twisting of a heavy box; and that prior to that, five years before, she had been lifting her father.

So any situation which forces a person with poor mechanical support, with some arthritis of the spine, to do lifting and bending is likely to aggravate them.

....

Q. All right. With regard to the back, Mr. Humphrey asked you if the kind of motion that she mentioned here could account for her problems; could have caused it, I think was the way he phrased it.

A. Could have caused the aggravation.

Q. Right.

A. But not the degenerative disk disease.

Q. And I believe your testimony was that it could?

A. Aggravate.

Q. All right. Are you able to say with reasonable medical certainty -- let me back up. Are there other conditions present in Mrs. Van Gundy that could account for her symptoms; her weight, her mechanical back?

A. Yes, and I mentioned those several times, yes.

Q. Is your testimony for the Commissioner that your opinion is with reasonable medical certainty that the back incident did do that or could do that?

A. The back incident; you're talking about the 13th of October?

Q. The twisting incident; I'm sorry.

A. All right. My statement is that such an episode of lifting and twisting could produce symptoms, back pain and leg pain, but I'm not saying that that's what caused the x-ray changes, the arthritis.

Q. All right.

A. I wish I could tell you how much of the total percentage is due to the work and how much is due to the age and the arthritis and the weight. Then it would be all right if I could to that.

He thought claimant had sustained a 15 percent physical impairment to the body as a whole because of the injury. (Misol dep., p. 19.)

Dr. Bakody also testified as to the causal connection:

Q. Now, Doctor, just from a causal relationship standpoint I would ask you at this time if you have a medical opinion to a reasonable degree of medical certainty as to whether or not Mrs. Van Gundy's present problem and disability is, in fact, related back to her work relationship.

A. I do have an opinion.

Q. What is that opinion?

A. It is my opinion there is a cause and effect relationship between her present disability and the described work accident of October 12, 1978.

As to the matter of recuperation, Dr. Bakody testified as follows:

Q. When you saw her on July 9, 1982, did you feel that she had yet reached a plateau of recovery?

A. I did not.

....

Q. Doctor, when you use the words plateau of recovery, does that equate with what the commissioner describes as maximum medical improvement?

A. I borrowed the term from his description.

Claimant was examined by Thomas A. Carlstrom, M.D., a neurosurgeon on April 30, 1982. He noted that claimant had full range of motion of her low back, but movement was accomplished quite deliberately. He thought claimant had failed back syndrome and that claimant could work:

A. She basically represents what I term a failed back syndrome in that she has had low back pain and has not had a satisfactory response to a surgical procedure.

Q. Let me ask you about her ability to work. I want you to assume that her job is primarily a clerical one; that she works at a desk; that she processes mail orders that are received by Meredith.

I want to show you this basket box that is used in the department in which she works that mail is placed in these, and that she would have occasion to get up from her desk and go back to where the mail is gathered, and get one of these baskets filled with mail; bring it back to her desk, and sit there and work on it until she needed to go back and get another one; that she has the opportunity to be up and around from her desk. She can go to the rest room when she feels she needs to; get up and walk around. She works in a carpeted area.

Based on your examination of her on April 20th, and assuming those facts to be true, do you have an opinion with reasonable medical certainty as to whether or not she could perform those duties or duties substantially similar to those?

A. Yes, I would think she should be able to do those without any difficulty.

Q. And was that true as of April 20th when you saw her?

A. Yes.

He concurred in the 15 percent permanent partial disability. Doctors Rosenfeld and Adelman did not have an opinion concerning the back.

As regards claimant's foot problems, Dr. Misol testified as follows:

Q. Doctor, with regard to the foot condition, again based on the history you received from Ms. Van Gundy and your examination of her concerning that condition as well as the treatment you prescribed for her, the complaints that she gave to you, do you have an opinion which you could state to a reasonable degree of medical certainty as to whether her foot condition could in any way have been aggravated by her employment responsibilities?

A. Yes.

Q. And what is that opinion, doctor?

A. As I stated earlier, I believe that the standing and walking on hard floors may aggravate such a condition as this; as I said, age and the obesity.

Dr. Adelman testified:

Q. Doctor, did you, at any time while you were seeing and treating this lady, try to determine the etiology, the cause, of her problem other than the surgery that was conducted on her foot by Doctor Misol?

A. Sure. There were several possibilities, okay. First of all, she was certainly overweight, and while that is not an actual cause of the problem it certainly can aggravate it once there is a problem present. The second thing is that she did pronate terribly, and pronation is known to cause plantar fascial problems and the stresses that she did have. In fact, she had these arch supports put into these shoes, which I can assume did alleviate her problem because I haven't heard from her.

Those two possibilities, plus -- and without ever getting Doctor Socarras' report, which he was going to send me and never did. And then when we never heard from her again, we never followed it up. We can still make a strong case for a tarsal tunnel based on her symptoms.

....

Q. Doctor, did you, at any time while treating this lady, try to determine whether her work duties and responsibilities at work, the type of work that she was doing, would have contributed to or exacerbated this condition that you have described?

A. Well, Mrs. Van Gundy mentioned to me that she was on her feet for long periods of time during the day, and it was our feeling that certainly with the type of problem that she had, that being on her feet for a long period of time was detrimental to her problem.

....

Q. And if her duties and job responsiblities did cause her to be on her feet, would this, in your opinion, exacerbate her condition or lighten it?

A. It certainly could make it worse.

Q. Make it more symptomatic?

A. Yes.

Q. Doctor, since you have last seen her and Doctor Rosenfeld has last seen her, this lady has suffered a back injury which has disabled her from work so she is not on her feet anymore and she is not now complaining of her foot problems. What, in your opinion, would that signify?

A. Oh, boy. Of course, it's very difficult to tell. The fact of the matter is, that when she was on her feet and she was pronating, having her plantar fascia, and even if she had a tarsal tunnel, these certainly would show up on ambulation and on constantly being on her feet. The fact that she is not on her feet, they are not present, I would be drawing a conclusion but the conclusion would be that she would certainly be better off with a position where she wasn't on her feet.

Dr. Rosenfeld testified:

Q. We have previously taken Doctor Misol's deposition, and he at that time causally related the foot condition to her employment which required her to be on her feet. Would you have a comment as to that at this time, Doctor?

A. It would be very hard for me to say.

....

A. I just don't know. Again, we want probabilities and that's one of these possibilities. It certainly can. Any time you have something abnormal in your feet and you have to be on your feet, it gets irritated. So as a general rule, yes, having a foot problem, being obese, and then having to be on your feel on hard surfaces can certainly irritate it.

Q. Now, we're not talking about actually causing the malady. That seems to be something that comes from Mother Nature.

A. Correct.

Q. We're talking about here's a human being that's got this problem. They got a, quote, deformed foot, end quote, as compared to normal; but their work requires them to be on their feet and walking on hard surfaces. It would then, if I understand your testimony, be your opinion that this could aggravate the condition and make it maybe so symptomatic that surgical intervention would be necessary?

A. Oh, yes, it could do that.

....

Q. Are there any other things that might be considered factors in bringing about a problem with this particular congenital condition?

A. Oh, the type of shoes a person wears. If they wear proper shoes, a lot of times that will be helpful. If they were improper shoes, that can be very detrimental. Again, the amount of time they spend on their feet, the obesity factor, circulation in general in the lower extremities can be a factor. If they have poor circulation, it can bother them sooner, but mostly it's the demands placed on the foot.

Doctors Carlstrom and Bakody did not address the foot problem.

APPLICABLE LAW

1. Sections 85.3 and 85.20 confer jurisdiction upon this agency in workers' compensation.

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

3. Claimant has the burden of proving by a preponderance of the evidence that she received injuries on October 13, 1978 and June 13, 1979 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).

4. The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 13, 1978 and June 13, 1979 are causally related to 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 (1955). 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).

5. 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. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). 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).

6. 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."

7. Section 85.27, Code of Iowa, provides for the payment of reasonable medical expenses.

8. Section 85.34(1), Code of Iowa, provides for the payment of a healing period for an injury causing permanent partial disability. Healing period compensation is paid until the employee has returned to work or competent medical evidence indicates that recuperation from the injury has been accomplished, whicher comes first. Recuperation occurs when it is medically indicated that either no further improvement is anticipated or the employee is capable of returning to substantially similar employment. The claimant returned to work part-time for a short period, although it was not substantially similar to that in which she was engaged at the time of her injury. However, the medical reports indicate that no further improvement of claimant's condition as a result of her injury was anticipated.

That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond the point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition. Castle v. Mercy Hospital, Iowa Industrial Commissioner Report 50, 52 (1980).

ANALYSIS

1. The back injury. Inasmuch s a memorandum of agreement has been filed, it is found that claimant's back problems were caused by the employment, and were an aggravation of a preexisting back condition. It follows, therefore, that the medical expenses for the back care should be paid.

Claimant's healing period must be determined since it is apparent that claimant's condition is permanent. On first reading of Dr. Bakody's deposition, it would appear that claimant's healing period extends to the present and that she is entitled to a so-called "running award." It would appear that claimant's condition is really in a state of "limbo" and is not going to improve and has not changed since Dr. Bakody's deposition on September 27, 1981. Exhibit 9 indicates that claimant has not materially changed since that time although some treatment continues. Healing period will be terminated on September 27, 1982. An award for healing period will have to include time off since the occurrence of injury. (It is noted that defendants were told to file a final report and have not done so.)

The record fairly indicates that claimant was within healing period for the following periods:

November 16, 1978 through March 11, 1979	(16 3/7)
March 30, 1979 through May 20, 1979	(7 3/7)
December 15, 1980 through September 27, 1982	(93 1/7)
	117 Weeks

Considering claimant's age (42), her 10th grade education and experience (mainly laboring, with minimal clerical experience), and the physical impairment caused by the injury, it is apparent that claimant's industrial disability is severe. She should be awarded 35 percent of the body as a whole for industrial purposes. Although claimant is not employed by defendants, she is capable of some activity. Her earning capacity, however, has been reduced. She will, in all likelihood, require future surgery.

2. The foot. The only medical evidence which the undersigned could find making the necessary causal connection between the employment and the condition was that of Dr. Rosenfeld, quoted above. However, this seeming endorsement of Dr. Misol's opinion that the causal connection was present fails because Dr. Misol did not have an opinion, as stated by counsel. The undersigned carefully has read and reread Dr. Misol's deposition and discovered that the presence of the subjunctive mode in the syntax of Dr. Misol (and also Dr. Rosenfeld) is of such magnitude to make the undersigned conclude that claimant has failed to sustain her burden of proof. The mere allegation that claimant's work activity may have been one of a multitude of problems which may have caused a condition is insufficient to sustain a finding that that condition was causally related to the employment within the meaning of the law.

FINDINGS OF FACT

1. At all times material hereto, claimant was employed by the defendant employer.

2. Defendants filed a memorandum of agreement concerning an October 13, 1978.

3. Claimant's back injury is related to employment, said injury being in the nature of an aggravation of a preexisting condition.

4. Claimant was disabled from working as set forth above, reaching maximum medical recuperation on September 27, 1982.

5. Claimant's permanent disability for industrial purposes because of the back injury is 35 percent of the body as a whole.

6. The medical expenses submitted for the back is causally connected to the injury. Claimant, however, has not proven that expenses not ordered herein are related. Claimant will be allowed to supplement the record to show that the mileage submitted was related to the back and at the correct rate (See Rule 500-8.1). Claimant did not prove that the waterbed expense was reasonable or related to employment.

7. Claimant failed to prove that her foot problems were related to the employment.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and subject matter.

2. Claimant was employed by defendant employer on October 12, 1978.

3. Claimant sustained an injury arising out of and in the course of her employment on October 13, 1978.

4. Claimant should be paid 116 weeks of healing period compensation at the rate of $115.16 per week.

5. Claimant should be paid 175 weeks of permanent partial disability compensation at the rate of $115.16.

6. Claimant should be paid for the following medical expenses:

Medical Center Anesthesiologists (1-28-81)	$ 336.00
John T. Bakody, M.D.	1,440.00
Hammer Pharmacy (TENS)	412.23
Mercy Medical Center (1-22-81 - 2-5-81)	3,969.47
Mercy Medical Center (2-28-81)	41.00
Mercy Medical Center (5-23-82 - 6-5-82)	3,168.39
Sinesio Misol, M.D.	121.00

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred seventeen (117) weeks of healing period compensation at the rate of one hundred fifteen and 16/100 dollars ($115.16) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of one hundred fifteen and 16/100 dollars ($115.16) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant the following medical expenses, to wit:

Medical Center Anesthesiologists (1-28-82)	$ 336.00
John T. Bakody, M.D.	1,440.00
Hammer Pharmacy (TENS)	412.23
Mercy Medical Center (1-22-81 - 2-5-81)	3,969.47
Mercy Medical Center (2-28-81)	41.00
Mercy Medical Center (5-23-82 - 6-5-82)	3,168.39
Sinesio Misol, M.D.	121.00

Costs are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants are to receive credit for amounts previously paid.

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

Signed and filed this 3rd day of March, 1983.

No Appeal

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARRIET H. VAN ZELE,	:	
Claimant,	:	
vs.	:	File No. 709328
IOWA DEPARTMENT OF SOCIAL SERVICES,	:	D E C I S I O N
Employer,	:	O N
and	:	85.27
STATE OF IOWA,	:	B E N E F I T S
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding for medical benefits brought by Harriet H. Van Zele against the Iowa Department of Social Services and the State of Iowa as a result of an injury on December 22, 1977. On June 14, 1983, this case was heard by the undersigned. This case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant and Kirk Fuller; claimant's exhibits 1-5; and defendants' exhibit 1.

The only issue presented by the parties is whether claimant is entitled to the recovery of medical benefits. At the time of hearing defendants stipulated that claimant's injury arose out of and in the course of her employment and stipulated that the charges were fair and reasonable.

FACTS PRESENTED

On December 22, 1977, claimant received an injury arising out of and in the course of her employment with defendant employer when she was involved in a two-car accident. Claimant testified that because of her injuries she was seen by J. Larry Troxell, D.C. Claimant continued to have treatment by Dr. Troxell until August of 1979. Claimant stated that two weeks after she submitted her claim she was contacted by a woman who worked for the workers' compensation office of the State of Iowa over the telephone. Claimant indicated the person asked her if she wanted to see a medical doctor. Claimant told the individual that she wanted to continue with her chiropractic care. Claimant testified she was never instructed to discontinue her treatment or instructed to see someone else. Claimant disclosed that she received a second call and again she had no specific instructions.

On cross-examination claimant again indicated that discussion about seeing a physician other than a chiropractor was a mere suggestion, not a direction.

Sharon Lynn Durrell, who testified by deposition, indicated that she worked for the workers' compensation division of the State comptroller's office for a period from 1977 until 1979 or 1980. Ms. Durrell indicated that she had no independent recollection of claimant or her case. In a note dated January 16, 1978, Ms. Durrell stated:

> Called Harriet H. Van Zele and advised her of our reluctance to pay beyond 4-5 more treatments. She has no other physician, other than Dr. J. Larry Troxell, D.C., and considers going to an M.D. or D.O. unnecessary. She is a past patient of Dr. Troxell and had been going to him for "regular maintenance" treatments at approximately 3 wk. intervals. She, in turn, is reluctant to go anywhere else, and plans to have her D.C. get in touch with this dept., or call.

In a letter dated March 15, 1982, Richard L. Andrews stated:

> I was able to locate Harriet VanZele's [sic] file, which was on micro-fiche.
>
> In reviewing the file, it was noted that this office contacted Mrs. VanZele [sic] by telephone on 1/16/78. She was told that we would pay for the treatment through 1/16/78, and advised her to consult a specialist or medical doctor if the problem persists. Mrs. VanZele [sic] indicated that she would not do so and would continue this type of treatment. She was advised by this office that the treatment was not authorized, and that the responsibility would be hers to meet.
>
> Based on our file, I would be willing to pay for the charges through 1/16/78, which total $196.00.
>
> I assume you will be conversing with Mrs. VanZele [sic] and advise if this office should issue a warrant in that amount.
>
> Should you have questions on the above, please feel free to call or write.

APPLICABLE LAW

Section 85.27 states:

> 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 shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one permanent prosthetic device.
>
> 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.

Section 85.39 states in part:

> After an injury, the employee, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employee; but if the employee requests, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. Whenever an employee is required to leave his work for which he is being paid wages to attend upon such requested examination, he shall be compensated at his regular rate for the time he shall have lost by reason thereof, and he shall be furnished transportation to and from the place of examination, or the employer may elect to pay him the reasonable cost of such transportation. The refusal of the employee to submit to such examination shall deprive him of the right to any compensation for the period of such refusal. When a right of compensation is thus suspended, no compensation shall be payable for the period of suspension.
>
> Whenever an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, he shall, upon application to the commissioner and at the same time delivery of a copy to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of his own choice, and reasonably necessary transportation expenses incurred for such examination. The physician chosen by the employee shall have the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

ANALYSIS

Defendants contend that they should not have to pay a portion of the medical benefits claimed by claimant because claimant failed to consult a specialist or medical doctor after being advised to by them. The defendants also claim they informed claimant that her chiropractic care was unauthorized.

Claimant's exhibit 3, which was the note that defendants apparently rely on supports claimant's testimony. While defendants contend that further medical treatment by claimant's chiropractor was unauthorized, the note indicates that defendants at that time were at least willing to pay for four or five more treatments. The note does not indicate that claimant refused to see anyone designated by defendants but reflects reluctance to go elsewhere.

An inference can be drawn from the defendants' note that if claimant required more than four or five additional treatments that they would have her seen by someone else, but nothing specific was done on January 16, 1978. Such an inference does not contradict claimant's testimony but supports it. None of the evidence presented indicates that defendants actually requested claimant to seek alternative care.

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 December 22, 1977, claimant was injured in an auto accident while working for defendant employer.

Finding 2. As a result of her injuries, claimant sought medical treatment from J. Larry Troxell, D.C.

Finding 3. Defendants told claimant they had a reluctance to pay beyond four or five additional treatments by Dr. Troxell.

Finding 4. Defendants failed to provide claimant any alternative care.

Finding 5. Defendants never told claimant Dr. Troxell was in fact unauthorized to treat her.

Finding 6. Defendants never directed claimant to see any other physician.

Finding 7. Defendants have not paid claimant's medical bills which resulted from her injury.

Conclusion A. Claimant received an injury arising out of and in the course of her employment with defendant employer on December 22, 1977.

Conclusion B. Defendants are responsible for claimant's medical bills.

ORDER

THEREFORE, defendants are to reimburse claimant the sum of eight hundred eight and 00/100 dollars ($808.00) for medical bills.

Defendants are to pay the costs of this action.

Signed and filed this 30th day of June, 1983.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PEGGY VOSS, Claimant, vs. GEORGE E. SWENSON, GUINEVIERE SWENSON, AND JAMES SWENSON d/b/a SWENSON TRUCKING AND SPENCER BROKERAGE, INC., Employers, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 652827 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant, Peggy Voss, is the widow of decedent, Darwin Voss, who died as a result of injuries he sustained in a motor vehicle accident involving his operation of a semitractor. Claimant filed a petition for arbitration seeking death, medical expense and dependency benefits under chapter 85 of the Code of Iowa. On arbitration, the claimant alleged decedent was an employee of both defendants, George Swenson, Guinevere Swenson and James Swenson, doing business as Swenson Trucking, and defendant Spencer Brokerage, Inc., hereinafter called "Spencer." All defendants raised the affirmative defense that decedent was an independent contractor.

Claimant appeals the deputy's proposed arbitration decision finding defendant Spencer was not an employer of decedent. Defendants Swensons appeal the proposed finding that decedent was their employee at the time of his death as well as the finding that James Swenson is jointly liable as an employer of the decedent.

The record on appeal consists of the hearing transcript which includes the testimony of the claimant, George Swenson, Doug Hart, Bonnie Quirin, Guinevere Swenson, James Swenson, Julie Meyer, and Mrs. Arnold Voss; claimant's exhibits 1 to 25; and defendants' exhibits B, A-1, A-2, and A-3. All parties have filed briefs on appeal.

ISSUES

Defendants Swensons' stated issue on appeal is whether "[t]he decision of the deputy industrial commissioner is supported by a preponderance of the evidence?" They contend the decedent and they did not intend to create an employer-employee relationship, rather decedent was an independent contractor.

Claimant's stated issue is whether defendant Spencer was a "joint employer" of decedent. Defendant Spencer concurs with this issue and argues with regard to the relationship with them that defendants Swensons and decedent both were independent contractors.

REVIEW OF THE EVIDENCE

The deputy's review of the evidence is well founded and is fully adopted as part of this final decision with the following amplification from a review of the record.

Defendants George and Guinevere Swenson purportedly are the sole owners of a partnership known as Swenson Trucking. There is controverted testimony as to whether or not their 25 year old son is a joint partner. In April 1980 the decedent and, at least, George and Guinevere Swenson entered into a verbal agreement by which the decedent was to operate one of three semitractors. The registered owners of the semitractors were George and Guinevere Swenson.

The Swensons testified the agreement with decedent established an independent contractor relationship. The Swenson's received 75 percent of any gross profit produced from use of the semitractor by the decedent. The Swensons furnished all fuel and maintenance costs, as well as truck operator permits required by the state and insurance for the semitractor driven by decedent.

Swensons testified they leased the vehicle to decedent subject to a current "29 day lease" with defendant Spencer. They stated the decedent was to honor the 29 day lease until its termination and thereafter the decedent could contract to haul with other customers other than Spencer.

Spencer is an incorporated interstate motor carrier which primarily coordinates transportation and delivery of prefabricated buildings which are manufactured and sold by a local business known as Morton Buildings.

The record established that the decedent did not seek any hauling contracts on his own behalf. The evidence shows repetitive 29 day lease agreements concerning the use of the semitractor operated by decedent were signed by George Swenson and Doug Hart, as president of Spencer, during the total course of decedent's association with the parties.

The Swensons testified their agreement with decedent permitted him to seek other hauling contracts despite the existence of the 29 day leases with Spencer. The decedent undertook two hauling trips for a second company called Stoller Fisheries, however this work was also arranged by Swenson Trucking.

Spencer maintains long-term lease contracts with approximately 20 truck owner-operators. The 29 day lease agreement with the Swensons is an exception to Spencer's normal business practice. All long term owner-operators under long term lease agreements are covered under Spencer's state operational licences and insurance liability. In contrast, Swensons provide their own license and insurance.

Doug Hart, president of Spencer, testified the Swensons, under the 29 day leases, had a right to refuse any hauls he scheduled for their trucks. He also testified the Swensons normally would not refuse assigned hauls. Doug Hart assigned

the drivers on a daily basis for interstate and intrastate deliveries. He testified he balanced the assignments between the drivers. Doug Hart also testified he gave George Swenson some employment application packets upon request.

The evidence shows that if the decedent did not have a prior scheduled trip, he would contact the Swensons' residence until he was eventually assigned a haul with Spencer. Upon assignment he would drive his personal vehicle to the Swensons' residence where the designated semitractor was serviced and stored while not in use; then the decedent would drive the tractor to the site of Morton Buildings; hook up his tractor to a trailer which was already attached to a building; haul the building to a location designated by Doug Hart for Spencer; help unload the building, if necessary; return the trailer to the site of Morton Building; check the following day's assignment sheet which was produced by Doug Hart and posted on a bulletin board at the Morton Building business; then return the tractor to the Swenson's residence and return home in his personal vehicle.

Spencer withheld 20 percent of its compensation received from Morton Buildings and sent the remaining 80 percent to the Swensons, whereby the Swensons withheld 75 percent of the total payment made by Spencer and paid the remaining 25 percent to decedent out of their business account.

Decedent occasionally received periodic small payments directly from Spencer. These payments were compensation for telephone contacts to Morton Building customers while en route to delivery locations and for his occasional assistance of unloading buildings if the customer, upon a discount cost arrangement, failed to provide enough manpower to perform the unloading task. Morton Building tabulated these services provided by decedent and Spencer would regularly transfer the appropriate compensation directly to decedent and charge Morton Buildings for reimbursement.

The record shows the motor vehicle accident which resulted in the decedent's death occurred while he was hauling an empty trailer back to the site of Morton Buildings. The record reflects controverted testimony on whether Swensons instructed the decedent on maintenance of the semitractor.

APPLICABLE LAW

The deputy's statement of applicable law sets forth the factors discussed in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1966) for determination of whether an employer-employee relationship or independent contractor relationship exists. The deputy's statement is proper in all respects and is hereby adopted.

Additionally, it must be noted that "[t]he principle accepted test of an independent contractor is that he is free to determine for himself the manner in which the specified result shall be accomplished." Id. at 1215-1216, (citing Hassebroch v. Weaver Construction Co., 246 Iowa 622, 628, 67 N.W.2d 549).

Furthermore, in Nelson, 259 Iowa 1209, 146 N.W.2d 261, the Iowa Supreme Court, explicity stated that the finder of fact may, where appropriate, use evidence of the intention of the parties as to the relationship as a "subjective standard to the extent it serves to shed light upon the true status of the parties." 259 Iowa at 1216-1217, (discussing Restatement, Agency 2d, comment m.)

ANALYSIS

Defendants Swensons' Appeal

Defendants Swensons argue the deputy ignored the parties intentions to create an independent contractor relationship. Swensons contend their agreement to provide fuel expenses and other trucking expenses were intended to assist the decedent in getting his new driving business off to a good start.

As stated by the court in Nelson, 259 Iowa 1209, 146 N.W.2d 261, the subject standard of intentions of the parties is only appropriate to the extent it serves to shed light upon the true status of the parties. Here, even if the parties subjectively intended an independent contractor relationship to be formed, an employer-employee relationship was in fact formed and maintained by the parties.

Decedent clearly did not have the right of control to determine for himself the manner by which the work was to be accomplished. Decedent only used the semitractor whenever a haul was made available under the direction of the Swensons. Even if the decedent sought additional hauling services, the evidence regarding the payment system suggests he needed to obtain the approval of the Swensons before he would be able to undertake such work. Further, although the record is not explicitly clear, it seems the decedent did not have the proper state permits to personally enter into authorized hauling contracts on his own behalf.

Defendants Swensons' contention that they entered into the 29 day leases with Spencer on behalf of the decedent is not very persuasive. This conclusion is made in light of their work history with Spencer and in consideration of the system of payment from Spencer to Swensons before decedent received his share of the proceeds.

Therefore, it is determined upon review of the record as a whole that the claimant has proved an employer-employee relationship existed between the Swensons and the decedent by a preponderance of the evidence because an implicit service contract was maintained by these parties notwithstanding defendant Swenson's alleged intentions to create an independent contractor relationship.

It is not entirely clear, whether defendant James Swenson contests the deputy's proposed decision finding him to be a partner in Swenson Trucking, and thus subject to liability for any workers' compensation award on behalf of claimant. James Swenson is represented by the same counsel for his parents. The deputy's decision finding James Swenson as a partner in Swenson Trucking is found, upon review, to be based upon more than sufficient evidence in the record and is adopted as this agency's final decision.

Claimant's Appeal

Claimant alleges the deputy "overlooked vital criteria" as to whether Spencer, was a joint employer of the decedent. Claimant contends the deputy overlooked the "29 day lease" between the Swensons and Spencer which contains a clause stating "[t]he Leesee shall be responsible for the driver or drivers of subject vehicle and said driver(s) shall be employees of the Leesee." (Claimant's ex. 24)

At the outset, it must be noted that the "29 day lease" is a standard equipment lease as opposed to a truck operator's lease between two parties. Swensons and Spencer's business relations did not contemplate the decedent as an employee of Spencer as both parties testified the repetitive 29 day leases were not exclusive. In fact, there is unrebutted testimony by Doug Hart, acting as president for Spencer, that the Swensons could have refused any of their scheduled hauls. The fact that Swensons carried their own permits and insurance on the vehicle the decedent operated is further evidence of a nonexclusive lease arrangement and nonemployment of the decedent by Spencer. The actions of the parties indicate the employee clause was not effective. Furthermore, even assuming the clause could be interpreted as a truck operator's lease, the effect of a written lease is not determinative on whether an employer-employee relationship exists. Here, in view of the business activities, the lease is in no way determinative of the relationship between decedent and Spencer

Claimant is unsupported in her assertion that the decedent approved of the lease agreement, implying the decedent considered himself an employee of Spencer. A review of the hearing transcript shows that an objection to such a question posed to George Swenson by claimant's counsel was sustained, thus there is no basis in the record for claimant's assertion.

The claimant is not correct in contending the Swensons needed the approval of Spencer before hiring the decedent. Spencer merely allowed the decedent to haul freight pursuant to its contract with Morton Buildings. Spencer did not choose him to drive Swenson's semitractor. The communication between Doug Hart and George Swenson before decedent was hired is only indicative of George Swenson's desire to hire a driver who would be acceptable to Spencer's necessity to satisfy state motor carrier regulations regarding acceptance of qualified drivers to haul its freight.

Claimant is equally incorrect in her assertion that the Swensons and decedent needed to obtain permission from Spencer before they hauled another company's freight. As stated above, there is unrebutted testimony that the Swensons had the right to refuse any hauls scheduled by Spencer.

Claimant relies, in part, on its joint employer theory on a prior appeal decision of this agency and case law from jurisdictions outside of Iowa. These cases are easily distinguishable. First, the claimant states Funk v. Bekins Van Lines Co., 1 Iowa Industrial Commissioner Report 82 (1981) stands for the proposition that where a lessee truck company can effectively terminate a relationship with a truck owner-operator by withholding business, an element of an employer-employee relationship may be found by inference. While this may be a factor, it is not determinative. This factor was only one of several taken into consideration by this agency in Funk, 1 Iowa Industrial Commissioner Report 82 and the overriding factor was an exclusive and expressly written contract between the lessor claimant and lessee trucking company. In the case sub judice, even though Spencer could have effectively terminated the relationship with defendants Swensons by withholding business, this would not have affected the relationship between decedent and Swensons. In addition, the other factors which indicate a nonemployment status outweigh this single consideration.

The factual setting of the other case law cited by claimant does not establish an analogy with the claimant's case. For example, in Wabash Smelting v. Murphy, 186 N.E.2d 586 (Ind. App. 1962) the injured worker was directly placed on lessee's payroll and the lessee totally controlled the movement of the worker and his truck during the time period of the lease. While in Dillaha Trent Co. v. Latourrette, 557 S.W.2d 397 (Ark. 1977) the injured truck driver was employed by two separate companies when he was injured while delivering goods for both companies, and in Mead v. Cole, 186 N.Y.S.2d 969 (1959) the lessee company made direct employment payments to the injured truck driver.

The deputy's characterization of Spencer as a conduit for Morton Buildings by transferring compensation for phone calls and unloading services is, without question, entirely proper.

Thus, upon a review of the record as a whole, the claimant failed in her burden to prove an employer-employee relationship with Spencer Brokerage.

FINDINGS OF FACT

1. Decedent and defendants, George and Guinevere Swenson, entered into oral agreement whereby decedent would operate one of their three registered semitractors for 25 percent of any proceeds produced from the use of the semitractor.

2. Swensons could have terminated their relationship with decedent at will.

3. Swensons provided all equipment, tools, fuel costs, license expense and state motor carrier permits.

4. Decedent only provided his truck driving service.

5. The oral agreement was of indefinite duration at a fixed price.

6. Decedent trained to operate the Swensons' registered-owned semitruck vehicle pursuant to their agreement.

7. Prior to the above training by the Swensons, claimant did not know how to operate semitruck vehicles.

8. Decedent was paid directly from the Swenson Trucking business account and was never paid for his hauling services from any other party.

9. Decedent was apparently told by the Swensons that he could solicit hauling contracts, however, decedent did not seek hauling contracts other than hauls arranged by the Swensons.

10. Decedent did not possess State permits to personally enter into authorized hauling contracts on his own behalf.

11. Decedent operated the Swensons' designated semitractor only when the Swensons arranged hauls for their registered vehicles. Decedent did not possess an independent nature in his relationship with the Swensons.

12. Swensons had the right to control the work of decedent and the manner of his operation of the semitractor.

13. Repetitive short term, non-exclusive leases between Swensons and defendant Spencer were for the benefit of the Swensons.

14. Decedent frequently hauled freight for Spencer pursuant to the agreement between the Swensons and Spencer.

15. Spencer made fee payments for the use of Swensons' semitractor, which was driven by decedent, to defendant James Swenson who transferred the payment into the Swenson Trucking account.

16. Decedent was paid a percentage of the proceeds received by Swensons' from Spencer.

17. Spencer did not choose decedent for employment by the Swensons.

18. Spencer did not have the right to control the work of decedent except as to final result.

CONCLUSIONS OF LAW

An employer-employee relationship existed between the decedent and defendants George, Guinevere and James Swenson as an implicit service contract was maintained between the parties despite a possible intention to create an independent contractor relationship.

Decedent did not have an employer-employee relationship with defendant Spencer Brokerage, Inc.

WHEREFORE, the deputy's proposed decision is affirmed.

THEREFORE, defendants George Swenson, Guinevere Swenson and James Swenson d/b/a Swenson Trucking are to pay unto claimant weekly benefits pursuant to Code section 85.43 at a rate of one hundred thirty-one and 29/100 dollars ($131.29) per week as determined by the deputy. This award is not to be apportioned between claimant and her two dependent children.

Defendants George Swenson, Guinevere Swenson and James Swenson d/b/a Swenson Trucking are also to reimburse claimant for the following medical bills:

Radiologists of Mason City. P.C.	- $ 13.00
St. Mary's Hospital	- 658.66
St. Joseph Mercy Hospital	- 371.25
Snells Ambulance Service	- 461.00
Mayo Clinic	- 2,292.30

Defendants George Swenson, Guinevere and James Swenson d/b/a Swenson Trucking are also to reimburse claimant one thousand and 00/100 dollars ($1,000.00) for burial expenses.

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

Defendants George Swenson, Guinevere Swenson and James Swenson d/b/a Swenson Trucking are to pay unto the Treasurer of the State of Iowa one thousand and 00/100 dollars ($1,000.00) for the Second Injury Fund.

Defendants George Swenson, Guinevere Swenson and James Swenson d/b/a Swenson Trucking are also to pay the costs of this action which includes reimbursement of the defendant Spencer Brokerage, Inc., for their contribution to the transcript of the original proceeding and the claimant for her contribution to the transcript on appeal.

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

Signed and filed this 30th day of December, 1982.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOAN WALKER, Claimant, vs. HIDDEN VALLEY EQUESTRIAN CENTER, LTD., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 675402 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Joan Walker, claimant, against Hidden Valley Equestrian Center, Ltd., employer, and Travelers Insurance Company, insurance carrier, for benefits as a result of an injury on May 5, 1981. On October 27, 1982 this case was heard by the undersigned. This case was considered fully submitted upon receipt of claimant's and defendants' reply briefs on November 1, 1982.

The record consists of the testimony of claimant, Joanne Walker, Bob Wise, George Schneider and Patty Chiaculas; and claimant's exhibits A and B.

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 her employment; the extent of temporary total, healing period and permanent partial disability benefits she is entitled to; and claimant's rate of compensation.

FACTS PRESENTED

Claimant testified that on December 3, 1980 she started working for defendant on a part-time basis helping groom, lunge and take care of some race horses. Claimant stated that Bob Wise, who owns defendant employer, asked her to work full-time after another employee left in the middle of January. Claimant indicated that her full-time job included feeding and watering horses, cleaning out stalls and other duties with care of the horses. Claimant indicated she also kept her duties with the race horses. Claimant disclosed that she was being paid $540 per month and was allowed to take riding lessons for free. Claimant testified that she told Mr. Wise she was interested in becoming a better rider, so she would work so she could ride.

Claimant indicated that on May 5, 1981 she did her normal duties which she completed about 4:00 or 4:30 p.m. Later that evening, while taking a riding lesson which required jumping, claimant was thrown from her horse. As a result of her injuries, claimant was taken by ambulance to the hospital where she was treated. Claimant disclosed that among other things, she had broken her wrist. Claimant revealed that her wrist remained in a cast from the date of injury to the middle of November 1981. Claimant stated she went to visit in California from June until August, but continued to be treated while there. Claimant testified that she was released by Dr. Dubansky on January 22, 1982. Claimant indicated that she briefly worked for a modeling agency, a racket club, a hospital and presently teaches beginners lessons in riding and helps train horses in the state of Florida.

On cross-examination claimant indicated that while at the adult lessons, she was treated like any other customer and had no duties to perform for defendant. Claimant indicated that she felt the lessons were part of her pay or benefits.

Bob Wise testified he and his wife own defendant employer. Mr. Wise stated he hired claimant full-time in the beginning of March 1981. Mr. Wise indicated that claimant's pay was $540 a month and revealed that employees had the ability to take adult riding lessons at no cost. Mr. Wise testified it was not necessary for claimant to ride a horse, but allowed employees to take lessons because of their interest in horses. Mr. Wise disclosed that he wanted employees who were interested in horses. On January 22, 1982 defendant had no employees.

George Schneider testified that at the time of claimant's injury, he worked for defendant as a trainer and head instructor. Mr. Schneider stated that claimant's job did not require her riding horses and that during her lessons claimant performed no job functions but was treated like any other student. Mr. Schneider indicated that employees were authorized to ride in his classes.

A report from Marvin H. Dubansky, M.D, dated May 5, 1982, indicates that claimant had a trans-scaphoid perilunar dislocation of the right wrist. Claimant also had multiple abrasions, contusions and lacerations. X-rays revealed a small avulsion fracture of the ulnar styloid. In his report of October 6, 1981 Dr. Dubansky revealed that the fracture and dislocation of claimant's wrist is a very severe injury and very prone to complications. Dr. Dubansky's office notes of December 1981 and January 1982 indicate that claimant's wrist appeared to be healing and doing well. Dr. Dubansky told claimant to be careful of falling on her wrist and told her to see him on a PRN basis.

A report of James A. Frahm, M.D., dated October 15, 1981, indicates that claimant also had a cerebral concussion and probable bruises or small cracks of the right ribs.

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).

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 5, 1981 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).

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 she 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).

Section 85.61, Code of Iowa, states:

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

A major question is whether or not the employee was furthering the employer's business. Danico v. Davenport Chamber of Commerce, 232 Iowa 318, 5 N.W.2d 609 (1942).

Professor Arthur Larson in 1A Workmen's Compensation, Section 22.00 (1978 edition) lists the following three instances in which recreational or social activities are within the course of employment:

1. They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
2. The employer, by expressly or impliedly requiring participation, or making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
3. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement of employee health and morale that is common to all kinds of recreation and social life.

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 increase in cases in which section 85.32 applies."

ANALYSIS

Claimant has met her burden in proving her injury on May 5, 1981 arose out of and in the course of her employment with defendant. Although claimant was not performing any job function at the time of her injury, it is clear that what she was doing greatly benefited the employer. Mr. Wise indicated that he wanted employees who were interested in horses. How better to keep employees interested in horses than by giving them opportunities to ride free. The greater weight of evidence would also indicate that the free riding lessons were for defendant's benefit in that it allowed defendant to pay its help a lot less than might otherwise be expected. The activity in which claimant was injured was on claimant's property, regularly held, with the knowledge, consent and approval of defendant. Defendant's equipment was used and the activity was supervised by claimant's superiors.

As defendants indicate in their brief, claimant has failed to prove that she is entitled to permanent partial disability benefits. Not only did claimant fail to present any medical evidence that she has any permanent impairment, but claimant's own testimony would indicate that no permanent impairment resulted from the injury.

However, claimant has met her burden in proving that as a result of her injury, she is entitled to temporary total disability benefits. The evidence indicates that claimant did not work from the day she was injured until after she was released by Dr. Dubansky in January 1982. The greater weight of evidence indicates that claimant's disability ended on January 22, 1982 when she was released by Dr. Dubansky on a PRN basis. Although claimant missed work after that date, it had no causal connection to her injury.

Claimant was paid on a monthly basis the sum of $540 at the time of her injury. The greater weight of evidence also discloses that defendant allowed claimant to take lessons, which, at the time of her injury, had a value of $90 per month. Figuring claimant's gross earnings under Section 85.36(3), claimant's gross weekly wage was $145.38.

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 5, 1981 claimant was injured when thrown from a horse while taking lessons furnished by defendant.

FINDING 2. At the time of her injury, claimant was an employee of defendant.

FINDING 3. While taking lessons, claimant was performing none of her duties for defendant.

FINDING 4. The defendant benefited from the activity in which claimant was injured by having employees keep or expand their knowledge and interest in horses and by being able to pay less for the work which was performed by its employees.

FINDING 5. Claimant's injury occurred on defendant's premises.

FINDING 6. The activity in which claimant was injured was regularly held and was with the knowledge, consent, approval and supervision of the defendant.

CONCLUSION A. Claimant met her burden in proving her injury arose out of and in the course of her employment.

FINDING 7. Claimant has no permanent functional impairment as a result of her injury.

FINDING 8. Claimant was disabled from the date of her injury until Dr. Dubansky released claimant on January 22, 1982 on a PRN basis.

FINDING 9. Claimant missed some work after Dr. Dubansky released her, but not because of her injury.

CONCLUSION B. Claimant met her burden in proving she is entitled to temporary total disability benefits from May 5, 1981 until January 22, 1982.

FINDING 10. Claimant was paid on a monthly salary of five hundred forty dollars ($540), but was paid twice per month.

FINDING 11. Claimant also received the equivalent of ninety dollars ($90) per month in riding lessons as part of her salary.

CONCLUSION C. Claimant's gross weekly wage was one hundred forty-five and 38/100 dollars ($145.38) per week.

THEREFORE, defendants are to pay claimant thirty-seven and four-sevenths (37 4/7) weeks of temporary total disability benefits at a rate of ninety-one and 13/100 dollars ($91.13) per week.

Accrued benefits are to be made in a lump sum together with statutory interest at the rate of ten (10) percent per year pursuant to Section 85.30, Code of Iowa, as amended.

Defendants are also to reimburse claimant for the following medical expenses:

City of Des Moines	$45.00
Medical Center Anesthesiologists, P.C.	$132.00
Dr. Schultheis	$104.00
Mercy Hospital Medical Center	$836.68
Dr. Frahm	$123.00
Corona Orthopaedic Associates	$286.50
Orthopedic Associates, P.C.	$825.00

Costs are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report upon payment of this award.

Signed and filed this 19th day of November, 1982.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERNICE WATTERS, SURVIVING SPOUSE OF MILTON M. WATTERS,

Claimant,

vs.

CLINTON ENGINES CORPORATION,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 691707

A P P E A L

D E C I S I O N

Defendants appeal from a commutation decision granting claimant a full commutation of all remaining benefits to which she is entitled pursuant to life expectancy and remarriage probability tables adopted by the Iowa Industrial Commissioner. (Rule 500-6.3(3) I.A.C.)

The record on appeal consists of the pleadings of the original commutation proceeding transcript of the hearing and the pleadings on appeal with defendants appeal brief.

ISSUE

Defendants state the issue on appeal as whether claimant is entitled to a full commutation of the remaining benefits.

REVIEW OF EVIDENCE

The evidence as succintly stated by the deputy discloses claimant, age 57, is currently an assistant vice president of the Maquoketa State Bank earning $18,500.00 per year. Claimant testified without contradiction that she is debt-free with substantial cash assets in excess of $25,000.00. Claimant further testified that she desires the entire commuted value of her claim so that she may invest these sums for her future retirement needs. Claimant's ability to manage her personal finances are of the highest order.

APPLICABLE LAW

Section 85.45, Code of Iowa, states in part:

Commutation. Future payments of compensation may be commuted to a present worth lump sum payment on the following conditions:

....

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.

Iowa Industrial Commissioner Rule 500-6.2 states in part:

Commutation. The following requirements must be met before a commutation will be considered or granted:

....

6.2(6) A detailed statement of claimant's need or other reason for a lump sum of money must be attached to the application.

ANALYSIS

In his decision the deputy quoted from an opinion of the commissioner in Finn v. Gee Grading, Appeal decision filed November 5, 1980. This same or similar language is contained in appeal decisions filed prior and subsequent to Finn. (Williams v. HLV Community School District, Appeal decision, July 2, 1981; Dameron v. Neumann Brothers, Inc., Appeal decision, November 9, 1981) and states:

> 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 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 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.
>
> ....
>
> 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.

Defendants complain that the claimant has not shown a present need for the commutation. Other than the language in Rule 500-6.2(6) the showing of present "need" is not indicated. In this rule a showing of need is one of the options of the claimant to indicate best interests but it is not exclusive as the rule goes on to say "or other reason for a lump sum."

Defendants are correct that claimant does not have a present need for the lump sum, however, the evidence shows and the above discussion discloses why the lump sum would be in the best interests of the claimant.

FINDINGS OF FACT

That the commuted benefits can be definitely determined by the use of the table in I.A.C. Rule 500-6.3(3).

That the commutation is in claimant's best interest.

CONCLUSIONS OF LAW

That claimant is entitled to a lump sum of future benefits based upon the stipulated weekly rate of one hundred twenty-seven and 14/100 dollars ($127.14) pursuant to section 85.47, Code, 1983 and Rule 500-6.3(3) I.A.C.

As the amount of payments previously paid and the future payments to be made are not a matter of record in the event this order becomes final the parties shall resubmit the current payment status so that the commutation can be computed.

WHEREFORE, the commutation decision is affirmed.

THEREFORE, it is ordered that claimant be granted a full commutation of future benefits.

Signed and filed this 31st day of March, 1983.

No Appeal

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES W. WHITE, Claimant, vs. JIMMY DEAN MEAT COMPANY, Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 645714/682995 A P P E A L D E C I S I O N

By order of the industrial commissioner filed March 31, 1983 the undersigned deputy industrial commissioner has been appointed under the provisions of §86.3, Code of Iowa, 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; the deposition of Todd F. Hines, Ph.D.; claimant's exhibits 1 through 10 and defendants' exhibits A through D (exhibit A is the deposition of Thomas Lee Ray, M.D.), all of which evidence was considered in reaching this final agency decision.

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

SUMMARY

Claimant's original case against this employer for dermatitis was heard in August of 1981 and decided in January of 1982. The decision was in claimant's favor and resulted in an award of eight percent permanent partial disability.

Claimant filed in arbitration again on November 13, 1981. The industrial commissioner's office opened a second file since the date of injury was different from that of the first. However, the same deputy who heard the first case heard the second case and held that the second case was really a review-reopening of the first case. He decided that, although claimant showed no change in physical condition, claimant had shown a change of condition in that he was unable to work as had been projected in the first decision. The hearing deputy awarded 310 weeks permanent partial disability, temporary total disability of 26 weeks, 4 days, and some mileage pursuant to §85.27, The Code.

ISSUES

Defendant's appeal cites six issues:

1. Whether claimant's present "disability" is causally connected to the occupational disease he incurred while working in the boning area of defendant employer's plant or whether it is directly traceable to other causes.

2. Whether an award of permanent partial disability benefits is in error as a matter of law where there is no evidence in the record that claimant has a permanent functional impairment.

3. Whether the award of permanent partial disability benefits in the amount of 70% of the body as a whole is unreasonable, arbitrary and capricious and not supported by substantial evidence in the record.

4. Whether the award of temporary total disability benefits is supported by substantial evidence in the record.

5. Whether the Deputy Industrial Commissioner failed to consider the relevant factors in determining claimant's industrial ability both before and after the alleged injury thus causing the finding of 70% industrial disability to be in error as a matter of law.

6. Whether the rejection of the testimony of Deanna Hardin by the Deputy without stating his reasons therefor is in error as a matter of law.

The hearing deputy's decision correctly states the applicable law. Other legal principles are discussed below.

ANALYSIS

Defendant's first issue argues that, despite the fact that claimant has a res adjudicata determination that he sustained an occupational disease in 1980, claimant must still show a causal relationship between the work and the disease. In this assertion, defendants are, of course, correct. The evidence quite firmly shows that claimant's dermatitis is connected to his work place. Since October 1981, claimant's principal treatment has been at University Hospitals and Clinics in Iowa City, with Thomas L. Ray, M.D., a qualified dermatologist, being the treating physician. In a letter of November 2, 1981 which was signed by Dr. Ray and Allen Olmstead, a dermatology resident, the doctors stated "[w]e feel that this dermatitis is related to his occupation as a meat cutter."

Further, in a letter of May 20, 1982, Dr. Ray states that, "[a]lthough the precise etiology of this dermatitis has not been definitely established, there is a temporal relationship of his skin disease with his employment. His history is one of continued dermatitis while working, and gradual improvement while away from work for a period of four days or more." In his evidentiary deposition Dr. Ray states that "I think the aspect of his dermatitis being related to his work has not been seriously in question." (Dep., p. 51)

Such evidence is not only sufficient but is quite convincing that claimant's work place caused at least an aggravation of a preexisting dermatological condition.

Defendants next argue that claimant should not have a permanent partial disability award because the evidence does not disclose claimant has any permanent partial impairment. This argument will be taken up at this point as part of the entire question of industrial disability and the amount thereof to which claimant is entitled.

First, claimant need not show any permanent partial impairment in order to be entitled to permanent partial disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). Even so, claimant must show a change of condition, not necessarily a change of physical condition from the prior determination of his entitlement. The hearing deputy met this problem when he stated that although claimant had shown no change in functional impairment, he had satisfied the burden of proving a change for the worse in his ability to work. Thus, at the time of the first hearing, an assessment of eight percent permanent partial impairment showed a somewhat minor loss of earning capacity and projected an ability to engage in most occupations. Also a part of claimant's relative ability to work at that time was the fact that he had a job at Jimmy Dean Meat Company.

The record reveals that claimant was unable to continue working at Jimmy Dean Meat Company because of his dermatitis. This evidence shows that claimant's lack of ability to work in that industry is a serious foreclosure of his marketability. The high award of an additional 62 percent reflects all of the aspects of industrial disability such as considerations beyond functional impairment like age, education, qualifications, experience and his ability, because of the injury, to engage in employment for which he is fitted. See 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); Blacksmith v. All-American, Inc., 290 N.W.2d 348; and McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Claimant is 30 years old and, although he is a high school graduate, has an IQ of 75. His work experience is limited to such jobs as car washing, work at a pizza house, work at a grocery store and at the Jimmy Dean Meat Company. And, although claimant has no permanent physical impairment, he cannot perform any occupation which would require friction, irritation or trauma to his hands or which would expose him to wet or wet-to-dry episodes. (Ray dep., pp. 41-42)

Finally, and this is also related to claimant's industrial disability, there is the matter of the hearing deputy rejecting the testimony of both Todd Hines, Ph.D. (on behalf of claimant) and Deanna Hardin, a vocational coordinator with Professional Rehabilitation Management (on behalf of defendants). The hearing deputy indicated that the presentation of the testimony of these two witnesses was an attempt by the parties to get some record into the evidence that should have been presented at the prior hearing.

The testimony of Dr. Hines gives us some insight into claimant's character, particularly his intelligence quotient. According to Dr. Hines, also, claimant is the sort of person who will indicate he understands something when he does not. The testimony of Ms. Hardin showed that claimant had a stable work history and should be able to do some work within his abilities. The testimony of these witnesses should not have been rejected because both contain evidence of some weight. The evidence of Ms. Hardin shows claimant does have some work potential, a fact which is conceded by an award of 70 percent permanent partial disability. It is, of course, arguable whether or not some of the areas of work recommended (such as assembly, dock worker, auto body or engine repair [trans., p. 88]) would not provide friction, irritation or trauma to claimant's hands.

The final issue on appeal is whether or not claimant should have been awarded temporary total disability benefits. Since the award is for permanent disability, the correct name for the amounts owed during claimant's recuperation would be healing period benefits. In this regard, the deputy's analysis is accepted and such benefits will be a part of this award.

The findings of fact and conclusions of law repeated below are the same as those of the hearing deputy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDING 1. The basis for this claim is the same as for the previous decision which was filed on January 29, 1982 regarding File 645714.

FINDING 2. Claimant's functional impairment has not changed since his previous hearing.

FINDING 3. At the time of his previous hearing, it was found that claimant could work at some jobs that pay as much as when he contracted the dermatitis.

FINDING 4. It is now evident that claimant will not be able to continue working for defendants because of his occupational disease.

FINDING 5. The best job that claimant might obtain would be a minimum wage position.

CONCLUSION A. Claimant has had a change in his condition to warrant an increase in his industrial disability.

FINDING 6. Only claimant's inability because of his occupational disease to engage in employment for which he is fitted has changed since his previous hearing.

CONCLUSION B. Claimant's present industrial disability is seventy (70) percent.

FINDING 7. Claimant was unable to work from October 23, 1981 until April 26, 1982 because of his occupational disease.

CONCLUSION C. Claimant is entitled to healing period benefits from October 23, 1981 until April 26, 1982.

FINDING 8. Claimant has incurred additional medical expenses as a result of his occupational disease.

CONCLUSION D. Claimant is entitled to reimbursement for his additional medical expenses.

CONCLUSION E. Section 86.13 does not apply to medical benefits.

ORDER

THEREFORE, defendants are to pay unto claimant an additional three hundred ten (310) weeks of permanent partial disability benefits at a rate of two hundred twenty-four and 62/100 dollars ($224.62) per week.

Defendants are also to pay unto claimant an additional twenty-six (26) weeks and four (4) days of healing period benefits to claimant at a rate of two hundred twenty-four and 62/100 dollars ($224.62) per week.

Defendants are to reimburse claimant one thousand nine hundred eighty-four and 42/100 dollars ($1,984.42) for additional medical expenses and seven hundred three and 98/100 dollars ($703.98) for mileage.

Defendants are to be given credit for payments made under a group plan.

Accrued benefits are to be made in a lump sum together with statutory interest at the rate of ten (10) percent per year pursuant to Section 85.30, Code of Iowa, 1981, said interest to run from the date of the hearing deputy's arbitration decision, December 30, 1982.

Costs are taxed to defendants pursuant to Industrial Commission Rule 500-4.33.

Defendants shall file a final report upon payment of this award.

Signed and filed at Des Moines, Iowa this 31st day of May, 1983.

No Appeal

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES WILLIAMS,	:	
Claimant,	:	File No. 520299
vs.	:	R E V I E W -
FIRESTONE TIRE AND RUBBER COMPANY,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
TRAVELERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by James Williams, claimant, against Firestone Tire and Rubber Company, employer, and Travelers Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on March 9, 1978. Claimant's rate of compensation as stipulated by the parties and as indicated in the memorandum of agreement previously filed in this proceeding is $209.14. A hearing was held before the undersigned on May 17, 1982. The case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant, Roger Marquardt, R. V. Bianchi, Marian Jacobs and Jack Reynolds; claimant's exhibits 1 through 3; and defendants' exhibits A through D.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing are whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim and the extent of permanent partial disability benefits he is entitled to.

FACTS PRESENTED

On March 9, 1978 claimant received an injury arising out of and in the course of his employment with defendant when while working as a tread end cementer, he threw a rolled up tread and felt something snap in his back. Claimant reported his injury to his foreman and went to medical aid. Claimant testified that defendant referred him to Robert Hayne, M.D., in April. Claimant stated he had pain in his back, a loss of feeling in his left leg and a loss of feeling in the toes of both of his feet. Claimant indicated that the pain got so bad that he returned to see the company physician who told him to stay home for a week. September 26, 1978 was the first day claimant missed any work because of his injury. On October 2, 1978 claimant returned to work at the same job he had at the time of his injury. Claimant testified he saw Dr. Hayne for the last time in September 1980 and was told that he had five bad discs which could not be helped by surgery.

In February 1980 claimant was hospitalized and remained off work from February 5, 1980 until July 23, 1980. On July 24, 1980 claimant returned to his former position, but was only able to work one day because of the pain. Claimant was transferred to a job cleaning numbers which required no lifting, but paid the same. Claimant testified that on September 10, 1980 Dr. Hayne told him to put in for retirement. Claimant stated he has not worked since September 11, 1980.

Claimant revealed that presently he is in pain all the time and has no feeling in his left leg or in toes of both feet. Claimant disclosed that his problem becomes worse if he sits too long or stands too long. Claimant admitted he is also a diabetic and has high blood pressure. Claimant indicated he has not looked for a job since March 1, 1981 and has not sought vocational rehabilitation.

On cross-examination claimant revealed that his injury was actually in December 1977, but did not go to a doctor until March 1978. Claimant testified that in 1973 he pulled a muscle in his back.

Roger Marquardt, who works for North Central Rehabilitation Services, testified he saw claimant on March 5, 1982 in order to determine claimant's vocational rehabilitation potential. Mr. Marquardt indicated that it is not very realistic to see claimant back in the work force because of his age, limitations, absence of transferable skills or motivation. Mr. Marquardt opined that claimant could only expect a part-time job at minimum wage.

R. V. Bianchi testified that he is a union representative and helped claimant get the job of cleaning letters and numbers. Mr. Bianchi stated that in order to retire a person on disability, the person would have to be totally disabled from any classification in the plant.

Marian Jacobs testified that she is a vocational rehabilitation consultant and opined that claimant could still do some jobs with defendant, but not for eight hours a day. Ms. Jacobs also opined that claimant could do some other minimum wage jobs with other employers. Ms. Jacobs stated that claimant believes he has earned his retirement.

Jack E. Reynolds testified he works for defendant as a safety engineer. Mr. Reynolds indicated there were jobs that claimant could perform with defendant and that because of his seniority, claimant could get the job he wanted. On cross-examination Mr. Reynolds stated he was amazed at claimant's good work record.

Robert Hayne, M.D., who is a neurosurgeon, testified he first saw claimant on April 27, 1978 upon a referral from John Gustafson, M.D. Dr. Hayne indicated claimant gave a history of injuring his back while working. Dr. Hayne disclosed that claimant's neurological examination was within normal limits except for moderate atrophy of the left thigh and loss of sensation over the outer aspect of the left thigh. Dr. Hayne's diagnosis was a possible herniated lumbar disc. Dr. Hayne next saw claimant on January 30, 1980 because of progressively severe pain. Dr. Hayne disclosed his findings were the same as previously. In February 1980 Dr. Hayne performed a lumbar myelographic examination on claimant at Iowa Methodist Hospital. Dr. Hayne stated:

Q. What were the findings of that test?

A. The examination showed evidence of a rather severe arthritis in the lumbar spine, and, furthermore, showed multiple deformities of the opaque column with the contrast material due to degenerative

changes in the lumbar spine with these being manifested by osteophytic spurring and encroachment on the spinal canal by spurs in all of the lumbar levels. These resulted in hourglass type of deformities, the contrast material, at all of the lumbar interspaces, that is, the disc interspaces. There was no evidence of neoplasm or obstruction otherwise.

Q. Doctor, is this the sort of condition that occurs as a result of an acute or a one-time injury?

A. Generally not. It is the type of abnormality which is usually associated with or felt to be due to the natural degenerative process in the spine and changes which are secondary to osteoarthritic involvement and generally felt to be changes resulting from multiple incidents of stress and strain on the spine.

Q. In your opinion, in Mr. Williams' case were his problems the result of a degenerative process which had occurred over a period of time?

A. You have reference to the findings on the myelogram?

Q. Yes.

A. And of the plain x-rays? Yes, I felt that the findings were representative of a chronic, long standing involvement. (Depo., pp. 7 - 9.)

In a report dated March 10, 1981 Dr. Hayne stated:

> He was seen for examination on July 23, 1980. At that time he stated he returned to work on his regular job which required twisting and bending. He was able to work only one day and had to quit. At the time of this examination he was having intermittent pain in the back of his thighs. The neurological examination was unchanged. I felt he was able to return to work if he could be given work with a twenty-five weight lifting limitation.
>
> He was seen for examination on September 10, 1980, at which time he felt the right lower extremity pain had become worse.
>
> He was seen on the last occasion on November 17, 1980. At that time he had been off work for five months and felt his symptoms had remained about the same. Mr. Williams went on to state that Firestone did not have light work for him.
>
> I feel that inview [sic] of his marked changes on his lumbosacral spine x-rays and the myelograms, that Mr. Williams should avoid work that requires lifting weights over twenty to twenty-five pounds. He should also have work that requires minimal bending and stooping. In view of his age, I feel he is probably incapacitated from gainful occupation.

Later, in his report of March 31, 1981, Dr. Hayne stated:

> I am enclosing a copy of a letter written to the Department of Public Instruction dated March 10, 1981. It would appear at this time that the aggravation of his prior back problems has subsided and he is back to his original state of health. The permanent disability attributed to injuries sustained around the first of March of 1978 is 12% of body total. Osteophytic spurring and encroachment on the canal by osteophytic spurs was seen on the lumbar myelogram of February 6, 1980.

On cross-examination Dr. Hayne opined that claimant was permanently disabled from work requiring relatively frequent lifting of weights over 30 pounds or so.

In a medical certificate of disability, John E. Gustafson, M.D, indicated claimant's problems were disabling because he "can't sit, stand or walk except briefly."

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 9, 1978 is causally related to 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 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).

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, 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 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 to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

ANALYSIS

Claimant has met his burden in proving that as a result of his injury on March 9, 1978, he has permanent impairment. The testimony of Dr. Hayne giving claimant a permanent functional impairment rating of 12 percent of the body stands unrebutted. This rating Dr. Hayne causally connects to claimant's injury.

As indicated previously, functional impairment is only one of the factors considered in determining a person's industrial disability. Claimant is 62 years old and is a high school graduate. Claimant starting working for defendant on September 24, 1945 and worked for defendant until he was retired on March 1, 1981. Dr. Hayne has placed restrictions on claimant and it is apparent that even defendants realize that claimant is not capable of working for them. The greater weight of testimony indicated that if claimant could have done any job with defendant, he would not have been able to take early retirement because of his disability.

Although claimant cannot do anything for defendant, it would appear that there are jobs which pay the minimum wage that claimant could perform. However, it is unrealistic to think that claimant will ever attempt such a job, because he has no motivation to do so. As noted by one witness, claimant feels like he has earned his retirement. Defendants are only responsible for the reduction of claimant's earning capacity which was caused by his injury, and are not responsible for the reduction of earnings claimant will actually have because he voluntarily resists return to the work force. It is determined that claimant has an industrial disability of 65 percent as a result of his injury on March 9, 1978.

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. By filing a memorandum of agreement, defendants have admitted that on March 9, 1978 claimant had an injury which arose out of and in the course of his employment with them.

FINDING 2. As a result of his injury on March 9, 1978, claimant has a functional impairment of twelve (12) percent of the body.

FINDING 3. Claimant is sixty-two (62) years old and is a high school graduate.

FINDING 4. Claimant worked for defendant from September 24, 1945 until March 1, 1981 when he was retired because of his disabilities.

FINDING 5. Claimant is not capable of holding any position with defendant employer.

FINDING 6. Claimant is capable of handling work that would pay minimum wage.

FINDING 7. Claimant is poorly motivated to look for any other work and has not attempted to seek other work.

CONCLUSION A. Claimant has met his burden in proving that as a

result of his injury on March 9, 1978, he has an industrial disability of sixty-five (65) percent.

THEREFORE, defendants are to pay unto claimant three hundred twenty-five (325) weeks of permanent partial disability at a rate of two hundred nine and 14/100 dollars ($209.14) per week.

Defendants are to be given credit for any permanent partial disability benefits previously paid.

Defendants are to reimburse claimant the amount of seventy-two dollars ($72) for mileage claimant has incurred.

Defendants are to pay the costs of this action which shall include one hundred fifty dollars ($150) for the witness fee of Roger Marquardt.

Accrued benefits are to be made in a lump sum together with statutory interest at the rate of ten (10) percent per year pursuant to Section 85.30, Code of Iowa, as amended.

Defendants shall file a final report upon completion of payment of this award.

Signed and filed this 28th day of September, 1982.

No Appeal

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WALTER E. WYCKOFF,

Claimant,

vs.

S & BB CORP., THE JOKER LOUNGE, PETE BONACCI and RON BONACCI,

Employers,
Uninsured,
Defendants.

File No. 704312

A R B I T R A T I O N

D E C I S I O N

This is a proceeding in arbitration brought by Walter E. Wyckoff, claimant, against S & BB Corp., The Joker Lounge, Pete Bonacci and Ron Bonacci, his employers, who are uninsured, and in relation to §87.1, Code of Iowa 1981, to recover benefits under the Iowa Workers' Compensation Act by virtue of an industrial injury which occurred on June 25, 1982. This matter came on for hearing in the office of the Iowa Industrial Commissioner in Des Moines, Iowa, pursuant to proper notice on January 5, 1982. At the conclusion of the hearing, the record was considered as closed. The hearing took place without the benefit of the presence of a court reporter.

It should be noted that prior to the hearing, Walt Byers, counsel for the defendants, made a motion regarding permission to withdraw his representation of the defendants based upon the defendants' refusal to cooperate, attend the hearing or contact Mr. Byers. The motion was overruled and Mr. Byers was instructed to participate in the hearing process.

The issue requiring a ruling is whether or not claimant sustained an industrial injury which arose out of and in the course of his employment duties.

The record in this matter consisted of the testimony of Des Moines Police Officer Tom Trimble and the claimant together with claimant's exhibits 1 through 15.

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 this agency has jurisdiction over the parties and the subject matter involved in this litigation.

2. That Walter E. Wyckoff, aged twenty-five and single, was a part-time employee of the defendants on and before June 25, 1982.

3. That in addition to being a high school graduate, claimant is the holder of a 1980 B.A. degree in business administration from Drake University.

4. That the condition of claimant's health prior to June 25, 1982 was excellent and allowed him to do a series of simultaneous part-time jobs for various employers, one of which was for the defendants herein, jointly and severally.

5. That in the year preceding the injury in question, claimant earned $11,630.36.

6. That §85.36(10)(a), Code of Iowa 1981, reads as follows:

> 10. If an employee who earns either no wages or less than the weekly earnings of the regular full-time adult laborer in the line of industry in which the employee 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.

7. That claimant's gross weekly wages are found to be $232.60 resulting in a weekly entitlement of $138.92.

8. That on June 25, 1982 claimant was assaulted by a customer, Keith Hiltiper, while claimant was on his employer's premises and while performing those duties assigned to him by the employers.

9. That claimant did not instigate the resulting assault.

10. That Keith Hiltiper was charged with criminal assault, has plead guilty and paid a fine in connection with this episode.

11. That as a direct result thereof, claimant sustained a broken jaw, requiring the claimant to seek and incur necessary medical and dental and transportation expenses to treat the injury.

12. That certain of claimant's medical, dental and transportation expenses remain unpaid.

13. That as a direct result of the aforesaid injury, claimant was unable to engage in acts of gainful employment for a period of four (4) weeks.

14. That claimant was not able to work a full eight (8) hours per day and resume his normal full-time duties until August 9, 1982.

15. That the claimant drove one hundred eighty-six (186) miles seeking care at the rate of twenty-two cents ($.22) per mile.

16. That the claimant is in need of future medical care.

17. That is has not yet been medically determined that claimant's current neck and head and back difficulties will result in permanent functional impairment.

18. That defendants, acting through Ron Bonacci, have refused to honor their statutory workers' compensation obligation as well as threatening claimant with physical harm if he persisted in his claim.

THEREFORE, IT IS ORDERED that the defendants pay the claimant a four (4) week period of temporary total disability at a weekly rate of one hundred thirty-eight and 92/100 dollars ($138.92) plus legal interest of ten (10) percent from the date due.

It is further found that claimant's benefits are being withheld without reasonable or probable cause or excuse contrary to §86.13, Code of Iowa 1981, thereby entitling the claimant to an additional two (2) week period of temporary disability benefits plus ten (10) percent interest from July 1, 1982.

It is further ordered that the defendants pay to the claimant the following medical expenses:

Mileage	$40.92
Drugs	$19.95
Broadawns Hospital	$126.60
Iowa Lutheran	$3,301.48
Iowa Head and Neck Associates	$100.00
Family Care Center	$21.00
Des Moines Anesthesiologists	$400.00
H. L. Edwards, D.D.S.	$1,425.00
Joseph L. Sullivan, D.D.S.	$67.00
Daniel A. Keat, D.C.	$185.00

There being no costs, none are assessed.

Defendants, as aforesaid, are found to be jointly and severally liable for the payments as set forth above.

Defendants are ordered to file a first report of injury together with a final report evidencing payment of the above within twenty (20) days from the date below.

Signed and filed this 14th day of January, 1983.

No Appeal

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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Mr. Walt Byers
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1832 Hubbell
Des Moines, Iowa 50316

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WALTER E. WYCKOFF,	:	
	:	FILE NO. 704312
Claimant,	:	
	:	
vs.	:	O R D E R
	:	
S & BB CORP., THE JOKER LOUNGE, PETE BONACCI and RON BONACCI,	:	N U N C
	:	P R O
	:	
Employers,	:	T U N C
Uninsured,	:	
Defendants.	:	

Be it remembered that on the date below, it having been brought to the undersigned's attention that the decision of January 14, 1983 contains certain clerical errors, the said decision is amended as follows:

1. Sections 8 and 10 are amended to show the correct spelling of the person named is Keith Hilpipre.

2. Costs are charged to the defendant in accordance with Rule 500-4.33 and shall include $50.00 payable to Daniel A. Keat, D.C.

3. Claimant's application for an award of permanent partial disability is premature and is overruled at the present time.

Signed and filed this 27th day of January, 1983.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VERNON YILEK,	:	
	:	
Claimant,	:	File No. 508143
	:	
vs.	:	R E V I E W -
	:	
TAMA MEAT PACKING CORP.,	:	R E O P E N I N G
	:	
Employer,	:	D E C I S I O N
	:	
and	:	
	:	
IDEAL MUTUAL,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Vernon Yilek, the claimant, against his employer, Tama Meat Packing Corp., and their insurance carrier, Ideal Mutual, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on May 26, 1978.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Juvenile Court Facility in Cedar Rapids, Iowa on August 24, 1982. The record was considered fully submitted on December 3, 1982.

An examination of the industrial commissioner's file indicates that a first report of injury was filed June 14, 1978. A memorandum of agreement was filed June 14, 1978. A Form 5 was filed on July 3, 1978 indicating the extent of benefits paid. There are no other official filings.

The record in this case consists of the testimony of the claimant, Kim Long, Vernon Bloome, Rosemary Yilek, Cyndra Gratias, Richard Pundt, Don Jones, Robert Bristol; claimant's exhibits A, 28, 29 and 30; defendants' exhibits 1 through 11, inclusive, as well as a stipulation filed by the parties dated September 29, 1982 and the data thereto. Objections lodged to the aforementioned exhibits are overruled. The exhibits will all be considered for whatever probative information they may contain.

ISSUES

The issues to be resolved in this case are whether there exists a causal relationship between the claimant's work injury of May 26, 1978 and his present disability, the nature and extent of the disability, the appropriateness of certain medical charges under section 85.27, and the applicable rate of compensation in the event of an award.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties were unable to stipulate as to the applicable rate in the event of an award. The parties, however, were able to stipulate that the claimant had been off work twelve weeks. The parties, additionally, stipulated to the fairness and reasonableness of any medical charges which are at issue in this case.

The claimant, Vernon Yilek, testified that he is 45 years of age and a resident of Belle Plaine, Iowa.

His educational background indicates that he finished the eighth grade and has no other schooling.

The claimant is married and has four children.

Claimant indicated that he has been employed by Tama Meat Packing Corp. since 1972. He has always held the same job of driving cattle into the kill floor area. He indicated that at the time of hearing he is still employed by the defendant.

Mr. Yilek reconfirmed that the date of injury in this case is May 26, 1978. He indicated that on the aforementioned date he was moving cattle around in their pens and a bull charged him, striking him "square in the back," knocking him to the ground. The injured area appears to be in the lower left side of claimant's back, just above his belt line. Claimant confirmed he was off work and hospitalized for a few days. He then returned to work. He confirmed that workers' compensation benefits were paid for the period of time he was off.

After his return to work the claimant stated he has had sporadic problems with his back. Occasionally, he experiences some sharp pain, specifically when prodding cattle or pushing gates. He confirmed that he continues to work with this discomfort.

The record establishes that Mr. Yilek saw James B. Paulson, M.D., on March 12, 1979. This examination, according to the claimant, was for neck and upper back discomfort and had no relationship in his judgment to his low back discomfort. Dr. Paulson again examined the claimant on March 26, 1979. Claimant indicates that his complaint on this occasion was sharp pain in his back radiating down the left leg. Claimant confirmed that he was home on March 26, 1979 when the sharp pain and radiation was noted. He testified that just prior to the onset of this pain he was bending over a bench in his pickup truck. He indicated that he simply "bent over" and experienced a sharp pain and was unable to stand up. The claimant denies that he picked up a picnic table at home on this date. Mr. Yilek indicated that he went to the hospital in Grinnell and received various forms of conservative treatment. It appears that the claimant returned to work on April 8, 1979, at which time his condition had improved.

Mr. Yilek confirmed that he rides to work with Vernon Bloome, and stated he may have told Mr. Bloome about bending over a bench. He denies, however, telling Mr. Bloome that he bent over a picnic table. The claimant denies that he even owned a picnic table in 1979. His testimony is emphatic on the point that he did not lift a picnic table on March 26, 1979. The claimant also stated that he told Bob Bristol he bent over a bench but denies telling him that it was a picnic table.

The record establishes that claimant continued to work for the period April 8, 1979 through May 7, 1979. Mr. Yilek indicated that he continued to have sharp pain in the lower back during this period of time. Mr. Yilek again visited Dr. Paulson, who referred him to John Huey, M.D., an orthopedic specialist. The record establishes the claimant was hospitalized by Dr. Huey a short period of time in May of 1979. He then returned to work and was rehospitalized by Dr. Huey on or about June 3, 1979 as a result of additional complaints of pain. A myelogram was performed and the claimant was subjected to a surgical procedure in June 1979. From the record, it appears that the claimant remained off work until August 6, 1979, when he returned to his duties. It appears from the record that the claimant is continuing under the care of Dr. Huey. Mr. Yilek testified that after April 6, 1979 he has not missed any work except for medical appointments.

Counsel for the claimant requested that official notice be taken of the following dates and coinciding days upon which the date falls. Official notice is hereby taken of the following: March 26, 1979 was a Monday, April 8, 1979 was a Sunday, May 7, 1979 was a Monday, May 11, 1979 was a Friday, June 3, 1979 was a Sunday, August 6, 1979 was a Monday.

On cross-examination, the claimant stated that there were two butting incidents at work, one in 1977 and a second in 1978. With respect to the 1977 incident, the claimant indicated that he was butted by an animal and cracked two ribs as a consequence. He stated that this injury was to his back and on the same side as the 1978 injury, but at a higher area. No continuing physical problems were experienced until the second butting incident occurred in 1978.

Regarding the benches which are at issue in this case, claimant testified that the benches in his pickup truck are made of 1/4" plywood. They are divided into compartments and he stores various tools in each compartment. He admitted that the storage areas were empty at the time of the onset of pain but denies that he just emptied them. The employer's group insurance carrier paid all the hospital bills related to the 1979 flareup.

Mr. Yilek confirmed that he gave a statement over the telephone in July of 1979. The claimant again denied that he told anyone he picked up or moved a picnic table in March of 1979. He re-confirmed that he merely bent over in his pickup truck and had an onset of pain. He also admitted that he shoveled snow and pushed a car in early 1979, but denied that he was injured as a result. Mr. Yilek indicated that when he was hospitalized after March 1979 he advised them that he had been bending over, and also provided information about pushing a car.

The claimant indicated that he has known Vernon Bloome for twenty years, and revealed that sometimes he does not trust Mr.

Bloome. He confirmed, however, that he listed Mr. Bloome as a reference on his job application. Claimant also confirmed that he has known Mr. Bristol for approximately ten years.

The claimant confirmed that he is working for the employer in the same position he had on the date of injury. He also confirmed that his income was greater in 1980 than in previous years.

On redirect examination, Mr. Yilek admitted that he had been shoveling snow on March 25, 1979. He denied, however, that he injured his back while pursuing this activity.

On re-cross-examination, the claimant confirmed that March 26, 1979 was a Monday. He worked a portion of that day, and it was in the afternoon or the evening that the pickup incident allegedly occurred. Claimant further does not dispute that he pushed a car on March 25, 1979.

Kim Long testified on behalf of the claimant. He is the claimant's friend and has been his neighbor since October of 1978. He is aware of the alleged incident which occurred on March 26, 1979 and states that he was present when the incident occurred. He indicated that the claimant bent over the tailgate of his pickup and then had extreme difficulty standing up straight. He stated that the claimant was at or near the benches located in the back of his truck. He denied that the claimant was lifting, and he denied that the claimant was straining. He denied that the claimant lifted a picnic table. He indicated that the claimant did not complain of any pain or discomfort prior to this incident. He stated that claimant stated after the incident that the pain was in the low left center of his back.

On cross-examination, this witness indicated that the claimant may have had an old picnic table at his house but is not sure. He confirmed, however, that he never saw the claimant use the old picnic table, and further denied the picnic table would fit in the back of claimant's truck. This witness does not know what activities the claimant was involved in prior to his observation and this incident. This witness thought the claimant had either taken out or put the benches in his truck and the tailgate of the pickup was down. This witness was not present when the claimant allegedly pushed a car on March 25.

Vernon Bloome testified on behalf of the defense. He has known the claimant for 25 years and confirms that prior to the claimant's surgery they rode together to work on a frequent basis. Post-surgery there has been some cooling of their relationship. This witness indicated claimant stated that he pinched something in his back while attempting to move a table. He understood that the claimant was unloading a picnic table and hurt his back. On cross-examination, Mr. Bloome indicates that the claimant said he had a picnic table in his truck. The balance of this witness' testimony has been considered in the final disposition of this case.

Rosemary Yilek testified in these proceedings and was called by the defense. She has been married to the claimant for 15 years. She confirmed that at one time after March 1979 the claimant was hospitalized for a nervous condition. She indicated that he had been under significant pressure from his work.

This witness unequivocally denied telling anyone that the claimant hurt his back lifting a picnic table or lifting anything out of his truck. She indicated that the claimant was bent over his pickup truck doing some sawing on one of the benches when he noticed a catch in his back. Mrs. Yilek was present when the incident occurred. She confirmed that he was then taken to the hospital. This witness denied that claimant lifted anything out of the back of the pickup truck. On cross-examination, this witness confirmed that after March 1979 the claimant complained of discomfort in his back but did not see a doctor on a frequent basis because he couldn't afford it. This witness confirmed that an old picnic table was located behind the Yilek home but stated it is worn out and never used. This witness believes that the claimant's back problems are related to a 1977 injury and confirms that he has had back complaints post-1978. The first bad attack of discomfort, she noted, was at the time of this truck incident. This witness denied telling Cyndra Gratias that the claimant lifted a picnic table.

On redirect examination, this witness confirmed that she had discussed the case with one of her husband's former attorneys, Richard Pundt. She does not remember telling Mr. Pundt of a specific work injury on March 26, 1979. She was concerned that Mr. Pundt may have confused his dates.

Cyndra Gratias testified in these proceedings on behalf of the defense. She is an employee of Crawford & Company and is the workers' compensation supervisor for that establishment. She confirmed the amount of workers' compensation benefits paid the claimant based on the May 26, 1978 injury. She indicated after 1978 the next contact she had with the claimant was on July 18, 1979 when she was contacted by the industrial commissioner's office concerning an alleged claim. Statements were taken and an investigation was undertaken. This witness indicated Mrs. Yilek told her that the claimant was lifting a picnic table and aggravated his back pain. Contact was also made by this witness with Mr. Bristol and Mr. Bloome and they confirmed the picnic table lifting incident. Based on the investigation the claim was denied in September of 1979. This witness admitted that no statement was taken of Mrs. Yilek. On cross-examination, Ms. Gratias reiterated that Mrs. Yilek told her that the claimant was somewhat confused on dates.

The claimant, Vernon Yilek, was then called to testify by the defense. He was given an opportunity to examine exhibit 8 and confirmed that he signed it. He did not know who made the alterations on the exhibit.

The defense then called Richard Pundt to testify on their behalf. Mr. Pundt is an attorney, presently residing in Des Moines. He once represented the claimant in this litigation. Mr. Pundt stated that claimant called his office on August 27, 1979 regarding a potential workers' compensation case. An initial meeting was undertaken and this witness confirmed that the claimant was very confused on the dates in this case. An investigation was undertaken by Attorney Pundt, and it appears from Mr. Pundt's testimony that he was confused on the facts. Apparently, he understood there had been another work-related injury, specifically on March 26, 1979. This witness received information in the course of his investigation with regard to the picnic table incident and he spoke with the claimant and his wife regarding this. This witness moved to Des Moines and referred the case to claimant's present counsel.

Don Jones testified on behalf of the defense. Mr. Jones is the workers' compensation claim supervisor for Ideal Mutual Insurance Company, and his home is in New York State. He is familiar with the claim against the Tama Meat Packing Corporation. He confirmed that there have been no other claims for compensation between May 26, 1978 and March 26, 1979. The basis for the denial of the claim was the lack of causation or causal connection between the 1979 claim and the 1978 injury. This witness' record showed intervening incidents which were non-work related, specifically the picnic bench lift, the snow shoveling and pushing of the automobile. The balance of this witness' testimony has been considered in the final disposition of this case.

Robert Bristol testified on behalf of the defense. He is the personnel director and oversees industrial relations for the defendent employer. He is familiar with the claimant's work background and all of the incidents in question with this case. He first learned of the 1979 incident when claimant and his wife came to him seeking group insuance carrier forms. Claimant indicated, at that time, that the injury sustained occurred at home. Mr. Bristol indicated that the claimant said he was lifting a picnic table off his truck and his back popped. As a result of this conversation, Mr. Yilek's claim for group insurance benefits were processed.

The statement of Jerry L. Jacobi, submitted by joint stipulation of the parties, was reviewed and considered in the final dispostion of this case.

Defendants' exhibit 1 is a multitude of medical records related to the claimant's general physical condition. Contained in that record are the Grinnell General Hospital records for the admission date of March 26, 1979. On the initial admitting form the following symptoms were noted, "acute low back pain." The emergency room record contained in the Grinnell Hospital records indicates, "back pain - no (indication) of trauma." In a summary sheet signed by J. B. Paulson, M.D., and related to the admission of March 26, 1979, he notes, "Findings: The patient had a two week history of neck and back pain prior to admission which was treated with Robaxin and rest. The day preceeding [sic] admission he was shoveling snow and pushing cars and the following day noted that he had severe low back pain which radiated down the left leg." In a history and physical examination, apparently done at the direction of Dr. Paulson, it is noted "Present Illness: The patient states that 3-25-79 he shoveled snow and pushed a car out of a ditch, on 3-26-79 he then while sitting watching TV experienced severe low back pain, left side, which radiated into the left leg." Entries in the nurse's notes for March 26, 1979 confirms the aforementioned facts relative to history.

In the Mercy Hospital medical records, the following notation dated May 8, 1979 was made by Dr. Huey: "He says that he works and does a lot of lifting, and he has got butted around by a bull on two different occasions, the last one in March of this year. Since that time his back has been bothering him severely." In a letter dated October 3, 1979, contained in defendants' exhibit 1, and signed by Don Salisbury for Dr. Paulson, he notes, "He was then admitted to Grinnell General Hospital on 3-26-79 and included is a Hospital Summary of this admission. As you will note, the patient had a previous history of neck and back problems which date back to his previous visit. Preceeding [sic] the admission he stated that he was shoveling snow and pushing cars and the following day noted he had severe low back pain which radiated down the left leg."

In Dr. Huey's office notes of May 5, 1979, he indicated:

> The patient is complaining of pain in the lumbosacral area of his back. He has been hit on several occasions over the past couple of years by bulls....
>
> ....
>
> ...There is scoliosis of the lumbar area of his back present....
>
> I feel this man has discogenic disease...."

In a letter date September 5, 1979 from Dr. Paulson to Crawford and Company, he notes:

> Mr. Yilek was hospitalized at Grinnell General on 3-29-79. Enclosed please find a Discharge Summary indicating what that hospitalization was for. You may judge for yourself whether or not this is a pre-existing condition. As his physician for only this current year, I am unable to answer whether or not this is a pre-existing condition or related to minor work injuries of 3-77.
>
> I would suggest you contact previous physicians for this information.

In a letter from Dr. Huey to Crawford and Company dated August 1, 1979 he notes:

> In response to your letter regarding the named patient, he denies that he ever did have any problems lifting a picnic table so the only thing I have to relate to his injury was his injury at work

that may have set this off.

The balance of the voluminous medical records has been considered in the final disposition of this case. Additionally, all other exhibits have also been considered and thoroughly reviewed in the final disposition of this case.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 26, 1978 is causally related to 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 (1955). 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, 247 Iowa 691, 73 N.W.2d 732 (1955). 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, expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 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, 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The Iowa Supreme Court in Becker v. D & E Distributing Company, 247, N.W.2d 722 (Iowa 1976) noted at 730:

> An expert may express his opinion either as to the 'possibility, probability, or actuality' of causations. (Citing authority.)
>
> Evidence indicating a probability or likelihood of the causal connection is necessary to generate a jury issue. (Citing Bradshaw v. Iowa Methodist Hospital.) However, this "probability" may be inferred by combining an expert's "possibility" testimony with nonexpert testimony that the described condition of which complaint is made did not exist before occurrence of those facts alleged to be the cause thereof.
>
> See also Winter v. Honeggers & Co, Inc., 215 N.W.2d 316, 323.
>
> See also Giere v. Aase Haugen Homes, Inc., 259 Iowa 1072.

The expert medical evidence must be considered with all other evidence introduced at hearing on the causal connection between the injury and the disability. Burt, 247 Iowa 691, 73 N.W.2d 732 (1955).

A decision to award compensation may not be predicated upon conjecture, speculation or mere surmise. Id.

ANALYSIS

There is no dispute in this case that on May 26, 1978 Vernon Yilek was an employee of Tama Meat Packing Corporation. This fact has been admitted by the unilateral act of the employer-insurance carrier filing a memorandum of agreement. Additionally, by the filing of that document the employer-insurance carrier admit that on May 26, 1978 the claimant sustained a personal injury which both arose out of and in the course of his employment with them.

The crucial issue for determination in this case is whether there exists a causal relationship between claimant's condition on or about March 26, 1979, and his resulting surgery and present disability, and the work injury of May 26, 1978. Resolution of this crucial issue, according to the aforecited case law, rests exclusively within the domain of expert medical testimony. While it is true that the opinions of the medical experts need not be couched in definite and positive terms or unequivocal language, it is also true that the expert medical testimony must, at a minimum, address the causation issue.

It is critical in a case of this nature where there are allegations of a variety of physical activities occurring on or about March 26, 1979, that the testifying physician be fully appraised of the details and all the facts surrounding those incidents so that he, in his professional judgment, may weigh and consider the effect of those incidents and subsequently express an opinion as to the cause and/or effect, if any, of those incidents on the claimant's present physical impairment.

An examination, and thorough consideration of all of the medical data, as well as all of the testimony in this case leads the undersigned to only one conclusion, and that is that the claimant has not sustained his burden of proof and has not established a causal relationship between the work injury of May 26, 1978, the initial surgery, and his present disability. The claimant's credibility has been brought into serious question due to the numerous scenarios as to what actually occurred on or about March 26, 1979. There is data in the record that the day before the onset of pain the claimant had been shoveling snow and pushing automobiles. There are allegations from two independent witnesses that the claimant had been lifting a picnic table on March 26, 1979 when the onset of symptoms occurred. The claimant, in his statement, marked defendants' exhibit 2, said, "when it happened I was just sitting just like I'm sitting in the chair now." Mr. Yilek's testimony indicates that he was leaning into the back of his pickup truck in the vicinity of some built-in benches when the symptoms came on. There is also testimony from Mrs. Yilek that he was not leaning into the truck but was doing some sawing on the benches contained therein. The variety of testimony from various questions, in the opinion of the undersigned, brings the claimant's credibility into question.

However, for purposes of analysis, if we assume and accept the claimant's testimony as true, that is, that he was not lifting a picnic table, his legal situation from a causation standpoint is not improved.

There remains evidence that on March 25 he was shoveling snow and pushing a car. Additionally, he was leaning into a truck and probably sawing. All of these activities proceeded in almost immediate proximity the onset of significant low back symptoms.

Dr. John R. Huey is the treating physician in this case, and is the orthopedic specialist that performed the surgery on claimant. It is noted that Dr. Huey was never deposed in this case. In Dr. Huey's two critical letters of October 5, 1979 and August 1, 1979 there is no indication that he has any data or information as to precisely what activity the claimant was performing on March 25 or 26. He does mention in his August 1 letter that claimant denied lifting a picnic table. If we assume claimant did not lift the picnic table, the testimony still does not directly and specifically address the activity that claimant was in fact performing, that is, working in the back of his pickup truck, shoveling snow, and pushing a car. The letter of October 5, 1979 does not begin to approach the issue of causation with respect to the specific activity that claimant was performing on the date of injury. Due to the lack of data Dr. Huey had at hand when he covered the information in question, his opinions are rejected.

After examining all of the data in the record and based upon all of the aforementioned legal citations, it is the undersigned's opinion that the claimant has failed to sustain his burden of proof and has not established a causal relationship between the work injury of May 26, 1978 and his present disability.

Claimant cites to the undersigned the case of Langford v. Keller Excavating & Engraving, Inc., 191 N.W.2d 667 (Iowa 1971) as authority for his position in this case. After closely examining the Langford case, the undersigned is of the opinion that that case and the case at bar are clearly distinguishable. In Langford, there is direct testimony from Dr. Hayne breaching the issue of causation. It is the opinion of the undersigned, in the present case, the physician was not fully advised of all the extenuating circumstances and activities surrounding the March 26, 1979 onset of difficulties and could not, and did not clearly, address each and every issue in terms of its effect upon the claimant's condition and its effect upon the ultimate issue of causation.

FINDINGS OF FACT

That on May 26, 1978 the claimant was an employee of the defendant.

That on May 26, 1978 the claimant sustained a personal injury which both arose out of and in the course of his employment with this defendant.

That the claimant returned to work on June 12, 1978 and worked until March 26, 1979.

That during this period of time continuing symptoms of discomfort were noted but claimant was not prohibited from working.

That on March 25, 1979 the claimant shoveled snow and pushed an automobile.

That on March 26, 1979 the claimant was working in the back of his pickup truck, sawing on or near some benches, when he experienced an onset of low back pain and was assisted to his house.

That subsequent to March 26, 1979 the claimant returned to work for a brief period of time.

That he was hospitalized from May 7, through May 11, 1979, and subsequently returned to work for a brief period of time.

That he was re-hospitalized in June 1979 and surgery was performed, and he remained off work until August 6, 1979.

That the claimant returned to work on August 6, 1979 and has continued to work for this employer in the same capacity as he did on May 26, 1978.

CONCLUSIONS OF LAW

The claimant has failed to sustain his burden of proof and has not established a causal relationship between the May 26, 1978 work incident and his present disability.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing further from these proceedings.

That each party shall bear their own litigation costs.

Signed and filed this 26th day of April, 1983.

No Appeal

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

DECISION INDEX

VOLUME III

SUBJECT INDEX

Volume III